



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. E007 OF 2022

ALVINE BROOKS LIMITED.....PLAINTIFF

VERSUS

GEOFFREY KIMANI KIRUNYU.....DEFENDANT

RULING

1. The plaintiff initiated this suit through a plaint dated 19/1/2022. In summary, its case was that, by an agreement for sale dated 5/11/2021 (**the agreement for sale**), the defendant agreed to sell to it and it agreed to purchase **Land Reference Number 4953/2149**, comprised in **Grant Number IR 57398**, located in Thika, Kiambu County, at a purchase price of Kshs 45,000,000. Among the salient terms of the sale agreement were that: (i) the plaintiff was to pay a deposit of Kshs 15,000,000 within seven (7) days of execution of the agreement; (ii) the defendant was to pay the balance of the purchase price [Kshs 30,000,000] on completion; (iii) the completion period was to be 90 days from the date of execution of the agreement; and (iv) the property was being sold with vacant possession and the plaintiff was to take possession thereof within 30 days of payment of the agreed deposit of Kshs 15,000,000.

2. The plaintiff contended that upon execution of the agreement on 5/11/2021, it proceeded to pay the agreed deposit of Kshs 15,000,000 on 8/11/2021, and the defendant, through his advocate, acknowledged receipt of the money. By a letter dated 30/11/2021, the defendant requested the plaintiff to grant him an extension of the period within which to take vacant possession by 30 days, a request which the plaintiff acceded to and advised the defendant to yield vacant possession by 31/12/2021.

3. The plaintiff added that although the last day for paying balance of the purchase price was 6/2/2022, it paid the said sum of Kshs 30,000,000 on 31/12/2021 and forwarded to the defendant a copy of the RTGS form evidencing payment. Further, it requested the defendant to yield vacant possession and supply completion documents. The plaintiff added that having paid purchase price in full, it subsequently took vacant possession of the suit property on 17/1/2022 at about 12.00 noon, with the knowledge and consent of the defendant, and immediately commenced renovations and developments on the suit property.

4. The plaintiff further contended that on 18/1/2022, it notified the defendant's advocates that it had taken vacant possession on 17/1/2022 and it had commenced developments and renovations on the suit property. On the same day, 18/1/2022, the defendant wrote to the plaintiff purporting to cancel the sale transaction on the ground that some strangers who were neither owners of the suit property nor privy to the sale agreement had objected to it. It was the case of the defendant that the action of the defendant constituted a breach of the agreement for sale. He itemized various particulars of breach.

5. Consequently, the plaintiff sought the following verbatim reliefs against the defendant:

a) A declaration that the plaintiff is entitled to registration as the owner of all that property known as Land Reference Number 4953/2149, Grant 57398, situated at Thika in Kiambu County as envisaged in the agreement for sale dated 5th November, 2021 to the exclusion of the defendant, his agents, servants, relatives or howsoever claiming under him.

b) An order of specific performance compelling the defendant to procure, execute and supply all documents that are necessary to transfer the property known as Land Reference Number 4953/2149, Grant 57398, situated in Thika in Kiambu County to the Plaintiff as envisaged in the agreement for sale dated 5th November, 2021.

c) An order that in default of the defendant executing any document that is necessary to complete the sale within 7 days of the judgement, the Deputy Registrar of the Environment and Land Court be and is hereby directed to execute such documents, including the transfer instrument, as are necessary to complete the transfer of the property known as Land Reference Number 4953/2149, Grant 57398, situated in Thika in Kiambu County, in favour of the plaintiff.

d) An order compelling the defendant to pay outstanding land rates of Kshs.1,349,749.00 as at the year 2021 to Kiambu County

Government within 7 days of the judgment herein, in default, the plaintiff to pay and recover the said sum by way of execution against the defendant.

e) An order compelling the defendant to pay outstanding land rent of Kshs 147,510.00 as at the year 2021 to the Government of the Republic of Kenya within 7 days of the judgment herein, in default the plaintiff to pay and recover this sum by way of execution against the defendant.

