Superior Homes (Kenya) Limited v East Africa Portland Cement Company Limited (Environment & Land Case 6 of 2022) [2024] KEELC 15 (KLR) (17 January 2024) (Ruling)

Neutral citation: [2024] KEELC 15 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 6 OF 2022

A NYUKURI, J

JANUARY 17, 2024

BETWEEN

SUPERIOR HOMES (KENYA) LIMITED ..... DECREE HOLDER

AND

EAST AFRICA PORTLAND CEMENT COMPANY LIMITED .... JUDGMENT DEBTOR

RULING

Introduction

1. Before court is a Notice of Motion dated 20th November 2023 filed by the plaintiff/decree holder and brought under the provisions of Order 40 Rules 1 (a) and (b), 2, 3, 4 and 5 of the *Civil Procedure Rules* and Sections 3 and 3A of the *Civil Procedure Act*. The application seeks the following orders;

    a. Spent

    b. Spent

    c. That pending the full satisfaction and settlement by the judgment debtor/respondent of the decree herein issued on 17th December 2012, a permanent injunction be and is hereby issued restraining the judgment debtor/respondent whether by itself, its employees, servants and or agents or otherwise, howsoever from interfering with, advertising, wasting, damaging, alienating, subdividing, selling, removing, disposing off and/or dealing with any manner whatsoever with all that parcel of land known as Land Reference Number 8784/4 (now subdivided into LR. No. 8784/144, 145 and 163) Athi River, Machakos.

    d. That this Honourable court do issue any such further and appropriate orders in the circumstances of this matter as it deems fit.

    e. That the costs of this application be provided for.

2. The application is anchored on grounds on its face and supporting affidavit sworn by SHIV ARORA, the Chief Executive Officer of the applicant. The applicant's case is that by a decree of this court issued on 17th December 2012 which was based on a consent, the respondent was ordered to transfer to the applicant a portion of land measuring three hundred and thirty seven (337) acres to be excised off from parcel LR Number 8784/4 (now subdivided into LR No. 8784/144, 145 and 163) (hereinafter referred to as the suit property). That pursuant to the decree, the applicant paid Kshs. 100,000,000/- to the respondent's advocates, M/s Letangule & Company as a deposit on the purchase price to be held in stakeholder capacity by the said advocates for the respondent and not to be released to the respondent or any other party until completion of the transfer transaction.

3. He further stated that in further compliance of the decree, the applicant provided a facility letter dated 5th April 2013 from I & M Bank Limited as security and guarantee for the balance of the purchase price in the sum of Kshs. 650,000,000/-, meaning that the applicant fully discharged their obligations under the decree. He deponed that the respondent declined to discharge their obligations under the decree and refused to release completion documents to the applicant, which resulted in the lapse of 145 days for completion under the decree. That although the court extended the completion period by 120 days upon application by the applicant, the respondent appealed that decision and obtained stay of execution pending determination of Appeal Case No. 75 of 2014, but that the said case was dismissed and the Court Appeal extended the completion period by 120 days from 22nd September 2017. That the respondents have been unwilling to release transfer documents to facilitate completion of the transfer.

4. He stated that the respondent had derailed the completion process and that therefore it became necessary for the applicant to seek an order for specific performance. That subsequently parties filed another consent on 14th April 2022, varying the consent of 17th December 2012 and allowing the applicant to purchase 100 acres at Kshs. 4,500,000/- per acre from Land Reference No. 10424/3, the total purchase price being Kshs. 450,000,000/-. That the deposit of Kshs. 100,000,000/- paid to Letangule & Company Advocates was deemed as the deposit and the balance of Kshs. 350,000,000/- was to be paid in 120 days. That the default clause on that consent was that, if completion is not done by the defendant, parties shall revert to the status quo ante before execution of the said consent, and parties will have rights to pursue their rights including original claim and enforcement of the decree.

5. The deponent stated that the defendant defaulted on the consent by their failure to give the applicant vacant possession and therefore parties reverted to the status quo ante hence they are now expected to discharge their obligations under the decree of 17th December 2012. According to the applicant, under the said decree, parties are at liberty to apply for orders sought in this application. He stated that as the suit property was subdivided, the orders sought should be granted. That as the respondent still holds Kshs. 100 Million, it is only fair that the applicant's prayers are granted. He attached the decree of 17th December 2012; facility letter; ruling of 11th March 2014; memorandum of appeal and judgment in Nairobi CACA No. Nai 75 of 2014; correspondence; consent dated 14th April 2022; letters and a notice.

