



**Kabutiyei v Ketbonet Bookstores Limited (Environment and Land Case
E003 of 2024) [2025] KEELC 4299 (KLR) (26 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4299 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
ENVIRONMENT AND LAND CASE E003 OF 2024**

**L WAITHAKA, J
MAY 26, 2025**

BETWEEN

CHESANG KABUTIYEI PLAINTIFF

AND

KETBONET BOOKSTORES LIMITED DEFENDANT

RULING

Introduction

1. This suit was filed/instituted by the plaintiff seeking judgment against the defendant for among other reliefs; an order declaring the land sale agreement entered between the plaintiff and the defendant to be voidable on account of breach of its terms by the defendant; an order directing the defendant to refund rental income collected from the suit premises amounting to Kshs.17,556,000; an order of eviction of the defendant from part of the suit premises, an order for mesne profits, costs of the suit and interest.
2. The plaintiff acknowledges that he entered into an agreement with the defendant for sale of a portion of the parcel of land known as Kabarnet/Municipality/390 and that pursuant to the agreement, he received part payment of the purchase price.
3. Contending that the purchase price has not been fully paid, the plaintiff complains that the defendant committed acts of fraud warranting grant of the orders/reliefs sought.
4. The defendant filed a statement of defence and counter-claim denying the allegation levelled against it. Contending that it fully met the terms of the contract and carried out the alleged fraudulent dealing with the knowledge/consent of the plaintiff, the defendant contends that it is the plaintiff who is in breach of the agreement.
5. By way of counterclaim, the defendant seeks an order directing the plaintiff to specifically perform his obligation under the agreement by executing transfer documents in its favour failing which the



execution be done by the Deputy Registrar of this court. The defendant also seeks an order of permanent injunction to restrain the plaintiff, his agents, servants and/or employees from demanding for rent and/or in any other manner interfering with the tenants occupying its portion of the suit property.

6. Complaining that the plaintiff is interfering with its ownership of the portion of the suit property it bought, the defendant filed the notice of motion, application, dated 13th January 2025 seeking the following orders: -
 1. Spent
 2. Spent
 3. A conservatory order in the nature of an injunction restraining the plaintiff, his employees, servants and or agents from entering, trespassing or in any other way interfering with the defendant and his tenants' quiet use of premises of the property known as land parcel registration number Kabarnet/Municipality/390 pending the hearing and determination of the suit.
 4. In alternative to prayer 3 above, the honourable court be pleased to issue an order of status quo pending hearing and determination of the suit.
 5. Costs be provided for.
7. As can be discerned from the grounds on the face of the application and the averments in the affidavit sworn in support thereof, the application is premised on the grounds that the defendant/applicant bought the suit property from the plaintiff/respondent; that the defendant/applicant fulfilled his obligation under the sale agreement and was given possession of the portion of the suit property it bought by the plaintiff/respondent and that the defendant/applicant has been earning rental income from his portion of the suit property since the time he took possession.
8. The defendant/applicant complains that in December 2024 or thereabout, the plaintiff/respondent, in blatant disregard to its right of ownership of the portion of the suit property it bought, began interfering with its peaceful use and possession of the portion of the suit property it bought.
9. Terming the actions of the plaintiff/respondent complained off trespass to his portion of the suit property, the defendant/applicant avers that the actions of the plaintiff/respondent complained of are causing it enormous financial loss, inconvenience and may lead to breach of peace. In support of its case, the defendant/applicant has annexed the following documents to the affidavit sworn in support of the application:-
 - i. Copy of the Sale Agreement executed between it and the plaintiff, marked AK-1;
 - ii. Copy of Charge document and bank statement, marked AK-2(a) and 2(b) respectively in support of its claim that it paid the purchase price to the plaintiff/respondent;
 - iii. Copy of bank statement, marked AK-3 showing that he paid the purchase price (Kshs.13,000,000/-);
 - iv. Copy of a letter from the Plaintiff to one of the Plaintiff's tenant's before the suit property was sold, in particular Faulu Microfinance Bank, dated 25th April 2017, informing the Bank that he had sold a portion of the suit property and that the buyer was mandated to take over as the new landlord from 1st April 2017, marked AK-4.



