



**Sobocon Associates Limited v Caperina Enterprises Limited (Environment & Land Case 189 of 2024) [2024] KEELC 6684 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6684 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 189 OF 2024**

**JA MOGENI, J**

**OCTOBER 9, 2024**

**BETWEEN**

**SOBOCON ASSOCIATES LIMITED ..... PLAINTIFF**

**AND**

**CAPERINA ENTERPRISES LIMITED ..... DEFENDANT**

**RULING**

1. The application before the court for determination is a Notice of Motion dated 19/05/2024 expressed to be brought under Order 40 Rules 1, 2, 3 and 4 Order 51 Rule 1 of the Civil Procedure Rule 2010 and sections 1A, 1B, 3, 3A and 63(c) & e of the Civil Procedure Act, sections 7 of the Arbitration Act and all other enabling provisions of the law seeking the following orders from the court:
  1. Spent
  2. That pending the hearing and determination of this Application inter partes this Honorable Court be pleased to issue a temporary injunction ex-parte restraining the Defendant/ Respondent by itself, its servants, agents, proxies or any other person claiming under or through it from alienating, selling, renting, occupying or dealing with Office space, Suite B on the Third Floor, Wing measuring approximately 2,586 sqft, together with (4) parking bays located at Morningside Office Park developed on LR No. 2/704 and is comprised in a Grant registered at the Lands Titles Registry as Number I.R 127882/1 Ngong Road, Kilimani, Nairobi in any manner whatsoever.
  3. That pending the hearing and determination of this suit inter partes this Honorable Court be pleased to issue a temporary injunction ex-parte restraining the Defendant/Respondent by itself, its servants, agents, proxies or any other person claiming under or through it from alienating, selling, renting, occupying or dealing with Office space, Suite B on the Third Floor, Wing measuring approximately 2,586 sqft, together with (4) parking bays located at



Morningside Office Park developed on LR No. 2/704 and is comprised in a Grant registered at the Lands Titles Registry as Number I.R 127882/1 Ngong Road, Kilimani, Nairobi in any manner whatsoever.

4. That pending the hearing and determination of this suit the Honorable court do order that Defendant do deposit within seven (7) days Kenya Shillings Sixteen Million Six Hundred and Fifty Three Thousand Eight Hundred and Forty (Kesh 16,653,840/=) in court
  5. Any other relief that the court may deem fit to grant
  6. That costs be provided for
2. The grounds upon which the application is founded on are set out on the face of the motion and in the Supporting Affidavit of the Plaintiff/Applicant, Bernard Omondi Odhuno sworn on 9/05/2024. According to the Plaintiff/Applicant, it entered into a sale agreement on 5/07/2023 with the defendant for purchase of property known as office space, suite B on the third floor, wing A measuring approximately 2,586 square ft together with (4) parking bay located at Morning Side office Park developed on LR No. 2/704 in a grant registered in the Land Title registry as Number LR 127882/1 Ngong Road, Kilimani Nairobi.
  3. The Plaintiff/Applicant paid a deposit of Kshs. 16,653,840 and avers that without justification the Defendant/Respondent has refused and/or ignored to fulfill its obligation but continues to hold the deposit and intends to sell the disputed property to another person contrary to the signed sale agreement.
  4. That the Defendant/Respondent has refused to release the completion documents and that attempted negotiation has failed. The Plaintiff/Applicant avers that despite declaring a dispute the Defendant has refused any arbitration process claiming that the agreement was revoked. Thus the Plaintiff seeks the orders prayed for because they are likely to suffer irreparable loss and damage.
  5. The Defendant/Respondent opposed the application vide a Replying Affidavit sworn by Priscilla Murungi on 22/05/2024 wherein she deposed that she is the sole director of the defendant and thus duly authorized to swear the affidavit. She stated that there exists a sale agreement between the Plaintiff/Applicant and the Defendant/Respondent which the Applicant sought to vary from a cash purchase as per clause 3 of the Agreement of Kesh 36,204,000. That the said Sale Agreement was to be completed within 90 days of signing as per Clause 4 of the Agreement and in any case not later than 5/10/2023.
  6. That the Applicant paid a deposit of Kshs 3,620,400 on 31/05/2023 but made no further payments. That before completion date the plaintiff indicated they wanted to settle the balance of purchase price through a financing arrangement. The defendant avers that it rejected this financing proposal by expressing its reservation because the sale agreement was a cash transaction as per the plaintiff's payment of the deposit by cash.
  7. That despite the defendant's reservations the plaintiff caused the firm of Mulanya & Maondo Advocates to issue a professional undertaking but which was declined by the defendant and returned as stated in the copy of letter dated 9/11/2023 which is marked as PM-01.
  8. The defendant contends that its advocates, Humphrey & Company LLP issued a completion notice dated 3/11/2023 to the plaintiffs after having reached out to the plaintiff's severally for payment of the balance and that though the plaintiff undertook to pay Kshs 25,000,000 before end of October 2023 it was never honored although on 8/11/2023 the plaintiff made a payment of Kshs. 13,033,440.
  9. It is the defendant's contention that it later met with the plaintiff online on 14<sup>th</sup> and 17<sup>th</sup> November 2023 and the defendant agreed to extend time to allow the plaintiff to complete the transaction but



