



**Said (Legal representative of the Estate of Said Abdalla Azubedi (Deceased) v Ikumbu
(Environment & Land Case 178 of 2015) [2023] KEELC 16049 (KLR) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16049 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 178 OF 2015**

JM MUTUNGI, J

MARCH 1, 2023

BETWEEN

**FEISAL SAID (LEGAL REPRESENTATIVE OF THE ESTATE OF SAID ABDALLA
AZUBEDI (DECEASED) PLAINTIFF**

AND

SAMUEL MBUGUA IKUMBU DEFENDANT

RULING

1. The present suit was filed by the Plaintiff on June 22, 2015. The plaintiff sought an order of permanent injunction restraining the defendant from in any manner dealing with and/or interfering with the parcel of land Nakuru Municipality Block 5/133. The plaintiff further sought an order of specific performance of the terms of an agreement of sale dated July 31, 2013 entered into between the plaintiff and the defendant respecting the land parcel Nakuru Municipality Block 5/133 that the defendant had agreed to sell to the plaintiff.
2. The defendant following grant of leave after his application dated October 11, 2017 seeking to set aside an ex-parte ruling delivered on September 22, 2015 was allowed, filed defence, counter-claim and set-off to the plaintiff's claim on March 1, 2018. The defendant denied the plaintiff was entitled to the orders claimed in the suit besides averring the suit was misconceived and incompetent. The defendant prayed for the dismissal of the plaintiff's suit and for judgment in his favour in the counter-claim for a permanent injunction; account by the plaintiff; set off; possession of the property; rescission of the sale agreement; damages and mesne profits.
3. The hearing of the suit has in-explicably delayed for over 7 years now. The onset of the Covid-19 Pandemic in the years 2020 and 2021 was a contributory factor to the delay as two scheduled hearings aborted on account of the incidence of the pandemic. The parties were aged and preferred to have a physical hearing owing to the nature of the suit. Probably because of the delay in having the matter



heard and finally determined, the defendant on July 25, 2022 filed the Notice of Motion application which is the subject of this Ruling. By the application, the defendant prayed for the following orders:-

1. That this application be heard ex-parte in the first instance due to the nature of its urgency.
 2. That pending the inter-partes hearing and determination of this application, this Honourable Court be pleased to grant an ex-parte injunction in favour of the Defendant/Applicant, restraining the Plaintiff/Respondent by himself, his servants and/or agents from being or remaining in possession, and/or collection of rent in the Applicant's property known as Nakuru Municipality Block 5/133.
 3. That pending the hearing and determination of this suit by Plaintiff, Defence, Counterclaim and Set-off, an Interlocutory injunction be granted restraining the Plaintiff/Respondent by himself, his servants from being or remaining in possession, and/or collection of rent in the Applicant's property known as Nakuru Municipality Block 5/133.
 4. That the Plaintiff/Respondent be ordered to render to the Defendant/Applicant, and to the Court, a full and proper account in respect of rent collected in the suit premises, from August 1, 2013, to the date of such order, or other date appointed by Court.
 5. That pending the hearing and determination of this suit, this Honourable Court do issue appropriate orders for the Preservation and Inspection of the suit property, Nakuru Municipality Block 5/133.
 6. That the costs of this Application be provided for.
4. The application was premised on the grounds set out on the body of the application and the affidavit sworn in support by the defendant/applicant. Inter alia, the defendant's grounds in support of the application are as follows:-
- a. That the plaintiff has conducted delay to the hearing of this matter for the past 7 years.
 - b. That the defendant/applicant is the registered proprietor of the suit premises, Nakuru Municipality Block 5/133.
 - c. That in spite of repeated requests, the plaintiff/respondent has neglected, failed and/or refused to render the applicant an account showing the collection of rent, since 1st August 2013 to date.
 - d. That the possession by the plaintiff/respondent of the premises is fraudulent, and is grounded on unlawful, unjustifiable and inequitable process.
 - e. That unless the plaintiff/respondent is restrained from further acts of waste, the defendant/applicant will suffer devaluation of value relating to the suit premises, which is imminent.
 - f. That the defendant/applicant stands to suffer irreparable financial loss, or damage if his property is retained by the plaintiff/respondent.
5. The defendant in the supporting affidavit averred that he was the one who had been paying the security services for the premises since 2013 and had paid Kshs 836,793/= to the Security firm which they had acknowledged as per annexure "SMI 2". The defendant also averred the premises had a rental value of Kshs 446,000/= per month which the plaintiff has been collecting without giving an account. The defendant averred that the plaintiff had collected from rent more than Kshs 20,000,000/= that he (defendant) had received as deposit towards the purchase. He deposed that the property was not properly managed or maintained and that unless the orders sought were granted, the property will continue to undergo waste.



