



Vision-One Constructions International (K) Limited v Simei & another (Environment & Land Case E014 of 2022) [2023] KEELC 433 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEELC 433 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E014 OF 2022
A NYUKURI, J
FEBRUARY 1, 2023**

BETWEEN

**VISION-ONE CONSTRUCTIONS INTERNATIONAL (K)
LIMITED PLAINTIFF**

AND

**JOHN YIAMIT SIMEI 1ST DEFENDANT
ANNE MUNENE & COMPANY ADVOCATES 2ND DEFENDANT**

RULING

1. Before court is a notice of motion dated March 1, 2022 filed by the plaintiff/applicant seeking the following orders
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this suit, a temporary injunction does issue restraining the defendants, their servants and or agents or any other person whosoever acting on instructions and authority of the defendant whether express or implied from taking possession, selling, disposing, alienating, changing, advertising for sale, or in any manner dealing with the property known as LR No 12610/120(1R 157120)
 - d. That the officer commanding station, Mlolongo Police station be directed to aid in enforcing the order herein.
 - e. That the costs of this application be awarded to the plaintiff/applicant.
2. The application is premised on the affidavit sworn on March 1, 2022 by Dr George Muigai Kiongera who is one of the directors of the plaintiff/applicant. The applicant's case is that LR No 12610/120 (IR



- 151120) (suit property) belongs to the plaintiff and the same was purchased from the 1st Defendant vide an agreement of sale dated August 9, 2017 and that they have been in a continuous active possession thereof.
3. The applicant further stated that they paid the entire purchase price of Ksh 60,000,000/- to the vendor's advocate who are the 2nd respondent in this matter, in accordance with the sale argument but later learnt that the 1st respondent never received the entire purchase price. The applicant complained that on February 25, 2022, persons hired by the 1st respondent invaded the suit property and destroyed the plaintiff's building and that therefore there is imminent danger of them losing the suit property. Further that the invasion of the suit property was a collusion between the 1st and 2nd respondents.
 4. The application was opposed. The 1st defendant filed a replying affidavit sworn by himself and dated April 13, 2022. His case was that he entered into a sale of land agreement with the plaintiff for sale of the suit property at Ksh 60,000,000/-. Further that the plaintiff's agents introduced him to the 2nd defendant/respondent who informed him that the 2nd respondent was going to be her advocate for the purpose of the sale which arrangement was agreed by the 1st respondent.
 5. The 1st respondent further stated that he had a loan facility against the title to the suit property in the sum of Ksh 1,500,000/-, which he asked the plaintiff to pay, being part of the consideration of Ksh 60,000,000/-. He also stated that he only handed over his National Identification card, pin certificate and coloured photographs as completion documents.
 6. He further stated that he was made to open an account with M/S Equity Bank Limited Kitengela Branch Account No 017xxxxxxx903 with instructions that he was the only person to operate the same. That he did not receive the money as expected and sought from the plaintiff's agent to know when he will get the same, when he was sporadically paid through Mpesa, a sum of Ksh 5,800,000/-. That he never got any other money despite pressing the plaintiff's agents for it. That he allowed the plaintiff to build a structure on the suit property as he continued waiting to be paid the balance of the purchase price.
 7. It was his assertion that thereafter the plaintiff brought heavy machines to the suit property. That although he did not operate his account at Equity Bank save for only two instances, he realized that there were deposits of Ksh 23,000,000/- but the same was immediately sent to different accounts without his knowledge or authority although he was the sole signatory to the account.
 8. The 1st defendant pleaded that the suit property was his only family land and that he sold the same so as to buy another parcel for his family. He stated that if the orders sought are granted, he will become destitute and homeless together with his family.
 9. The 2nd respondent on her part filed grounds of opposition dated March 30, 2022 in response to the application. Her case was that the application was incompetent, lacked merit and was baseless as there were no grounds showing that the 2nd defendant had committed trespass.
 10. According to the 2nd respondent, the agreement had an arbitration clause and that the suit ought to be referred to arbitration and that the plaintiff had failed to demonstrate an arguable case. He denied even meeting any of the plaintiff's directors. He also denied demolishing the plaintiff's structures.
 11. In a rejoinder to the 1st respondent's replying affidavit, George Muigai Kiongera, swore a supplementary affidavit dated April 25, 2022. He stated that Patrick Macharia Nderitu was their mutual agent as he was the one who introduced the 1st respondent to him. He denied having any relationship with Patrick, and stated that Patrick's role was only in identifying a parcel of land that suited his company's needs



- particularly for quarrying business. His position was that the 2nd respondent was the 1st respondent's advocate.
12. He stated that his advocate furnished him with the original title document for the suit property, upon completion of the purchase transaction, registered the suit property in the plaintiff's name and subsequently the plaintiff took possession thereof.
 13. He also stated that he was not in the country when the transaction concerning the suit property took place. Further, that the fact that the 1st respondent sold the property to the plaintiff was not disputed and that he was not privy to what transpired between the 1st and 2nd respondents and ought not to be denied proprietary rights on account of an advocate – client dispute between the respondents.
 14. The application was canvassed by way of written submissions. On record are the applicant's submissions filed on May 6, 2022 and the 2nd respondent's submissions filed on 1st April 2022.

