



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 6 OF 2021

JOSEPH MUTURI WAINAINA.....PLAINTIFF/APPLICANT

VERSUS

CLEMMENT KUNGU WAIBARA.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the Amended Notice of Motion Application dated **18th February 2021**, by the Plaintiff/ Applicant seeking for orders that;

- 1. That this Honourable Court be pleased to issue an order of injunction restraining the Defendant, his servants and or agents from interfering with the Plaintiff's and his tenants quiet user of premises known as L.R. No. Ruiru/Ruiru east Block 1/649, until the final determination of this suit.***
- 2. That the officers in charge of Ruiru Police Station be and is hereby ordered to ensure with compliance of the orders.***
- 3. Costs of this Application be provided for.***

The Application is premised on the grounds that the Country is facing a pandemic and the children are suffering and are entitled to an education. That the tenants are not in rent arrears, since they have paid to the Plaintiff/ Applicant. Further that the Defendant/ Respondent has failed to pay the balance of the purchase price.

In his supporting Affidavit, the Plaintiff/ Applicant averred that on **20th June 2018**, he entered into a sale agreement with the Defendant/ Respondent for the sale of his developed property to wit the suit property. That the Defendant/ Respondent paid a deposit of **Kshs. 5,000,000/=** and the balance of the purchase price was to be paid within **90 days**. That the Defendant/ Respondent paid a total of **Kshs.24,000,000/=**.

That it was a term of the agreement that the Defendant/ Respondent would take possession of the suit property after paying the full purchase price. Further, that the Defendant/ Respondent has defaulted in payment of the balance of the purchase price and on **21st January 2021**, he instructed his Advocates to give a **21 days** Notice to the Defendant/Respondent to pay the balance of the purchase price or he would rescind the Contract. Further that on **26th January 2021**, he instructed the firm of **Messrs Kamau Kinga & Company Advocates** to write a letter to the Defendant/Respondent.

That on **26th January 2021**, the Defendant/ Respondent went to the suit property and welded the gate of one of the tenant and denied the tenant entry to the property and access to his house, claiming that he had not paid any rent. That the Defendant/ Respondent has leased one of the houses to another tenant and charges **Kshs. 65,000/=**. Further that the Defendant/Respondent had not paid the balance of the purchase price and the sale agreement therefore stands rescinded.

He further averred that it is only with the intervention of the Police that the tenant has gone back to his house, although the Defendant/ Respondent has removed the gate. That the Defendant/ Respondent's actions are illegal and he has caused annoyance to the tenant, which is contrary to the law.

The Application is opposed and the Defendant/ Respondent **Clement Kungu Waibara**, swore a Replying Affidavit on **9th April 2021**, and averred that he entered into a sale agreement with the Plaintiff/ Applicant at an agreed purchase price of **Kshs.25,000,000/=**. That he paid a sum of **Kshs. 24,000,000/=** and it was agreed between the two of them that the Plaintiff/ Applicant would collect rent from the tenants to the sum of **Kshs.1,000,000/=** to clear the balance of the purchase price. That between the period of **November 2018 and December 2019**, the Plaintiff/ Applicant collected and applied the rent towards the balance of the purchase price.

Further, that after collecting the agreed balance, the Plaintiff/ Applicant began remitting the rental income he collected to the Defendant/Respondent personal account. That the Applicant deposited **Kshs.130,000/=** to Defendant's bank account on the **11th of December 2019**, together with the deposit he had collected from a tenant who had taken up one of the units. Further that on **10th January 2020** the Plaintiff/Applicant deposited **Kshs.65,000/=** to Defendant's bank account, which had been collected from the said tenant for the month of January. That there was a change in tenancy for one of the units and on **1st February 2020**, the Defendant entered into a tenancy agreement with one of the tenants, who pays rent directly to him. That the Plaintiff/ Applicant stopped remitting the rent he collected from one of the tenants on account of a legal interpretation of the sale agreement to wit that the Amendment to the sale agreement allowing Plaintiff/Applicant to collect rent and apply the same to the balance of the purchase price was not in writing.

That the Plaintiff/ Applicant's actions are motivated by financial greed and predicated on the hope that an injunction in place will continue to illegally and unjustifiably reap beyond what was due. That if indeed the Plaintiff/ Applicant had not been fully paid, he would have no reason to remit the collected rent to the Defendant's bank account.

He averred that he has been advised by his Advocate on record, that the question of ownership of the suit premises is a serious issue yet it can only be determined in the full hearing. That damages can be computed in form of the rents collected in the course of time. That the Court should consider the fact that there has been a tenancy agreement between one of the tenants and the Respondent, which agreement has been in a place for over a year. That in granting the orders sought, the Court would impose undue hardship on the seamless tenancy agreement subsisting, and the said tenant who is not a party to this suit. That the Plaintiff/ Applicant needs to relinquish vacant possession as he is in breach of the sale agreement. That the Plaintiff/ Applicant will not suffer any prejudice if the orders sought are not granted.

