



Kenyariri v Double Win Company Limited & 2 others (Environment and Land Case Civil Suit E288 of 2022) [2023] KEELC 17256 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17256 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E288 OF 2022**

OA ANGOTE, J

MAY 4, 2023

BETWEEN

DR CHRISTOPHER O KENYARIRI PLAINTIFF

AND

DOUBLE WIN COMPANY LIMITED 1ST DEFENDANT

MIA YUN FEI 2ND DEFENDANT

LIU YUPIN 3RD DEFENDANT

RULING

Background

1. Before this Court for determination is the Plaintiff's Notice of Motion application dated 14th September, 2022 brought pursuant to the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 Rules 1,2,3 & 4 and Order 51 Rule 1 of the *Civil Procedure Rules*, seeking the following reliefs;
 - i. Pending the determination of this suit, a permanent injunction does issue restraining the Defendants, their agents and/or appointees from disconnecting water supply in the suit premises and from collecting any monies from the residents of the suit premises.
 - ii. Pending the determination of the suit, the Honourable Court be pleased to grant a mandatory order directing the Defendants to specifically perform the two agreements/contracts dated 3rd February, 2020 to complete the sale of the two Apartments A102 and A105 in favour of the Plaintiff and provide respective leases to the Plaintiff.
 - iii. A declaration be made that the Plaintiff is a bona fide shareholder of Sandalwood Garden Management Public Limited Company with rights to be part of the management board of the Company and be a necessary signatory to the Company's' Bank Accounts.



- iv. A declaration be and is hereby made that the water from the borehole in the suit premises forms part of the common property to be maintained by service charge once established and fixed by the Management Board.
 - v. The Costs of the Application be provided for.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of the Plaintiff who deposed that on 3rd February, 2020, he entered into two agreements with the Defendants for the purchase of two apartments, being A102 and A105 at Sandalwood Gardens, Kilimani, Nairobi at the sum of Kshs 8,000,000 each and that he paid for the water and electricity meters and two share certificates (representing the two apartments) in the management company for the sum of Kshs 70,000.
 3. The Plaintiff deposed that after making the payments, and upon the Defendants obtaining an occupational license dated 21st September, 2021, they granted him possession of the apartments; that the Defendants incorporated a management company known as Sandalwood Garden Management Public Limited Company and that the above notwithstanding, they have refused to issue to him with the two share certificates in respect of the apartments.
 4. The Plaintiff deposed that the Defendants have gone ahead and opened account no 0766673068 with Equity Bank without consulting him and other shareholders; that the Defendants, through strangers placed on the property, have embarked on charging water consumed by the occupants of the apartments and that water from the borehole and from Nairobi Water Sewerage Company forms part of the common property and should be taken care of by the service charge as indicated in the third schedule of the Agreements.
 5. It was deposed that the Defendants have failed to complete the sale transactions to enable him get sub-leases in respect of house number A102 and A105 despite having obtained the occupation license on time and despite demand for the same and that the Defendants have commenced other construction projects within the premises without involving other shareholders.
 6. Vide a Replying Affidavit sworn on 10th October, 2022, the 3rd Respondent and the Director of the 1st Defendant deposed that the 1st Defendant is the registered proprietor of all that property known as LR 1/95 Nairobi and that the 1st Defendant embarked on the construction of one hundred and sixty-nine residential apartments on the property and entered into an agreement with the Plaintiff for the purchase of two apartments being A102 and A105.
 7. It was deposed by the 3rd Defendant that upon completion of the construction, issuance of the occupation certificate and payment of all costs stipulated in the agreement, the 1st Defendant, through its representatives, handed over possession of the apartments to the Plaintiff and that pursuant to recital G of the Agreement, the 1st Defendant incorporated a management company being Sandalwood Gardens Management PLC to manage and maintain the development which is now managed by the 1st Respondent.
 8. According to the Defendants, the apartment owners, other than the Plaintiff, entrusted the 1st Defendant to collect service charge, maintain and manage the development and the management company proceeded to open an account all of which has been agreeable to the other tenants.
 9. It was submitted that the 1st Defendant receives a water bill from the Nairobi Water and Sewerage Company on a monthly basis which is divided equally among the purchasers within the development; that as the amount varies each month, it cannot be included in the service charge and that the other owners have had no objection to the payment of water charges due to them.



