



**Mbaka v Mbogo (Environment & Land Case E009 of 2023)
[2023] KEELC 20810 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20810 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E009 OF 2023
LC KOMINGOI, J
OCTOBER 12, 2023**

BETWEEN

CHARLES ALBERT OTWORI MBAKA PLAINTIFF

AND

GODFREY MWAWAZA MBOGO DEFENDANT

RULING

1. The plaintiff filed a notice of motion dated February 1, 2023 on February 7, 2023 seeking for the following orders;
 - a. Spent.
 - b. That this honorable court be pleased to restrain the Respondent by himself, agents, servants or otherwise from disposing of, transferring, charging, alienating, developing, subdividing or in any manner whatsoever interfering with the ownership of the suit property Ngong/Ngong/25066 until hearing and determination of this suit.
 - c. That the costs of the Application be borne by the defendant.
2. The Application which is brought under sections 1A,3 and 3A of the *Civil Procedure Act*, Order 40 Rules 1 and 4, Order 5 Rule 17, Order 51 Rules of the *Civil Procedure Rules* and article 40 and 159(2) of the *Constitution* is supported by Charles Albert Otwor Mbaka supporting and further affidavit sworn on February 1, 2023 and June 15, 2023. He depones that he purchased Ngong/Ngong/25066 from the defendant at Ksh.38,000,000/= through an sale agreement dated 14/10/2021 out of which he paid Ksh.4,000,000/=.He explains that a joint resurvey conducted before the completion date revealed that the property was 0.9724ha yet the title deed issued on 16/09/2022 stated that it was of 1.012ha. When the defendant admitted existence of disparities, parties were agreeable that the purchase price would be reduced by Ksh.1, 475,000/=. The transaction would also be held in abeyance until the defendant looks into the issues raised. He states that even though through a letter dated 23/09/2022 he accepted



the proposed reduction of the purchase price, the defendant disregard the issue of rectification of title and instead demanded payment be effected within 14 days through a letter dated 3/10/2022. This prompted issuance of a reminder to defendant through a letter dated 14/10/2022 that the title deed and sale agreement needed to be rectified accordingly. In addition, pending conclusion of the transaction, the defendant counsel was required to surrender the original title deed so that it would be held in trust. He asserts that when the defendant failed to respond to his letter, he issued him with a 21 completion notice dated 24/10/2022 indicating he was reading and willing to complete the transactions. The defendant through a letter dated 28/10/2022 issued a completion notice stating that the issues raised by the plaintiff had already been dealt with and that amended of the title was to be done by the plaintiff. In response, the plaintiff informed him through a letter dated 25/11/2022 that even through the 21 days' notice had lapsed, the completion period would be extended to 31/01/2023.

3. The defendant opposes the Application through Godfrey Mwawaza Mbogo's replying affidavit sworn on April 14, 2023 filed on April 19, 2023. He avers that the Application must be dismissed with costs because it is a waste of court process as it seeks to advance plaintiff selfish economic agenda at the detriment of the defendant. This is because he seeks to advance his case using documents written on "without prejudice basis" and which documents ought to be expunged from court records. He admits that the plaintiff only paid Ksh.4, 000,000/= of the purchase price and that the parties advocates are aware that discrepancies of the title deed ought to be rectified as guided and recommended by the surveyors. He asserts that whenever the plaintiff payment obligations is due, he has a tendency of creating panic situations as evidenced in their two other similar transaction. Even though parties agreed that the purchase price would be reduced in order to reflect the less acreage, the plaintiff never made any payment and instead reneged and issued a notice. It is his case that he cannot transfer his property or release the completion documents to the plaintiff because he had not completed paying the purchase price. Further, the plaintiff letter dated 06/10/2022 and 24/10/2022 were responded to.
4. He states that despite the plaintiff conduct, he is willing to have the transaction completed and the matter resolved without involving the courts. This is evident by a duly executed application for consent, letter of consent and transfer form filed in support of the Application. Therefore, if the plaintiff is not willing to complete the transaction, no timelines will be extended for him and that his deposit shall be refunded to him. However, if he pays the remaining conceded balance of Ksh.32, 525,000/=-, then he would make good his end of bargain. He affirms that the defendant actions have made him waste time and incur unnecessary expenses as the defendant continues to frustrate him. He may also engage other potential buyers in order to defeat the interest of justice therefor making the suit a nugatory.
5. In response to the replying affidavit, the plaintiff claims that he is willing to pay the balance of the purchase price upon release of the completion documents. However, the filing of this suit was necessitated by the defendant breach of the sale agreement. His dishonest and frustration of the completion date is seen when he asserted that the plaintiff relied on letters written on "without prejudice basis" yet it was what led to a joint survey report. He maintains that he will only make pay the remaining balance if the agreement and title deed is rectified accordingly. This is because even though the defendant is committed to completion date, he is non-committal on rectification and reduction of the purchase price. His fear is that the defendant may not perform his contractual obligations. He contends that the defendant purported completion documents filed before this court are not only incomplete and forged but also indicate that the disputed property is 1.012ha. He denies ever causing any delay and that it is the defendant who put the transaction in abeyance. According to him, failure to complete the transaction has been caused by the defendant failure to rectify the issues raised despite his willingness to conclude the sale.



