



**Kiritkumar Rambhai Patel & Arunaben Kiritkumar Rambhai v Limuru Hills Limited & Equity Bank (Kenya) Limited (Environment & Land Case E027 of 2021) [2022] KEELC 1559 (KLR) (9 February 2022) (Ruling)**

*Kiritkumar Rambhai Patel & another v Limuru Hills Limited & another [2022] eKLR*

Neutral citation: [2022] KEELC 1559 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E027 OF 2021**

**JG KEMEI, J  
FEBRUARY 9, 2022**

**BETWEEN**

**KIRITKUMAR RAMBHAJI PATEL ..... 1<sup>ST</sup> PLAINTIFF**

**ARUNABEN KIRITKUMAR RAMBHAJI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**LIMURU HILLS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**EQUITY BANK (KENYA) LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. There are two applications before court for determination; the notice of motion dated the 25/2/2021 filed by the plaintiffs and the one dated the 23/5/2021 brought by the 2<sup>nd</sup> Defendant. Parties elected to canvass the two applications together. I will start with the latter application.
2. The application by the plaintiffs dated 25/2/2021 seeks orders that;
  - a. Spent.
  - b. Spent.
  - c. A temporary injunction do issue restraining the defendants whether by themselves, through their agents, servants and/or employees from selling or offering for sale whether by private entity or public auction, transferring, pledging or in any other way alienating or disposing of the suit property, Log Home No 19situate on Land Reference Numbers 4967/3 (Original Number 4967/14/7) and 4967/38 (Original Number 467/14/8) pending the hearing and determination of the suit or further orders by this court.



- d. This Honorable Court do issue an order for the expeditious hearing of the suit.
  - e. The costs of the application be borne by the defendants/respondents in any event.
3. The application is based on the grounds thereto and supporting affidavit of Kiritkumar Rambhai Patel.
  4. The application is opposed. The 2<sup>nd</sup> defendant's Legal Manager, Kariuki King'ori swore the Replying Affidavit on 7/4/2021. He averred that the 1<sup>st</sup> defendant is the bona fide registered owner of the suit properties namely LR No 4967/37 and LR No 4967/38. That the 1<sup>st</sup> defendant had on three occasions approached the 2<sup>nd</sup> defendant with a view of securing three securities totaling over USD 22,692,629.99 as at March 2021 secured by the suit properties. Accordingly, therefore, there is a valid legal charge duly executed by the 1<sup>st</sup> defendant in favor of the 2<sup>nd</sup> defendant granting the 2<sup>nd</sup> defendant's statutory rights over the said properties.
  5. In addition, the 2<sup>nd</sup> defendant filed grounds of opposition dated 31/3/2021.

### The Submissions

6. The firm of Issa & Co Advocates filed submissions dated 24/9/2021 on behalf of the plaintiffs. Firstly, it was submitted that the procedural law for striking out suits is contained in order 2 rule 15(1) *Civil Procedure Rules* and such power ought to be used sparingly. That the 2<sup>nd</sup> defendant is properly sued in light of prayers a, b and d of the Plaint dated 25/2/2021 and the claims against it are merited.
7. Secondly, the plaintiff recapped the law on temporary injunctions as stated in order 40 of CPR. That besides the threshold set in the leading case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 at page 360, courts may consider the circumstances of the case and override objective of the law. That in proving a *prima facie* case, the plaintiffs purchased the suit land from the 1<sup>st</sup> defendant for Kshs 26M based on the now frustrated Sale Agreement dated 26/5/2017. That Plaintiffs paid a deposit of Kshs. 2.6 M that was acknowledged by the 1<sup>st</sup> defendant. The Plaintiffs blame the 1<sup>st</sup> defendant for breaching the said Agreement by failing to avail a notification of the issuance of a Certificate of Practical Completion despite development of the suit property. Moreover that under Clause 2 of the Agreement it was an express term that the property was sold free from any encumbrances.
8. To demonstrate irreparable injury, the plaintiffs have explained that their attempt to secure their beneficial interests over the property by registering cautions were futile. Furthermore that the 2<sup>nd</sup> defendant has confirmed the default in repaying the loans advanced to the 1<sup>st</sup> defendant. Therefore it is paramount that this court preserves the suit property pending determination of the suit. Reliance was placed on a number of cases including *DT Dobie & Company (Kenya) Ltd v Joseph Mbaria Muchina & another* [1980] eKLR and *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another* [1990] eKLR.
9. The 1<sup>st</sup> defendant has been served by way of substituted service by advertisement on but has not opposed the application. The 2<sup>nd</sup> defendant did not file any submissions.
10. The Second application dated 13/5/2021 is filed by the 2<sup>nd</sup> Defendant and craves for orders that;
  - a) The plaintiffs suit and/or claim as against the 2<sup>nd</sup> defendant herein vide the plaint dated February 25, 2021 be struck out and/or dismissed.
  - b) The costs of this application and the suit be borne by the plaintiffs in any event.
11. The application is founded on the grounds on the face of it and supporting affidavit of Kariuki King'ori sworn on even date. He averred despite a Notice to produce dated 26/8/2021, the Plaintiff has ignored