10. The 3rd Defendant deposed that the share certificate sought by the Plaintiff is part of the completion documents and will be issued together with the title documents; that vide Gazette Notice dated 20th May, 2022, the suit property was listed as mature for conversion and the Advocates were in the process of undertaking a change of user; and that there have been delays at the Lands Registry with respect to the change of user, conversion and processing of sectional titles due to the digitalization process at the Lands Registry, factors beyond the Defendants and their Counsel.
11. It was deposed that the [Sectional Properties Act, 2020](#) is in force and the development being new requires a sectional title; that including the Plaintiff as a signatory to the account would be highly prejudicial to the other purchasers and that if he wishes to be a signatory, he should get approval from the other purchasers.
12. The Plaintiff filed a Further Affidavit in which he stated that the 1st Defendant cannot purport to manage the management company of the apartments which it sold; that the management company should comprise of owners of the apartments; that further, there is no evidence that the 1st Defendant has been entrusted with the management of the management company as alleged and that no service charge has been fixed, which service charge should cater for the bills from Nairobi Water and Sewerage Company.
13. It was deposed by the Plaintiff that the completion date, being 31st December, 2020, has long passed and the Plaintiff has not been provided with any paper work; that the Defendants cannot use the reason of delays at the Lands Registry when they have not demonstrated the same and that there is no evidence of any communication with the lands office by the Defendants.

Submissions

14. The Plaintiff submitted that despite the establishment of a management company pursuant to Part C of the Sale Agreements between himself and the Defendants, and despite the Plaintiff having fully paid for the apartments, he has yet to be issued with shares in the management company and that clause 13 of the Sale Agreements makes his admission in the management company mandatory.
15. It was submitted that pursuant to clause 13.3 of the agreement, service charge should be determined by the management board; that the management board which should consist of purchasers has yet to be formed and subsequently no service charge has been fixed and that the 1st Defendant has no authority to manage the management company and no authority had been granted to them in that regard.
16. It was submitted that the annexures attached referencing the water bills from the Nairobi Water and Sewerage Company are fraudulent; that the Defendants are in breach of the agreement whose completion date was 31st December, 2020; that the Defendants have not demonstrated any progress in the transaction and are relying on the excuse of delays at the lands registry and that it is imperative that the Plaintiff is made a signatory for purposes of accountability as the accounts belong to the shareholders and not the vendor.
17. The Defendant's counsel submitted that the Plaintiff has not proven that the Defendants intend to use the title of the suit property as security contrary to the provisions of Section 107 of the [Evidence Act](#); that the 1st Defendant is mandated to comply with the [Sectional Properties Act, 2020](#); that issuance of leases will be contrary to the law and that the Defendants temporarily opened the management company to manage the suit property pending the processing of the sectional titles.
18. It was submitted that the Lands Ministry issued a directive that all properties in Nairobi are required to be converted and the Defendants have no choice but to comply; that contrary to the Plaintiff's



allegations, they have informed them of the reasons for the delay and indicated the progress in the matter and that the Plaintiff cannot seek to be made a signatory to the management account without the authority of the other purchasers.

Analysis & Determination

19. Having canvassed the Application, Affidavits in support and against and the submissions, the sole issue for determination is whether the Plaintiff has met the threshold to warrant the grant of the orders sought?
20. The present Application has its foundation in Order 40 Rules 1, 2, 3 and 4 of the [Civil Procedure Rules](#) which deals with the grant of temporary injunctive orders and interlocutory orders. The principles underpinning the grant of temporary injunctions are now settled. The same are found in the celebrated case of *Giella vs Cassman Brown* (1973) EA 358 where it was stated thus:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Plaintiff must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Plaintiff might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

21. The Court of Appeal in [Nguruman Limited vs Jan Bonde Nielsen & 2 Others](#) [2014] eKLR expounded on this principle stating;

“In an interlocutory injunction application, the Plaintiff has to satisfy the triple requirements to:-

- (a) Establish his case only at a prima facie level,
- (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially. (See *Kenya Commercial Finance Co. Ltd V. Afraba Education Society* [2001] Vol. 1 EA 86) If the Plaintiff establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Plaintiff's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the Plaintiff to injunction directly without crossing the other hurdles in between.”



