



REPUBLIC OF KENYA



Ngahu & 2 others v Adan & another (Environment & Land Case E021 of 2024) [2024] KEELC 1011 (KLR) (26 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1011 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E021 OF 2024**

JA MOGENI, J

FEBRUARY 26, 2024

BETWEEN

STANLEY KAMAU NGAHU 1ST APPLICANT

ALEX NJENGA NGAHU 2ND APPLICANT

SAMUEL NDUNG’U NGAHU 3RD APPLICANT

AND

MUSDAFA SUGULE ADAN 1ST RESPONDENT

IBRAHIM ADDE GROUP 2ND RESPONDENT

RULING

1. The matter coming up for determination is the Plaintiff/Applicant’s Notice of Motion dated 24/01/2024, brought under Section 1A, 1B, and 3A of the Civil Procedure Act and Order 40 Rules 1 & 2 and Order 51 Rule 1 of the Civil Procedure Rules 2010, and all enabling provisions of the law. The applicant has sought for these orders; -
 - i. Spent
 - ii. That a Temporary Injunction do issue stopping the 1st and 2nd Respondent by themselves, agents, servant, employees, representatives or any person acting on their authority from continuing to wrongly enter and trespass, excavating, constructing permanent structures or otherwise disposing of ALL that property LR No. 36/1/85 pending hearing and determination of this Application.
 - iii. That a Temporary Injunction do issue stopping the 1st and 2nd Respondent by themselves, agents, servant, employees, representatives or any person acting on their authority from continuing to wrongly enter and trespass, excavating, constructing permanent structures



or otherwise disposing of ALL that property LR No. 36/1/85 pending hearing and determination of the main suit.

- iv. That the court does make a declaration that the Agreement for Sale dated 17th April, 2020 is rescinded and the 1st Respondent forfeits the deposit paid.
 - v. That the court does make a declaration that the transfer of the suit property to the 1st Respondent was fraudulently done and is null and void.
 - vi. That the court does make a declaration that the subsequent transfer of the suit property to the 2nd Respondent is null and void ab initio by dint of fraud on the part of the 1st Respondent who did not have good title.
 - vii. That the court does make an order directing the 2nd Respondent to give the Applicants vacant possession of the suit property.
 - viii. That a Permanent injunction does issue restraining the Respondents from trespassing on the suit property.
 - ix. That the Applicants be granted damages for trespass by the Respondents.
 - x. That the applicants be granted costs of this Application.
 - xi. That this Honorable Court do issue any such other and/or further orders as justice of the case herein may demand.
2. The application is supported by the grounds stated on the face of the application and on the supporting Affidavit of Stanley Kamau Ngahu who has the written authority of the 2nd and 3rd applicant to swear, plead and/or sign documents on their behalf in relation to the proceedings.
 3. In his Supporting Affidavit, Stanley Kamau Ngahu averred that on 24/01/2024, that the 1st, 2nd and 3rd defendant are the beneficial owners of the suit property in equal shares through the certification of confirmation of granted issued on 13/11/2013 following succession cause No. 1274 of 2012 copy of the annexed marked as SKN-2.
 4. That they entered into a sale agreement dated 17/04/2020 with the 1st respondent where they agreed to sale the suit property for Ksh. 39,000,000 with a deposit of Ksh. 16,500,000 and the balance of Ksh. 22,500,000 was to be paid upon completion. The Completion date was 90 days from the date of execution.
 5. That they were represented by the same firm of Advocates Messrs Abdullahi & Associates. That on they deposited completion documents with the firm of advocates on the promise that the 1st respondent would keep his part of his bargain and pay the amount agreed upon.
 6. That on 17/07/2020 the 1st respondent wired to the bank of the three plaintiffs Ksh. 6,300,000 each totaling Ksh. 18,900,000 and that at the time of completion date the 1st respondent had paid Ksh 19,200,000 only. And for more than three years there has been no payment of the balance of the purchase price.
 7. That the shared advocate could not help the plaintiffs trace the 1st respondent and so they instructed a new advocated M/s Mugane and Company Advocates who issued the 1st respondent with a 21 Days Completion Notice informing him of the breach. The 1st respondent has failed to pay the balance of the purchase price and on 18/01/2024 after the lapse of the completion notice the plaintiffs rescinded



