



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 144 OF 2019**

KENNETH KINOTI MURIUKI.....1<sup>ST</sup> PLAINTIFF/APPLICANT  
NANCY MUTHONI WAMAE.....2<sup>ND</sup> PLAINTIFF/APPLICANT  
JOHNSON IRERI KINYUA.....3<sup>RD</sup> PLAINTIFF/APPLICANT  
CAROLINE KAMAR.....4<sup>TH</sup> PLAINTIFF/APPLICANT  
SIMON NABISWA MASIBO AND PENINA KINYA MASIBO....5<sup>TH</sup> PLAINTIFFS/APPLICANTS

**VERSUS**

DINARA DEVELOPERS LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT  
ANDREW KAMAU MUHIU.....2<sup>ND</sup> DEFENDANT/RESPONDENT

**RULING**

The matter for determination is the Notice of Motion Application dated 21<sup>st</sup> April 2020, by the Plaintiffs/Applicants seeking for orders that;

**1. That this Honourable Court be pleased to grant a temporary order of injunction in favour of the Plaintiffs/Applicants directed at the Defendants/Respondents restraining any acts whether by themselves or through any of their agents, employees or officers in dealing and or acting in any manner whatsoever to transact on the subject property until the hearing and final determination of case No. ELC Number 144 of 2019.**

**2. THAT costs of this Application be provided for.**

The Application is premised on the grounds that the Plaintiffs/ Applicants have sued the Defendants seeking orders of **Specific Performance** over several town houses/maisonettes as listed in the Plaint. That the Defendants/Respondents have not filed any Defence but put up advertisements offering the subject property for sale for **Kshs.14,000,000/=** in utter disregard of the suit by the Plaintiffs/ Applicants. That the Defendant/Respondents intend to deprive the Plaintiffs/Applicants of their claim in the property by disposing the subject property with the aim of defeating the instant suit. Further that the matter was scheduled for hearing of the Plaintiffs/Applicants application dated **8<sup>th</sup> November 2019**, on **14<sup>th</sup> April 2020**, wherein the Plaintiffs/ Applicants were seeking for inter alia **specific performance** orders over the subject property. That unless the Court grants the orders sought, the Defendants/ Respondents herein would deprive the Plaintiffs/Applicants of their rightful interest in the subject property bonafide purchasers.

In his further affidavit sworn on **21<sup>st</sup> April 2020**, in support of the Application, **Simon Nabiswa Masibo**, the 5<sup>th</sup> Plaintiff/Applicant herein reiterated the contents of the grounds in support of the application and further averred that the conduct of the Defendants/ Respondents should be construed to be frustration to determine the suit and or to circumvent the same. He contended that the Defendants/Respondents want to defeat and circumvent the Court's jurisdiction by advertising the subject property and offering them for sale despite the instant suit pending before this Court. He further averred that the Plaintiffs/Applicants were willing to abide by any condition as to the costs and or damage which might arise as a result of the Court issuing the temporary orders.

The Application is opposed and the 2<sup>nd</sup> Defendant/ Respondent, **Andrew Kamau Muhiu**, who filed a Replying Affidavit dated **5<sup>th</sup> May 2020**, and averred that the Defendants/Respondents have caused to be developed an Estate consisting of 19 Housing units. That the instant Application is premature and also seeks to defeat the written procedure of the Law in securing justice. It was his contention that in the year

2018, the 1<sup>st</sup> Defendant entered into an agreement with the Plaintiffs/ Applicants, wherein the Defendants offered to sell to the Plaintiffs/Applicants three bedroom mansionettes in a project consisting of **19 off plan Mansions**. That each of the Plaintiffs/Applicants purchased one house on the project that consists of 19 houses. He alleged that the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs/ Applicants breached the terms of the agreement of sale by not fully paying for two of the said houses in full and on time and consequently a **completion notice** was sent out to the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs/ Applicants which was ignored warranting the repossession of the same.

It was his contention that the Plaintiffs / Applicants only have a claim on three out of the nineteen houses in the said project and that their houses are at an advanced stage of construction and will be handed over to them as soon as practicable. Further that the houses that the Plaintiffs/Applicants are referring to as being advertised are not among the three houses that were purchased by themselves. Further that he has been advised by his Advocates that the Defendants are well within their rights to advertise the unsold houses. He contended that the Application is unmerited, baseless and an abuse of the Court process which is only meant to waste the Court's time. That it would be extremely prejudicial to the Defendants/Respondent if the Court stops the sale and advertisement of the **16** unsold Houses that fully belong to them.

