

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC L CASE NO. E362 OF 2024**

**HYDRO BRIGHTSHINE DEVELOPERS LIMITED .....**

**PLAINTIFF**

**VERSUS**

**WINNIE WANGU MUGWERU (DECEASED) ..... 1<sup>ST</sup>**

**DEFENDANT**

**LOISE WAIRIMU MUGWERU ..... 2<sup>ND</sup>**

**DEFENDANT**

**RUTH WANJIRU MUGWERU ..... 3<sup>RD</sup>**

**DEFENDANT**

**(AS ADMINISTRATORS OF THE ESTATE**

**OF MAAKA MUKUTI MUGWERU)**

**RULING**

1. What is before Court for determination is the Notice of Motion application dated the 30<sup>th</sup> August, 2024 where the Plaintiff seeks the following Orders:

**1) Spent**

**2) Spent**

**3) That pending the referral of the dispute herein to arbitration and its determination thereof in accordance with the Arbitration provisions in Clause U of the Sale Agreement dated 9<sup>th</sup> September 2020, a temporary order of injunction do issue restraining the Respondent, their agents, servants, or any other person acting on their behalf from selling, transferring, or in any other manner dealing with the property known as Land Reference No. 13041/2.**

**4) That this Honourable Court be pleased to grant any such further orders as it may deem fit in order to secure the ends of justice.**

**5) That costs of this application be provided for.**

2. The application is premised on grounds on the face of it and the supporting affidavit of MOHAMED TAHIR. The Plaintiff contends that a dispute has arisen out of an Agreement for Sale dated 9<sup>th</sup> September, 2020 for the sale of property known as LR No. 13401/2 with a purchase price of Kshs. 245,700,000/= which was executed between the Respondent (vendor) and itself. It explains that Clause U of the Agreement dated the 9<sup>th</sup> September, 2020 stipulates that in case of a dispute, the matter should be referred to Arbitration for final determination. It confirms paying Kshs. 100,000,000/= as deposit and Kshs. 74, 530,000/ = as advance payment, to the Respondent, towards settling the purchase price. It insists that the Respondent has failed in its obligations within the said Sale Agreement. Further, that the Respondent has now proceeded to enter into a Sale Agreement with a third party in respect to the suit property, purported to cancel their transaction to avoid specific

performance and demanded that the Applicant be refunded the amounts paid.

3. The Respondent opposed the instant application by filing replying affidavits sworn by LOISE WAIRIMU MUGWERU and RUTH WANJIRU MUGWERU. They insist that the suit land should not have been sold before the Grant in respect to the deceased estate was confirmed. Further, that the impugned sale amounted to intermeddling with the estate of a deceased person. They insist that the matter should not be referred to Arbitration.
4. The parties informed Court of a pending application dated the 10<sup>th</sup> December, 2024 but I note the same is not filed in the Judiciary CTS, hence this Court cannot make a determination of the same.
5. The application dated the 30<sup>th</sup> August, 2024 was canvassed by way of written submissions

### **Analysis and Determination**

**ELC L CASE NO. E 362 OF 2024**

***Ruling***

6. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the only issue for determination is whether an order of interlocutory injunction should issue restraining the Respondents or their agents or any persons acting on their behalf from selling, transferring, or in any other manner dealing with the property known as Land Reference No. 13041/2.
7. The Applicant has sought for interim injunctive orders to restrain the Respondents or their agents, servants, or any other person acting on their behalf from selling, transferring, or in any other manner dealing with the property known as Land Reference No. 13041/2. The Respondents have opposed the application insisting that the Sale Agreement was void since there was no Certificate of Confirmation of Grant for the deceased estate. Further, that the alleged purchase price was paid to an advocate and the Applicant is free to collect its monies. As to whether the Applicant is entitled to the

Orders as sought, I wish to rely on the principles as established in the case of **Giella v Cassman Brown (1973) EA 358** as well as section 7 of the Arbitration Act which provides that:

***'7. Interim measures by court***

***(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.***

***(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.***

8. In the case of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR**, it was held as follows:

***“Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are: - 1. The existence of an arbitration agreement. 2. Whether the subject matter of arbitration is under threat.3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application 4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal’s decision making power as intended by the parties.....It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. Whatever their description however, they are intended in principle to operate as ‘holding’ orders, pending the outcome of the arbitral proceedings.”***

9. Erick Ogola J stated as follows in **Itabuild Imports Limited v A.I.C Kijabe Hospital [2015] eKLR:**

*“Section 7 of the Arbitration Act allows the court to issue interim measures of protection to the suit property pending arbitration. The existence of an Arbitration Clause in a contract, and the fact that in this case the arbitration process is almost underway, are in themselves prima facie evidence that the Applicant could have a case to be protected in much the same way as the principles established under Giella - Vs - Cassman Brown & Company Limited Case. However, that alone is not enough. The court must look into the nature of the subject matter to be protected in relation to the totality of the agreement or contract allowing the arbitration process. The court in exercising jurisdiction under Section 7 must satisfy itself that the subject matter to be protected is one which will dissipate if not protected, and also one which once lost, would not be recovered. That is to say, the Applicant must show a possibility of*

***irreparable loss which cannot be compensated for by way of damages. The court must also consider the inconvenience to be suffered by either of the parties in considering whether or not to grant the interim measures of protection.”***

10. In this instance, I note it is not in dispute that there was a Sale Agreement between the Applicant and Respondents dated the 9<sup>th</sup> September, 2020 in respect to the suit land. Further, that the Applicant paid the aforementioned amount of money towards the purchase price. The Respondents contend that they did not receive the monies but the same was paid to the lawyers. However, they have not denied that the lawyer was acting on their behalf and that there was Clause U in the aforementioned Sale Agreement which provided for an arbitration clause. The Respondents have insisted that the Applicant can collect the monies it paid to the lawyers.

11. However, based on the facts before Court including relying on the legal provisions cited and associating myself with the decisions quoted, I find that the Respondents cannot simply avoid their obligations in the aforementioned Sale Agreement, yet there were monies paid to a lawyer, who was representing them. The Respondents have not denied that they intend to dispose of the subject property to a third party. I opine that it would be pertinent to grant orders of interlocutory injunction pending the determination of the arbitral proceedings, so as not to interfere with the fulcrum of the dispute herein. Since there is Clause U in the Sale Agreement which provided for arbitration, in my view the Applicant has a right to invoke it.
12. In the circumstances, I find the Applicant's Notice of Motion application dated the 30<sup>th</sup> August, 2024 merited and will allow it. I will proceed to make the following orders:

**1) That pending the referral of the dispute herein  
to**

**arbitration and its determination thereof in  
accordance with the Arbitration provisions in  
Clause U of the Sale Agreement dated 9<sup>th</sup>  
September 2020, a temporary order of  
injunction be and is hereby issued restraining  
the Respondents, their agents, servants, or any  
other person acting on their behalf from selling,  
transferring, or in any other manner dealing  
with the property known as Land Reference No.  
13041/2.**

**2) Costs will be in the cause**

**DATED SIGNED AND DELIVERED AT NAIROBI THIS  
15<sup>TH</sup> DAY OF JANUARY, 2026**

**CHRISTINE OCHIENG**

**JUDGE**

**In the presence of:**

Mwangi for Mbuthia for Plaintiff

Mbugua for Mbiyu Kamau for 3<sup>rd</sup> Defendant

Court Assistant: Joan

ORIGINAL