Abshir Issack Ibrahim t/a Bukuur Integrated Academy & another v Sakwa & 5 others (Environment & Land Case E089 of 2024) [2024] KEELC 5828 (KLR) (29 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5828 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E089 OF 2024

JO MBOYA, J

JULY 29, 2024

BETWEEN

ABSHIR ISSACK IBRAHIM T/A BUKUUR INTEGRATED ACADEMY .... 1ST PLAINTIFF

ANQRA SERVICES LIMITED .... 2ND PLAINTIFF

AND

CHARLES TEMBA HOSEA SAKWA .... 1ST DEFENDANT

FRANCIS AMULIOTO SAKWA .... 2ND DEFENDANT

RUTH AMIMO MUHAKA .... 3RD DEFENDANT

ANNE KABEKA SAKWA (ALL BEING SUED AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE HOSEA SAKWA SILUNYA) .... 4TH DEFENDANT

TAQWA TRANSPORTERS LIMITED .... 5TH DEFENDANT

CHIEF LAND REGISTRAR .... 6TH DEFENDANT

RULING

Introduction And Background:

1. The Plaintiffs/Applicants herein have approached the court vide the Notice of Motion Application dated the 4th March 2024; brought pursuant to the provisions of Order 40 Rule 1, 2, 3, 9 and 10 of the *Civil Procedure Rules, 2010* as well as Section 3A of the *Civil Procedure Act* and wherein the Applicants have sought for the following reliefs;

    i. This Application be certified urgent in the first instance and the same be heard Ex-parte.

ii. Pending hearing and determination of this Application the Honourable court be pleased to issue an order of *status quo* in terms of learning activities of the school, Bukuur Intergrated Academy to remain in the suit premises known as Land Reference Number 36//878, 5th Street, Section One, Eastleigh, Nairobi, (Hereinafter referred to as 'the Suit Property).

iii. Pending hearing and determination of this Application and suit, the Court do issue restraining orders against the 1s, 2nd , 3rd,4th and 5th Defendant whether by themselves, their employees, servants or agents from selling, disposing of the suit property, evicting, harassing, wasting, alienating, meddling in, transferring, dealing with and/or in any other manner howsoever and whatsoever interfering with the Plaintiffs' quiet occupation of the suit property known as Land Reference Number 36/1/878,5th Street,section One,eastleigh, Nairobi;

iv. An order for specific performance by the Defendants herein compelling them to release the completion documents to the Plaintiffs, to facilitate completion of the sale and payment of the balance of the purchase price by the Plaintiffs.

v. Pending the hearing and determination of the suit, this court do issue an order of reference of this suit to Arbitration for hearing and determination.

vi. In the alternative, the Defendants be ordered to deposit the original title documents of the suit property in Court pending hearing and determination of this suit.

vii. Costs of this application be provided for.

2. The instant application is premised on a plethora of grounds which have been highlighted in the body thereof. Furthermore, the application beforehand is supported by the affidavit of Abshir Isaac Ibrahim sworn on even date as well as the further affidavit sworn on the 25th July 2024, respectively.

3. Upon being served with the subject application, the 1st to 4th Defendants/Respondents filed a Replying affidavit sworn on the 19th of March 2024; and wherein same have contended that the Plaintiff's suit is premature and misconceived insofar as the sale agreement which underpins the suit does not accord with and/or adhere to the provisions of Section 3[3] of the *Law of Contract Act* as well as Section 38 of the *Land Act*, 2012.

4. On the other hand, the 5th Respondent filed a Replying affidavit sworn by one Adan Adan Ibrahim on the 18th March 2024 and in respect of which same has highlighted various issues inter-alia that the suit property has since been sold to and transferred in favour of the 5th Defendant/Respondent.

5. Consequently and in this regard, the 5th Defendant/Respondent has posited that by virtue of being the registered and lawful proprietor of the suit property, same is legally entitled to exclusive possession, occupation and use thereof.

6. Suffice it to point out that though the application beforehand was filed under certificate of urgency and same was thereafter duly certified urgent and directions given towards the hearing and disposal thereof, the Plaintiff/Applicant herein filed yet another application during the pendency of the current application. For good measure, the Plaintiff filed the application dated the 22nd May 2024 and which application was heard and disposed of vide ruling rendered on the 18th July 2024.

7. Following the delivery of the ruling on the 18th July 2024, the parties herein took further directions pertaining to and concerning the filing and exchange of written submissions over and in respect of the current application.

