REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC CASE NO.24 OF 2020

KOBILO FARM LIMITED..1ST PLAINTIFF

METROPOLE HOLDINGS LIMITED...2ND PLAINTIFF

VERSUS

ELFAM LIMITED..DEFENDANT

COMMODITIES FUND...INTERESTED PARTY

RULING

This ruling is in respect of three applications dated 10th June 2020, 24th June 2020 by the plaintiff/applicant and 22nd June by the defendant. The matter came up for hearing under certificate of urgency and the court ordered that the status quo be maintained pending the hearing and determination of the application inter partes.

The plaintiff’s application dated 10th June 2020 is seeking for the following orders:

a) Spent.

b) That the Honourable court be pleased to issue an order of temporary injunction restraining the defendant/respondent either acting by itself, its agents , servants and or agents from evicting the applicant, alienating, advertising for sale, offering for sale, taking possession, leasing, transferring, encroaching and or otherwise disposing off that parcel of land known as **SERGOIT/KOIWOPTAI BLOCK 13/4**

c) That the Hounorable Court be pleased to issue an order of status quo preserving the suit property **SERGOIT/KOIWOPTAI BLOCK 13/4,** pending the hearing of this application inter partes and the main suit

d) That pending the hearing and determination of this application and the main suit an order of temporary injunction be issued restraining the defendant/respondent either acting by itself, its agents, servants and or agents from evicting the applicant, alienating, advertising for sale, offering for sale, taking possession, leasing, transferring, encroaching and or otherwise disposing off that parcel of land known as **SERGOIT/KOIWOPTAI BLOCK 13/4**

e) That the Honourable court do issue an order of inhibition stopping further dealings, registration and transactions over that parcel of land known as **SERGOIT/KOIWOPTAI BLOCK 13/4** pending the hearing and determination of this suit.

f) That the costs of this application be borne by the defendant

When this matter came up for hearing of the application under certificate of urgency, the court issued an order of status quo to be maintained pending the hearing of the application inter partes. Before the application could be heard, the applicant filed another application dated 24th June 2020 seeking for the following orders:

a) Spent

b) That the Honourable Court be pleased to summon MARGART JEPKOECH KAMAR AND SOTIMARIE JEPKEMBOI BIWOTT to show cause why they should not be committed to civil jail for a period of upto six months for blatantly disrespecting the Honourable court by disobeying orders issued on 22nd June 2020.

c) That the Respondents be ordered to reopen the main entrance to the suit property herein and in default, the applicant be at liberty to break the new locks under the supervision of the OCS Chepkanga Police Station who should ensure that peace and tranquility is maintained.

d) That the Respondents be ordered to pay the costs of the application.

The defendant also filed an application dated 22nd June 2020 seeking for the following orders:

a) Spent

b)That pending the hearing and determination of this application the Honourable Court do and hereby issue orders of contempt against the plaintiff's Directors, WILSON K. MAINA & TERESA C MAINA. their agents, workers and/or servants by failure to maintain the status quo in regard to land dispute on land parcel No. **SERGOIT/KOIWOPTAI BLOCK 13/4** vide the order dated 11th June 2020.

c) That pending the hearing and final determination of this application, the Honourable Court be pleased to issue summons to the plaintiff's Directors to show cause why they should not be committed to civil jail for a period of six months for disobeying the orders issued on 11th June 2020.

d) That pending the hearing and determination of this application the Honourable Court do affirm and extend the interim orders issued on 11th June 2020.

e) That the Honourable Court be pleased to grant any other or further orders for the purposes of protecting the dignity and authority of the Court.

f) That the OCS Eldoret Central Police Station to ensure compliance and enforcement of this order.

The court gave directions that all the applications be heard together and counsel to file responses and submissions in respect of the three applications which were duly filed.

PLAINTIFF'S SUBMISSION IN RESPECT OF APPLICATION DATED 10TH JUNE 2020, 24TH JUNE 2020 AND 22ND JUNE 2020

Counsel relied on the grounds on the face of the application and the plaintiff's supporting affidavit. He submitted that it is not in dispute that the plaintiff/applicants are purchasers for value of the suit property together with Sergoit/Koiwoptai Block 13/9 having purchased the same from the defendant/respondent

Counsel submitted that there are three sets of agreements which were annexed to the plaintiff/applicant's supporting affidavit where the Director Wilson Kipkosgei Maina averred that they purchased the properties Sergoit/Koiwoptai Block 13/9 measuring 36.7HA at a consideration of Kshs. 150,000,000/= and Sergoit/Koiwoptai/ Block 13/4 measuring 18.62 Ha at a consideration of Kshs. 50,000,000/= vide sale agreements dated 9th July 2018.

It was the applicant's evidence that they had so far paid Kshs. 194,000,000/= (one Hundred and Ninety Four Million) leaving a balance of Kshss/ 6,000,000/- for the said land and the defendant transferred to them parcel number Sergoit/Koiwoptai/Block 13/9.

Counsel submitted that the second agreement was for a consideration of Kshs. 204,000,000/ of which the plaintiff paid Kshs. 194,000,000, leaving a balance of Kshs.10,000,000/ unpaid. That the third agreement for two parcels was for a consideration of Kshs.109, 320,000/ that there was an overpayment of Kshs. 90,680,000/ respectively from the 1st and 2nd agreements.

Mr. Kibii submitted that the mutation form annexed to the plaintiff's replying affidavit shows that demarcation and subdivision of the mother title resulted in the creation of the suit property SERGOIT/KOIWOPTAOI BLOCK 13/19 and that the suit property are next to each other and hence share a common boundary. Counsel further submitted that the said parcel was transferred to the plaintiff in 2019 and the plaintiff took possession of the two parcels of land as per the valuation report annexed to the affidavit.

Counsel submitted that the valuation report and the photographs indicate the tree stumps that had been harvested by the defendant illegally hence the plaintiff/applicant will suffer irreparable damage if the orders sought are not granted.

Counsel relied on the case of **William Kipkurgat Melly v. Susan Chelagat Biwott & 5 ors(**2017**) eklr** where the court held that:

> "*I also find that the applicants would suffer irreparable damage which cannot be compensated by way of damages as they are in occupation and have carried out developments as per the attached valuation report.*
>
> *I have considered the pleadings and the submissions of both counsel and find that the application has merit. The upshot is that the application dated 27th June 2017 is hereby allowed with costs to the applicants."*

Mr. Kibii counsel for the applicant submitted that the suit was informed by the defendant's refusal to clear loan arrears owing to the

interested party as indicated in annexure WKM18 and the valuation report. That the applicant has been ready and willing to clear the balance that is owing and to take the obligations of the defendant to clear the loan arrears with a corresponding order for reimbursement of the same from the defendant.

Counsel urged the court to issue an order for inhibition, to prevent the defendant from further dealing with the land thus rendering this suit nugatory, for the reason that they had already paid 97%of the purchase price. Further that the court should preserve the substratum of the case.

Mr Kibii counsel for the plaintiff/applicant further stated that the applicant has never received any notice of intention to revoke the agreements and the annexed notices were baseless and the defendant has not demonstrated how the letters were served on the plaintiff. Further that the plaintiff never approved the rescission of the agreements in the alleged text messages

Counsel cited the case of **Mary Watiri Kirumba v. Nyokabi Ndungu(2014)eklr** where the court held as follows:

> "*It is clear from these provisions that the powers granted to the court are discretionary, and are to be exercised when there is good reason to preserve, or stay the registration of dealings, with respect to a particular parcel of land for a temporary period. There is no requirement that the applicant must show a prima facie case before an inhibition can issue, and the general principle that will apply is that the discretion is exercised judicially by being exercised in good faith, for a proper purpose, taking into account all relevant factors and is reasonable in the circumstances of the case.*
>
> *I have in this regard taken into account the allegations by the Plaintiff of fraud in the transfer of the suit property to the Defendant, and the fact that this court has already granted temporary injunction orders in her favour. I also note that the portion of the suit property that is the subject of the dispute herein is now more defined and has a separate title against which an order of inhibition can issue. I accordingly find that there are reasonable grounds for the grant of an inhibition with respect to the suit property. I accordingly order the Registrar of Lands not to register any transfer, charge or other transaction in respect of the parcel of land known as Loitokitok/Ngama/2513 pending the determination of this suit and/or further orders".*

Counsel urged the court to find that the plaintiff/applicant has established a prima facie case against the defendant and therefore the conservatory orders should be granted.

In respect of the application dated 24th June 2020, counsel relied on the grounds on the face of the application and the supporting affidavit of Wilson Kipkosgei Maina to cite the directors of the defendant for contempt for disobeying the court order of maintenance of status quo.

Counsel listed instances of the disobedience of the court order by the defendant that the defendant was aware of the order but forcefully entered the land and ploughed it.

That on 23rd June 2020 the defendant/respondent through its directors destroyed locks to the main gate and replaced the same with their own, that on 25th June 2020 the respondents forcefully invaded the suit land and destroyed the fence and ploughed a portion of the land, and that the matter was reported to Chepkanga Police station to restore peace.

Further that on 9th July 2020 the defendant commenced erecting a barbed wire fence on the common boundary of the suit property Sergoit/Koiwoptai block 13/9 with the motive of altering the *status quo*. Counsel submitted that this was done willingly and thus they be held for contempt, as held in **Suleiman Murunga v. Nilester Holding ltd & 6 ors(2019)eklr** that:

> "*The court is of the view that the mode which can be brought to bear on the directors of the 1st and 2nd Defendants is to order that they make good the damage and loss suffered by the Plaintiff when through their actions or their agents, the Plaintiff was forcefully evicted from the Suit Property in March 2018. The Plaintiff is to submit a valuation report within 30 days to the 1st and Defendants showing the goods, stock, furniture and equipment that were damaged or lost during his eviction and the demolition of his restaurant. In addition, the 1st and 2nd Defendants will pay the Plaintiff a sum equivalent to six months' rent which would have catered for his relocation to other premises had the unlawful eviction not taken place as it did. The rent will be calculated based on the last rent the Plaintiff was paying to the 1st and 2nd Defendants. The Plaintiff, 1st and 2nd Defendants are directed to file submissions on the financial loss suffered by the Plaintiff within 14 days of the date of service of the Plaintiff's valuation report".*

Counsel responded to the defendant's application dated 22nd June 2020 for contempt against the plaintiff directors and relied on the replying affidavit sworn by Wilson Kipkosgei Maina and the annexures thereto. Mr. Kibii took issue with the fact that the application was not served upon them and therefore the ex-parte orders requiring the directors to show cause amounted to summary and final orders, which this court has power to correct the mistake.

Counsel further submitted that the affidavit sworn by the defendants' director was commissioned by Mr. Joshua Maritim, and he still appeared on record on 26th June 2020 and on 29th June 2020 as counsel for the defendant which is a great violation of section 4 of the Oaths and Statutory Declarations Act which cannot be cured by article 159 of the Constitution.

Counsel relied on the case of **Nyamira Election Petition no. 2 of 2017, Stephen M.Mogaka v. IEBC & 2 ors** where the court was struck out an application commissioned by the same firm and appearing in court for the same and sated as follows:

> "*The Petitioner and his witnesses' affidavits offends* ***Section 4 (1) of the Oaths and Statutory Declarations Act****. The seven affidavits have been sworn before an unauthorized commissioner by virtue of* ***Section 4 (1) of the Oaths and Declarations Act*** *as a*

Commissioner cannot commission his or her own documents or documents prepared by the firm where that Commissioner works or where he/she is interested. The said Section is couched in a mandatory form. The swearing of the aforesaid affidavits by the said commissioner offends an Act of Parliament and in my view that do not represent a mere irregularity either in a defect in form neither can it be said to be a technical irregularity as it goes to the root of the substantive issue before court. It is an irregularity that is incurably defective. All the affidavits in the Petition having been commissioned by an unauthorized person or contrary to the law are in my view defective. I accordingly strike out and expunge from the Court records…"

Mr. Kibii also cited the case of **Caltex Oil (Kenya) Limited v New Stadium Service Station Ltd & another [2002] eKLR** where the court held that

> *"With profound respect, I disagree. These affidavits were clearly in breach of the provisions of an Act of Parliament namely The Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya. They were not irregularity as to form only as the Applicant would have me believe. Section 4(1) of the Oaths & Statutory Declaration Act is clear."*

Counsel therefore urged the court to find that the application is defective for not complying with the mandatory provision of section 5 of the Oaths and Statutory Declarations Act. That once the affidavits are struck out the application remains unsupported hence baseless.

Counsel also submitted that on a without prejudice basis that the orders of 11th June 2020 were not injunctive in nature hence the plaintiff was not barred from putting up structures on the suit land and relied on the case of **Daniel Leuru Kalasinga v James Kayioni Kaikai [2016] eKLR** where the court held that:

> *"observance of the status quo lacked clarity and was not express and explicit that the defendant was not to put up any structures on the portion he was occupying."*

Mr. Kibii urged the court to dismiss the defendant's application for contempt with costs and allow the plaintiff's application as prayed.

DEFENDANT'S SUBMISSION TO APPLICATION DATED 10TH JUNE 2020, 22ND JUNE 2020 AND 24TH JUNE 2020

Counsel for the defendant relied on the affidavits of the defendant directors to oppose the plaintiff's application for injunction and the application for contempt. Counsel gave an elaborate background to the transaction that gave rise to the current case. That the defendant Director Prof. Margret Jepkoech Kamar swore an affidavit and stated that Elfam Ltd entered into a sale agreement with Metropole Holdings Ltd for purchase of two properties measuring 100acres and 33 acres which was within LR No. 7217/1, the completion date was to be within 90 days by 9th October 2018 but as at that date only Kshs. 60.000.000/= had been paid.

She further averred that on 9th July 2018, the directors of Metropole Holdings asked Elfam Ltd to extend the time which proposal was accepted and they entered into two agreements for two separate parcels of land known as Sergoit/Koiwaptaoi 13/9(36.7 hectares) and Sergoit/Koiwaptaoi 13/4(18.64 hectares). In the new sale agreement Metropole Holdings Ltd was not a party to it and Kobilo Farm Ltd entered into the agreement which saw the extension of payment period to 365 days. By the end of the completion date 9th July 2019 Kobilo Farm had only paid for one parcel namely Sergoit/Koiwaptaoi 13/9 and the title to the land was surrendered to their advocate and transferred into their name.

It was the defendant's evidence that she had made many attempts to reach the plaintiffs'' Directors to pay the balance and allow them to reduce the land acreage so that they could sell to other purchasers but it was declined by the plaintiff.

That the plaintiffs' Directors promised that they would pay up by end of October 2019 but the same was not honored and on 24th December 2019 she informed the plaintiffs that they would resell the land parcel number Sergoit/Koiwaotaoi 13/4 to another person who had agreed to pay the whole purchase price.

The defendant further stated that the plaintiffs' advocate got in touch with her co-director on completion of the purchase price but the same was declined and they were ready to refund the initial purchase price for the same. The plaintiffs had illegally encroached on the parcel of land with their advocate yet they were aware of the maintenance of the status quo.

Mrs Yano counsel for the defendant framed the issues for determination as to whether the court should grant an order for temporary injunction and whether this court has jurisdiction to punish for contempt.

Counsel cited **HALSBURY'S LAWS OF ENGLAND 3rd Edition , Volume 21, Page 346 paragraph 7631**on temporary injunctions as follows:

> "*In cases of interlocutory injunction in aid of the plaintiff's right all the Court usually has to consider is whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established but in no case does the Court grant an interlocutory injunction as of course*."

Further in at paragraph 765 it stated that

> *"Where the plaintiff is asserting a right, he should show a strong prima facie case, at least, in support of the right which he asserts..."*

In the next paragraph (paragraph 766) on page 366, it is stated:-

> "*where any doubt exists as to the plaintiff's right, or if his right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden f proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff*."

The court was also referred to the case of **Giella v. Cassman Brown Co. Ltd 1973 E.A , 358** where it was held,

> *"First an applicant has to 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 harm which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on a balance of convenience"*

Mrs. Yano submitted that the plaintiffs have failed to show they have a prima facie case, since they were in breach of the terms of the sale agreement by defaulting in completing payment in respect of parcel No. **SERGOIT/KOIWOPTAOI BLOCK 13/4** and that on 15th October 2019 the defendant ga.ve a 21-day notice for termination of agreement

Counsel submitted that the plaintiff is in default and cannot benefit from the equitable remedy of injunction. That the plaintiff has not met the second limb for grant of injunction to demonstrate that it will suffer irreparable harm if the order is not granted. That the plaintiff is in breach of the clause in the agreement and the only remedy as per the agreement is refund the initially paid purchase price less 10% of the purchase price deposit plus accrued interest.

It was counsel's further submission that it is the defendant who stands to suffer due to the plaintiff's breach of the terms of the agreement and relied on the case of **DEVANI V BHADRESA AND ANOR. (CIVIL APPEAL NO 21 OF 1971) [1971] EACA 27; (10 NOVEMBER 1971)** where the court held that

> *"As I understand it the object of an interim injunction is to keep matters or things in status quo, in order that, if at the hearing of the substantive action the plaintiff obtains a judgment in his favour, the defendant or the respondent, will have been prevented, in the meantime, from dealing with the property or the subject matter in such a manner as to make that judgment ineffectual - see HALSBURY'S LAWS OF ENGLAND, 3rd Edition, Volume 21, page 343, paragraph 716."*

Counsel therefore urged the court to find that the only fair decision is to maintain the status quo by allowing the defendant to continue growing crops pending the hearing of the main suit.

On the limb of balance of convenience counsel submitted that the same does not tilt in favor of the plaintiffs since they have failed to show completion of the contract and that the title to the parcel of land is on the defendant's name. Counsel cited the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR** where the court held that:

> *"Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right… Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies".*

On the issue of contempt application counsel, submitted that this court has jurisdiction to punish for contempt of its orders. Section 63(C) of the Civil Procedure Act provides that in order to prevent the ends of justice being defeated, the court may grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold and once a court order is granted the same has to be obeyed but the plaintiffs disobeyed the same.

Mrs. Yano counsel for the plaintiff also relied on the case of **Shimmers Plaza Limited v National Bank of Kenya Ltd [2013] eKLR** where the court held that:

> *"We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not…... The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy."*

In conclusion counsel for the defendant submitted that they were willing to deposit the purchase price less 10% being the deposit and less the accrued interest in an interest earning account in the names of both advocates or in the court's account. Counsel urged the court to dismiss the plaintiff's application with costs.

ANALYSIS AND DETERMINATION

This application was filed during an unprecedented time of COVID 19 pandemic. At that time countries were still grappling with how to deal with the new normal to stem the pandemic.

The courts were also hit hard and had to adapt to the digital space to continue offering services to enable citizens access justice. It is in that spirit that the courts embraced e-filing and virtual hearings. The current case has three applications which were consolidated to be heard together. The first application dated 10th June 2020 by the plaintiff applicant was for a temporary injunction against the defendant from interfering with the suit land. The court gave orders of status quo to be maintained to preserve the substratum of the case but the said order gave rise to two other applications for contempt by both the defendant and the plaintiff. I will therefore deal with all the applications together starting with the plaintiff's application for injunction.

The issues for determination in an application for injunction are well settled and I need not reinvent the wheel. A party must meet the threshold as was enunciated in the **Giella Casman Brown Case**. The court may also look at the circumstances surrounding the case together with the principles in the Giella Casman Brown case as was held in the case of **JAN BOLDEN NIELSEN v HERMAN PHILLIIPUS STEYA ALSO KNOWN AS HERMANNUS PHILLIPUS STEYN & 2 OTHERS (2012) eKLR** where Mabeya J remarked as follows:-

> *'I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In* ***Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J*** *(as he then was) at page 607 delivered himself thus:-*
>
> *'………counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago. In Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law as always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- " A fundamental principle of…that the court should take whichever course appears to carry the lower risk of injustice if it should turnout to have been "wrong"…."*
>
> *Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella Vs Cassman Brown the court has had to consider the following questions before granting injunctive relief.*
>
> i. *Is there a prima facie case….*
>
> ii. *Does the applicant stand to suffer irreparable harm…*
>
> iii. *On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice……*

I agree with the above that the court should always opt for a lower rather than the higher risk that may cause injustice. The court must look at the case in totality and see where the lower risks lies.