6. The plaintiff/respondent filed grounds of opposition and replying affidavit in opposition to the defendant's application. The plaintiff contended that he had not committed any fundamental breach of the agreement of sale to warrant any intervention of the Court. The defendant attributed breach of the agreement to the defendant reiterating that was the reason, he was seeking specific performance of the agreement of sale in the suit. The plaintiff averred the orders the defendant is seeking in the application are premature and would not be available at the interlocutory stage. The plaintiff denied the delay in having the suit heard was attributable to him. Through the replying affidavit, the plaintiff stated that the issue of possession and rent collection were covered under the agreement of sale which is in contention and are issues that cannot be determined at the interlocutory stage as the validity or otherwise of the agreement of sale will be determined on the evidence to be adduced at the trial. The plaintiff denied the premises was not being properly maintained and/or was in a state of disrepair as alleged by the defendant and pointed to the defendant's own Valuation Report "SM1" Clause 8.0 where it was stated:-

"The building is in sound structural state and in good state of repair and maintenance, no immediate repair are required".

7. The plaintiff further disputed it was the defendant who was paying for security for the premises. He stated he was the one who was paying for security services and attached two receipts issued by Hunters Guard Security Ltd in the month of May and June 2022 marked "FS 1 & FS 2".

8. The defendant with the leave of the Court filed a further affidavit, in response to the plaintiff's grounds of opposition and replying affidavit on 2/9/2022. The defendant averred that he only became aware of the existence of the suit in August 2017 when he sought to gain access to his property and he was shown the order issued by the Court on 22/9/2015 restraining him from accessing the property. The defendant reiterated, the property was continuing to undergo deterioration and exhibited a valuation by Prime Valuers dated 31/1/2020 where the Valuers stated:-

"We noted the property is in a prime location but the building on it is, old, functionally and economically obsolete, options for re-development should be considered in order to maximize on returns".

9. The defendant doubted the authenticity of the Receipts for security services exhibited "FS1" and "FS 2" while reiterating that he was the one who was paying for security services.

10. The defendant's application was canvassed by the parties by way of written submissions. The defendant/applicant filed his submissions dated September 1, 2022 on September 2, 2022 while the plaintiff/respondent filed his submissions dated September 20, 2022 on September 22, 2022. I have considered the application and the affidavits sworn in support and in opposition and the submissions of the parties and the issue for determination is whether on the facts and the law, the defendant has made out a case for grant of the orders he seeks.

11. It is not disputed that the instant suit is founded on the disputed agreement of sale dated 31st July 2013. Both the plaintiff and the defendant blame the other for breach of the agreement. The plaintiff fundamentally seeks specific performance of the said agreement. It is not clear at what point the plaintiff was granted possession of the suit property and the authority to receive rent from the tenants. These definitely would be points to be given clarity during the trial. The defendant has for instance alleged the possession was obtained by the plaintiff fraudulently. Evidence would be required to prove how the plaintiff entered into possession of the suit property and such evidence would only be adduced



at the trial such that the disputing party would have the right to cross-examine the witness who tenders the evidence.

12. The defendant in the counter-claim seeks among other orders – taking of accounts; possession of the suit property; rescission of the sale agreement; damages; and mesne profits. These are orders that the Court can properly give at the conclusion of the case and after taking and evaluating the evidence. It is evident in the instant matter, that, and having regard to the pleadings, and affidavits presented by the parties, that the issues and facts are in dispute and in my view, it would be inappropriate to make a determination of the contested issues at this interlocutory stage. The defendant under prayer 3 of the application seeks an order as follows:-

3. That pending the hearing and determination of this suit by plaint, defence, counter-claim and set-off, an interlocutory injunction be granted restraining the plaintiff/respondent by himself, his servants from being or remaining in possession, and/or collection of rent in the applicant’s property known as Nakuru Municipality Block 5/133.

13. As per the pleadings, it is admitted the plaintiff is in possession and is collecting rent from the tenants. That explains why the defendant in the counter-claim is seeking to be granted possession and an account of the rent collected to be accounted. The effect of granting an order as prayed under prayer (3) of the Defendant’s Notice of Motion would be to sanction eviction of the plaintiff and to put a stop to the plaintiff’s collection of rent from the tenants. That would have the effect of determining issues that properly ought to be determined at the trial. The Court in the case of *Joyce Mutindi Ndili v Mulu Ndili* (2022) eKLR relied upon by the plaintiff stated as follows concerning contested issues in interlocutory application:-

18. The plaintiff/applicant having sought for injunctive orders is only entitled to either grant or denial of the same at this stage. It is not in doubt that there has been contradictory and contentious issues that have been raised by both parties that require proper interrogation during the main trial by calling of evidence, testing the same through cross-examination and arrival of determination of the same. However, the suit is still at an interlocutory stage and the Court cannot deal with the merit of the case at this stage. See the case of *Airland Tours and Travel Ltd v National Industrial Credit Bank Milimani HCCC No 1234 of 2003*, where the Court held that:-

“In an interlocutory application, the Court is not required to make any conclusive or definitive findings of facts of law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of the law”.