6. The application is opposed. Florence Mitey, the company secretary and legal services manager of the defendant filed a replying affidavit sworn on 1st December 2023. She stated that parties entered into a consent which was adopted as a decree of the court on 17th December 2012. Further that the plaintiff delayed in issuing the defendant with the Bank Guarantee to facilitate completion of the transaction. That the completion period lapsed and it was later extended by 120 days on 11th March 2014.

7. She asserted that although the defendant appealed that decision, the Court of Appeal upheld the decision of the High Court in Nairobi Civil Appeal No. 158 of 2014. He conceded that the timeline

having lapsed, parties entered into a consent dated 14th April 2022 which required the applicant to deposit Kshs. 30 million to the defendant's advocates account, in addition to the earlier Kshs. 100 million paid to Letangule & Company Advocates (previous advocates for the defendants). Further that Kshs. 60 million was to be paid in 30 days and Kshs. 290 million in 120 days, the completion date being 120 days. That parties having entered into a sale agreement, the defendant demolished structures on the parcel of land and granted the plaintiff vacant possession on 7th July 2022.

8. She stated that the applicant commenced constructing a perimeter wall on the property and that vide a letter dated 22nd July 2022, the defendant forwarded completion documents to the plaintiff and sought for further payment of the second deposit.

9. She averred that despite the defendant complying by issuing the plaintiff with vacant possession and completion documents, the plaintiff continued in the default by failing to pay the second deposit. That therefore by letter dated 14th June 2023, the defendant refunded the plaintiff the sum of Kshs. 30 million.

10. She stated that under clause 9 of the consent order issued on 22nd August 2022, if the agreement was terminated the parties were to revert to the status quo that existed before the consent and the agreement, which is the consent adopted on 17th December 2012. She stated that a permanent injunction can only be granted upon hearing the suit and that the decree of 17th December 2012, did not provide for a permanent injunction as a remedy for non completion.

11. It was her assertion that the plaintiff has continued to frustrate the transaction by their failure to pay the agreed instalments to date, and that the plaintiff has rescinded the transaction hence the application should not be allowed. She stated that the applicant had not come to equity with clean hands as they failed to comply with consent orders. She stated that parties having reverted to status quo under the decree of 17th December 2012, the only available remedy to the plaintiff is clause 7 of the decree that requires the plaintiff to demand without interest the deposit of Kshs. 100 million which the plaintiff is yet to demand and that the defendant should not be barred from dealing in its property. She attached the decree dated 17th December 2012; consent order of 22nd August 2022 and letters dated 7th July 2022, 26th July 2022; 4th May 2023; and 14th June 2023.

12. In a rejoinder, the applicant filed a further affidavit sworn on 19th December 2023 by Shiv Arora. He stated that the applicant fully complied with the consent of 14th April 2022. He stated that although the defendant demolished structures on the suit property to give the plaintiff vacant possession, the plaintiff did not take vacant possession because of the presence of hostile and dangerous armed individuals on the property; and that there was a pending court case No. 74 of 2014 and Petition No. 10 of 2018 in regard to the suit property which had not been disclosed to the applicant by the respondent.

13. He stated that as regards the Kshs. 100 million paid as deposit, its immediate availability is a matter of serious concerns as there was a dispute between the firm of Letangule Advocates and the respondents as the said advocates claimed to hold onto the same in lieu of their legal fees owed by the respondent and that the said sum was not transferred to the current advocates for the respondent and that therefore there is no guarantee that the amount will be refunded. He stated that if there is a refund of the same, it will be without interest and that it is therefore just that the transaction between the parties as per the decree of 17th December 2012 be concluded. That the applicant filed a notice to show cause on 20th November 2023, which is pending and that therefore the orders sought be granted.

14. The application was canvassed by way of written submissions and on record are written submissions filed by the applicant on 20th December 2023, and the respondent on 5th January 2024.

Submissions by the applicant

15. Counsel for the applicant submitted that the applicant fully complied with the consent of 14th April 2022 and that since the respondent defaulted by failing to grant the applicant vacant possession, the parties reverted to the status quo ante before executing the said consent, and that therefore parties are bound to discharge their obligations under the decree dated 17th December 2012. Counsel maintained that as the respondents are the ones who failed to comply with the consent decree, the applicant is entitled to the orders sought.

16. As regards the deposit of Kshs. 100 million, counsel submitted that its immediate availability is a matter of serious concern as there is a dispute between the respondent and their former advocates; Letangule Advocates. Counsel argued that if the amount were to be refunded, it will be without interest which will be unjust.

Submissions by the respondent

17. Counsel for the respondent submitted that this suit having already been heard and determined and the decree having not provided for a permanent injunction, then such injunction cannot be granted. Reliance was placed on the case of Kenya Power & Lighting Company Limited v. Sheriff Morana Habib [2018] eKLR for the proposition that a permanent injunction determines the rights of the parties and is thus a decree of the court.

