



REPUBLIC OF KENYA



**Kihoro v Maingi (Environment & Land Case E011 of 2023)
[2024] KEELC 3676 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3676 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E011 OF 2023**

JO OLOLA, J

MAY 9, 2024

BETWEEN

HON. WANYIRI KIHORO PLAINTIFF

AND

JOSEPH WAWERU MAINGI DEFENDANT

RULING

1. By the Notice of Motion dated 15th February 2023, Hon. Wanyiri Kihoro (the Plaintiff) prays for an order of temporary injunction to issue restraining the Defendant from selling, transferring, subdividing or charging the parcel of land known as L.R No. Aguthi/Gatitu/1477 and 2383 or any subdivisions arising therefrom pending the hearing and determination of the suit.
2. The Application which is supported by an Affidavit sworn by the Plaintiff Advocate is premised on the grounds:
 - (i) That on 19th March 2014, the Defendant was able to obtain possession and ownership of the residential property known as L.R No. Aguthi/Gatitu/1477 under various pretences, more specifically that he would in turn transfer to the Plaintiff an agricultural property known as L.R No. Aguthi/Gatitu/2383;
 - (ii) That the arrangement was that the Defendant would exchange and transfer his property – Aguthi/Gatitu/2383 with the Plaintiff but the Plaintiff has not bothered to do so for the last 9 years and has become unavailable;
 - (iii) That the Plaintiff having given the Defendant enough time to comply now wants to terminate the exchange arrangement and to recover his property and does not want to be caught in the prescription and limitation laws;



- (iv) That the 9 years impasse in completing the exchange is of the Defendant's own making; he has not committed anything to the arrangements and the Plaintiff should be freed by terminating the unworkable arrangement.
3. Joseph Waweru Maingi (the Defendant) is opposed to the Application. In his Replying Affidavit sworn on 24th March 2023, the Defendant asserts that the Agreement between himself and the Plaintiff was to the effect that he was to sell to the Plaintiff his parcel of land known as Aguthi/Gatitu/512 at a consideration of Kshs.5,000,000/- which was to be paid as follows:
- (i) Kshs.320,000/- paid to the Plaintiff prior to the agreement;
 - (ii) The Plaintiff was to transfer his L.R No. Aguthi/Gatitu/1477 valued at Kshs.2,000,000/- and
 - (iii) The balance of Kshs.2,680,000/- was to be paid on or before 30th June, 2014.
4. The Defendant avers that the Plaintiff transferred the said Aguthi/Gatitu/1477 and that hence he has so far paid the total sum of Kshs.2,320,000/- leaving an outstanding balance of Kshs.2,680,000/-. The Defendant further avers that the agreement that the Plaintiff is trying to enforce lapsed after 6 years and the same is not capable of being enforced any longer.
5. I have carefully perused and considered the Plaintiff's Application as well as the response thereto by the Defendant. I have similarly perused and considered the submissions placed before me by the rival Parties.
6. By his Application before the Court, the Plaintiff has urged the Court to issue a temporary order of injunction restraining the Defendant from selling, transferring, sub-dividing or charging the parcels of land known as L.R Nos Aguthi/Gatitu/1477 and 2383 pending the hearing and determination of this suit.
7. In support of his Application, the Plaintiff has deposed that in early 2014, he transferred his residential plot known as L.R No. Aguthi/Gatitu/1477 to the Defendant on the basis that the Defendant would also transfer to the Plaintiff, the Defendant's parcel of land known as L.R No. Aguthi/Gatitu/2383 which was an agricultural property situated near the Plaintiff's farm. It is the Plaintiff's case that despite his preparing, executing and handing over the transfer documents to the Defendant, he soon came to the realisation that the Defendant had no intention of similarly executing transfer documents for his agricultural property to the Plaintiff and hence his suit herein seeking to bring the exchange transaction to an end.
8. On his part, the Defendant while admitting entering into the sale agreement with the Plaintiff denies any wrong doing. It is instead the Defendant's case that it is indeed the Plaintiff who is in breach of the Sale Agreement and that hence, the Plaintiff does not deserve the orders sought herein.
9. As was stated in the celebrated case of *Giella -vs- Cassman Brown & Another* (1973) EA 358:
- “The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”



10. Again as was explained by the Court of Appeal in *Mrao -vs- First American Bank of Kenya Limited & 2 Others* (2003) KLR 125:

“... 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.”