Submissions

15. Counsel for the applicant submitted that the applicant had established a prima facie case with a probability of success to warrant grant of an order of interlocutory injunction. Reliance was placed on the case of *Giella v Cassman Brown & Company Ltd* [1973] EA 358, *Nguruman Ltd v Jan Bonde Nielson & 2 Others* [2014] eKLR and *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] eKLR, all of which this court has considered.
16. It was contended for the applicant that the applicant lawfully purchased the suit property from the 1st respondent and paid the purchase price in full, when the 1st respondent was represented by an Advocate. Further that the applicant had been in active possession when the respondents hired goons and invaded the suit property. Counsel relied on Section 26 (1) of the *Land Registration Act*, to argue that there was no fraud or illegality involved in the acquisition of the certificate of title in favour of the applicant and therefore the title was absolute and indefeasible.
17. It was argued for the applicant that Patrick Macharia Nderitu, who was a land agent, is the one who pointed out the suit property to the applicant's Advocates and that the applicant is not privy to the relationship between Patrick Macharia Nderitu and the respondents. Counsel maintained that the applicant complied with all the conditions of the sale agreement and paid the entire purchase price as confirmed by the letter of the 2nd respondent and it was upon the 2nd respondent to remit the same to the 1st respondent. Counsel also submitted that being the Registered Proprietor, tilted the balance of convenience in favour of the applicant.
18. On whether this matter ought to have been referred to arbitration, counsel referred to the arbitrator clause in the agreement and argued that the arbitration clause referred only to situations where parties disputed on the provisions of the sale agreement. Counsel argued that since all the parties performed their obligations under the agreement, there was no dispute to be referred to arbitration and that arbitration clause does not apply in cases of alleged fraud like in the present case.
19. Counsel referred to the case of *Adrec Limited v Nation Media Group Limited* [2017] eKLR and Section 6(1) of the *Arbitration Act* for the proposition that a party seeking to have a matter referred to arbitration must seek leave of court to refer the matter to arbitration at the point of entry of appearance. Counsel pointed out that the issue of arbitration was only raised in the submissions.
20. Counsel for the 2nd respondent submitted that principles for grant injunction were laid out in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358, to wit that the applicant must demonstrate a prima facie case with a probability of success; demonstrate that the injury to be suffered is of great



magnitude that cannot be adequately compensated in damages and that where the court is in doubt, it ought to consider the application on a balance of convenience.

21. Counsel argued that the plaintiff's case as against the 2nd defendant was flawed because the agreement in respect of the purchase of the suit property contains an arbitration clause and therefore this matter ought to be referred to arbitration. Counsel argued that this court has no jurisdiction to determine this matter. Counsel also argued that the 2nd defendant was acting on behalf of a disclosed principal hence the suit against her was defective.
22. On whether the plaintiff has established a *prima facie* case with a probability of success, counsel argued that the 2nd respondent was not responsible for the invasion of the suit property. Besides, counsel argued that as the plaint has a prayer for general damages which is a liquidated issue, therefore, that the injury that may be suffered is capable of liquidation and quantification. Counsel's position was that the balance of convenience tilted against the grant of an interlocutory injunction.

Analysis and determination

23. I have carefully considered the application, the responses and the submissions. The issues that fall for determination are as follows;
 - a) Whether this court lacks jurisdiction to determine this suit.
 - b) Whether the applicant has met the threshold for grant of an interlocutory injunction.
24. The 2nd defendant argued that this court lacks jurisdiction to hear and determine this suit as there is a clause in the agreement stating that the parties shall refer their disputes to arbitration. I have considered the agreement which was made on August 9, 2017. The said clause is in paragraph 19 of the agreement and it states as follows;

“ Arbitration

Should any dispute arise between the parties hereto with regard to the interpretation, rights, obligations and or implementation of any one or more of the provisions of this Agreement, the parties to such dispute shall in the first instance attempt to resolve such dispute by amicable negotiation. Should such negotiations fail to achieve a resolution within fifteen (15) days, either party may declare a dispute by written notification to the other, whereupon such dispute shall be referred to arbitration under the following terms:..”

25. Having considered the import of paragraph 19 of the agreement dated August 9, 2017, it is my view that the agreement required that where a dispute arises in respect of the interpretation or right, or obligations or implementation of any of the provisions of the agreement, then such dispute could first be resolved by negotiations and if that fails, any of the parties could refer it to arbitration. My understanding of that clause is that not all disputes between the plaintiff and the 1st defendant in regard to the suit property ought to be referred to arbitration. The disputes referred to are disputes arising before completion of the agreement and before all the parties comply with their obligations under the agreement.
26. As there is no dispute to the fact that the suit property was sold by the 1st defendant to the plaintiff at a consideration of Ksh 60,000,000/- which sum was paid in full to the 2nd defendant as advocate acting for the 1st defendant as agreed vide Clauses 2.1 and 2.2 of the agreement, and the land duly transferred to the plaintiff on December 13, 2017 and subsequently the plaintiff took possession thereof, the agreement dated August 9, 2017 was spent as each party had performed their obligations as spelt out