it hence the application to compel him to produce. In default of such production, the deponent urged the court to strike out the plaintiff's suit.

12. The 1<sup>st</sup> Plaintiff swore a Replying Affidavit dated 23/6/2021. He avowed that the plaintiff properly purchased the suit land from the 1<sup>st</sup> defendant vide a sale agreement dated 26/5/2017 annexed as KRP1. That the suit against the 2<sup>nd</sup> defendant is meritorious in line with the prayers sought against in the plaint dated 25/2/2021. In any event the deponent averred that they are willing to pay the remainder of the purchase price balance of Kshs 23.4 M to obtain a partial discharge from the 2<sup>nd</sup> defendant. He implored the court to dismiss the application with costs.

### **Analysis & Determination**

13. The issues for determination are; whether the plaintiffs' suit should be struck out, whether the plaintiffs' have established a case for grant of temporary injunction and who bears costs of the application?
14. The legal provisions of for the court's power to strike out a suit is found in order 2 rule 15 that;

“ 15. Striking out pleadings [Order 2, rule 15.]

(1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that—

- (a) it discloses no reasonable cause of action or defence in law; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

15. It is settled law that the court's power to strike out pleadings is to be exercised sparingly and cautiously, because the court exercises the power without being fully informed on the merits of the case through discovery and oral evidence. This was the finding in the case of *DT Dobie & Company (Kenya) Ltd v Muchina* [1982]KLR 1 at p 9 where it was stated as follows:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

16. The 2<sup>nd</sup> Defendant claims that the suit discloses no reasonable cause of action and /or sustainable legal claim against it and that there are no reliefs sought against it that are capable of being enforced. The overriding principle to be considered in an application for striking out a pleading therefore is, whether triable issues have been raised. At paragraphs 18, 19, 20 and 22 the plaintiffs explained the basis of suing the 2<sup>nd</sup> defendant in this suit. Prayers a b and c comprise the reliefs sought by the Plaintiff. It is not disputed that the 1<sup>st</sup> Defendant is the registered owner of the suit lands. It is also not in dispute that the 2<sup>nd</sup> Defendant advanced various loan facilities to the 1<sup>st</sup> Defendant as early as 2015 for the development of the log houses on the suit lands. Additionally, it is not in dispute that the Plaintiffs entered into a sale agreement for the purchase of log 19 constructed on the suit land.



17. Based on the above facts the court is of the opinion that the claim of the Plaintiffs is not plainly or obviously unsustainable. The court is of the view that the suit be determined on its merit.
18. Thus the application dated 13/5/2021 fails.
19. The next issue is whether the Plaintiffs are deserving of the prayer for temporary injunction.
20. The application is founded on order 40 rule 1 which states,

“ 1. Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved by affidavit or otherwise— (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

21. It is now well settled law that the granting of injunctive reliefs is a discretionary exercise predicated upon three sequential limbs to wit: that the claimant has established a prima facie case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the court would decide the application on a balance of convenience. See the celebrated cases of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and *Nguruman Ltd v Jan Bonde Nielsen & 2 others* [2014] eKLR.