- the Agreement for Sale and informed the 1st respondent. He attached a copy of the rescission notice marked as SKN-9.
8. They aver that even without paying the balance of the purchase price they established through a search conducted that the 1st respondent fraudulently caused the suit property to be registered in his name and has since transferred it to other persons with the 2nd respondent being the current registered proprietor. He attached a copy of the certificate of postal search marked as SKN-10.
 9. They are apprehensive that the 1st respondent may dispose of the suit property if the orders sought are not issued.
 10. He also deposed that unless the orders sought are granted, the applicant will suffer irreparable loss and the suit will be rendered nugatory as the 1st respondent will have already disposed off the subject matter of the suit properties herein.
 11. The Notice of Motion is opposed. Musdafa Sugule Adan, 1st defendant swore on 31/01/2024 a Replying Affidavit. He averred that plaintiff/applicants are guilty of material non-disclosure thus the application is a gross abuse of the court process.
 12. He avers that he duly paid the plaintiffs the entire purchase price of Ksh. 39,000,000. That in April 2020 one Robleh Abdulkader Almi who had entered into a sale agreement with the Plaintiffs requested the 1st defendant to take over the process from him. The 1st defendant annexed a copy of the Sale Agreement marked as MSA-1.
 13. He averred that in the said sale agreement, Almi agreed with the plaintiffs to buy the suit property for Ksh. 36,000,000 and that he (Almi) paid Ksh. 15,000,000 and availed to the 1st defendant a Deed of Variation of Agreement dated 18.09.2015 a copy of which was attached and marked MSA-2.
 14. On his part he avers that he agreed with Mr Almi to take over the sale and purchase of the suit property and therefore he entered into a new agreement with the plaintiffs. He further contends that he did due diligence through a postal search on 16.04.2020 and 27.05.2020 which process confirmed ownership of the suit property. Following the due diligence, he states that he entered into a Sale Agreement dated 17.04.2020. He annexed a copy of the searches and the sale agreement marked as MSA-3(a), MSA – 3 (b) and MSA – 4.
 15. In his averment he states that at Clause 4.1 (a) of the said sale agreement, the plaintiffs acknowledge receiving Kshs 15,000,000 that had been paid to them by Mr Almi and at Clause 4.1 (b) he acknowledged receiving Ksh 15,000,000 from the 1st defendant upon signing the Agreement.
 16. Further that the amounts reflected as a balance shown at Clause 4.1 (c) was Kshs 22,500,000 which he completed by June 2020. He annexed a bundle of relevant document marked as MSA-5. The 1st defendant further states that the plaintiff acknowledged having received Ksh 5,040,000 from the 1st defendant by 16.07.2020 and he annexed a bundle of documents marked as MSA-6.
 17. He averred that thereafter the balance Ksh. 18,960,000 divided into three was paid into the three accounts by 17.07.2020 by way of swift transfer being Ksh. 6,300,000 to each plaintiff. He annexed the swift transfer of MSA – 7 C.
 18. That the swift transfer was in addition to Mpesa transfers of Ksh. 20,000 to each plaintiff on 16.07.2020 and he attached Mpesa statement MSA-8.
 19. That the plaintiff willfully transferred the suit property and an official search dated 10.07.2020 showed that the 1st defendant as the registered owner. That the upon the transfer to the 1st defendant she



- transferred the suit property to the 2nd defendant. He attached the transfer between the 1st defendant and the 2nd defendant marked as MSA-11.
20. It is the 1st defendant's contention that the plaintiff did not challenge the transfer between the 1st defendant and the 2nd defendant and that the plaintiff failed to include Mr Almi to this suit deliberately.
 21. That the Completion Notice and the Notice of Rescission dated 21/12/2003 and 18/01/2024 respectively were served upon the 1st defendant 3 years after the sale between the plaintiff and the 1st defendant and the eventual transfer to the 2nd defendant which is a red herring.
 22. That the 2nd defendant is in occupation of the suit property and the plaintiffs appended their signatures on each page of the sale agreement and so they are in court with unclean hands.
 23. The 2nd defendant/respondent never entered appearance nor filed any response to the application.
 24. The application was canvassed by way of written submissions. I have taken the liberty to consider the pleadings, affidavits and the submissions filed.
 25. The applicant herein has sought for various injunctive Orders. The application is premised under Sections 1A,1B, 3A of the [Civil Procedure Act](#) and Order 40 Rule 1 and 2, Order 51 Rule 1.
 26. Order 40 Rule 1&2 states that; -
 - i. 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 wrongfully sold in execution of a decree; or
 - b. That the Defendant threatens or intends to remove or dispose of his property in reasonable probability that the Plaintiff will or may be obstructed or delayed in 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, alienating, sale removal or disposition of the property as the Court thinks fit until further Orders.
 27. It follows therefore that the Orders sought by the applicant falls under the purview of Order 40 Rules 1&2. The Court has a duty to further the overriding objective as stipulated in Section 1A &1B of the [Civil Procedure Act](#) and also the court is further empowered by Section 3A of the [Civil Procedure Act](#) to make orders that would ensure that the end of justice has been met.
 28. Taking into account, the above provisions of law and the pleadings in general, the Court finds that the applicant has sought for equitable reliefs which are granted at the discretion of the Court. However, such discretion must be exercised judicially. The court in the case of CMC Motors Group Ltd and another v Evans Kageche Boro Civil Appeal No.295 of 2001, with regard to the equitable reliefs stated as follows: -