11. In the matter before the Court, the Plaintiff makes reference to having transferred his parcel of land referred to as Aguthi/Gatitu/1477 to the Defendant which transfer he asserts was on the basis that the Defendant would also transfer to the Plaintiff a parcel of land the Plaintiff refers to at paragraph 5 of the Supporting Affidavit as L.R No. Aguthi/Gatitu/2383. The Plaintiff did not refer to any Agreement pursuant to which that arrangement was referred to.
12. From the Defendant’s documents however, it is apparent that the said arrangement was arrived at pursuant to a Sale Agreement between the parties dated 25th November, 2013. That Agreement attached generally as an annexure in the Replying Affidavit reads as follows in the relevant portion.

“Sale Of Land L.r No. Aguthi/gatitu/512

I, Waweru Maingi of P.O. BoxNairobi and Wanyiri Kihoro of P.O. Box
Nariobi agree as follows:

1. That I will sell my above land to Wanyiri Kihoro at a price of Shillings Five Million (Kshs.5,000,000/- only;
 2. That as part of this agreement Wanyiri Kihoro will transfer to me his land L.R No. Aguthi/Gatitu/1477 which is valued at Shs. Two Million (Kshs.2,000,000/-) only;
 3. That Wanyiri Kihoro has already paid me Kshs. Three Hundred and Twenty Thousand (Kshs.320,000/-) only in the past towards the purchase price;
 4. That the balance of the purchase price is Shillings Two Million Six Hundred and Eighty Thousand (Kshs.2,680,000/-) only and will be paid on or before 30th June, 2014 by Wanyiri Kihoro;
 5. That as part of this agreement Wanyiri Kihoro will transfer to me immediately L.R No. Aguthi/Gatitu/1477 mentioned in Paragraph 2 above and I will also transfer to him L.R No. Aguthi/Gatitu/512;
 6. That Waweru Maingi will take over L.R No. Aguthi/Gatitu/1477 immediately and Wanyiri Kihoro will take him for an inspection tour for the take over on 25th November, 2013;
 7. That Wanyiri Kihoro will only go to occupation of the above land after he completes the payment of shilling Two Million Six Hundred and Eighty Thousand (Shs.2,680,000/-) only which he will do by 30th June 2014.”
13. As it were, the Plaintiff does not deny that the above agreement was the basis of the arrangement that they had with the Defendant. Indeed the Plaintiff concedes this fact at Paragraph 2(b) of his



submissions dated 18th August, 2023 and filed in Court on 25th August, 2023 wherein he asserts as follows:

“2(b) The defendant has now produced a draft agreement dated 25th November, 2013 which he has filed in Court. Under Paragraph 5 of the draft, it reads:-

5. That as part of this Agreement Wanyiri Kihoro will transfer to me immediately L.R No. Aguthi/Gatitu/1477 mentioned in paragraph 2 above and I will also transfer to him L.R No. Aguthi/Gatitu/512.”

14. From my perusal of the Sale Agreement dated 25th November, 2013 it was apparent that the Plaintiff was to transfer his parcel of land L.R No. Aguthi/Gatitu/1477 in exchange for the Defendant’s parcel of land known as Aguthi/Gatitu/512 and not Aguthi/Gatitu/2383 referred to in the Plaintiff’s Supporting Affidavit. It was also apparent that the Defendant’s said parcel of land was being sold at KShs.5,000,000/- to the Plaintiff and that apart from exchanging his parcel of land, the Plaintiff was required to pay a further sum of KShs.2,680,000/- to the Defendant on or before 30th June, 2014 before he could be granted possession of the Defendant’s residential property.

15. From the material placed before the Court, there is nowhere where the Plaintiff makes any assertion that he had concluded payment of the purchase price to warrant the Defendant to transfer his parcel of land. While clauses 5 and 6 of the Agreement imposed an obligation upon the Plaintiff to “immediately” transfer his parcel to the Defendant, there was no similar obligation placed on the Defendant from a casual reading of those clauses. This could only have been done out of abundance of caution as at the time of execution thereof the Plaintiff was yet to pay more than half of the purchase price.

16. In the circumstances herein, I was neither persuaded that the Plaintiff had shown a *prima facie* case with a probability of success at the trial nor that he stood to suffer any injury irreparable or otherwise that could not be compensated by an award of damages. As the Court of Appeal did state in *Charter House Investments Limited -vs- Simon K. Sang & 3 Others* (2010) eKLR:

“An injunction is an equitable remedy, given when the subject matter of the case before the Court requires protection and maintenance of the status quo. The award of a temporary injunction by the Courts of equity has never been regarded as matter of right even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the Court balances the convenience of the parties and possible injuries to them and to third parties.”

17. In the premises herein, the Motion dated 15th February, 2023 is dismissed with costs to the Defendant.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 9TH DAY OF MAY, 2024.

In the presence of:

No appearance for the Plaintiff

Mr. Muchiri Wa Gathoni for the Defendant

Court assistant - Kendi

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J. O. OLOLA
JUDGE

