



Hensel & another v Seehafer & another (Environment & Land Case E005 of 2023) [2024] KEELC 1086 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1086 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E005 OF 2023**

AE DENA, J

FEBRUARY 29, 2024

BETWEEN

STEFAN KARL DIETER HENSEL 1ST PLAINTIFF

MANUELA HENSEL 2ND PLAINTIFF

AND

DIETMAR JURGEN SEEHAFFER 1ST DEFENDANT

REGISTRAR OF TITLES KWALE 2ND DEFENDANT

RULING

Background

1. The Plaintiffs filed this suit against the 1st Defendant claiming purchasers interest in parcel Kwale/ Galu Kinondo/996 (suit property) registered in the name of the 1st Defendant. The Plaintiffs claim a beneficial interest in the suit property by virtue of a sale and purchase of the same from the 1st Defendant. That following an agreement for sale at the consideration of Kshs. 13,500,000/=, the Plaintiff made the initial deposit of Kshs. 2,700,000/=. Before signing of the transfer, the Plaintiffs discovered that the 1st Defendant had without notice to them, advertised the suit property for sale on a platform known as Blue Homes dot com. This came as a surprise as the Plaintiffs had a legitimate expectation that pursuant to the sale agreement they had acquired both beneficial and legal interest in the property as they awaited for completion. That the same has denied them a right to own property, quiet enjoyment and physical possession. They seek specific performance of the agreement among other orders.

Application

2. Together with the suit, the Plaintiffs filed an application dated 19/07/23 seeking the following verbatim orders:-



1.
 2. That pending the hearing and determination of this application inter-parties this Honourable Court be pleased to issue an order of temporary injunction, restraining the Respondents, whether by themselves, their agents, employees, servants or any person acting at their behest, from trespassing, building, selling, disposing off, alienating, or in any other manner having any dealings of any nature with the parcel of land situate in Kwale County, known as L.R. No. Kwale/galu Kinondo/996 (hereinafter referred to as the suit property) which Order be implemented and supervised by the OCS Diani Police Station.
 3. THAT pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of temporary injunction, restraining the Respondents, whether by themselves, their agents, employees, servants or any person acting at their behest, from trespassing, building, selling, disposing off, alienating, or in any other manner having any dealings of any nature with the parcel of land situated in Kwale County, known as L.R. No. Kwale /galukinondo/996 which Order be implemented and supervised by the OCS Dianipolice Station.
 4. That the 1st Respondent through his servants, agents or any other persons whatsoever be restrained from advertising the suit property, residing in and/or operating from, working in, or in any other manner having any dealings of any nature on the suit property pending the hearing and final determination of this application and suit at large.
 5. That pending the hearing and determination of this suit this Honourable Court be pleased to issue an Order directing the 1st Defendant/Respondent to perform specific performance and cease advertising the land known as L.R No. Kwale/Galu Kinondo/996, Approximate Area 0.158 Ha, to the Plaintiffs/Applicants herein.
 6. That this Honourable Court be pleased to issue a declaration that the Plaintiffs have beneficial interests over the suit property; L.R No. Kwale/galu Kinondo/996
 7. That this Honourable Court be pleased to issue a declaration that Title Number L.R No. Kwale/galu Kinondo/996 be registered in favor of the Plaintiffs and the 1st Respondent's/Defendant's title deed be and is hereby revoked upon the Plaintiffs remitting the balance of the Purchase price.
 8. That this Honourable Court be pleased to issue an Order directing the 2nd Respondent/Defendant to cancel and/or revoke the Title Deed for all that portion of land in L.R No. Kwale/galu Kinondo/996 currently in the name of the 1st Respondent/Defendant and direct the 2nd Respondent/Defendant to issue a new title deed in the Plaintiffs' name.
 9. That this Application be heard inter-parties on such date and at such time as this Honourable Court may direct.
 10. That this Honourable Court be pleased to grant orders or any such relief it deems fit and necessary to grant to meet the end of justice; and
 11. That the costs of this Application be borne by the Respondents.
3. The application was filed under certificate of urgency and the court issued orders of status quo for purposes of protecting the register by prohibiting the Land Registrar Kwale from effecting any transfer on the suit property.