The Application was canvassed by way of written submissions. The Plaintiffs/Respondents through the **Law Firm of Sheikh & Company Advocates** submitted that the law regarding temporal Injunction is set out under **Order 40(1) (a) and (b)** of the Civil Procedure Rules 2010. It was their submissions that if the orders sought are not granted, the Plaintiffs/Applicants stand to suffer great injustice and irreparable damage. Further that Applicants have established a **prima facie case** and are therefore entitled to the orders sought.

The Defendants/Respondents through the **Law Firm of Njeri & Partners** submitted that they are not opposed to the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Applicant's claim as their houses are at an advanced stage of construction and will be handed to them as soon as practicable. However, the 3<sup>rd</sup> and 4<sup>th</sup> Applicant's repossession and advertisement of their houses is justifiable and was done in accordance with the sale agreements and therefore, they do not have a legitimate claim.

It was further submitted that the agreement for sale in which the suit is based defines and lays down its **modus operandi** in cases of disputes, **Arbitration** being expressly provided for in the agreement and the instant Application is therefore wrongly filed before the Court. Further that the Application is bad in law and the Court was urged to dismiss the same.

The Court has now carefully read and considered, the Application, the Affidavits in support and the written submissions by the parties. The issues for determination are;

**1. Whether the Court has jurisdiction to hear and determine the matter**

**2. Whether the Plaintiffs/ Applicants have met the threshold for grant of orders of temporary injunction.**

**1. Whether the Court has jurisdiction to hear and determine the matter**

It is trite that Jurisdiction is everything and without it, the Court has no option but to down its tool. The Defendants/ Respondents have submitted that the Court does not have jurisdiction as the agreements for sale entered into between the parties laid down its modus operandi in cases of dispute. While the Court recognizes that the issue of jurisdiction can be raised at any opportune time, the Court notes that the issue has only been brought up by the Defendants/Respondents in their submissions. It is trite that submissions are only there to support pleadings and can not be used to bring up issues that are not in the pleadings. This is so as the other party is denied an opportunity to respond to the allegations and properly defend itself. See the case of **Daniel Toroitich Arap Moi & Another ...Vs... Mwangi Stephen Murithi & Another (2014) eKLR** where the Court held that:

**“Submissions cannot take the place of evidence. The Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid---Submissions are generally parties “marketing language....”**

Further Parties are bound by their pleadings as was stated in the case of **Joseph Mbuta Nziu ....Vs... Kenya Orient Insurance Company Ltd [2015] eKLR** where the Court referring to a decision of Nigerian Supreme Court stated-**“In ADETOUN OLADEJI (NIG) LTD ... Vs... NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. stated as follows;**

**‘... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.’**

Therefore, the Court finds and holds that the issue of jurisdiction has not been pleaded and cannot be submitted at this stage.

**2. Whether the Plaintiffs/ Applicants have met the threshold for grant of orders of temporary injunction.**

The court is called upon to determine whether the Applicants are deserving of injunctive orders based on the usual criteria laid down in the case of **Giella...Vs... Cassman Brown & Co. Ltd 1973 EA 358**, These thresholds have been adopted in various other judicial determinations. In the case of **Kibutiri ... Vs ...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, the Court held that:-

**“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of**

damages. **Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs..Trufoods (1972) EA 420.**

Firstly, the court must determine whether the Plaintiffs/Applicants have established a prima facie case with chances of success. In the case of Mr Rao Ltd....Vs.....First American Bank of Kenya, the Court held that

**“A prima facie case in civil application includes but not confined to a genuine and arguable case. It is a case on the material presented to a court, tribunal properly directing itself, will conclude there exists a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the later.”**

The question would then be whether the Plaintiffs/Applicant have a right that has apparently been infringed upon that would then call for a rebuttal. In the case of the 1<sup>st</sup> 2<sup>nd</sup> and 5<sup>th</sup> Plaintiffs/Applicants, the 2<sup>nd</sup> Defendant/ Respondent has acknowledged that they have interest over the various suit properties that they bought and they automatically have a **prima facie case**. However, with regards to the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs/Applicants, it is the Defendants/Respondents Contention that they have not paid the full amount of the purchase price and therefore are not entitled to the said property since the Defendants have rescinded the agreement. This Court notes that the 2<sup>nd</sup> Defendant/Respondent has acknowledged that he indeed entered into a contract of sale with the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs/Applicants. Therefore, it is evident that the said 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs/Applicants have an interest over the suit property. The Court further notes that the Defendants/Respondents have not filed a Defence nor have they annexed any documents to show that the said Contracts were rescinded.