8. Pursuant to the foregoing directions, the Plaintiff/Applicant proceeded to and filed written submissions dated the 24th July 2024. However, the 1st to 4th Defendants/Respondents filed their written submissions dated the 15th May 2024, whilst on the other hand, the 5th Defendant/ Respondent filed written submissions on the 15th May 2024.

9. For coherence, the written submissions [details in terms of the preceding paragraph] form part of the record of the court.

Parties' Submissions:

a. Applicants'submissions:

10. The Applicants herein filed written submissions dated the 24th July 2024 and in respect of which same [Applicants] have reiterated the grounds contained in the body of the application as well as the contents/averments at the foot of the supporting affidavit. Furthermore, the Applicants have thereafter ventured forward and highlighted three [3] salient issues for consideration by the court.

11. Firstly, learned counsel for the Applicants has submitted that the Plaintiffs/Applicants herein entered into and executed a sale agreement dated the 28th October 2022 and pertaining to and concerning the sale of the suit property. Furthermore, learned counsel for the Applicants has contended that the sale agreement under reference was entered into after the Plaintiffs herein held a meeting with the 1st to 4th Defendants/Respondents, who all agreed to have the suit property sold.

12. On the other hand, learned counsel for the Plaintiffs/Applicants has submitted that subsequent to the entry into and execution of the sale agreement, the Applicants proceeded to and paid out the stakeholder sum which was agreed to be 10% of the purchase price. Pertinently, learned counsel has posited that the sum of Kes.6, 000, 000/= Only, was duly paid out in accordance with the terms of the said agreement.

13. Arising from the foregoing, learned counsel for the Applicants has submitted that the fact that the sale agreement, was not signed by two [2] of the administrators does not therefore negate and/or vitiate the sale agreement, either in the manner contended or otherwise.

14. At any rate, learned counsel for the Applicants has submitted that the provisions of Section 3[3] of the *Law of Contract Act*, do not vitiate all contracts, which do not fully comply with the requirement[s] alluded to and highlighted thereunder. For good measure, learned counsel for the Applicants has implored the court to take into account the special circumstances attendant to the entry into and execution of the sale agreement under reference.

15. Secondly, learned counsel for the Applicants has submitted that to the extent that the Applicants herein paid out the stakeholders sum of 10% and which monies have been retained by two [2] of the administrators of the estate, it is evident that the Applicants herein have acquired equitable rights and/ or interests to and in respect of the suit property. In this regard, learned counsel for the Applicants has submitted that the rights acquired by the Applicants suffice to warrant a finding that there exists implied and/or constructive trust in favour of the Applicants.

16. To amplify the submissions that there exists implied and/or constructive trust in favour of the Applicants, learned counsel for the Applicants has cited and relied on the decision in the case of *Mwangi Macharia & 87 others v Davidson Kagiri Mwangi* [2014]eKLR, wherein the Court of Appeal elaborated upon the ingredients/ circumstances to be taken into account prior to and before returning a finding pertaining to constructive trust.

17. Other than the foregoing, learned counsel for the Applicants has submitted that trust is an equitable remedy and thus the court ought to invoke and rely on same with a view to ensuring that a party does not accrue and/ or attract an unjust enrichment out of a transaction.

18. Thirdly, learned counsel has submitted that the circumstances obtaining at the foot of the instant matter warrants the grant and/or issuance of an order for status quo, with a view to preserving the current status of the suit property pending the hearing and determination of the suit.

19. In support of the contention that the orders of *status quo*, ought to be granted, learned counsel for the Applicants has cited and relied on inter-alia the holding in the case of *Fatuma Abdi Gilo v Kuro Lengesen & another* [2021]eKLR, *Republic v National Environment tribunal Ex-parte Palm Homes Ltd & another* [2013]eKLR, *TSS Spinning & Wiving Co Ltd v NIC Bank Ltd & another* [2020]eKLR, respectively.

20. In a nutshell, learned counsel for the Applicants has implored the court to find and hold that the Applicants herein, have placed before the court cogent and plausible reasons to warrant the grant of the reliefs sought at the foot of the current application.

b. 1st to the 4th defendants' submissions:

21. The 1st to 4th Defendants/Respondents filed written submissions dated the 15th May 2024 and in respect of which same have raised, highlighted and canvassed three [3] salient issues for due consideration and determination by the court.

22. First and foremost, learned counsel for the named Respondents has submitted that the 1st Plaintiff herein lacks the requisite locus standi to originate and/or maintain the instant suit insofar as same [1st Plaintiff] is neither the owner or a director of Bukuur Intergrated Academy, either in the manner contended or at all. In this regard, learned counsel for the named Respondents has invited the court to reference a copy of the business registration certificate [CR13] as well as [CR12] relating to Bukuur Holding Ltd, the latter which is a limited liability company.

