



**Simiyu & another v Brookside Pearl Limited (Commercial Case E560 of 2021)
[2024] KEHC 12928 (KLR) (Commercial and Tax) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12928 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E560 OF 2021
JWW MONG'ARE, J
OCTOBER 25, 2024**

BETWEEN

MERCY NELIMA SIMIYU 1ST PLAINTIFF

MICHALIS GEORGIU 2ND PLAINTIFF

AND

BROOKSIDE PEARL LIMITED DEFENDANT

RULING

1. By a Plaint dated 30th April 2021, Plaintiffs filed the present suit claiming that they are husband and wife living in Apartment Number Eight (8) on the Eighth Floor in Block C on Land Reference Number 1870/III/578, Nairobi, a property owned by the Defendant (“the Apartment”). That sometime in 2020, they expressed interest in purchasing the Apartment and they engaged the Defendant in negotiations leading to the execution of a sale and purchase agreement dated 26th May 2020 (“the Agreement”). The Agreement indicated that the Apartment was being sold for a consideration of Kshs. 26,500,000.00/= and the Plaintiffs aver that they were to secure a bank financing facility for Kshs. 20,000,000.00/= and then pay to the Defendant an unsecured sum of Kshs. 6,500,000.00/= which amount was payable on diverse dates as outlined under the first schedule of the Agreement.
2. The Plaintiffs claim that they took over possession of the Apartment and began to customize the same to suit their preferences and that they carried out major repairs and improvements in the Apartment thereby greatly raising its value. They claim that the improvements cost them about Kshs. 3,000,000.00/= and that acting in furtherance to the Agreement, they went ahead and made various instalments on the unsecured sum and paid a total of Kshs.3,500,000.00/= by June 2020 thereby remaining with only a balance of Kshs. 3,000,000.00/= on the unsecured sum. The Plaintiffs hasten



to add that in the course of the negotiations, the Plaintiffs again went ahead and negotiated for a bank facility for the secured sum of Kshs.20,000,000.00/= from I&M Bank being their banker whose advocates then proceeded to issue the Defendant with a professional undertaking to release the said amount upon successful registration of the charge in favour of the bank.

3. The Plaintiffs state that the said Professional Undertaking has not been withdrawn and the same is still valid and standing to date and that it was after they made all these major steps described above in furtherance of the Agreement that their finances were adversely affected by the Covid19 pandemic. The Plaintiffs contend that their business which is mainly construction was greatly affected as most sites were temporarily halted and further, the international travel restrictions narrowed their sources of income which is also heavily dependent on their offshore businesses.
4. The Plaintiffs further aver that due to the pandemic and the less flow of finances, they were unable to secure immediate finances for the registration of the charge to enable their bank release the secured amount in time and consequently the transaction could not be closed within the previously agreed 90 days' completion period. That having explained the challenge to the Defendant, the latter did accommodate the Plaintiffs save that it expressed that should the situation continue for a longer period then it would require the Plaintiffs to pay rent on the premises for the entire period pending the completion of the transaction which the Plaintiffs obliged.
5. The Plaintiffs aver that on 23rd February, 2021, they were surprised to be served through their advocates herein a completion notice dated the same day requiring them to complete the transaction within 21 days from that day. On the same day, they were also served with an alleged demand for rent from the month of March 2020 whereupon they were required to pay a total sum of Kshs. 1,500,000.00/= within seven (7) days from the day thereof. The Plaintiffs further aver that on 11th March, 2021, the Defendant instructed the firm of Regent Auctioneers who proceeded to the Apartment and proclaimed in an attempt to recover the alleged Kshs. 1,500,000.00/= rent arrears.
6. The Plaintiffs contend that in the period preceding that distress, they were treated as owners of the Apartment as they paid service charge in accordance with the Agreement and thus did not expect such an abrupt demand for rent arrears even before being notified to begin paying rent as had been agreed earlier. The Plaintiffs aver that upon such action having been taken by the Defendant, they on 15th March, 2021 wrote to the Defendant's counsel requesting yet again that they do accept rent payments and withdraw the completion notice as the Plaintiffs were working on having the balance released to them in due course in which period the Agreement would remain suspended as the Defendant kept receiving rent. That the Defendant then wrote back on 16th March, 2021 promising to issue a response to the counter-proposal upon receiving the said Kshs. 1,500,000.00/=, rent for April and the fees charged by the Auctioneer for serving the letter of 11th March 2021.
7. The Plaintiffs further state that following a long chain of correspondences, between the counsel therein, the Defendant made it a condition that it would accept further correspondences or negotiations upon the Plaintiffs having settled all the rents as demanded which the Plaintiff obliged and settled the same on 31st March, 2021. The Plaintiffs claim that upon relying on the Defendant's promise to renegotiate the position upon payment of the over Kshs. 1,700,000.00/=, the Defendant reneged in its promise and issued them with a notice rescinding the Agreement and a demand for vacant possession. The Plaintiffs aver that pursuant to the representations by the Defendant, they spent the amount in paying rent which amount they would have used to pay for the legal costs necessary to ensure registration of the charge in favour of the bank to enable the release of the Kshs. 20,000,000.00/= by which the Defendant would have received a substantial sum of the purchase price. The Plaintiffs aver