22. What constitutes a prima facie case was discussed by the Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] eKLR who defined prima facie thus;
- “...So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
23. It is undisputed that the Plaintiff purchased Apartments A102 and A105 from the 1st Plaintiff, fully paid the purchase price and was granted possession thereof. It is the Plaintiff's case that notwithstanding full payments, the Defendants have failed to complete the sale transaction and give him the leases to the apartments and have further refused to issue him with share certificates.
24. According to the Plaintiff, the Defendants have incorporated a management company and opened an account for the same without the input of other shareholders and that the Defendants are illegally charging for water from the borehole and from Nairobi Water and Sewerage Company whilst the same should form part of the service charge which has yet to be fixed.
25. The Plaintiff adduced into evidence the Sale Agreements for the apartments, receipts for the various payments, occupation license, incorporation certificate of Sandalwood Garden Management company, demand letters and correspondence with the Defendants.
26. In contrast, the Defendants assert that they incorporated the management company pursuant to recital C of the Agreements; that the apartment owners entrusted them to manage and maintain the premises and to that end, the 1st Defendant opened an account and has not received any complaints with respect to the same and that the 1st Defendant receives a monthly water bill from the Nairobi Water and Sewerage Company which is divided equally among the purchasers.
27. It is the Defendants, case that the 1st Defendant has not refused to complete the transaction but the same has stalled on account of delays at the Lands Registry and the new laws governing sectional titles.
28. The Defendants adduced into evidence a copy of the water bill from the Nairobi Water and Sewerage company for July, 2022, gazette notice indicating the property is mature for conversion, notice by Law Society of Kenya calling for demonstrations over delays at the Lands Registry, and the statement of understanding between LSK and the Ministry of Lands.
29. Flowing from the foregoing, the Plaintiff is seeking for a permanent injunction restraining the Defendants from disconnecting water supply in the suit premises and from collecting any monies from the residents of the suit premises; and a mandatory order directing the Defendants to specifically perform the two agreements/contracts dated 3rd February, 2020 to complete the sale of the two Apartments A102 and A105 in his favour and to provide to him respective leases.
30. The Plaintiff is also seeking for declarations that he is a bona fide shareholder of Sandalwood Garden Management Public Limited Company with rights to be part of the management board of the Company and be made a signatory to the company's' bank accounts.
31. The Plaintiff is seeking for a permanent injunction restraining the Defendants from disconnecting water supply in the suit premises and from collecting any monies from the residents of the suit premises. By its nature, a permanent injunction finally determines the rights of a party and as such cannot be



granted at an interlocutory stage. The Court is in this respect persuaded by the decision in *Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib* [2018] eKLR where it was held as follows:

“...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

32. It follows that granting this prayer at this stage would be premature further noting that the issue of the water payment is disputed. However, the court will make an assumption that the Plaintiff is seeking for temporary orders of injunction restraining the Defendants, their agents and/or appointees from disconnecting water supply in the suit premises and from collecting any monies from the residents of the suit premises pending the hearing of the suit.
33. It is not in dispute that the Plaintiff purchased the suit properties from the 1st Defendant. It is also not in dispute that the agreement between the parties provided for the establishment of a management company to manage the development, where every shareholder is entitled to a share. The Defendants have not refuted the fact that indeed, a management company has been registered.
34. However, it would appear that it is the seller, the 1st Defendant, who is still managing the operations of the Estate despite having sold the units on the suit property, two of which have been sold to the Plaintiff. The Defendants have agreed that the suit property is governed by the *Sectional Properties Act, 2020*, and the Regulations thereunder.
35. The *Sectional Properties Act 2020* was enacted in 2020 to align with the provisions of the land laws enacted in 2012. Subsequently, the Cabinet Secretary for the Ministry of Lands and Physical Planning gazetted the *Sectional Properties Regulations* ("the Regulations") on 16 November 2021.
36. The *Act* provides for the division of buildings into units to be owned by individual proprietors and common property to be owned by proprietors of the units as tenants in common and to provide for the use and management of the units and common property. The Regulations operationalize the Act and outline the procedure for registration of sectional plans and conversion of long-term leases registered under the *Land Registration Act* to sectional titles, among others.
37. The sectional regime of ownership of land simplifies sale transactions since individual sectional titles can be transferred in the typical way that land is transferred. Lengthy lease documents are no longer required under the regime.
38. The *Act* requires a sectional plan describing two or more units to be prepared by a surveyor from a building plan approved by the county government. The application to register a sectional plan is accompanied by an application to incorporate a management corporation. The management corporation consists of the unit owners. The consequences of registration of a sectional plan is that the register relating to the mother title is closed and its title is surrendered to the land registry.
39. A separate register is supposed to be opened for every sectional unit. certificates of title (for freehold land) or certificates of lease (for leasehold land) are issued for each sectional unit and the interests



registered against the mother title, including encumbrances, are endorsed on the sectional title documents.

