

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM. CASE NO. E175 OF 2024

BETWEEN

ADA OLUMBE & 48 OTHERS.....

.....**PLAINTIFFS**

AND

DIAMOND TRUST BANK KENYA LIMITED.....

1ST DEFENDANT

WESTWOOD VILLAS LIMITED.....2ND

DEFENDANT

SURAYA PROPERTY GROUP LIMITED.....3RD

DEFENDANT

RULING

Introduction and Background

1. By an application dated 5th April 2024, the Plaintiffs seek an interlocutory injunction to restrain the 1st Defendant (DTB) from selling the property identified as Land Reference number 330/1383 Nairobi, *Terrace @ Hatheru Project* (“the suit property”) until this suit is determined. The application is supported by the affidavit of ALICE GATITU and ISAAC MUIINDE MAINGI, sworn on 5th April 2024 and 14th February 2025 respectively and by the 2nd and 3rd Defendants

through the replying affidavit of its director, PETER KIARIE MURAYA sworn on 22nd July 2024. DTB opposes the application through the replying affidavits of its Senior Manager Legal & Head of Debt Recovery Unit sworn on 5th July 2024 and 8th January 2025.

2. When the Plaintiffs filed their application, they also sought temporary injunctive orders pending hearing of the application which orders were granted on 10th April 2024. The Plaintiffs have now filed an application dated 15th February 2025 claiming that DTB and its directors are in contempt of the said orders and they seek that they be punished by way of a fine or committal to civil jail. DTB has responded to this application through the replying affidavit of its Legal Manager, FAITH NDONGA, sworn on 3rd April 2025. The applications have been canvassed by way of written submissions which are on record and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

3. I propose to first deal with the contempt application alleging that DTB sold and transferred the suit property in defiance of the interim injunction order issued by the court on 10th April 2024. They aver that DTB admits to selling the suit property by way of a private treaty as evidenced by a Sale Agreement dated 8th April 2024, a

Deed of Nomination dated 21st June 2024, and a Transfer dated 4th November 2024, which was effected on 8th November 2024. The Plaintiffs argue that this sale was in contempt of the court's injunction, which they contend was subsisting and never lifted or varied.

4. In response, DTB does not deny that the suit property was sold by way of private treaty for Kshs. 1,600,000,000.00/- on 8th April 2024 which was prior to it being served with the Order as they claim the same was served on 12th April 2024. DTB thus states that the interim injunction sought by the Plaintiffs had therefore already been overtaken by events but that despite the sale having been concluded, DTB complied with the initial court order by stopping the formal transfer of the suit property to the purchaser.
5. DTB contends that the interim orders, which were first granted on 10th April 2024, and extended on 23rd April 2024, subsequently lapsed because the Plaintiffs' advocates allegedly failed to apply for their extension during mentions on 23rd July 2024, 25th September 2024, and 15th October 2024. The court had directed parties to negotiate for 30 days on 23rd July 2024 and since the court was not sitting on 25th September 2024, and 15th October 2024, on the latter date, no interim orders were granted, particularly as the

Plaintiffs' counsel failed to appear. That since there were no valid court orders in effect, DTB proceeded to finalize the sale and transfer and the original purchaser nominated *AMBATO RESIDENCY LIMITED* and the transfer document was executed on 4th November 2024, and the transfer was effected on 8th November 2024. *AMBATO RESIDENCY LIMITED* was then registered as the new proprietor of the suit property.

6. In sum, DTB maintains it did not act in disregard of the court's orders, as the final transfer occurred when the interim orders had lapsed and it therefore urges the court to dismiss the application with costs.
7. Having gone through the record and the parties' depositions, I am inclined to agree with DTB's position that they were not in contempt of the interim orders for a number of reasons. First, it is correct that the interim injunction, initially granted on 10th April 10, 2024, and extended on 23rd April 2024, were not extended on 23rd July 2024, when the parties sought time for negotiations. It is also correct that the court was not sitting and the Plaintiffs' counsel was absent during the mention on 15th October 2024, leading to no interim orders being granted or extended on that date.