that the Defendant's act of fraudulent misrepresentation should not leave them at a prejudice as the Defendant is estopped from going back the said promise by the law.

8. The Plaintiffs state that they have at all times in the course of the transaction acted in utmost good faith in discharging their obligations and the Defendant must not be allowed to frustrate the said effort for its selfish gain and only to the detriment of the Plaintiffs. That the Defendant's alleged action of attempting to rescind the Agreement after the Plaintiffs acted on its promise is against the legal doctrine of promissory estoppel and they must not be allowed to benefit from the same.
9. For these reasons, the Plaintiffs seek a declaration that the actions and omissions of the Defendant herein amounts to a promise and that it is therefore estopped by the doctrine of Promissory Estoppel from reneging the same and an order of permanent injunction restraining the Defendants, servants, agents, employees and/or any person acting through them from advertising for sale, selling, disposing of, trespassing, evicting the Plaintiffs from or in any way interfering with the Plaintiffs rights in the property together with one (1) share in the Management Company. The Plaintiffs also seek an order of mandatory injunction compelling the Defendant to enforce and comply with the Agreement and the adjusted terms as per the various representations herein thereby completing the transaction; General damages for breach of contract; Interest and costs of this suit.
10. Contemporaneously with the suit, the Plaintiffs have also filed the Notice of Motion dated 30th April 2021 made under inter alia under sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Orders 40 Rule 1 and 4 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking to restrain the Defendant from advertising for sale, selling, trespassing, evicting the Plaintiffs from or in any way dealing in the Apartment together with one (1) share in the Management Company pending the hearing and determination of this suit. The application is supported by the grounds I have highlighted above and the same are anchored in the supporting affidavit of the 1st Plaintiff sworn on 30th April 2021.
11. The Defendant has responded to the application through the replying affidavit of its director GULHAMID JIVANJI, sworn on 2nd November 2021. It depones that the application is devoid of merit, vexatious, brought in bad faith, smacks of mischief and ought to be dismissed with costs to the Defendant. That the issues raised by the Plaintiffs are a red herring meant to divert the attention of this Court from the real issues in controversy that is; that the Plaintiffs have patently breached the terms of the Agreement by failing to pay the agreed Purchase Price and that they are hopelessly in rent arrears with no prospect of paying the same. It states that the Plaintiffs have not come to the Court with clean hands and are therefore not deserving of the reliefs sought in the application. The Defendant claims that the Plaintiffs obtained interim orders at the ex parte stage by failing to disclose to the Court material facts.
12. The Defendant avers that the application is mischievous and a contemptuous attempt by the Plaintiffs to embroil the Defendant in an illusory dispute herein created with the sole aim of frustrating the Defendant's right to enforce the remedies provided in the Agreement. The Defendant states that the purchase price of the Apartment was to be paid as follows:
 - a. Kshs. 1000,000/= to be paid on or before execution of the Agreement
 - b. Kshs. 1000,000/= on or before 15th April 2020
 - c. Kshs. 1000,000/= on or before 15th May 2020
 - d. Kshs. 1000,000/= on or before 25th May 2020
 - e. Kshs. 1000,000/= on or before 1st June 2020