40. The Act requires that a sectional unit owner's interest in the common areas are to be endorsed on their certificate of title or certificate of lease (as applicable); each sectional unit owner is responsible for payment of land rent and rates for their individual unit; the common areas are owned by the sectional unit owners as tenants in common in shares proportionate of their units; and the management corporation manages the common areas on behalf of the unit owners in accordance with the provisions of the Act and by-laws adopted by the members.
41. The objective of the Act which came into force on 28th December, 2020 is to provide for the division of buildings into units to be owned by individual proprietors and common property to be owned by proprietors of the units as tenants in common and to provide for the use and management of the units and common property. The suit premises fall within this category.
42. The Act requires the registration of a Corporation consisting of all those persons who are the owners of units in the parcel to which the sectional plan relates; or who are entitled to the parcel when the sectional arrangement is terminated under this Act. It is the requirement of the law that when a developer registers a sectional plan, he shall within ninety days from the day that fifty percent of the units are sold; or one hundred and eighty days from the day that the first unit is sold, whichever is sooner, convene a meeting of the Corporation at which a board shall be elected.
43. There is no evidence before this court that the Defendants have complied with any provisions of the Act. Indeed, contrary to the provisions of the Act and the sale agreements, it appears that the 1st Defendant, even after selling the units in the suit premises, has continued collecting service charges and managing the common properties.
44. The incorporation of a management company, surrendering of the mother title together with the survey plans of all units for the issuance of titles to unit holders has nothing to do with the delays at the Ministry of Lands.
45. Having failed to show the efforts they have made to comply with the Act after selling the two units to the Plaintiff, it is the finding of the court that the Plaintiff has established a prima facie case to the extent that a management company, where he is entitled to two shares, should be incorporated to manage the affairs of the suit premises.
46. Until the Corporation is registered, with all the unit owners listed as shareholders is done, it is the finding of this court that the Defendants have, prima facie, failed to comply with the Sectional Properties Act and should be inhibited in dealing with the suit premises, other than establishing the Corporation and conversion of all leases into sectional units.
47. The Plaintiff is also seeking for declarations that he is a bona fide shareholder of Sandalwood Garden Management Public Limited Company with rights to be part of the management board of the company and be made a signatory to the company's bank accounts; and that water from the borehole in the suit premises forms part of the common property and should be maintained by the service charge once established and fixed by the management board.
48. Much like permanent injunctive orders, a declaration is issued by the Court after consideration of all the facts presented by the parties. While the Plaintiff's entitlement to be a shareholder in the management company is not disputed, his entitlement to be a signatory to the management account can only be decided by the shareholders, and not this court.



49. Similarly, the question of whether the borehole should be maintained by the payable service charge is an issue that can only be determined by the management company, depending with the terms of the sale agreements. That is not a decision that the court can make at this stage.

50. The Plaintiff is also seeking for a mandatory order directing the Defendants to specifically perform the two agreements/contracts dated 3rd February, 2020 to complete the sale of the two Apartments A102 and A105 in his favour, and provide him with leases. Whereas the Court can grant mandatory injunctions at an interlocutory stage, it can only do so under special circumstances. As stated by the Court of Appeal in *Kenya Breweries Ltd & Another vs Washington O. Okeya* [2002] eKLR;

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

51. This position was re-affirmed by the Court of Appeal in *Joseph Kaloki t/a Royal Family Assembly vs Nancy Atieno Ouma* [2020] eKLR as follows:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.”

52. In the present case, the mandatory injunction sought is to compel the Defendants to complete the sale of the apartments by issuing the Plaintiff with leases. This prayer cannot be granted in view of the provisions of the *Sectional Properties Act* which outlaws issuance of long term leases for sectional properties.

53. For those reasons, the Plaintiff’s application partially succeeds as follows:

- a. Pending the hearing and determination of this suit, a temporary injunction is hereby issued restraining the Defendants, their agents and/or appointees from disconnecting water supply in the suit premises and from collecting any monies from the Plaintiff in respect of provision of services in the suit premises.
- b. The Defendants to pay the Plaintiff the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 4TH DAY OF MAY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Dr. Kanyariri for Plaintiff

Ms Kagai for Defendants

Court Assistant - June

