



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 47 OF 2020

FRANCIS NYORO MUIRURI.....PLAINTIFF /APPLICANT

VERSUS

BIDAN MWAURA MWANGI.....1ST DEFENDANT/RESPONDENT

SAMUEL WAITHUKI NGUGI T/A

NGUGI WAITHUKU & CO. ADVOCATES.....2ND DEFENDANT/RESPONDENT

RULING

The Matter for determination is the **Notice of Motion Application**, dated **10th July 2020**, bought under **Order 51 of the Civil Procedure Rules, Sections 1A, 1B, 3A of the Civil Procedure Act** seeking for Orders that:-

1. This Honorable Court be pleased to issue an Order directing the 1st Defendant/Respondent to surrender and yield up or cause the said surrendering or yielding up of five (5) out of ten (10) Title Deeds held by the 2nd Defendant/Respondent on his behalf as the mutual Advocates of the parties as he is fundamental and material breach of the Agreement by failing to pay for the five (5) plots as agreed by the parties.

*2. This Honorable Court be pleased to issue an Injunction restraining and prohibiting the 2nd Respondent/ Defendant from transferring, conveying or transmitting the title deeds or processing the transfer relating to property known as **LR NO'S KIAMBU/ MUNYU/5760-5769** in Kiambu County pending the hearing and determination of this Application and the suit herein.*

3. This Honorable Court be pleased to issue an Order for the transfer back of the sum of one million five hundred thousand only (Kshs.1,500,000) which the 1st Respondent has unilaterally deposited in the Applicant's account in a poorly disguised attempt to defeat the Applicant's claim.

4. Costs be provided for.

The Application is supported by the Affidavit of **Francis Nyoro Muiruri**, who averred that he is the legal and registered owner of **LR No. Kiambu/Munyu 5760-5769**. That on **6th November 2017**, he entered into a Sale Agreement with the Respondents for the sale of his **10 plots**. He further averred that the agreed sale price of each of the 10 plots was **Kshs.500,000/=** total being **Kshs.5,000,000/=**.

It was his contention that the 1st Respondent only made payment of **Kshs.2,500,000/=** upon execution of the Agreement, and he has failed to pay the balance of **Kshs.2,500,000/=** within the stipulated period **90 days**. That after unsuccessful follow up on the balance, he instructed his Advocates to write to the 1st Respondent on **6th January 2020**, demanding the surrender of 5 of the 10 plots, that he held which he had not made payment for.

It was his further contention that he enquired from the 2nd Defendant on the release of the 5 title deeds, but he was informed that they could only release the title deeds with the 1st Respondent's authority. That he served upon the 1st Respondent a Notice to sue dated **10th February 2020**. Further, upon checking his account, he noted that the 1st Respondent had deposited a sum of **Kshs.750,000/=** on **5th March 2020** and **Kshs.750,000/=** on **9th March 2020**, without notice to him and the conduct of depositing the said amounts is an attempt to defeat the claim of recovering back his plots.

The Application is opposed and the 1st Defendant/Respondent filed a Replying Affidavit dated **1st September 2020** by **Bidan Mwaura**

Mwangi. He averred that the Application is a non-starter and the orders sought are incapable of being granted at an interlocutory stage. He further averred that the said Agreement for Sale is still existing, valid and in force and he performed his part of the Contract on **5th March 2020** and **9th March 2020** respectively.

That the subject Agreement did not stipulate a Completion period and the Plaintiff/Applicant was only entitled to sue for balance of the consideration and compensation for any late completion in accordance with **condition 13.2.1** of the **Law Society of Kenya Conditions**.

The Plaintiff/Applicant swore a Further Affidavit dated **23rd September 2020**, and wholly reiterated the contents on his Application.

The Court directed parties to file Written submissions. The Plaintiff /Applicant filed his submissions on **14th October 2020**, through the **Law Firm of Murimi Thiongo & Kungu Advocates**, and urged the Court to issue the prayers sought in his Application. While the **1st Defendant/Respondent** filed his written submissions on **2nd November 2020**, through the **Law Firm of E.M Wachira & Co. Advocates** urging the Court to dismiss the instant Application.

Despite the **2nd Defendant/Respondent** having been duly served, he did not enter appearance nor filed any Pleadings with regards to the Plaintiff/Applicant's Application.

The main issue for determination is whether the Applicant/Plaintiff is deserving of the orders sought.