f) An order compelling the defendant to pay all outstanding utilities and procure land rent and rates clearance certificate at his own expense within 7 days of the judgement herein, in default the plaintiff to pay for all these utilities and procurement of land rent and rates clearance certificates and recover the amounts so paid by way of execution against the defendant.

g) A permanent injunction be issued restraining the defendant either by himself, his agents, relatives or employees or otherwise howsoever from interfering with the plaintiff's quiet and peaceful possession and occupation of the property known as Land Reference Number 4953/2149, Grant 57398, situated in Thika in Kiambu County.

h) A declaration that the plaintiff company is entitled to exclusive ownership, possession and occupation of the property known as Land Reference Number 4953/2149, Grant 57398 situated in Thika in Kiambu County as against the defendant, his agents, representatives or relatives, which possession and occupation should be granted to the plaintiff unconditionally, in default of which an eviction order against the defendant, his agents, representatives or relative do issue and which eviction order should be enforced by the Officer Commanding Station, Thika Police Station.

i) In the alternative to prayers (a), (b), (c), (d), (e), (f), (g) and (h) above, an order be issued compelling the defendant to refund the plaintiff the same of Kenya Shillings Forty Five Million (Kshs 45,000,000.00), being the full purchase price paid and an additional Kenya Shillings Nine Million (Kshs 9,000,000.00) being the agreed liquidated damages for breach of contract under clause 10.3 of the agreement for sale dated 5th November, 2021.

j) Compound interest on each of the amount in (i) above effective the scheduled completion date of 6th February 2022 at the rate of 20% per annum as envisaged in clause 3.2 of the agreement for sale dated 5th November, 2021 until payment in full.

k) Costs of the suit.

6. Contemporaneous with the plaint, the plaintiff brought a notice of motion dated 19/1/2022, seeking interlocutory injunctive reliefs in the following verbatim terms:

“(b) Pending the interpartes hearing and determination of this application, an order be issued restraining the defendant whether by himself, agents, representatives, relatives and principals, servants or anyone acting on his authority howsoever from interfering with the plaintiff's possession, trespassing on, remaining onto, invading, damaging, developing, constructing on, cultivating, alienating, charging transferring, leasing and/or in any manner whatsoever dealing with all the suit property known as Land Reference Number 4953/2149, Grant 57398, situated in Thika in Kiambu County in the Republic of Kenya, which order shall be enforced by the Officer Commanding Station, Thika Police Station.

(c) Pending the hearing and determination of the suit herein, an order be issued restraining the defendant whether by himself, agents, representatives, relatives and principals, servants or anyone acting on his authority, howsoever, from interfering with the plaintiff's possession, trespassing on, remaining onto, invading, damaging, developing, constructing on, cultivating, alienating, charging, transferring, leasing and/or in any manner whatsoever dealing with all the suit property known as Land Reference Number 4953/2149, Grant 57398, situated in Thika in Kiambu County in the Republic of Kenya, which order shall be enforced by the Officer Commanding Station, Thika Police Station.

(d) Costs of the application be provided.

7. The application was supported by an affidavit dated 19/1/2022 and a supplementary affidavit dated 28/1/2022, both sworn by **Prof Simon Nyutu Gicharu**, in which he made depositions outlining the plaintiff's case as summarized above. He annexed various exhibits to the said affidavits. The above application dated 19/1/2022 is the subject of this ruling.

8. The defendant opposed the application through a replying affidavit he swore on 24/1/2022. He deposed that he was the registered proprietor of the suit property and that he had indeed entered into the sale agreement dated 5/11/2021. He also confirmed receipt of the deposit of Kshs.15,000,000 from the plaintiff. He added that he was to deliver vacant possession of the suit premises within 30 days of payment of the deposit and in an effort to comply with that contractual obligation, he informed the tenants who were in the suit premises, among them his two sons who operated a garage therein for their transport business. His two sons objected to the sale, despite several family meetings. He added that on 17/1/2022, his son instructed the firm of *P. K. Njiiri & Co Advocates* to write to his advocates expressing their opposition to the sale. Consequently, he decided to cancel the sale transaction. On 17/1/2022, he wired Kshs 30,000,000 back to the bank account of the plaintiff out of the sum of Kshs 45,000,000 which the plaintiff had paid.