Be that as it may, the said facts are disputed and it would only mean that the same can only be determined on merit at the main trial. See the case of Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003, where the Court held that:-

**“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law.”**

There is no doubt that the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs/Applicants have laid a claim to the suit properties which means that they have an interest and their claim will call for a rebuttal. It is the Court’s considered view that since the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs/Applicants have shown that they have an interest over the suit properties which calls for a rebuttal, then they have also established a prima facie case with probability of success at the trial.

The second limb in grant of interlocutory orders is whether the Plaintiffs/ Applicants will suffer irreparable loss which cannot be compensated by way of damages. It is not in doubt that the Plaintiffs/Applicants had bought the suit properties while the same were still **off plan** and that the same are now in the later stages of construction. Further the Plaintiffs have paid substantial amounts of money. It is a fact that land is unique in nature and the same cannot be compensated by way of damages. See the case Olympic Sports House Ltd...Vs... School Equipment Centre Ltd (2012) eKLR, wherein the Court held that:-

**“a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction”.**

It is trite that a crystalized right which is violated cannot be equated to compensation by damages. See the Case of Niaz Mohammed Janmohammed...Vs...Commissioner for Lands & 4 Others (1996) eKLR, where the Court held that:-

**“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought”.**

Equally in this case, the Court finds that if the Applicants’ rights have been infringed, and no amount of money can compensate such infringement. Therefore, the Court finds that the Applicants have established that they are likely to suffer irreparable loss and/or injury which cannot be adequately compensated by an award of damages.

On the third limb, which states that if the court is doubt to decide on a balance of convenience, the Court finds that if it is to decide on a balance of convenience, the same will tilt in favour of maintaining the *status quo* and the *status quo* herein is in directing the Respondents to desist from carrying out any dealings with the suit properties until the suit is heard and determined. Thus the *status quo* herein should remain what was in existence before the Respondents allegedly unlawful action. See the case of Agnes Adhiambo Ojwang...Vs.... Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 of 2000, where the Court held that:-

**“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.**

The Court notes that the Defendants/Respondents have averred that there are 19 housing units to be sold. Further the Court notes that in their advertisement the Defendants/Respondents did not specify the units to be sold and that would only mean that all the units were put on sale including the ones bought by the Plaintiffs/Applicants. The said units ought to be preserved.

In this regard the injunction is granted in terms of Units No.10 bought by the 1<sup>st</sup> Plaintiff/ Applicant, B4 by the 2<sup>nd</sup> Plaintiff/ Applicant, A4 by the 3<sup>rd</sup> Plaintiff/ Applicant, B8 by the 4<sup>th</sup> Plaintiff/ Applicant, and A9 by the 5<sup>th</sup> Plaintiffs/ Applicants.

Having now carefully considered the available evidence and the written submissions, the Court finds that the Plaintiffs/ Applicants Application is merited and is allowed entirely with costs. For the avoidance of doubt, **injunction is** granted in terms of Units no. 10 bought by the 1<sup>st</sup> Plaintiff/ Applicant, unit no. B4 for the 2<sup>nd</sup> Plaintiff/ Applicant, unit no. A4 for the 3<sup>rd</sup> Plaintiff/Applicant, unit no. B8 for the 4<sup>th</sup> Plaintiff/ Applicant, and unit no. A9 for the 5<sup>th</sup> Plaintiffs/Applicants as per the schedule provided in the Plaint

It is so ordered.

**Dated, signed and Delivered at Thika this 11<sup>th</sup> day of June 2020**

**L. GACHERU**

**JUDGE**

**11/6/2020**

**Court Assistant – Jackline**

**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 **15<sup>th</sup> 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.

**In the presence of the following counsel via zoom conferencing**

**Mr. Makori for the Plaintiffs/Applicants**

**No appearance for the 1<sup>st</sup> Defendant/Respondent**

**No appearance for the 2<sup>nd</sup> Defendant/Respondent**

**L. GACHERU**

**JUDGE**

**11/6/2020**