The Plaintiff/ Applicant swore a Supplementary Affidavit on **3rd May 2021**, and averred that it is no true that he agreed that he would collect rent from the tenants to clear the balance owed by the Defendant/ Respondent, since it would not make any sense as the property still belonged to him. That the agreement clearly stated that the Defendant/Respondent would only take possession upon payment of the full purchase price and therefore could not act like a landlord or dictate on the terms. Further that since the agreement was in writing, the same could not be changed in another way. He denied depositing any rental income into the Defendant's/ Respondent's personal account as alleged, and the statement of **Winnie Mburu**, attached has not stated the relevance of the statement. Further that the deposit made to the account were for a loan the Defendant/ Respondent had requested for. That there was no amendment made to the sale agreement on the balance of the purchase price and the Defendant/ Respondent is interfering with their quiet possession of the suit property.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also read and considered the instant Application, Affidavits and the relevant provisions of law and finds that the issue for determination is ***whether the Plaintiff/ Applicant has established the threshold for grant of interlocutory orders sought***.

The threshold for grant of interlocutory orders was set out in the case of **Giella ...Vs... Cassman Brown (1973) EA 358** and was also reiterated in the case of **Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014)eKLR**, where the Court of Appeal held that;

“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, all 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”

Therefore, it is not in doubt that for the Court to find that the Plaintiff/ Applicant is entitled to the injunctive orders sought, the Plaintiff has to prove all the three principles.

Has the Plaintiff/ Applicant therefore established that he has prima facie case? In the case of **Mrao Ltd ...Vs... First American Bank Of Kenya Ltd (2003) eKLR**, the Court of Appeal gave a determination on a prima facie case. The court stated that :

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

It is not in doubt that the Plaintiff/Applicant is the registered owner of the suit property and therefore has interest over the said property. The Plaintiff/ Applicant avers that the Defendant/ Respondent is in breach of the sale agreement that they entered into as he has failed to pay the entire purchase price and has started to harass the tenants in the said premises. Therefore, it follows that if the same is the case, then his right over the same would mean that his right have been breached. The Court finds and holds that the Plaintiff/ Applicant has established a prima facie case as he has interest over the suit property that is apparently threatened.

The second limb that the Plaintiff / Applicant ought to satisfy the Court is that he will suffer irreparable injury if the injunction is not granted. In the case of **Pius Kipchirchir Kogo ...Vs...Frank Kimeli Tenai (2018) eKLR** the court stated;

“irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

Further in the case of Peter Kairu Gitu ...Vs... KCB Bank Kenya Limited & another [2021] eKLR the Court held that:-

“Having found that the applicant has not established a prima facie case, I find that it will not be necessary to consider if the two remaining conditions for the granting of orders of injunction have been met as it is a requirement that all the three conditions be fulfilled before an order of injunction is granted. I am guided by the decision in Nguruman Limited V. Jan Bonde Nielsen & 2 Others, CA NO. 77 OF 2012, where the Court expressed itself on the importance of satisfying all the three requirements for an order of injunction as follows: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay 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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.” (Emphasis added).

In this case, are damages recoverable in law? The Court acknowledges that land is a unique asset and that the same is held sentimentally. However, in this instant, it is not in doubt that the suit property was for sale and that the Plaintiff/ Applicant had sold the same to the Defendant/ Respondent and had further received almost all the purchase price for sale of the said property save for **Kshs.1,000,000/=** which is the amount in dispute as to whether or not the same was remitted to the Plaintiff. Therefore, the Court finds and holds that the damages are quantifiable as the same can be recovered.

Order 40 of the Civil Procedures Rules provides for instances in which the Court should consider in granting interlocutory injunction and in the case of Robert Mugo Wa Karanja ...Vs... Ecobank (Kenya) Limited & ano [2019] eKLR the court in deciding on an injunction application stated;

‘circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts.....’

It has not been denied by the Plaintiff/ Applicant that one of the tenants has been remitting rent to the Defendant/ Respondent as alleged. There are various issues in dispute, but there is no doubt that **Kshs.24,000,000/= out of Kshs.25,000,000/=** was paid to the Plaintiff/ Applicant for the sale of the suit property. The circumstances under **Order 40 Rule 1 of the Civil Procedure Rules** in the Court’s considered view have not been met. Further the Court finds that any injury suffered by the Plaintiff/ Applicant may be compensated by way of damages and therefore no irreparable harm will be caused.

Having held that no irreparable injury will be suffered if the orders are not granted and as the threshold for granting of the interlocutory injunction requires that the Applicant meets the three principles sequentially, the Court finds and holds that the threshold has not been met as no irreparable injury will be caused to the Plaintiff/ Applicant. In the circumstances the Court is not satisfied that the Plaintiff/ Applicant has met the threshold for grant of interlocutory injunction.

The Upshot of the foregoing is that the Notice of Motion Application dated **18th February 2021**, is found **not merited** and the same is dismissed with costs.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF SEPTEMBER, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy