

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC NO. E047 OF 2025

LILIAN ATIENO-----
PLAINTIFF/APPLICANT

VERSUS

JACKSON EKIM
OMAIDO-----DEFENDANT/RESPONDENT

RULING

1. The court is asked to issue a temporary injunction to maintain the status quo by restraining the respondent, his agents, servants, or assignees from wasting, constructing on, developing, alienating, or otherwise interfering or dealing with **L.R. No. 8699/7** or any portion thereof, pending hearing and determination of this suit. The reasons are set out on the face of the application dated **5/9/2025** and in a supporting affidavit sworn by Lillian Atieno on **5/9/2025**.
2. It is deposed that by a sale agreement dated **19/9/2009**, the plaintiff bought **5 acres** to be excised by the defendant from **L.R. No. 8699/7**, at **Kshs. 1,7000,000**, as per the sale agreement marked **LA-(1)**.

3. The applicant deposes that she has paid the entire purchase price as per the acknowledgements attached as **LR-(2)**. It is deposed that Clause **5** of the agreement of sale required the defendant to provide completion documents to effect the transfer.
4. The applicant deposes that the defendant provided her with architectural drawings for a residential house, which she consequently erected on the suit land attached as **LA-(3)**.
5. The applicant deposes that despite being paid more than the purchase price as represented above, she was on **9/1/2025** served with a completion notice demanding a further **Kshs. 910,000/=** without an explanation of how that figure was arrived at, a copy attached as **LA-(4)**.
6. Again, the plaintiff deposes that, in good faith, on **20/3/2025**, she issued a cheque of **Kshs. 200,000/=**, which the respondent rejected and later sent via Mpesa **Kshs. 130,000/=**, which he accepted as per annexure marked **LA-(4)**.
7. Despite the foregoing, the applicant deposes that the respondent has declined to transfer the land, which is a fundamental breach of the sale agreement, and instead has issued a termination notice dated

25/7/2025, attached as **LA-(5)** and seeking to have the land surrendered to him.

- 8.** Further, the applicant deposes that the respondent has now proposed to subdivide the suit land and transfer to her **2.5 acres** only and that she surrenders back the other **2.5 acres**, which is contrary to the sale agreement dated **19/9/2009**.
- 9.** The plaintiff deposes that he has extensively developed the suit land as per the photos attached as **LA-(6)**; otherwise, the conduct of the defendant amounts to unjust enrichment, as he cannot retain the entire purchase price while denying her a portion of the land fully paid to him.
- 10.** The application is opposed through a replying affidavit sworn on **1/11/2025**. The respondent avers that the applicant is out to mislead the court, since the application is full of falsehoods and misrepresentations. He avers that they entered into a sale agreement dated **17/9/2009**, for the purchase of the suit land, valued at **Kshs. 1,700,000/=**. The terms of the sale agreement were that the applicant was to deposit **Kshs. 850,000/=**, upon execution of the agreement, and the balance was to be paid by **31/1/2010**.

- 11.** The respondent avers that the applicant, in breach of Clause **3** of the sale agreement, issued a bankers' cheque on **28/9/2010** for part payment of the deposit of **Kshs. 460,000/=**, leaving a balance of **Kshs. 390,000/=**. In further breach of the terms of the sale agreement, the applicant continued to make partial payment of the consideration amounting to **Kshs. 1,310,000/=**. He has annexed copies of the deposit slips as **JEO-1** and **2**
- 12.** As to the alleged cash payment of **Kshs. 300,000/=**, the respondent avers that there is no evidence in support of the payment and denies holding a meeting at his residence. The respondent also avers that no deed of variation was executed to vary, extend, or waive the completion date. The contract of sale of the suit land was rendered voidable due to the applicant's failure to complete.
- 13.** The applicant avers that the applicant failed to comply with the completion notice issued on **9/1/2025**, which defaulted the sale agreement by **30/1/2025**. Subsequently, upon computation of the total amount paid, the parties agreed to refund the **Kshs. 1,310,000/=**, less **10%**. The applicant avers that it is now 16 years since the execution of the agreement, the applicant has come to court with

unclean hands, there are ongoing legitimate transactions over the said property involving third parties not before the court, and it would be unjust to issue injunctive orders restraining dealings with the entire parcel

14. Again, the respondent avers that there are no permanent structures have been erected on the property by the applicant, who has, from time to time, leased out the said parcel to third parties for her personal gain. It is, therefore, inequitable and unconscionable for the applicant to seek relief, since she caused the delay and non-performance of her contractual obligations

15. The respondent avers that there is no prima facie case established, the applicant shall not suffer any irreparable loss, and the balance of convenience favours the registered proprietor.

16. The applicant filed written submissions dated **10/11/2025** while the respondent relied on submissions dated **14/11/2025**, both of which this court has considered.

17. Order 40 Rule 1 of the Civil Procedure Rules provides that where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any

party to the suit or that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant the suit, the court may order or grant a temporary injunction to restrain such act or may order to prevent such wasting, damaging, alienation, sale, removal or disporting of the property as the court thinks fit, until the disposal of the suit, or until further orders.

18. Order 40 Rule 2 of the Civil Procedure Rules provides that in any suit restraining he defendant from committing a breach of contract or other injury of any kind, a plaintiff may apply for a temporary injunction to restrain the defendant from committing a breach of contract or such injury complained of arising out of the same contract or relating to the same property or right.

19. The cause of action by the plaintiff is captured in the plaint dated **5/9/2025**, in which she seeks, inter alia a declaratory order that she is a beneficial and legal owner of the **5 acres** out of the suit land, an order compelling the defendant to subdivide the land, and transfer the **5 acres** to her, a permanent injunction,

adverse possession, general damages for trespass and breach of contract.

20. Courts do not rewrite contracts, but enforce them. Parties are bound by the terms and conditions of their contract, unless the same is vitiated by illegality, fraud, or undue influence, or is against public policy. See **National Bank of Kenya -vs- Pipe Plastic Samkolit (K) Ltd [2002] 2 EA 503** and **Pius Kimaiyo Langat -vs- Co-operative Bank (K) Ltd [2017] eKLR**.

21. The burden is on the applicant to establish a prima facie case with a probability of success at the hearing, show that she will suffer irreparable loss or damage in the absence of an injunction and lastly that the balance of convenience tilts in favour of granting the orders sought. A *prima facie* case is established where, looking at the material before the court, a right has been violated or breached to call the opposite party for a rebuttal. See **Mrao Ltd -vs- First American Bank of (K) Ltd & Others [2005] KLR 125**.

22. The applicant contends that she has paid a substantial amount to acquire the property measuring **5 acres** from the respondent, which he is yet to subdivide or transfer to her.

- 23.** It is averred that a premature termination notice attached as **LA-(5)** has been issued despite the defendant receiving full payment. She terms the termination as a fundamental breach of the sale agreement dated **19/9/2009. Order 40 Rule 2** of the Civil Procedure Rules envisages the issuance of a temporary injunction to restrain a breach of a contract or other injury of any kind to the property in dispute and to preserve it if it is established that it is in danger of being wasted, damaged, or alienated.
- 24.** An arguable case or question must be raised by the applicant to be tried at the hearing. Irreparable damage or loss is one that may not be quantified in monetary terms. It must be real, apparent, imminent, and mere fear or apprehension is not enough. See **E.A. Industries Ltd -vs- Trufoods Ltd [1972] EA 420.**
- 25.** Balance of convenience as held in **Paul Gitonga Wanjau -vs- Gathuthi Tea Factory Co. Ltd & Others [2016] eKLR,** arises where if the injunction is not granted, and the suit ultimately decided in favour of the plaintiff, the inconvenience to him would be greater than that which would be occasioned to the defendant, if the injunction is granted and the suit

ultimately dismissed. See **Pius K. Kogo -vs- F.K. Tenai [2018] eKLR.**

26. The three steps must be established logically and sequentially. To establish whether or not the steps have been met, the court need not conduct a mini-trial or make definitive findings on both law and facts. See **Nguruman Ltd -vs- Jan Bonde Nielsen & Others [2014] eKLR.**

27. In doing so, the court evaluates the facts or the evidence presented, without going to the merits of the case at the interlocutory stage, to see to it that there is a need to preserve the subject matter pending the hearing and determination of the suit. See **Uhuru Highway Development Ltd -vs- Central Bank of Kenya & Others [1996] eKLR.**

28. The court strives to mitigate the lower risk of injustice in case it turns out to have been wrong. See **Films Rover International -vs- Cannon Films Sales Ltd [1986] 3 ALLER 772.** The defendant herein has not filed a replying affidavit by **22/10/2025**. The notice rescinding the contract of sale of land is what has triggered this application. It is only in special cases where equity might be prepared to relieve a party from a bad bargain. It is not the function of a court of equity to allow a party to escape from a bad bargain.

See **Fina Bank Ltd -vs- Spares & Industries Ltd Civil Appeal No. 51 of 2000** and **Eldo City Limited -vs- Corn Products Kenya Ltd & another [2013] eKLR.**

29. Discharge from the obligation in the sale agreement on the part of the defendant is what the applicant says shall amount to irreparable loss and damage, for she has paid all the consideration. I think the applicant has established a *prima facie* case.

30. In **Mwangi -vs- Kiru [1987] eKLR**, the court cited *Chitty on Contracts 25th Edition Vol. 1 page 1591* on discharge by breach, which in law gives rise to a cause of action. Specific performance is what the applicant is also seeking, which is a discretionary remedy. See **Reliable Electrical Engineers Ltd -vs- Mantrac (K) Ltd [2006] eKLR.** I think the circumstances herein favour a grant of a temporary injunction as prayed. The same is allowed to last for **one (1) year**, from the date **hereof**.

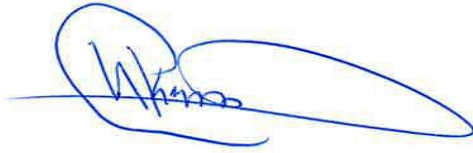
31. Orders accordingly.

Ruling dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 26th day of November 2025.

In the presence of:

Court Assistant – Dennis

Cherono for the Respondent present
Otieno for the Applicant present



**HON. C.K. NZILI
JUDGE, ELC KITALE.**

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