- v. Copy of a letter dated 30th December 2024 from the plaintiff/respondent to Faulu Micro Finance (one of the Defendant/Applicant's tenants as at that time) demanding handing over of the keys to the premises to enable him gain full access of the premises, marked AK-5.
10. In reply and opposition to the application, the plaintiff/respondent filed the replying affidavit he swore on 10th February 2025 in which he contends that the application is meant to delay the determination of this suit; that the applicant has approached the court with unclean hands in that the applicant is using the police illegally evicted him from one of the suit premises and that the applicant is using unorthodox means to get access into a unit premise in his wicked bid to justify possession in order to defeat justice on the pretext that when an order of status quo is issued, he will be the one in actual occupation thereby benefiting unjustly from his illegal actions.
11. The plaintiff/respondent denies having received the balance of the purchase price, Kshs. 13,000,000/- and terms the defendant's claim that he was paid that amount false. In that regard, he contends that the bank account purported to have received the money is not his but belongs to a Mr. Charles C. who is not him.
12. Maintaining that the defendant/applicant is in breach of a term of the contract which warrants rescission of the sale agreement, the plaintiff/respondent admits having entered into an agreement for sale of a portion of the suit property to the defendant/applicant but denies having given it possession of the portion sold or to collect rent therefrom.
13. Based on a term of the contract to the effect that possession would occur after payment in full, the plaintiff/respondent contends that the burden is on the defendant/applicant to prove to the court that he paid the purchase price in full before he was given possession, which burden the plaintiff/respondent contends that the defendant/applicant has failed to discharge.
14. Concerning the defendant/applicant's contention/ suggestion that the respondent allowed it to take possession of the suit property through the letter dated 25th April 2017 addressed to Faulu Micro Finance Bank, the plaintiff/respondent contends that the applicant cannot rely on it as it was neither addressed to it nor copied to it. The respondent contends that the letter is a forgery.
15. The respondent claims that the defendant is taking advantage of his age and patience to try and illegally obtain his property.
16. In a rejoinder, the defendant through its director, Auckman Kittony, vide a further affidavit sworn on 18th March 2025, has reiterated its averments that it complied with the terms of the sale agreement and was given portion of the portion of the suit property by the plaintiff/respondent.
17. The applicant maintains that he was given possession of the portion of the suit property sold to him.
18. On proof of payment of the purchase price, the applicant has given a detailed account of the payment it claims to have made in respect of the portion of the suit property sold to it.
19. Pursuant to directions given on 12th February 2025 to the effect that the application be disposed of by way of written submissions, parties filed submissions, which submissions I have read and considered.

Submissions

Applicant's submissions

20. In its submissions filed on 3rd April 2025, the defendant /applicant has given an overview of the cases urged by the parties and framed the following as the issues for the court's determination: -