18. It was further submitted for the respondent that the instant application is an attempt to have the court re-write the terms of the consent dated 14th December 2012, when it was the plaintiff who frustrated the transaction by failing to pay the agreed instalments for the purchase price. To buttress their argument, counsel referred the court to the case of Murtaza Hassan & Another v. Ahmed Slad Kulminye [2020] eKLR for the proposition that a consent binds all parties thereto and cannot be set aside unless it is demonstrated that the same was obtained by fraud, collusion, misapprehension or ignorance of material facts.

19. Relying on the case of Abu Chiaba Mohammed v. Mohammed Bwana Bakari & 2 Others [2005] eKLR, counsel argued that no one should be allowed to benefit from his or her own wrong doing. Counsel submitted that it is the plaintiff who failed to pay the purchase price as agreed and has therefore rescinded the transaction. Counsel contended that although the plaintiff seeks equitable orders, they have not approached court with clean hands.

Analysis and determination

20. I have carefully considered the instant application, the response thereto and the parties' rival submissions. In my view the only issue that arise for determination is whether the applicant deserves the orders sought of permanent injunction.

21. A permanent injunction is an order perpetually restraining the defendant from committing certain acts for purposes of protecting the plaintiffs rights under the law. This injunction is a final injunction that fully determines the rights of parties and the same is granted upon hearing a suit on merit. The Black's Law Dictionary, 11th Edition defines a permanent injunction as follows;

> An injunction granted after a final hearing on the merits. Despite its name, a permanent injunction does not necessarily last forever. Also termed perpetual injunction, final injunction.

22. In the case of Kenya Power & Lighting Company Ltd v. Sheriff Molana Habib [2018] eKLR the court described a permanent injunction as follows;

> A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of or against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

23. In the instant matter, it is not disputed that the parties herein entered into a consent which was adopted as a decree of this court on 17th December 2012. It is also clear that parties herein did not complete the transactions spelt out in that consent even after obtaining extension of time for compliance. That consent required the transfer from the defendant of 337 acres of land from parcel of land known as LR. No. 8784/4 to the plaintiff at a consideration of Kshs. 750,000,000/-. The sum of Kshs. 100,000,000/- was paid to the defendants advocate then, being the firm of Letangule & Company Advocates on condition that the same should not be released to the defendant or any other party until completion of the transactions in the consent. The completion period was 145 days and the plaintiff was to pay the balance of Kshs. 650,000,000/- upon transfer of the suit property to them.

24. As the consent of the 17th December 2012 was not complied with, parties herein subsequently entered into another consent adopted on 14th April 2022, altering the earlier consent and providing that the plaintiff was now to purchase 100 acres at Kshs. 450,000,000/-. However this second consent was not complied with. Clause 9 thereof provided that in default by the defendant including failure to provide the plaintiff with vacant possession, the parties shall revert to status quo ante before execution of the consent. This therefore meant that parties herein reverted to their rights spelt out under the consent decree of 17th December 2012.

25. As earlier stated, the terms of the consent of 17th December 2012 were not complied with by the parties. The said consent contained clauses that would be applied in the event of default. These are clauses 7 and 8 thereof.

26. Clauses 7 and 8 of the said consent decree of 17th April 2012, provided default clauses as follows;

> 7. That in default of completion for whatever reason, the deposit of Kenya shillings one hundred million (Kshs. 100,000,000/-) shall be refunded to the plaintiff within seven (7) days of written demand without interest.
>
> 8. That in default by the plaintiff in completing the transaction for purchase of the above mentioned parcel of land for want of the balance or for whatever reason the plaintiff will have no other claim against the defendant in respect of the parcel of land.

27. It is clear that clause 7 of the decree of 17th December 2012 provided that if the defendant fails to comply with the said consent, the plaintiff was entitled to a refund of the deposit of Kshs. 100 million without interest. The refund is to be done in 7 days upon demand. The facts herein disclose that the defendant defaulted the above consent by failing to grant the plaintiff vacant possession and transfer of the said land. Although the plaintiff argues that having paid the sum of Kshs. 100 million in 2012, it would be unfair for them to be refunded that amount without interest, I do not agree with the plaintiff's argument that if the refund of Kshs. 100,000,000/- is allowed, that would be unfair to them. This is because the plaintiff agreed to that term of the consent and the same was adopted as a decree of the court, which up to date remains in force as the consent has not been stayed, appealed against, reviewed

or set aside. A party cannot escape from what they think to be a bad bargain unless they demonstrate that there are special circumstance and that it is equitable to do so; which is not the case herein.