6. Even though parties were directed to file submissions to dispose of the Application, only the plaintiff counsel filed submission on May 24, 2023 raising the issue whether the applicant is entitled to an order of temporary injunction. It is argued that temporary injunction can only be granted if a party meets the conditions set out in *Giella v Cassman Brown*. Counsel submits that the plaintiff has a prima facie case because he is a bonafide purchaser with beneficial interest. This is because even though the defendant has a legal and contractual obligation to rectify the title, he cannot now turn around and purport to claim that the communication to revise the purchase price was done on a without prejudice basis. He maintains that the plaintiff is willing to pay the remaining balance even though the defendant has failed to comply with the completion notice dated 24/10/2022. The Court of Appeal decision of *Mrao Ltd v First American Bank of Kenya* (2003)eKLR, is cited to demonstrate that the Plaintiff has a prima facie case with a possibility of success. According to the counsel, the Plaintiff will suffer irreparable harm if the courts does not grant injunction orders because he has paid Ksh.4,000,000/= and also showed willingness and readiness to complete the transaction. It is further argued that the defendant may interfere with suit property therefor rendering the suit nugatory if the court issues specific performance orders. The implication of this is that the balance of convenience tilts in preserving the suit property which is registered in defendants name. The court is invited to look at how the concept of balance of convenience was considered in *Pius Kipchirchir Kogo v Frank Kimeli Tenai*(2018)eKLR, when it is making its final determination.
7. The issue for determination after careful analysis of the notice of motion application, parties affidavits, annexures and plaintiffs submission is whether the defendant should restraining from dealing with the suit property pending the outcome of this suit.
8. It is not in dispute that the plaintiff entered into a sale agreement dated October 14, 2021 with the defendant for the sale of the suit property at Ksh.38,000,000/= where only Ksh.4,000,000/= was paid. Clause 1 of the Agreement stipulates that the size of the property being sold was 1.012ha. Before the transaction would be completed, a joint survey conducted by parties surveyor disclosed that the property was less by 0.0396 ha (0.0979 acres) due to encroachment. As a result, the surveyor through a letter dated September 21, 2022 recommended that the purchase price be reduced by Ksh.1, 915,200/= . This meant that the Plaintiff would now be required to pay Ksh.36, 084,800/=. It was further advised that the boundaries needed to be re-established in order to a certain acreage and measurement so as to avoid disputes with the neighboring parcels. This is because once the ground was adopted as it is, they would be peace and unity.
9. Even though the defendant acknowledges that the purchase price ought to have been reduced to reflect the ground acreage, he also suggested through a letter dated September 16, 2022 that the transaction be held in abeyance in order to address the issues raised. This information was formally conveyed on a without prejudice basis. A careful look at this letter conveying this information suggests that the defendant was willing to amicably resolve the outstanding issue by offering a solution that would see the matter settled and transaction completed within the set timelines. As a result, the plaintiff subsequent actions were guided and based on the defendants contact. This is what prompted him to inform the defendant to rectify the acreage. Contrary to the party's agreement, the defendant demanded payment of the entire purchase price in total disregard that the title and sale agreement had not yet been corrected accordingly.
10. The plaintiff fear is that if he proceeds with the agreement and acreage as it is, then his proprietary rights will be infringed and violated by the defendant. He would also loss his monies whose recovery he may never get. This suit revolves around disputes relating to contractual agreement. Courts have severally held that they cannot rewrite agreements for parties for the reason that they are bound by the terms of the contract.



11. It is not in dispute that the plaintiff has only paid Kshs.4,000,000/= of the purchase price leaving a balance of Kshs.32,525,000/=.
12. The court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR while adopting its position in *Mrao Ltd v First American Bank of Kenya* (2003)eKLR which has been cited by the plaintiff Counsel stated as follows in regard to prima facie case

“Recently, this court in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for “prima facie case” in civil cases in the following words:

“In civil cases, a *prima facie* case 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

13. I find that the plaintiff has failed to establish a prima facie case with a probability of success at the trial.
14. I also find that the plaintiff/applicant has failed to demonstrate that he will suffer irreparably if these orders are not granted.

I am guided by the case of *Ooko v Barclays Bank of Kenya Limited* (2002) KLR 394 where Ringera J (as he then was) stated;

“The second condition is that an interlocutory injunction will not normally be granted unless the applicant can show he will suffer irreparable injury which cannot be compensated by an award of damages....”

15. The balance of convenience tilts in favour of the defendant/respondent who is the registered owner of the suit property.
16. In conclusion I find no merit in this application and the same is dismissed. The costs will abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 12TH DAY OF OCTOBER 2023.

L. KOMINGOI

JUDGE.

In the presence of:

Mr. Mwalo for the Plaintiff/Applicant.

N/A for the Defendant/Respondent.