- i. Whether the applicant has satisfied the test for granting an injunction;
 - ii. Whether the applicant has made out a case to warrant the grant of interim orders pending the hearing and determination of the suit.
21. On whether the applicant has satisfied the test for granting an injunction, the defendant/applicant has made reference to the cases of *Giella vs. Cassman Brown and Company Ltd* (1973) E.A 358; *Nguruman Limited v. Jan Bonde Nielsen and 2 others* Nairobi Civil Appeal No.77 of 2012 (2014) e KLR and the case of *Mrao Ltd vs. First American Bank of Kenya and 2 Others* (2003) KLR 125 quoted in *Moses C. Muhia Njoroge & 2 others vs. Jane W. Lesaloi and 5 others* (High Court ELC Case No. 514 of 2013) where the principles that undergird grant of a temporary injunction are distilled. These are: -
- i. The applicant must establish that he has a prima facie case with high chance of success;
 - ii. The applicant would suffer irreparable loss that cannot be compensated by an award of damages;
 - iii. If the court is in doubt, it will decide on a balance of convenience.
22. Based on the authorities cited, the defendant acknowledges that the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.
23. As to whether the applicant has established a prima facie case with probability of success, based on the undisputed fact that the defendant and the plaintiff entered into an agreement for sale of a portion of the suit property; its contention that the defendant met its obligations under the sale agreement leading to its been given possession of a portion of the suit property, which possession it maintains to date, the defendant applicant submits that it has made up a prima facie case a probability of success.
24. Regarding what amounts to a prima facie case in civil cases, the defendant/applicant has made reference to the case of *Mrao Ltd vs. First American Bank of Kenya and 2 others* supra and maintains that on account of the facts/grounds stated herein above, it has a prima facie case with high probability of success.
25. As to whether the defendant/applicant would suffer irreparable loss that cannot be compensated by an award of damages, the applicant has made reference to *Halbury's Laws of England*, 3rd Edition, Volume 21, Paragraph 352 and the case of *Pius Kipchirchir Kogo vs. Frank Kimeli Tenai* (2018)e KLR for an explanation of what is meant by irreparable injury.
26. Maintaining that it will suffer irreparable injury if the orders sought are not granted pending the hearing and determination of the suit, the applicant states that unless the orders sought are granted, he stands to lose the suit property which loss may not be compensable by award of damages. The applicant is apprehensive that the respondent, who he claims lacks the capacity to refund the purchase price, may dispose of the suit property thereby making it difficult for him to realize the purchase in the event he wins the suit.
27. On balance of convenience, the defendant/applicant submits that the balance of convenience tilts in his favour as it may lose the property and be unable to recover the purchase price compared to the plaintiff/respondent who can be compensated by way of damages in case he wins the case against the defendant.
28. As to whether the applicant has made out a case to warrant the grant of interim orders pending the hearing and determination of the suit, the applicant has made reference to the cases of *Centre for Rights*



and awareness (CREAW) & another v Speaker of the National Assembly & 2 others (2017)e KLR and Board of Management of Uhuru Secondary School v. City Director of education & 2 others (2015)e KLR and based on his contention that he is in possession of the suit property courtesy of the sale agreement executed between him and the plaintiff /respondent, submits that he has rights to the suit property which rights, unless restrained, the plaintiff /respondent threatens to violate necessitating grant of the interim reliefs sought.

29. The Plaintiff/respondent did not file submissions although given an opportunity to do so and if he did, the same were not placed in the court file.

Analysis and determination

30. The sole issue arising from the application, the response thereto and the submissions, is whether the defendant /applicant has made up a case for being granted the orders sought or any of them.
31. The totality of the evidence adduced in this suit, which includes the conduct of the plaintiff/respondent of acquiescing to possession and collection of rent from the premises in the portion of the suit property sold to the defendant/applicant, militates against the plaintiff/ respondent's claim that entry of the defendant/applicant to the suit property was without his permission or consent. No evidence has been adduced before this court capable of showing that the defendant/applicant ever lost possession of the portion of the suit property sold to him after he took possession of it in 2017.
32. It is the considered view of this court that unless the orders sought are granted, the plaintiff, who is the registered owner of the suit property, may deal with the suit property in a manner prejudicial to the defendant/applicant's beneficial interest in it. He may, for instance sell and transfer it to a third party thereby compromising the defendant/applicant's beneficial interest therein.
33. In the event the plaintiff succeeds in his claim against the defendant/applicant, the loss suffered by him on account of the defendant/applicant's continued use and possession of the suit property is capable of being assessed and compensated by way of damages.
34. The upshot of the foregoing is that the application dated 23rd January 2025 has merit. Consequently, I allow it in terms of prayer (3).
35. Costs of the application shall abide the outcome of the main suit.
36. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KABARNET THIS 26TH DAY OF MAY, 2025.

L. N. WAITHAKA

JUDGE

Ruling delivered virtually in the presence of:-

Ms. Musanzu for the Applicant/Defendant

Mr. Kiptoo for the Respondent/plaintiff

Court Assistant: Lilian