4. The 1st Defendant responded through a replying affidavit sworn on 2/8/23. It is averred that the court has no jurisdiction to hear the matter and grant the orders in the application as there was no valid contract between the parties for want of compliance with section 3(3) of the Law of Contract Act as to signing by all parties to the agreement and attestation thereto. It is also deponed that the exparte orders issued by the court had denied the 1st Defendant the right to be heard and had been given for more than 14 days and which was beyond the statutory period. That the same were also granted following material non-disclosure that the Plaintiffs were in breach of clause 4(2) of the agreement for sale, for failure to pay the balance of the purchase price. That the agreement provided for transfer only upon payment of the same.
5. It is further deponed that should the court be inclined to allow this application and find there is a valid agreement the 1st Defendant was willing to hand over the completion documents subject to compliance with clause 4(2) of the agreement in addition to the applicant forfeiting 10% of the purchase price and topping up the difference of 10% of the purchase price to the balance due.
6. The 1st Defendant also filed a Notice of Preliminary objection dated 14/8/23 reiterating the courts lack of jurisdiction to determine the suit and application.
7. The Plaintiff filed grounds of opposition to the 1st Defendant's preliminary objection stating that the jurisdiction of this court is conferred by article 162(b) of the Constitution of Kenya and section 13(2) (d) of the environment and Court Act. That the issue of validity of contract is a matter of fact and not law. That the 1st Defendant is estopped from denying the existence of a valid contact due to his conduct or representations which led to the applicants to reasonably believe that a contract was in place. That the partial performance constitutes acceptance even without formal signature.
8. The 2nd Defendant entered appearance through the Attorney General and filed grounds of opposition in response to the preliminary objection. The grounds echoed those of the Plaintiffs as to the jurisdiction of the ELC conferred by the Constitution and the ELC Act. Further that the substratum of the suit is land. That the application offends the predominant purpose test.
9. The application and the preliminary objection were canvassed by way of written submissions. The Plaintiffs submissions were filed on 27/9/23 and the Defendants on 15/9/23. The court has been moved to expunge the Plaintiffs submissions for being filed outside the timelines set by the Court. I will however in the interest of justice admit the same. The court has considered the submissions filed.

Determination

10. The issues that commend for determination are whether the preliminary objection has been properly raised and if the application is merited.
11. In Civil Suit No. 85 of 1992, Oraro vs. Mbaja [2005] 1 KLR 141, Ojwang J, as he then was, cited with approval the position in Mukisa Biscuit -vs- West End Distributors (1969) EA 696, stated as follows on the operation of a preliminary objection: -

.... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.