22. The starting point is to establish whether the applicant has demonstrated a prima facie case to grant the orders sought. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 123, defined a *prima facie* case as:

“ A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. 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. In *Nguruman* case *supra* the Court of Appeal went on to further state that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.

24. It is against that background that I will analyze whether the plaintiffs have established a prima facie case herein. The plaintiffs have narrated the facts leading to filing of the instant case. It is their position that they entered in to an Agreement dated 26/5/2017, annexed as ‘KRP1’. The said Agreement is duly signed and executed by both parties thereto. Additionally, the purchase price is stated in the first



schedule therein as Kshs 26M. The plaintiffs aver that they a deposit of Kshs. 2.6M which is admitted by the 1<sup>st</sup> Defendant as per annexure ‘KRP2’.

25. The 2<sup>nd</sup> defendant also conceded advancing loans to the 1<sup>st</sup> defendant leading to creation of charge marked as annexure ‘SM-3’. The 2<sup>nd</sup> defendant added that the 1<sup>st</sup> defendant has defaulted in its repayment of the loan.
26. The Plaintiffs’ case is that the 1<sup>st</sup> Defendant breached the terms of the agreement of sale by failing to furnish them with a notification of the issuance of the certificate of practical completion despite the development of log 19 having been completed. They argue that the completion of the construction was to be 31/1/2018. That the notification was necessary to allow the Plaintiffs to pay the balance of the purchase price. That they have acquired a beneficial interest on the suit property that ought to be protected by this Court by way of an interim injunction. There is a confirmation by the 1<sup>st</sup> Defendant of receipt of the deposit of Kshs 2.6 million. The agreement at Clause 4.2 provided that the Plaintiffs shall pay the deposit to the vendors advocates who shall immediately and unconditionally release the same to the vendor. The Court at this stage was not shown any document to show that the 2<sup>nd</sup> Defendant received any monies on account of the sale of Log 19 through the 1<sup>st</sup> Defendant.
27. The plaintiffs purchased property that was already charged to the bank. Had they carried out a search on the suit land they would have discovered this important detail. They therefore purchased a property subject to a superior and prior interest in favour of the bank. section 88(1)(g) of the Land Act provides that there shall implied in every charge covenants by the chargor with the charge binding the chargor not to transfer or assign the land or lease or part of it without the previous consent in writing of the charge which consent shall not be unreasonably withheld. There was no evidence that the consent of the bank to sale was obtained by the 1<sup>st</sup> defendant nor the plaintiff. Further section 87 of the Land Act and section 59 of the Land Act expound this further.
28. The provisions make it mandatory for parties to seek and obtain the consent of the charge before an agreement of a charged property is entered into. The 1<sup>st</sup> Defendant did not disclose the fact of the charge in the agreement when it states in the agreement that the suit property is sold free from encumbrances and charges. Had the Plaintiffs carried out due diligence on the suit land they would have certainly come to discover that the suit land was encumbered.
29. It is clear that the plaintiffs purported to purchase a property that was subject to a charge without obtaining a consent as per the provisions of the law. The 1<sup>st</sup> defendant having charged the property in favour of the bank had no better interest to pass on to the plaintiffs except with the consent of the chargee. On the face of it the 2<sup>nd</sup> defendant on the other hand has a superior and prior interest by virtue of the charge. It is clear that the plaintiffs have not demonstrated any prima facie interest to warrant the grant of the orders by the court.
30. On irreparable harm the plaintiffs must demonstrate to the court that they will suffer irreparable harm if the injunction is not granted. The Plaintiffs have led affidavit evidence that they paid a deposit of Kshs 2.6 million to the 1<sup>st</sup> defendant hence the value of their loss is quantifiable and any damages can be compensable through monetary terms.
31. Finally, as the court is not in doubt, the balance of convenience tilts in the court declining the application.
32. The final orders are as follows;
  - a. The application dated the 25/2/2021 is dismissed



- b. The application dated the 13/5/2021 is dismissed
- c. Each of the parties to meet their costs of the applications.

33. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 9<sup>TH</sup> DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS.**

**JG KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ms Agwata holding brief for Ms Ahomo for Plaintiff.

1st Defendant – absent.

Ms Omutimba for 2<sup>nd</sup> Defendant.

Ms Phyllis – Court Assistant.