9. The defendant added that he had not surrendered possession of the suit property and that he was still operating his coffee berry dryers on the land; about 3 tenants were yet to move out; and his sons were still operating a garage on the land. He added that on 19/1/2022, he called his banker and he was advised that the sum of Kshs 30,000,000 which he had wired back to the plaintiff's account was reversed back to his account on 18/1/2022. The defendant further deposed that he was willing to refund the entire purchase price together with 20% penalty as stipulated in clauses 10.2 and 10.2 of the sale agreement. He contested the plaintiff's allegations that he had commenced renovations and development on the suit property. He offered to deposit the sum of Kshs 30,000,000 in court if directed. He urged the court to dismiss the application.

10. The application was canvassed through written submissions dated 9/2/2022, filed through the firm of *Rapando & Odunga Advocates*. Counsel for the plaintiff submitted that the primary issue for determination in the application was whether the orders of injunction sought by the plaintiff was merited. Counsel outlined the criteria upon which trial courts exercise the jurisdiction to grant an interlocutory injunction as set out by the Court of Appeal in *Giella v Cassman Brown Co. Ltd [1973] E.A. 358*. Citing the decision in: (i) *Mbuthia v Jimba Credit Corporation Ltd [1988]*; and (ii) *Mrao Ltd v First American Bank of Kenya & 2 others [2003]*, counsel submitted that the plaintiff had demonstrated that it purchased the suit property; it paid the agreed purchase price in full; and it took possession of the suit property on 17/1/2022, hence it had established a *prima facie* case with a probability of success. Counsel added that the allegation that the defendant's sons had objected to the transaction was not tenable because the suit property belonged to the defendant at the time of sale to the plaintiff.

11. On whether irreparable harm will result if the injunction is not granted, counsel submitted that harm is irreparable depending on the context. Counsel argued that the plaintiff had discharged all his contractual obligations and had taken possession of the suit property but there was evidence of interference by the plaintiff. Counsel contended that in the circumstances, the plaintiff stood to suffer irreparable injury if the order of injunction is denied. Counsel added that the facts and evidence in the case tilted the balance of convenience in favour of the plaintiff.

12. The defendant filed written submissions dated 4/1/2022 through the firm of *P K Njiiri & Co Advocates*. Counsel identified the following as the three issues falling for determination in the application: (i) Whether an injunction should issue against the plaintiff; (ii) Whether the applicant stands to suffer irreparable injury; and (iii) Whether possession passed before signing of completion documents (sic).

13. Counsel submitted that the plaintiff had not satisfied the criteria in *Giella v Cassman Brown Co. Ltd [1973] E.A. 358*. It was the position of counsel for the defendant that any injury suffered by the plaintiff would be indemnified through an award of damages. Counsel contended that the plaintiff's action of paying the balance of the purchase price before the completion documents had been signed was "coated by pure malice to deny the respondent's right and freedom under the agreement dated 5th November 2021." Counsel argued that possession and the right to use land is effective upon signing of the completion documents (sic), contending that interest in land does not pass upon payment of the purchase price. Counsel urged the court to dismiss the application.

14. The court has considered the application together with the defendant's response. The court has also considered the parties' respective submissions together with the legal framework and jurisprudence on the question falling for determination in the application. The single question falling for determination in the application is whether the applicant has satisfied the criteria upon which our trial courts exercise jurisdiction to grant interlocutory injunctive reliefs.

15. The relevant criteria was outlined in the case of *Giella v Cassman Brown Co. Ltd [1973] E.A. 358*. First, the applicant is required to demonstrate a *prima facie* case with a probability of success. Second, the applicant is required to demonstrate that if the injunctive relief is not granted, he would stand to suffer irreparable injury that may not be adequately indemnified through an award of damages. Third, should the court have doubt on both or either of the above two requirements, the application should be determined on the basis of the balance of convenience.

16. Equally important is the principle that, at the stage of disposing the application for interlocutory relief, the court does not make conclusive or definitive pronouncements or findings on the substantive issues in the case. Conclusive and definitive findings are reserved for the final determination of the dispute.