12. The main ground for the objection is that the sale agreement herein does not meet the criteria as to what constitutes a valid contract. This is set out in Section 3 of the [Law of Contract Act](#) Chapter 23 of the Laws of Kenya. Section 3(3) states;-
3. Certain contracts to be in writing
- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless —
- (a) the contract upon which the suit is founded—
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
13. For the court to determine if the sale agreement has fulfilled the above requirements, it would be necessary to review the sale agreement entered into between the Plaintiffs and the 1st Defendant. Clearly this is delving into evidence. It is my finding that the preliminary objection is not a pure point of law.
14. It has been deponed by the 1st Defendant that any claim by the Plaintiff should be in a civil court. It is established that the jurisdiction of a court emanates from [the Constitution](#), statute or both. The jurisdiction of this court is provided for in Article 162 (2) (b) of [the Constitution](#) of Kenya 2010 as read with Section 13 of the [Environment and Land Court Act](#). The contest herein involves a sale of land and the process of acquisition of title to the suit property which is within the jurisdiction of the Environment and Land Court. Let me add that the fact that a contract is not valid cannot be a ground for ousting the jurisdiction of the court. The court has perused the authorities cited by Counsel for the 1st Defendant and notes that the suits therein proceeded to full hearing. The matter of the validity of the contracts was not canvassed as preliminary issue. It is this courts finding that it is clothed with the requisite jurisdiction to determine this dispute.
15. I will now look into the application and the orders sought. The application is brought under the provisions of Section 1A, 1B and 3A of the [Civil Procedure Act](#). The orders have already been listed elsewhere in this ruling. I will not spend time on orders No. 5, 6,7, 8 since the orders sought have a finality in them and which will be tantamount to determining the dispute at a preliminary stage.
16. The other substantive prayer is for orders of injunction and it behooves the court to interrogate the same against the principles for grant of orders of injunction. These principles were set out in the case of *Giella vs Cassman Brown* (1973) EA 358 that an Applicant must show a prima facie case with a probability of success, the Applicant must demonstrate that they will suffer irreparable injury that cannot be adequately compensated by an award of damages if the court does not intervene by granting the injunction and where in doubt, the court will weigh and grant the orders based on the balance of convenience. All the conditions must be met separately.
17. Have the Plaintiffs established a prima facie case with a probability of success. As to prima facie case the court in Civil Appeal No. 77 of 2012, *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR had this to say; -

“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a



right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

18. Guided by the above dictum, a prima facie case is not necessarily a case which must succeed at the judgement stage. The Applicants presented a copy of an agreement for sale whose existence is not disputed by the parties except as to its validity in law including the alleged breaches as espoused by the 1st Defendant. I have also perused the Replying Affidavit of the 1st Defendant and nowhere does it deny there were arrangement to sell the suit property between the two parties. It has also not been denied that a deposit of the purchase price was made. It is therefore my finding that the Plaintiffs have established a prima facie case.

19. But having made the finding above, the next step would be to address whether the test on irreparable injury has been met. In the case of Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR the court had this to say; -

“irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury’ (emphasis is mine).

20. The Plaintiff has stated that he has already made a deposit of Kshs. 2,700,000/= and which has not been categorically disputed. The alleged full purchase price is also known. Any loss is therefore quantifiable based on these figures. It is my finding that the Plaintiffs have not demonstrated that they will suffer irreparable loss if the orders sought are not issued. This test having failed I do not see the need to discuss the balance of convenience.

21. The court has restrained itself from going into the terms and conditions of the agreement to avoid the danger of delving into the merits of the case. It is noteworthy that the 1st Defendant has restrained himself from rescinding the agreement amidst the allegations of breach leveled against the Plaintiffs. At paragraph 13 of the 1st Defendants Replying Affidavit herein, the 1st Defendant issues a conditional olive branch. That subject to interalia a finding of the existence of a valid agreement, jurisdiction and compliance to the terms of clause 4(2) the 1st Defendant is willing to hand over the completion documents. Indeed the court has not yet made a finding on the legality of the sale agreement but has made a determination on jurisdiction. For me the 1st Defendants good will is commendable but the court cannot impose terms of the negotiations upon the parties. However, the court is aware it is enjoined by article 159 (2) (c) of *the constitution* to promote alternative methods of dispute resolution. I'm inclined to take this path.

22. The upshot of the foregoing is that;-

1. The preliminary objection is hereby dismissed.
2. The court also declines to issue the orders sought in the application dated 19/07/23.
3. For the avoidance of doubt the status quo orders issued on 25/7/23 are hereby discharged.



4. There shall be no orders as to cost.
5. The parties shall pursue negotiations with a view to reaching an amicable settlement within 30 days of the date of this ruling.
6. Failure to reach any settlement in terms of 5) above parties shall comply with order 11 of the Civil Procedure Rules, within 14 days of expiry of the 30 days above.

It is so ordered

DELIVERED AND DATED AT KWALE THIS 29TH DAY OF FEBRUARY 2024

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A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Wambua holding brief for Obongo for the Plaintiff/Applicant

Mr. Mungai for Defendants/Respondents

Mr. Daniel Disii – Court Assistant