- the plaintiff did not honor what was agreed. The defendant avers to have given the applicant a final opportunity as per the letters dated 11<sup>th</sup> and 22<sup>nd</sup> December 2023 but that the applicant failed to complete the transaction inspite of the extensions.
10. The Defendant denies that the applicant made any request that the terms of the agreement for sale to provide for financing nor that the applicant declared any dispute and neither did the applicant refer the matter to arbitration. According to the defendant, despite the goodwill extended to the plaintiff it failed to honor the numerous promise to remedy default and complete the transaction. To prove their claim the defendant has attached copies of letters and emails marked as PM-03 to PM-7.
  11. Thus the Defendant contends that it is within its rights in the Agreement for Sale to retain the deposit paid since the Plaintiff/Applicant failed to honor its obligations.
  12. In a rejoinder, the Plaintiff/Applicant filed further affidavit sworn on 12/06/2024 and averred that clause 3 of the Sale Agreement does not state that payment was to be done in cash. Further that the deposit paid was Kshs. 16,653,840 and not Kshs 3,620,400 as stated.
  13. The applicant further stated that the Defendant has never indicated any reservations on financing arrangement and that is why the undertakings were given by Counsel of the applicant.
  14. Further that the Defendant has refused to release completion documents to facilitate the process and is thus in breach of the terms of the sale agreement. That the plaintiff/applicant is still willing and ready to complete the transaction once completion documents are ready.

### **Analysis and Determination**

15. I have considered the notice of motion dated 19/05/2024, the affidavits in support and in reply. The Applicant/plaintiff filed its submission dated 09/06/2024. The Respondent/Defendant filed submissions dated 24/07/2024. I have considered the submissions and filed authorities cited in support of the Applicant/Plaintiff and the submissions and filed authorities of the Respondent/Defendant together with the supporting affidavits.
16. The issues for determination are:-
  - (i) Whether the plaintiff's/applicant's application meets the threshold for grant of temporary injunctions.
  - (ii) Who should bear costs?
17. It is the plaintiff's/applicant's submissions that they entered into an Agreement for Sale for the suit property and paid a deposit of Kshs. 16,653,840. The sale price for the suit property measuring approximately 2,586sqft together with (4) parking bay located at Morning Side office Park developed on LR No. 2/704 comprising a grant registered in the land Title registry as Number LR 127882/1 Ngong Road, Kilimani Nairobi is Kshs 36,204,000.
18. The principles upon which this court exercises its discretion in applications for temporary injunction are now well settled. An applicant for a temporary injunction must establish that they have a prima facie case against the respondent and they stand to suffer irreparable harm which cannot be compensated in damages if the order is not granted.
19. In an application for injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were set out in the precedent setting case of *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358. In the case of *Mrao Limited vs First American Bank of Kenya Ltd & 2 Others*



[2003] KLR 125 the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

20. In the Case of Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557 Bosire J (as he then was) held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

21. What emerges clearly herein is that the twin problems are that, whereas the Plaintiff/Applicant blames the Defendant/Respondent for not completing the sale transaction, the Defendant/Respondent blames the Plaintiff/Applicant for not completing the payment for the suit property in cash because according to the Defendant this was a cash transaction The Plaintiff/Applicant through its advocate gave an undertaking for financing through the bank which was however rejected by the Defendant.