17. It is not disputed that the defendant entered into a sale agreement dated 5/11/2021. The salient features of the agreement which I captured in the opening paragraphs of this ruling are also not contested. The plaintiff paid the deposit of Kshs 15,000,000 on 8/11/2021, which was in tandem with the terms of the sale agreement. Secondly, on 31/12/2021, the plaintiff paid the balance of the purchase price, meaning that as at 1/1/2022, the plaintiff had fully discharged its key obligations under the agreement for sale. The plaintiff contends that it subsequently took possession of the suit property on 17/1/2022 and initiated renovations and developments thereon, allegations which the defendant contests.

18. The defendant contends that subsequent to entering into the sale agreement, his two sons who operate a garage for their transport business fleet on the suit property objected to the sale, prompting the defendant to instruct his advocate to advise the plaintiff's advocates that he was cancelling the transaction. The position of the plaintiff is that the defendant does not have that option because he sold the suit property and received purchase price in full. The plaintiff further contends that, having paid purchase price in full and having taken possession of the suit property, the option of cancellation by the defendant is not available.

19. On his part, the defendant contests the plaintiff's contention that it took possession of the suit property and commenced developments and renovations on it. He says that he is willing to refund the last instalment of Kshs 30,000,000 and if given time he will be able to make arrangements to refund the rest of the purchase price [Kshs 15,000,000] together with a penalty equivalent to 20% of the purchase price.

20. From the foregoing, it is apparent that pursuant to the sale agreement dated 5/11/2021, and pursuant to the remittance of the agreed purchase price in full, the plaintiff acquired an equitable interest in the suit property. What remains to be determined at the substantive hearing of this suit is whether, within the terms of the sale agreement, and under the law, the defendant has the right to unilaterally divest that equitable interest from the plaintiff. Indeed, the defendant has at this interlocutory stage not told the court which clause of the agreement for sale gives him the right to unilaterally cancel the agreement for sale after receiving purchase price in full and elect to offer to refund purchase price in instalments.

21. There are rival positions about possession, with the plaintiff contending that it took possession on 17/1/2022 while the defendant contends that he has never given the plaintiff possession of the suit property. Without venturing deep into this issue, clause 7 of the agreement for sale contained the following framework on possession:

"7. Possession

The property is sold with vacant possession and the purchaser shall take up possession thereof within thirty (30) days of payment of the deposit of the purchase price”.

22. All I can say at this stage is that, the agreement for sale gave the plaintiff the go ahead to take possession within 30 days of payment of the deposit. It did not require the defendant to hand over possession of the suit property to the plaintiff. The plaintiff contends that it took possession after paying the entire purchase price and after accommodating the defendant’s request for an extension of 30 days.

23. From the above analysis, the court is satisfied that the plaintiff/applicant has satisfied the 1st requirement under ***Giella v Cassman Brown Co. Ltd [1973] E.A. 358.***

24. On the second requirement of ***Giella v Cassman Brown***, counsel for the plaintiff submitted that the defendant is intent on evicting the plaintiff from the suit property which the plaintiff purchased for a purpose. The court takes into account that the suit property is land and no other piece of land or money will adequately satisfy the need for which the plaintiff purchased the suit property.

25. Similarly, the balance of convenience, in my view, tilts in favour of the plaintiff who appears to have discharged his contractual obligations by paying full purchase price as agreed and taken possession in tandem with clause 7 of the sale agreement.

26. The finding of the court on the single issue in this application therefore is that the plaintiff/applicant has satisfied the criteria upon which our courts exercise jurisdiction to grant interlocutory injunctive reliefs. Consequently, the notice of motion dated 19/1/2022 is granted in terms of prayer (c). The plaintiff shall have costs of the application.

27. Lastly, it is noted that the defendant filed a memorandum of appearance on or about 27/1/2022. In the event that he has not filed and served a defence, he will do so within seven (7) days. Parties will file and exchange their trial bundles within 30 days to facilitate quick disposal of this dispute.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 3RD DAY OF MARCH 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Rapando for the Plaintiff

Mr Njiri for the Defendant

Court Assistant: Lucy Muthoni