



REPUBLIC OF KENYA



Sagwe & another v Unity Court Limited & another (Environment & Land Case E110 of 2022) [2022] KEELC 15637 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15637 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E110 OF 2022
LN MBUGUA, J
DECEMBER 20, 2022**

BETWEEN

GRAHAM RIOBA SAGWE 1ST PLAINTIFF

BERYL ROSE AKINYI 2ND PLAINTIFF

AND

UNITY COURT LIMITED 1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED 2ND DEFENDANT

RULING

1. Before me is an application dated March 22, 2022 where the plaintiffs seek a temporary order of injunction restraining the Defendants their employees, agents, servant, assignees or any person working under their express and or implied instructions or authority from selling by public auction or private treaty, alienating, disposing, entering, leasing, appointing a receiver, trespassing, wasting, or in any other way dealing with the land parcel known as Maisonette No. 24 erected on L.R No. Nairobi/block 93/1712 (Originally Title No. Nairobi/block 93/1413), the suit property pending the hearing and determination of the application and the suit.
2. The applicants are also seeking an order maintaining the status quo of the suit premises.
3. The application is premised on the grounds set out on the face of the application and the supporting affidavit of the 1st plaintiff. The applicants contend they are the beneficial owners of the suit premises having entered into a legally binding and enforceable sale agreement dated January 27, 2014 with the 1st Respondent for the purchase of the suit property of which they and paid Kshs 3,500,000 as deposit and funds for the processing of completion documents.



4. They further state that the terms of the said sale agreement have not fully materialized (7) seven years since execution due to material breach by the 1st Respondent, which left the applicants' status of ownership and possession of the suit premises in limbo.
5. The Applicants recently learnt that the 1st Respondent has been in default of its loan obligations to the 2nd Respondent by failing to service its loan facility obtained by a Charge over several parcels of land including the Plaintiffs' Maisonette No. 24. As at February 2, 2022, the outstanding loan balance was Kshs 174,057,019.00.
6. Due to the aforementioned default, the 2nd Respondent has through its agents Watts Auctions Auctioneers issued the 1st Respondent with the statutory notices and more recently the Notification of sale of 45 days dated February 10, 2022 in exercise of its statutory powers of sale, where the applicants' Maisonette No. 24 on Title No. Nairobi/block 93/1712 is part of the properties scheduled to be sold by auction.
7. That further to the above and despite being in notorious and perpetual default of its obligation to furnish completion documents under the sale agreement dated January 27, 2014, the 1st Respondent has served the Applicants with a demand letter dated March 21, 2022 rescinding the sale agreement and are demanding the Applicants to immediately vacate from Maisonette No. 24, on the pretext that they have failed to pay the full purchase price. Thus the suit property is in imminent danger of being sold, transferred, wasted, damaged and/or alienated by the 2nd Defendant, yet the applicants are innocent purchasers who do not have alternative abode in the event of eviction. They therefore stand to suffer irreparable loss and damage.
8. The Applicants contend that being interested third parties to the dispute, they were not privy to the communications between the 1st and 2nd Respondents and thus they were not served with the statutory notices delivered unto the 1st Respondent. That is why they are seeking a determination of the respective parties' rights before any recovery is made.
9. The 1st respondent was served with the application but they filed no response.
10. The 2nd respondent opposed the suit via the Replying Affidavit dated May 20, 2022 sworn by its Recovery Manager Credit Unit, Bertha Oduor, averring that the 1st Respondent applied for a loan of sh.107,000,000 from the 2nd Respondent to complete construction of 19 mainsonettes on title No. 93/1413 Balozi Estate Nairobi as per a letter of offer dated July 19, 2011 and the security thereof was the suit property.
11. The 2nd Respondent therefore contends that the existence of a valid charge between the two Respondents supersedes the perceived rights of the plaintiffs. It was further averred that the sale agreement did not confer any title upon the plaintiffs in so far as the suit land is concerned.
12. In their submissions dated October 4, 2022, the plaintiffs argue that they have established a prima facie case with a probability of success and if the auction proceeds, it would amount to infringement of their constitutional rights to property and housing. They argue that the emotional and sentimental attachment to the suit property cannot be compensated by way of damages.
13. The submissions of the 2nd Respondent are dated October 31, 2022 where they argue that they were not privy to the contract/agreement between the plaintiffs and the 1st Respondent, thus no action can legally be brought against them. It is further argued that the plaintiffs were indolent as they ought to have exercised vigilance in ensuring that a partial discharge of the suit property was done in their



favour. It is also argued that the plaintiffs were well aware that the suit property was charged to the 2nd Respondents' bank hence they cannot feign ignorance.

14. It was further submitted that the applicants cannot claim the suit property as they hold no title to the same, hence the application should be disallowed with costs.
15. The issue on grant of temporary injunctions was settled in the case of *Giella v Cassman Brown* (1973) EA and reiterated in several case laws including *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR; whereby courts held that the applicants must satisfy that they have a prima facie case with a probability of success. Secondly, an interlocutory order of injunction will not be granted unless it is demonstrated that the applicants might suffer irreparable injury which would not be adequately compensated by an award of damages. Lastly, if the court is in doubt on the above two requirements, it will decide the application based on the balance of convenience.
16. In *Paul Gitonga Wanjau v Gatbuti Tea Factory Company Ltd & 2 others* [2016] Eklr, the court held that;

“An injunction is an equitable remedy, meaning the court hearing the application has discretion in making a decision on whether or not to grant the application. The court will consider if it is fair and equitable to grant the injunction, taking all the relevant facts into consideration.” .
17. The plaintiffs are claiming beneficial ownership of the house No 24 on the basis of having commenced purchase of the same via the sale agreement of January 27, 2014. On the other land, the 2nd Respondent claims that the suit land was already encumbered via a bank facility advanced to the 1st Respondent in year 2011.
18. It is quite clear that the property which the applicants had set out to buy in year 2014 was not free property, as the same was already encumbered by the interests of the 2nd Respondent.
19. In the case of *Paul Gatete Wangai & 13 others v. Capital Realty Ltd & Another* [2020] eKLR a case with eerie semblance of facts to the current suit, the court had this to say:

“Although the plaintiffs have a beneficial interest in the suit property having purchased the same, the said interest is subordinate to the Bank's Interest as chargee. A charge is an overriding interest within the meaning of section 28(g) of the *Land Registration Act* which means that the rights and interests of a chargee in the charged property are rights in rem and therefore remain superior to any other interests even where there is a sale, transfer or any other disposition in the property.”
20. Further, I find that none of the clauses set out in the sale agreement of January 27, 2014 between the applicants and the 1st Respondent can be constructed as crystallization of proprietorship of the suit land in favour of the applicants.
21. In light of the foregoing, I find that the applicants have not met the criteria for the grant of the injunctive orders. The application dated March 22, 2022 is dismissed. Costs thereof shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA



JUDGE

In the presence of:-

Aisha for 2nd Defendant

Court assistant: Eddel

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