- f. Kshs. 1500,000/= on or before 10th June 2020
- g. The balance of Kshs. 20,000,000/= to be paid within Fourteen (14) days of the successful registration of the Sub-Lease and Charge in favour of the Purchaser's Bank.
13. The Defendant states that in patent breach of the Agreement, the Plaintiffs have expressly admitted in their application that they have only paid a paltry Kshs.3,500,000.00/= of the Purchase Price out of Kshs. 26,500,000.00/=. As the Plaintiffs defaulted in payment of the instalments as required, the Defendant instructed M/s Taibjee & Bhalla Advocates LLP to send reminders to the Plaintiffs but the Plaintiffs refused to remedy the default and that even after the receipt of the reminders to pay, the Plaintiffs still neglected, refused and/or failed to take any action towards paying the full Purchase Price for the property. That the Defendant had no alternative but seek to exercise its contractual right to issue twenty-one (21) days Completion Notice in line with Clause 6 of the Agreement. The Completion Notice was dated 23rd February 2021 and was sent to the Plaintiffs' official postal address and a scanned copy of the Completion Notice was sent via email to the Plaintiffs on 23rd February 2021 at 11.21am. The Defendant asserts that Completion Notice issued by is in line with Clause 6 of the Agreement and that having breached their contractual obligations under the Agreement, the Plaintiffs' prayers for injunction are fatally defective and unfounded. That the Plaintiffs cannot turn round to hide behind any sentimental values and/or any other excuses outside the purview of the law relating to the grant of the equitable relief of injunction.
14. The Defendant states that it is simply exercising the remedies provided for in the Agreement and that a Court of law cannot rewrite a contract between parties and the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. That hitherto the execution of the Agreement, the Plaintiffs received independent legal advice through their appointed firm of Aguko Osman and Company Advocates, who reviewed the Agreement before the execution of the same and they are also acting for the Plaintiffs in the instant suit. The Defendant avers that since the Plaintiffs were in occupation of the property but could not pay the purchase price, vide their Advocates letter of 17th March 2021, the Plaintiffs proposed that they would start paying a monthly rent of Kshs. 150,000.00/= for the Apartment as they sourced funds for the entire Purchase Price. That vide the Defendant's Advocates' letter dated 18th March 2021, the proposal was accepted in good faith on inter alia, on condition that the Plaintiffs would settle the balance of the Purchase Price within 30 days.
15. The Defendant states that not only have the Plaintiffs failed to pay the full Purchase Price, but they have also been defaulting on payments of the monthly rent of Kshs. 150,000.00/= thus dishonouring both Agreements. That due to the chronic default, vide the Defendant's Advocates letter dated 20th April 2021, the Defendant issued a Rescission Notice to the Plaintiffs rescinding the Agreement and giving them notice to vacate the Apartment in accordance with the Agreement. A week later, the Plaintiffs filed the instant suit for a remedy of injunction and that due to the Plaintiffs' persistent default in paying rent, the Defendant has been compelled to levy distress for rent on several occasions through Regent Auctioneers. The Defendant states that the Plaintiffs' goods have been Proclaimed on several occasions as evidenced by the series of Proclamation Notices and that the most recent Proclamation was done on 22nd October 2021 to recover rent arrears for July, August and September 2021
16. The Defendant claims that the Plaintiffs have been issuing bounced cheques to the Defendant for the said rental arrears and this issue was communicated to the Plaintiffs' advocates vide a letter dated 15th July 2021 forwarding the Return Cheque Slip from the bank. That the Plaintiff is truly and justly indebted to the Defendant and the outstanding amount on account of rent arrears has now accrued to Kshs. 450,000.00/= being unpaid rent for the month of July, August and September 2021 whereas the unpaid Purchase Price for the Apartment on the other hand is Kshs. 23,000,000.00/= plus interest.



The Defendant states that the Plaintiffs have not disputed the amounts owed to the Defendant either on account of the purchase price of the Apartment or the monthly rent and that since the Plaintiffs have admitted to being indebted to the Defendant on account of Purchase Price and rent, then the Plaintiffs have not made out a prima facie case for themselves and this Court, while purely directing its mind to the principles of granting injunctions as enunciated in *Giella v Cassman Brown*, cannot grant the injunctive reliefs sought.

17. The Defendant laments that it continues to be denied the right to enjoy the true value of its investment by the Plaintiffs' refusal to pay the Purchase Price or the rent. Further, that the Plaintiffs have not demonstrated that they have the intention or financial ability to clear the arrears which are proliferating at an alarming rate and that unless the Court dismisses the instant application and orders that the Plaintiffs be evicted from the Apartment, the Defendant will be rendered destitute as the Plaintiffs have already frustrated the Defendant's right to exercise the remedy of repossession which is expressly provided for in the Agreement. That having mischievously secured an interim order preventing eviction, the Plaintiffs have abused the interim Court Orders and refused to pay rent or the Purchase Price notwithstanding that the Plaintiffs continues to reside in the Apartment.
18. The Defendant contends that in order to secure the payment of the admitted debt and to balance the scales of justice, the Defendant prays that judgment be entered against the Plaintiffs on admission and/or the Plaintiffs be ordered to deposit the unpaid Purchase Price, accumulated rent plus future rent in a joint interest-earning account in the name of Counsel pending the hearing and determination of this suit. In any event, that the Plaintiffs have admitted the accrued arrears as this affidavit has ably demonstrated and that the application does not meet the necessary requirements to grant an injunction and as the Plaintiffs have not come to court with clean hands. That they are therefore not deserving of any injunctive orders sought, the Defendant urges this Court to so find.
19. The application was canvassed by way of written submissions which regurgitate the positions of the parties I have already summarized above and as such, I will not rehash the same but make relevant references to in my analysis and determination below.