28. In the case of Hussamudin Gulamhussein Pothiwalla Administrator, Trustee and Executor of the Estate of Gulamhussein Ebraihim Pothiwalla v. Kidogo Basi Housing Cooperative Society Limited & 31 Others Civil Appeal No. 330 of 2003, the Court of Appeal held as follows;

> A court of law cannot rewrite a contract between the parties. It is clear beyond peradventure that save for those special cases where equity may be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape a bad bargain.

29. Clause 7 of the decree of 17th December 2012 having given a default clause, the plaintiff cannot escape its import on the basis that it is unfair for that provision to be applied or on the basis that the firm of Letangule has a dispute with the defendant over legal fees and that it will be difficult to refund the deposit of Kshs. 100 million. In my view, the firm of Letangule having been an agent of the defendant and acting on behalf of the defendant received the sum of Kshs. 100,000,000/- on behalf of the defendant from the plaintiff, and therefore it is obvious that it is the defendant who received the same amount. Whether or not there is a disagreement over the amount in regard to payment of legal fees between the firm of Letangule and the defendant; that in my opinion, is immaterial and not a matter for determination before this court. Clause 7 of the decree provides that in default of completion, the deposit of Kshs. 100,000,000/- shall be refunded to the plaintiff in 7 days of written demand, without interest. I take the view that the demand and refund referred to in the above clause is to be made to, and by the defendant respectively; whether or not the defendant is represented by the firm of Letangule & Company Advocates.

30. In the instant matter, the plaintiff has come to court under Order 40 Rules (1) (a) and (b), (2), (3), (4) and (5) of the Civil Procedure Rules 2010, seeking a permanent injunction pending full satisfaction of the decree. Order 40 Rules (1) (a) and (b), (2), (3), (4) and (5) of the Civil Procedure Rules provides as follows;

> [Order 40. rule 1] Cases in which temporary injunction may be granted. 1. Where in any suit it is proved by affidavit or otherwise—
>
> a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or y g wrongfully sold in execution of a decree; or
>
> b. 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 in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
>
> [Order 40, rule 2.] Injunction to restrain breach of contract or other injury. 2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or

injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

2. The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

[Order 40, rule 3.] Consequence of breach.

3. (1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

2. No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

3. An application under this rule shall be made by notice of motion in the same suit.

[Order 40, rule 4.] Notice of application.

4. (1) Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application ex parte.

2. An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.

3. In any case where the court grants an ex parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.

4. All applications under this order shall be heard expeditiously and in any event within sixty days from the date of filing unless the court for good reason extends the time.

[Order 40, rule 5] Ruling of the court.

5. In all applications for injunction, the court shall, after inter- partes hearing deliver its ruling either at once or within thirty days of the conclusion of the hearing with notice to the parties or their advocates; Provided where the ruling is not delivered within thirty days, the judge shall record the reason therefor and immediately fix a date for ruling.

31. It is my view that Order 40 of the Civil Procedure Rules provides for injunctive relief to preserve the substratum of the suit for a period pending determination of the suit on merit. Therefore those provisions are applicable where the court is yet to determine the suit and or the rights of the parties. In

the instant matter, there is already a consent decree which determined the parties' rights with finality and therefore it is my finding that as there is nothing pending merit determination in this matter, the provisions of Order 40 of the Civil Procedure Rules are inapplicable in the instant matter.

32. A permanent injunction is granted upon hearing a suit on merit. This suit has already been determined with finality vide a final decree of 17th December 2012 and therefore a permanent injunction cannot issue at this stage. Having considered the decree there is no provision for permanent injunction therein. I take the view that once a decree is issued by court, unless it is set aside or reviewed, what remains in that matter is execution of the decree. The applicant cannot come to court asking for other orders that have nothing to do with execution of the decree, in a matter that has been determined with finality. In the application herein, there is no prayer geared towards execution of the decree, and hence granting the same will not satisfy the decree. Therefore the interim/permanent relief sought is merely an abuse of the court process.

33. The plaintiff's complaint and basis for the prayer sought is non compliance with the decree of 17th December 2012. That decree is all encompassing and provides for what the parties ought to do to complete the agreed transaction and what should happen in the event of non compliance and therefore I am not convinced that the plaintiff deserves the orders sought in view of the default clause in the decree of the 17th December 2012.

34. The upshot is that I find no merit in the application dated 20th November 2023 and the same is hereby dismissed with costs to the defendant/respondent.

35. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 17TH DAY OF JANUARY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

In the presence of:

Ms. Mayega holding brief for Mr. Nyachoti for decree holder/applicant

Mr. Mumia for defendant/respondent

Josephine - Court Assistant