The Court of Appeal in the case of *Virginia Edith Wambui v Joash Ochieng Ougo* (1987) eKLR held that:-

“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the *status quo* until the dispute has been decided on a trial”.

14. I am persuaded an injunctive order in the terms sought by the defendant cannot be available as such an order can only be granted at the conclusion of the trial when the Court would make a determination based on the merit of the case after evaluating all the evidence. Equally, an order for taking accounts would not be available as that is the same order that the defendant prays for in his counter-claim which realistically can only be given at the close of the trial.



15. While the defendant sought an order for preservation and inspection of the property pending the hearing and determination of the suit, there was no clear evidence to show that the plaintiff had mismanaged the property leading to devaluation of the property owing to, acts of wastage. The Valuation Report by Prime Valuers relied upon by the defendant merely observed that even though the property was in a prime location, the building thereon was old, functionally and economically obsolete and recommended re-development to maximize returns. There was no suggestion of any misuse by the occupants.
16. However, the property the subject of the suit is in dispute between the plaintiff and the defendant. The plaintiff somehow obtained possession and has been collecting rent notwithstanding the sale transaction was not completed. The plaintiff has sued the defendant seeking specific performance of the agreement of sale. The defendant has counter-claimed seeking orders for the rescission of the sale agreement and possession to be handed back to him. Notwithstanding the bulk of the purchase price remains unpaid, the plaintiff continues to collect and perhaps to utilize the rent from the tenants. A perusal of the sale agreement provided that completion was to be within 180 days of the date of execution of the agreement or any other date as may be agreed by the parties. Vacant possession was to be granted to the purchaser on full payment of the purchase price. Completion did not occur within 180 days and the purchaser (plaintiff) took possession notwithstanding the provision in the Agreement. How this happened can only be clarified at the trial.
17. Be it as sit may be, it appears inequitable for the plaintiff to continue to receive rent when the terms of the Sale Agreement have not been fully performed. As matters stand, there is a dispute as to who between the defendant and the plaintiff breached the agreement. Under article 10(2)(b) of the [Constitution](#), equity is classified as a value and principle of governance that the court is enjoined to apply in the interpretation of any law. As I have observed, it is not equitable for the plaintiff to derive the full benefits, of a contract that he himself has not fully performed for whatever reason. As at this point, it is not possible to determine how the Court will finally decide on the pending matter. Will the court uphold the plaintiff's claim or will the Court allow the defendant's counter-claim?
18. This is both a court of justice and equity and being cognizant of article 10(2)(b) of the [Constitution](#) and the overriding objective under section 3 of the [Environment and Land Court Act](#) both set out hereunder, the Court is of the view it is necessary to intervene in the interest of justice. Article 10(2) of the [Constitution](#) provides:-

- (2) The National values and principles of governance include—
 - (a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
 - (c) good governance, integrity, transparency and accountability; and
 - (d) sustainable development.

Section 3 [Environment and Land Court Act](#) provides:-

- 3(1) The principal objective of this Act is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.



- (2) The court shall, in the discharge of its functions under this Act give effect to the principal objective in subsection (1).
- (3) The parties and their duly authorized representatives, as the case may be, shall assist the court to further the overriding objective and participate in the proceedings of the court.

19. The Court finds no justification for the plaintiff to continue receiving and maybe utilizing the rent when the sale of the property to him was not completed and when the full consideration agreed paid to the defendant. For that reason, I order and direct that both the plaintiff and the defendant within the next 30 days from the date of this Ruling agree on a Joint Property Management Agent who will be formally appointed and authorized to manage the suit property and collect rent from all the tenants to be accounted for on a quarterly basis. The Property Management Agent to be appointed shall commence the collection of rent with effect from June 1, 2023 until when the suit is heard and determined. The Property Management Agent shall be paid such commission as the parties and the Agents shall agree.
20. In view of the fact that this is a very old matter where scheduled hearings have failed to take off, I direct that the matter be mentioned before Ombwayo, J on April 18, 2023 to confirm the appointment of the Property Management Agent and to give such directions as may be appropriate to facilitate the hearing of the case on a priority basis.
21. Save for the order I have given for the appointment of a property management agent, the Defendant's application dated July 25, 2022 stands dismissed with no order as to costs.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED THIS 1ST DAY OF MARCH, 2023.

.....
JM MUTUNGI

ELC JUDGE