It is not in dispute that the Plaintiff/Applicant and the **1st Defendant/Respondent** entered into a sale agreement dated **6th November 2017**, in respect to **LR No. Kiambu/Munyu 5760-5769**. It is also not in dispute that the Plaintiff/Applicant is currently the registered owner of the suit property and that the **1st Defendant/Respondent** is in possession thereof. Further, it also not disputed that the balance of **Kshs.2,500,000/=** was not paid within the 90 days as agreed.

The Plaintiff/Applicant having sought for Injunctive orders, must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. The Applicant must establish a *prima facie* case with a probability of success. Even if he succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation, then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicants are expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

“in an interlocutory injunction application the applicant has to satisfy the triple requirements to (a) establishes his case only at a prima facie level, (b) demonstrates 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 states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.”

As to what constitutes a *prima facie* case, the Court of Appeal defined it in **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** as:

“... 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... [it] is more than an arguable case. It is not sufficient to raise issues. 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.”

It is not in dispute that the Plaintiff/Applicant is the registered owner of **LR No. Kiambu/Munyu 5760-5769**. There is also the allegation by the Plaintiff/Applicant that the **1st Defendant/Respondent** failed in its express obligations to the Plaintiff/Applicant pursuant to the provisions of the Sale Agreement dated **6th November 2017**. Further, a Notice to sue which was not complied with dated **10th February 2020**, was served upon the **1st Defendant/Respondent**. The Court is convinced that the three issues raised above sufficiently demonstrate a *prima facie* case that at trial the Defendants/Respondents will need a chance to explain. That need for an explanation is enough for a Court to say that let the status quo now prevailing be maintained by way of a temporary Injunction pending such explanation at the hearing and determination after the explanation.

On materials presented to this court, there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. However, as this Court has found that the Plaintiff/Applicant may have a good arguable case and that there is a real likelihood that the **2nd Defendant/Respondent** in conjunction with the **1st Defendant/Respondent** might waste or dispose off the suit property, this Court is inclined to give a measure of protection to the Plaintiff/Applicant's property.

Once a Plaintiff/Applicant demonstrates a *prima facie* case, it is this Court's considered view that, the second requirement as to inquiry if damages would be an adequate remedy need not necessarily be a major consideration in all cases. Like in this case, the **1st Defendant/Respondent** had admitted that he has breached the terms of the Sale Agreement in terms of Completion and that is enough that the Plaintiff/Applicant will suffer irreparable harm which might not necessarily be compensated by an award of damages.

To say that in such situation the **1st Defendant/Respondent** should be allowed to employ the law of the jungle merely because it shall pay damages is not to this court considered view the way a civilized society should work. It would fly in the face of the law guaranteeing equal

treatment before the law because every party able to pay damages would be free to infringe on others rights and proclaim the financial ability to pay. In the *Victoria Pumps Ltd vs Kenya Ports Authority and 4 Others [2015] eKLR*, the court said:-

“In those circumstances I find that the plaintiffs loss as far it touches on his right to be heard goes to the very root of administration of justice and that the defendant or any them ought not to be allowed to disregard the law with abandon merely because they are capable of paying damages. To me that would create a situation and state where the financially strong would be above the rule of law merely by courtesy of their ability to pay damages. That to me would run affront the provisions of Article 27 of the Constitution. I therefore find and hold that the plaintiff’s injury in this regard would be incapable of adequate compensation by an award of damages”.

For the foregoing reasons, the Court finds that on the material availed, the Plaintiff/Applicant is entitled to an order of injunction against the 2nd Defendant/Respondent restraining and prohibiting it from transferring, conveying or transmitting the title deeds or processing the transfer relating to property known as **LR Nos. Kiambu/Munyu/5760-5769**, in Kiambu County.

However, the Court declines to issue the other orders sought as it holds the considered view that once it gives the injunctions as to preserve the substratum of the dispute, the rest of the issues are due for determination upon tendering of evidence in full trial and hence, it will not delve into merit of the case herein.

Having now carefully read and considered the Applicant’s Notice of Motion Application dated **10th July 2020**, the Court finds it merited in terms of **prayer 2 and 4 only**. The other prayers will be considered once evidence is called at the main trial.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 1ST DAY OF JULY, 2021.

L. GACHERU

JUDGE

1/7/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Thiongo for the Plaintiff/Applicant

No appearance for the 1st Defendant/Respondent

No appearance for the 2nd Defendant/Respondent

L. GACHERU

JUDGE

1/7/2021