Analysis and Determination

20. The parties are aligned that for the Plaintiffs to be granted the injunction they seek, they ought to satisfy the conditions set out in the case of *Giella Vs. Cassman Brown*(supra) by demonstrating a prima facie case with a probability of success, that they will suffer irreparable injury which would not adequately be compensated by an award of damages and that if the Court is in doubt, it should decide the application on the balance of convenience. These conditions are to be applied as separate, distinct and logical hurdles which the Plaintiffs are expected to surmount sequentially which means that if they do not establish a prima facie case then irreparable injury and balance of convenience do not require consideration (see *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2013] KECA 347 (KLR)).
21. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) explained as follows:

A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case 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.
22. A prima facie case flows from what is pleaded in the Plaint and the Plaintiffs must demonstrate that they have a right which has been threatened or violated by the Defendant. The Plaintiffs do not dispute that they are indebted to the Defendant both in respect of payment of the purchase price and rent



for the Apartment. What they claim is that the Defendant ambushed them with the completion and rescission notice and demand for payment in breach of their earlier promise to accept the rent payment while the time of the sale transaction stopped and the Plaintiffs granted time to source for funds. However, I have gone through the series of correspondences annexed in the parties' depositions and find that this is not the position. The Defendant in its letter of 18th March 2021 was explicit that it did not accede to the Plaintiffs' offer as per their letter of 15th March 2021 and that the Defendant was to revert after payment of the demanded rent. Further, that payment towards rent was due and payable irrespective of the sale of the Apartment which was payable by close of business on 17th March, 2021. The Defendant informed the Plaintiffs that it was expecting payment of the rent, unsecured portion of the purchase and all payments stipulated in the Agreement within 30 days of the letter and that in default, the Sale would be rescinded as per the default Clause in the Agreement and the Plaintiffs would vacate the Premises on or before the expiry of the said Thirty (30) days. Further, that the Auctioneer's notice could only be rescinded upon payment of their fees, the Invoice of which had been forwarded to Plaintiffs and in payment of the aforesaid outstanding rent.

23. This letter by the Defendant was followed up with the letter of 20th April 2021 where the Defendant stated that the Plaintiffs had not complied as advised in the earlier letter and such, the sale was rescinded and the Plaintiffs were now to vacate the premises. The Plaintiff has not produced any evidence to support the assertions that the Defendant promised the Plaintiffs that they would halt the demand of the balance of the purchase price and completion of the sale transaction if they were to pay the outstanding rent. This was a misapprehension of the Defendant's letter of 23rd February 2021 and it will appear that the Plaintiffs further and deliberately sought to misinterpret the same to suit its case in as much as the Defendant had clarified its position in its letter of 18th March 2021.
24. It is evident that the Plaintiffs have not completed the sale and they have not been paying rent on the Apartment in as much as they have been living in it for some time. Clearly, they are the party in breach of the Agreement and the rental agreement and the Defendant is being denied the fruits of its investment. It is unfair for the Plaintiffs to not pay the balance of the purchase price for the Apartment and still live in the same property without paying rent. Since the Plaintiffs are admittedly indebted to the Defendant for both the purchase price and the rent and that the Defendant never made any promises or concessions in respect of the outstanding sums so as to state that it has reneged, I find that the Plaintiffs have not made out a prima facie case with a probability of success and as such, the inquiry on whether they are entitled to an injunction ends at this point in line with the dicta in *Nguruman Limited v Jane Bonde Nielsen and 2 Others*(supra).

Conclusion and Disposition

25. In conclusion I find and hold that the Plaintiffs' application dated April 30, 2021 has no merit and the same is hereby dismissed with costs to the Defendant. The interim orders in force are forthwith discharged. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF OCTOBER 2024

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Kimosop for the Plaintiff/Applicant.

N/A for the Defendant/Respondent.