- in the agreement. Therefore, a subsequent dispute such as this one where there is interference with the plaintiff's quiet possession, in my view, such dispute cannot be said to be within the purview of Clause 19 of the agreement herein.
27. My position above is informed by the provisions of Section 26 of the Land Registration Act No.3 of 2012 which provides for indefeasibility of title, for a registered title holder where there is no fraud, misrepresentation, illegality or corruption in the acquisition of title. At this preliminary stage, I note that there is no allegation of fraud or illegality in the acquisition of title by the plaintiff and therefore he is the absolute indefeasible owner of the suit property and his title is protected against the whole world including the defendants herein. Therefore this suit which is in regard to trespass is outside the clause on arbitration in the agreement. In the premises, I find and hold that this court has jurisdiction to hear and determine this dispute.
 28. I will therefore proceed to determine whether the applicant has met the threshold for grant of an interlocutory injunction.
 29. Principles for grant of interlocutory injunctions are well settled. In the case of *Giella v Cassman Brown Company Ltd*[1973] EA 358, the court stated that for an applicant to succeed in an application for interlocutory injunction, they must demonstrate that they have a prima facie case with a probability of success; demonstrate that they stand to suffer irreparable injury that may not be adequately compensated in damages and that where the court is in doubt, it ought to decide the application on a balance of convenience.
 30. A prima facie case was described in the case of *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] KLR, to mean the material placed before court where the court properly directing itself may conclude that there exists a right which has apparently been violated by the opposite party.
 31. I have considered the plaintiff's position and I note that it is not disputed that the plaintiff and the 1st defendant entered into an agreement for sale of the suit property at Ksh 60,000,000/- and that the 2nd defendant was acting in the sale transaction as an advocate for the 1st defendant. It is also not disputed that the parties agreed that the purchase price to be paid by the purchaser to the vendor by depositing the same with the vendor's advocate, who is the 2nd defendant. This transaction took place between August 9, 2017 and November 2017. The plaintiff stated clearly that he paid the entire purchase price to the 2nd defendant as agreed. Both defendants have not disputed this fact. What happened after the 2nd defendant received the purchase price is a matter that is known between the two defendant's as the 2nd defendant's silence on whether she remitted the amount to the 1st defendant is deafening. Her major concern was that this matter should be referred to arbitration.
 32. The plaintiff has also presented a certificate of title showing that they are the registered proprietor of the suit property. They have also stated that they are in possession of the same, which fact was conceded to by the 1st defendant. The issues raised by the 1st defendant is that he was paid by the 2nd defendant Ksh 1,500,000/- which settled the loan on the suit property and Kshs 5,800,000/- by Mpesa. Those are issues between a client and an advocate and have nothing to do with the plaintiff who paid the money to the 2nd defendant in compliance with the agreement. Due to the above reasons, I am satisfied that the plaintiff who has demonstrated at a *prima facie* level that they are the absolute indefeasible owner of the suit property, has demonstrated a prima facie case with a probability of success.
 33. On whether the plaintiff stands to suffer irreparable injury, the plaintiff argued that the 1st defendant had come on the suit property with goons who were demolishing the plaintiff's structures thereon. The 1st defendant although denying doing that stated that the plaintiff is occupying his property and that he may become homeless.



34. It is my view that the plaintiff has shown that they stand to suffer irreparable injury as continued destruction of their structures on the suit property and the trespass by the defendants thereon may cause them irreparable injury as it may alter the substratum of the subject matter herein.
35. On where the balance of convenience tilts, my view is that the plaintiff having both the title and possession of the suit property and there being no allegations of fraud against them, I find that the balance of convenience tilts in favour of the grant of the injunction.
36. The 2nd defendant has distanced herself from the suit on grounds that she is not the reason for the trespass. My view is that having a studious silence does not count in her favour, in the face of an allegation that out of Ksh 60,000,000/-, she only remitted to the 1st defendant a sum of Ksh 7,300,000/-. Being an officer of this court, the least she could do was to give a factual response to the allegations made by the 1st defendant who insists that he may become destitute if the orders sought are granted as the 2nd defendant has not remitted to him the entire purchase price. In my considered view, without any attempts on the part of the 2nd defendant to rebut the allegations by the 1st defendant clearly places her at the core of this dispute and therefore orders sought should also refer to her.
37. In the premises, I find the plaintiff's application dated 1st March 2022 as being meritorious and I allow the same as follows;
- a. That pending the hearing and determination of this suit, a temporary injunction be and hereby issued restraining the defendants, their servants and or agents or any other person whatsoever acting on instructions or authority for the defendant whether experts or implied from taking possession, selling, depositing, alienating, charging, advertising for sale or in any manner dealing with the property known as LR No.12610/120 (IR 151120).
 - b. That the officer commanding station, Mlolongo police station be and is hereby directed to aid in enforcing the order herein.
 - c. That the costs of this application are awarded to the plaintiff/applicant.
38. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 1st DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Mutwiri for the applicant

Mr. Kandere for 2nd defendant/respondent

Josephine – Court Assistant