It is not disputed that parties entered into three sets of agreements in respect of the suit land **SERGOIT/KOIWOPTAOI BLOCK 13/19 & 13/4** and it is further not disputed that the plaintiff paid part of the purchase price and is yet to complete the payment of the purchase price.

The evidence on record also confirms that the three agreements were entered into to vary the completion period of the sale transaction of the suit land at the request of the plaintiff which was mutually agreed to enable him meet the completion deadline. That the completion date was to be within 90 days that is by 9th July 2018 but later the plaintiff and the defendant agreed on an extension of the completion date by 365 days making the completion date 9th July 2019. The defendant stated which is not denied by the plaintiff that by the end on that period the plaintiff had only completed payment for one plot No **SERGOIT/KOIWOPTAOI BLOCK 13/19** which was duly transferred to the defendant but failed to complete the payment of the second plot in full.

In order for the court to grant an order for injunction, the plaintiff/applicant must establish a prima facie case with a probability of success. The plaintiff and the defendant in their affidavits have accusations and counter accusations on what transpired in the transaction and the extension of time. The order of injunction being an equitable remedy, a party must come with clean hands in order to partake from equity.

The transaction is based on contract which has strict timelines on the modalities of completion of the transaction. The terms were agreed by the parties and varied by consent by the parties for the extension of time within which payment was to be completed.

It is trite law that the court cannot rewrite contracts for parties as was held in the case of **GATOBU M'IBUUTU KARATHO v CHRISTOPHER MURIITHI KUBAI [2014] eKLR** where the court cited the decision of the Court of Appeal in **NATIONAL BANK OF KENYA LTD V PIPEPLASTIC SAMKOLIT (K) LTD AND ANOTHER (2002) EA 503** where it stated:-

> *"This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause."*

The plaintiff admitted that it has not completed the payment as per the agreement in respect of the second parcel of land Plot No 13/4 and is ready and willing to pay the balance and take over the defendant's obligation to clear the loan with the interested party. This shows that there is unfinished business between the plaintiff and the defendant in this transaction which the court cannot tell them how to go about.

On the second limb on whether the plaintiff will suffer irreparable damage, in the case of **Simon Kipngetich Bett vs. Richard C. Kandie (2012) eKLR, Munyao J.** stated what irreparable harm entailed as follows;

> "*To me, the assessment of irreparable harm has to be done on a case by case basis. The court must assess whether the subject matter of the case will be so wasted as to make the final determination, if in favour of the applicant, a nullity. In my view, if the subject matter of the suit is capable of substantially being maintained in no worse a state at the conclusion of the suit as it is at the time of application for injunction, then there is no irreparable harm. Such harm must also be harm that cannot be adequately compensated by an award of damages. In other words it is the sort of harm which will render victory in the suit empty and devoid of any substance. It is however arguable that in land matters, the denial to a proprietor of land, of the enjoyment of his proprietary rights by the unlawful action of another party would result in irreparable harm. This is because it is almost impossible to quantify the loss occasioned to a proprietor by denying him the enjoyment of his bundle of rights. Indeed it may be a loss that is not capable of being adequately compensated by an award of damages. If I am to go by this argument then the applicant is bound to suffer irreparable harm.*"

The plaintiff is desirous of acquiring the suit land but has not been able to complete the payment. The suit land is still registered in the defendant's name but the defendant transferred to the plaintiff plot No 13/9 which he completed payment. In my view going by the argument of Munyao J on the issue of, establishing irreparable harm, the plaintiff has not established any harm that he will suffer as the same can be compensated by an award on damages as it is quantifiable. There is no evidence that he is in occupation of the suit land which is still pending completion of payment.

Further in the case of **WAITHAKA v INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION (2001) KLR page 381,** where Ringera J (as he then was) he stated as follows:-

> "*As regard damages, I must say that in my understanding of the law, it is not inexorable rule that where damages may be an appropriate remedy an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespassers. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy.*"

The court must be careful not to apply the limb of irreparable damage to disadvantage an applicant just because the respondent can pay damages.

