



**King'oo v Njenga (Environment & Land Case 147 of 2023)  
[2023] KEELC 17752 (KLR) (6 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17752 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 147 OF 2023**

**MD MWANGI, J**

**JUNE 6, 2023**

**BETWEEN**

**NDULU KING'OO ..... PLAINTIFF**

**AND**

**HENRY MBUGUA NJENGA ..... DEFENDANT**

**RULING**

(In respect of the Plaintiff's application dated 20th April, 2023 seeking a permanent injunction, specific performance or reimbursement of the purchase price)

**Background**

1. By a Notice of Motion dated 20<sup>th</sup> January 2021, the Plaintiff moved the court seeking the following orders:
  - a. Spent
  - b. A permanent injunction do issue restraining the Defendant whether by himself or his servants or agents from accessing or remaining in, constructing in, demolishing, evicting, alienating or otherwise dealing with the suit property or interfering with the Plaintiff's peaceful possession pending the hearing and determination of this application.
  - c. A Specific Performance do issue ordering the Defendant to deposit with this Honourable Court the Original Title Deed of the suit property and all necessary documents for ease of transfer by the Plaintiff.
  - d. A Specific Performance do issue ordering the Defendant to reimburse the Plaintiff the purchase price of the suit property, together with all monies



incurred on the suit property should he not transfer the property to the Plaintiff.

- e. The costs of this application be met by the Defendant.
2. The application which is stated to have been brought under the provisions of Order 40 of the Civil Procedure Rules is premised on the grounds on the face of it and further supported by the Supporting Affidavit of the Plaintiff, Ndulu King'oo, deposed on the 20th April, 2023.
3. In summary, the Plaintiff's case is that she is a bona fide purchaser and owner of the property known as Title Number Dagoretti/Kangemi/46(G) measuring 50x100 feet which she allegedly purchased on the 3rd December, 2020. The price was Kshs. 12,600,000/=. The Plaintiff paid a total of Kshs.11,600/- leaving an outstanding balance of Kshs.1,000,000/=.
4. Though the Plaintiff has been in possession of the suit property since execution of the Sale Agreement the Plaintiff avers that the Defendant has refused to transfer the property to her giving all sought of excuses as a delay tactic. At one point, the Plaintiff alleges that the Defendant even shared a fake mutation form alleging an existing sub-division by his deceased mother yet no such sub-division had taken place. The property was to be transferred to her within 180 days but that has not been done, 4 years later.
5. The Plaintiff accuses the Advocate who drafted the Sale Agreement of acting maliciously on the basis that it has turned out that the alleged property Dagoretti/Kangemi/46(G) does not exist yet the Advocate knowingly still went ahead and drafted a sale agreement and made her commit to it. She states that she has not been able to conduct a search on the title (if any) as the file at the land registry cannot be traced.
6. The court directed that the application to be served upon the Defendant/Respondent for interpartes hearing. Despite service, the Defendant did not file a response to this application. This application is therefore not opposed.

#### **Court's Direction**

7. Having considered the application, the supporting affidavit and the annexures thereof, it is the court's opinion that the only issue for determination is whether the court should grant the orders sought by the Plaintiff.

#### **Analysis and Determination**

8. I must begin by pointing out that despite the Plaintiff's application being unopposed, the court has a responsibility to consider it on its merit.
9. It is clear from a look at the prayers sought by the Plaintiff that the Motion seeks final orders; in essence the same prayers sought in the plaint, that is to say, a permanent injunction, an order of Specific Performance and thirdly, an order of refund of the purchase price should the Defendant not transfer the suit property to the Plaintiff.
10. Order 40 of the *Civil Procedure Rules* makes provision for temporary injunctions and interlocutory orders. Would the Plaintiff's application fall within the scope of Order 40 of the *Civil Procedure Rules*?



11. Limo J. in the case of *Witmore Investment Limited vs County Government of Kirinyaga & 3 others* [2016] eKLR held as follows: -

“...where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy raised in the application, it should have moved this court properly in the manner provided by law.”

10. In regard to an order for a permanent injunction, the holding in the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR is instructive. The court 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...”

13. This Court, applying the reasoning in the above cited cases and the provisions of Order 40 of the *Civil Procedure Rules* finds that the instant application is incurably defective. The Orders sought cannot at this stage be granted. The Plaintiff’s application does not surely fall within the scope of Order 40 of the *Civil Procedure Rules*. I accordingly dismiss the application but with no orders as to costs.

14. It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JUNE 2023.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Chris Kamau holding brief for Ms. Njagi for the Plaintiff/Applicant.

No appearance for the Defendant/Respondent.

Court Assistant – Yvette.

**M.D. MWANGI**

**JUDGE**

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