8. It is not lost to me that an interim injunction granted *ex parte* or pending the determination of an application, is not perpetual. It is a temporary measure which remains in force for the period specified by the Court or until the matter for which it was granted is heard and determined. Where a Court grants an interim order "pending the hearing *inter partes*" and that hearing is adjourned without the order being specifically extended, the order is deemed to lapse on the day the hearing was to take place, unless the Court directs otherwise. It is thus clear that the interim orders lapsed on 23rd July 2024. The Plaintiffs bore the primary duty to ensure the continuation of the said orders by applying for their extension at every material mention date. Their failure to secure an extension on 23rd July 2024 resulted in the automatic collapse of the interim injunction (see **Onyango & another v Ng'ang'a & another [2024] KEHC 12557 (KLR)**).

9. Second, as the interim orders lapsed on 23rd July 2024, DTB proceeded to finalize the transfer of the suit property in November 2024. At that point in time, there was no subsisting Court order prohibiting it from doing so. While the Plaintiffs may feel aggrieved by the conduct of DTB, the conduct itself cannot be said to constitute contempt of court if the order allegedly contemned was

no longer legally enforceable. The threshold for proving contempt is high, and this Court cannot find that DTB's directors willfully and deliberately disobeyed an order that had already expired by operation of the Court's own record.

10. For these reasons, I find that the Plaintiffs have failed to demonstrate to the requisite standard that DTB or its directors were in willful disobedience of the court's order of 10th April 2024. The application dated 15th February 2025 lacks merit and is therefore dismissed.

11. Turning to the Plaintiff's application for an injunction, it is undisputed that DTB finalized the sale of the suit property by way of private treaty, the subsequent transfer of the suit property was fully executed and registered in favor of a third party on 8th November 2024 who is now the registered proprietor of the suit property. An interlocutory injunction is a preservative order intended to maintain the status quo and prevent future injury. The specific orders sought by the Plaintiffs, to restrain the selling, auctioning, or interference with the suit property, are orders that look forward in time. It is a well-established principle of equity that this court cannot issue an injunction to restrain an act that is a *fait accompli* (see **JOHN NZIOKA MATIVO & ANOTHER v INDUSTRIAL**

**COMMERCIAL DEVELOPMENT CORPORATION & ANOTHER
[2006] KEHC 2668 (KLR)].**

12. The suit property has already been sold and transferred to a new proprietor. Granting the injunctive orders sought in the application would be a futile exercise, as the orders would be incapable of enforcement or practical effect against the completed transaction. The application is therefore overtaken by events. The appropriate remedy for the Plaintiffs given the current circumstances, is now to pursue the main suit for compensatory damages or for final orders seeking to set aside or nullify the sale, a determination which can only be made after a full hearing on the merits.
13. Furthermore, granting the injunction as sought would directly and adversely affect the proprietary rights of the registered owner, ***Ambato Residency Limited***, who is a third-party purchaser. The Courts have repeatedly cautioned against issuing interlocutory orders that are prejudicial to third parties, especially where such third parties are bona fide purchasers for value who were not privy to the dispute at the time of purchase and are not parties to the suit (see **Pashito Holdings and Another v Ndung'u and 2 Others KLR [E &L] 1, 295** and **Villa Care Limited & another v Stanbic Limited [2022] KEHC 12173 (KLR)**]

14. For the foregoing reasons, particularly that the prayers sought in the application dated 5th April 2024 have been overtaken by events, and that granting the orders would unjustly interfere with the legally acquired rights of a third-party purchaser, the application must fail.

Conclusion and Disposition

15. In the upshot, the applications dated 5th April 2024 and 15th February 2025 are dismissed with costs to the 1st Defendant.

**DATED SIGNED and DELIVERED virtually at NAIROBI this
18TH DAY of NOVEMBER 2025**

.....
J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

- 1. Mr. Wabende holding brief for Mr. Makau for the Plaintiffs/
Applicants.
- 2. Mr. Kisinga for the 1st Respondents.
- 3. Ms. Kasyoka holding for Mr. Gecaga for the 2nd and 3rd
Defendants.
- 4. Amos - Court Assistant