In **Nguruman Ltd v Jan Bonde Nielsen and 2 Others [2014] e KLR** the Court of Appeal restated the principles governing the grant of an interlocutory injunction, as earlier enunciated in the *locus classicus* on the question, namely, **Giella v Cassman Brown and Co. Ltd [1973]EA 358,** the Court of Appeal observing, that the role of the judge dealing with such application is merely to consider whether the principles for the grant have been met. The Court of Appeal cautioned that such court ought to be careful not to determine with finality any issues arising. That is why I shall not determine some of the issues arising as they will be dealt with at the full trial.

From the evidence on record and the circumstances surrounding this case it is evident that the plaintiff has not met the first limb of establishing a prima facie case and that damages are quantifiable and the applicant would not suffer irreparable damages not capable of being compensated. An applicant must go a mile further to show what damage he/she is likely to suffer if the orders are not granted.

On the applications for contempt by both the plaintiff and the defendant, it is evident that these were precipitated by the order of the status quo which was granted by the court and that each party wanted to steal a march against each other. The situation was made worse by the COVID 19 pandemic restrictions.

On whether the directors to the parties are in contempt, both parties allege the other side is in contempt. Both parties reported the violation of alleged trespass and destruction of the property to the police. The court issued an order for status quo to be maintained on 11 th June 2020, but its alleged on 18th June 2020 the plaintiffs destroyed eucalyptus trees worth ksh10,000,000/=. The defendant is also accused of destroying property on 23rd June .2020 and denying access to the suit property.

According to the book on **Contempt in Modern New Zealand**, in an application for contempt of court, there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate.

The applicant must adhere to the requirements above and establish that the contemnor was personally served or had knowledge of the

alleged order. The reason why personal service is important is because of the nature of the punishment which involves the curtailment of the freedom of an individual and the fact that it is quasi criminal in nature. The standard of proof in contempt proceedings is also much higher than in civil cases.

The directors of both parties had actual knowledge of the order issued by the court on the maintenance of status quo and the plaintiff in his submissions stated that the order was not injunctive therefore it did not stop them from erecting structures. Does this mean that the order was ambiguous or the parties chose to interpret the order in a way that suits them? The allegation that the defendant denied the plaintiff access to the suit property by changing locks if it is true then it was not in compliance with the maintenance of the status quo.

The parties and the court should have made it clear as to what the status quo obtaining was so as not to be left to the parties to gamble with the interpretation of what the status quo is and not what it should be like.

It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it.

In the case of **GATHARIA K. MUTITIKA & 2 OTHERS -VS- BAHARINI FARM LTD** it was held that:

> "*it is quite clear on the authorities that anyone who, knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt…. The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the course of justice and so has attempted to set the order of the court at naught"*

It should also be noted that knowledge of the order supersedes personal service as was held in **NAIROBI MISC.CIVIL APPLICATION NO. 316 OF 2010 BASIL CRITICOS -VS- ATTONEY GENERAL & 4 others** where Lenaola J (as he then was) stated

> *that the law has changed and so as it stands today, knowledge supersedes personal service and for good reason. ….where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary*"

The court should therefore exercise restraint when dealing with cases of contempt where the standard of proof has not met the threshold. Parties should also be aware that orders of the court are not issued in vain and must be obeyed whether they agree with the terms of the order or not. There are avenues put in place to ventilate parties' displeasure with the terms and conditions of an order. I find that both applications have not met the threshold for proof of contempt and are therefore dismissed with costs in the cause.

Having considered the plaintiff's application together with the rival submissions by counsel I find that the balance of convenience tilts in favour of the defendant who is the registered owner of the suit land and order that the status quo obtaining as at 11th June 2020 be maintained to preserve the substratum of the case pending the hearing and determination of this case. I further order that in the interest of justice and to secure the interest of both parties the defendant to deposit in a joint interest earning account of the advocates on record for the parties the amount paid by the plaintiff in respect of the disputed parcel within the next 30 days.

Parties to comply with order 11 within 30 days

DATED* and *DELIVERED* at *ELDORET* this *23rd* *day* OF *September, 2020

DR. M. A. ODENY

JUDGE