22. I have perused Clause 3 of the Sale Agreement and note that it states at Clause 3.2 B thus “...Payment of the Purchase Price and Value Added Tax shall be made by way of RTGS to the Vendor’s Advocates account as detailed below.....”

23. Now, RTGS stands for Real-Time Gross Settlement. It is a payment system that enables instantaneous and secure fund transfers between your bank account to the beneficiary account. It is widely used for high-value transactions due to its real-time processing and the system of processing transactions individually and not in batches.

24. One can either use the online mode or visit the bank branch to make RTGS transactions. Thus it is used in the transfer of very large amounts and on a real-time basis. It is used by retail as well as corporate account holders to transfer instantly.

25. Therefore, considering that the Sale Agreement at Clause 3.2 B provided for this mode of payment I have not seen where it excluded money from a bank and neither did it indicate that the money shall be paid in cash. It states that it is by RTGS.

26. The Defendant has therefore not placed before the court evidence to show that the payment had to be strictly in cash. Further by virtue of the fact that the Defendant indulged the Plaintiff/Applicant it means that it was willing to allow the Applicant to mobilize the resources meant to pay for the property in question.

27. The Applicant insists that they are still ready, able and willing to complete part of their bargain. They are however apprehensive that the Defendant/Respondent might dispose the subject matter and thus be deprived the opportunity to recover the property subject herein or the deposit amount which they have paid towards the purchase.

28. On whether the Applicant has satisfied the conditions of grant of temporary injunction, the court makes the following findings:

On prima facie case, it is undisputed that the parties entered into a valid agreement, deposit paid and timelines set for completion of sale transaction. The Applicant went ahead to apply for loan to pay the balance purchase price and the Counsel for the Applicant gave an undertaking to this effect and it insists to date its ready, able and willing to perform its part of bargain. The Respondent is still holding the deposited amount Kshs.3,620,400 and an



additional Kshs 13,033,440 cumulatively being Kshs. 16,653,840 which has been outside Applicant's possession since 2023, July and November respectively.

29. There is no guarantee that if the Applicant is awarded a decree in the matter herein, he will be able to enforce it in the event the subject matter is out of the Respondent's control in the event the same is alienated or charged.
30. The Applicant may never recover the money or the land. It is in the interest of justice that the subject matter be preserved to protect the interest of all parties.
31. The issue of whether specific performance will be granted eventually will be determined at the trial.
32. For now it is apparent that the prima facie case has been established with probability of success. The failure to grant orders may render the applicant to eventually have a hollow decree.
33. The balance of convenience tilts in Applicant's favour who may be inconvenienced by failing to recover the suit property or its money.

### **Disposal Orders**

34. Given the foregoing, the court makes the following orders:
  - a. Interim injunction is granted in terms of prayer 3 of the Notice of Motion Application dated 9/05/2024 until suit herein is heard and determined.
  - b. In the interim and pending the hearing and determination of this suit the Honorable court do order that Defendant do deposit within seven (7) days Kenya Shillings Sixteen Million Six Hundred and Fifty Three Thousand Eight Hundred and Forty (Kshs 16,653,840/=) in a joint interest earning account held by Counsel for the plaintiff and the defendant which shall be released to the upon hearing and determination of the suit.
  - c. Costs in the cause.

It is so ordered

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF OCTOBER 2024.**

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**MOGENI J**

**JUDGE**

In the Virtual presence of: -

Mr. Ongoto for Plaintiff/Applicant

E. Omondi - Defendant

Caroline Sagina - Court Assistant

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**MOGENI J**

**JUDGE**