“In granting the injunctory reliefs, the Superior Court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the learned Judge if it is satisfied that the learned Judge did not exercise his discretion judiciously”.
 29. In arriving at a determination on whether to grant or not to grant the orders sought, the court will be guided by the laid down principles for grant of such orders. These principles were laid out in the case of Giella v Cassman Brown and Co. Ltd 1973 EA 358 and later emphasized in various



judicial pronouncements. In the case of *Kibutiri v Kenya Shell*, Nairobi, High Court, Civil Case No. 3398/1980 [1981] LR 390 the Court held that:-

“The conditions for granting of a temporary injunction in East Africa are well known and these are; First an applicant must show prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”

30. The above principles were reaffirmed by the court in the case of *Micah Cheserem v Immediate Media Services & 4 others* [2000] eKLR in this manner:

“Firstly, the applicant must establish a prima facie case with a probability of success. Secondly, the applicant must show that he or she stands to suffer irreparable loss that cannot be adequately compensated by way of damages. Thirdly, where the court is in doubt, then the balance of convenience should tilt in favour of the applicant.”

31. As concerns the first principle, the Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya and 2 others* [2003] eKLR sought to define a prima facie case in the following manner:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

32. The Court further opined that:

“...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

33. The applicants herein needed to establish the above stated principles.

Firstly, the applicants needed to establish that he has a prima facie case with a probability of success. In the case of *Mrao Ltd v First American Bank of Kenya and 2 Others* [2003] KLR 125, the Court described prima facie case as:-

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

34. From the above description, it is clear that a prima facie case means more than one having an arguable case. It is important that the evidence must show an infringement of a right or the probability of success of the applicant’s case at the trial.

35. The applicant’s argument here is that the 1st defendant did not pay the outstanding balance for the purchase of the suit property and that he has proceeded and transferred the suit property to the 2nd respondent.



36. On his part, the 1st defendant claims to have entered into a sale agreement with the plaintiffs through a variation of deed and alleges that one Almi paid the plaintiffs Ksh. 15,000,000. From the information presented in court the 1st defendant has not produced the payment of the said Ksh. 15,000,000 from one Almi. The plaintiffs deny receiving the said amount.
37. They however aver that they were paid Ksh. 16,500,000 and he balance of Ksh. 22,500,000 to be paid before the lapse of 90 days set as the date of execution of the sale agreement. The sale agreement is dated 17/04/2020 and it therefore follows that the completion dated should have been 17/07/2020
38. The 1st defendant contends that the plaintiffs were fully paid their purchase price and therefore on his part he does not owe them any money. He in fact transferred the suit property to the 2nd respondent. He alleges to have paid all the money owed to the plaintiffs by June 2020.
39. From the evidence presented it is not in dispute that the 1st defendant has already passed on the suit property to a third party despite the allegations of the plaintiffs that the balance of the purchase price had not been paid.
40. In essence the plaintiffs may be obstructed or unable to execute any decree that may be passed against the 1st and 2nd defendant in relation to these properties in case the plaintiffs succeed in the main suit. Since the purpose of an injunction in most cases is to keep things in Status Quo, pending the trial, the court finds that in the instant case, the applicant has demonstrated that it has a prima facie case with probability of success and it is deserving of the injunctive orders sought.
41. The 1st defendant averred that the suit property which the plaintiffs allege had been transferred to the 1st defendant because he had not honored the set Completion Date deadline has already been passed to the 2nd defendant according to the evidence of the 1st defendant. As was held in the case of Jane Kemunto Mayaka v Municipal Council of Nakuru & Others High Court Civil case No.124 of 2005, that;-

“Injunctions are issued to prevent the occurrence of an event that has not occurred or that is threatened to occur that would likely injure an applicant and are not issued where such an event has taken place”.
42. If the suit properties would be sold and transferred to third parties, there is likelihood that the applicants would be prejudiced in the event that the suit is decided in their favour therefore this suit would be rendered nugatory.
43. Having found that the applicants have a prima facie case with probability of success and that they have shown that their rights might be infringed in case the suit property is transferred to subsequent parties and the matter is later resolved in its favour after the trial, the Court finds no reason to delve on the other two principles for grant of injunctions as the orders are sequential. Consequently, the Court finds the applicant is deserving of prayer No.3 of the Notice of Motion Application dated 24/01/2024.
44. The other prayers No. 4 to 9 are issues that will have to await determination at the full trial. The Court therefore declines to grant those prayers.
45. Having now carefully considered the instant Notice of Motion and written submissions, the relevant provisions of law and the cited authorities, the Court finds that the applicants are only deserving of prayer No.3 of the said application.
46. In the end the Court finds that prayers No. 4 to 9 are not merited, and the same are disallowed and thus dismissed. The Court however allows prayer No.3 plus costs of the application.

It is so ordered.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY FEBRUARY 2024.

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MOGENI J

JUDGE

In the virtual presence of:

Mr. Gaitho for Plaintiff/Respondent

Mr. Chebon for Mr. Abdullahi for the 1st Respondent

Mr. Saad for the 2nd Defendant

Ms. C. Sagina: Court Assistant

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MOGENI J

JUDGE