23. Premised on the basis that the 1st Plaintiff/Applicant is neither the owner of the school nor a director of the company which is said to own the school, it is contended that the said 1st Plaintiff is therefore divested of the requisite capacity to originate and/or maintain the instant suit.

24. Secondly, learned counsel for the named Respondents has submitted that the sale agreement which is alluded to was only signed by two [2] out of the four persons [administrators], who are indicated to be the vendors of the suit property. To the extent that the sale agreement was not signed by the rest of the vendors, it has been contended that the sale agreement does not accord with the provisions of Section 3[3] of the *Law of Contract Act*.

25. Owing to the failure of the sale agreement to comply with and/or accord to the provisions of Section 3[3] of the *Law of Contract Act*, learned counsel for the said Respondents has submitted that the impugned sale agreement is therefore illegal and unlawful for all intent and purposes.

26. Additionally, learned counsel for the named Respondents has submitted that in the absence of a valid and lawful sale agreement, the Plaintiffs/Applicants herein cannot stake a claim to and in respect of the suit property or otherwise.

27. Instructively, learned counsel for the named Respondent[s] has cited and relied on various decisions inter-alia the case of *David Kipketer Birgen v Elgeyo Boarder Investement Ltd & another* [2023] KEELC 17209, *Daudi Ledama Morintat v Mary Christine Kiarie & 2 others* [2017]eKLR and *Beatrice Okoth v*

Francis Puis Omweri Nyaberi & another Civil Appeal No 248 of 2018 [UR], to anchor the contention that where the sale agreement does not comply with the law, then no suit can be sustained.

28. Thirdly, learned counsel for the named Respondents has contended that the Plaintiffs/Applicants here are not entitled to the suit property since same has since been transferred to and registered in favour of the 5th Defendant/Respondent. Consequently and in this regard, learned counsel has posited that upon the transfer and registration of the suit property in the name of 5th Defendant/Respondent, same [5th Defendant/Respondent] became the lawful owner and/or proprietor of the suit property.

29. Furthermore, learned counsel for the 1st to 4th Respondents has also submitted that vide the sale agreement dated the 1st February 2024 same [1st to 4th Respondents] were obligated to hand over vacant possession of the suit property to the 5th defendant/Respondent and in default same [1st to 4th Defendant/Respondent] were obliged to pay damages in the sum of Kes.500, 000/= only for every month during the duration of default.

30. Nevertheless, learned counsel for the 1st to 4th Respondents has submitted that it would be unreasonable and unjust for the Plaintiffs to continue occupying and remaining on the suit property even though same [suit property] now belongs to the 5th Defendant.

31. Arising from the foregoing, learned counsel for the 1st to 4th Defendants/Respondents has therefore contended that the Applicants herein have neither established nor demonstrated the requisite basis to warrant the grant of the orders sought at the foot of the application.

32. Consequently and in the premises, learned counsel has invited the court to find and hold that the application beforehand is devoid of merits and thus ought to be dismissed.

c. 5th defendant's submissions:

33. The 5th Defendant/Respondent filed written submissions dated the 15th May 2024 and in respect of which same [5th Defendant/Respondent] has raised, highlighted and canvassed two [2] salient issues for consideration and determination by the court.

34. Firstly, learned counsel for the 5th Respondent has submitted that the Applicants herein have neither demonstrated and/or proved the requisite conditions to warrant the grant/issuance of the orders of temporary injunction, either in the manner sought or at all.

35. In any event, learned counsel for the 5th Respondent has submitted that the sale agreement upon which the Applicant's case is premised and/or anchored does not accord with the statutory requirements of Section 3[3] of the *Law of Contract Act*.

36. In this regard, it has been posited that in the absence of a valid and lawful sale agreement, in the manner envisaged under the Law, the Plaintiff's suit is legally untenable and thus does not espouse any *prima facie* case or at all.

37. Additionally, learned counsel for the 5th Defendant/Respondent has also submitted that the Applicants herein have neither demonstrated nor established that same are likely to suffer and/or accrue any irreparable loss, if the orders sought are not granted.

38. To the extent that the Applicants herein have neither established nor demonstrated the existence of a *prima facie* case or the likelihood of irreparable loss accruing, learned counsel for the 5th Respondent has contended that the orders sought, namely orders of temporary injunction cannot issue.

39. Secondly, learned counsel for the 5th respondent has submitted that the suit property has since been sold and transferred to the 5th Respondent. In any event, it has been posited that the 5th Defendant/

Respondent currently holds a certificate of title to and in respect of the suit property and thus same is entitled to exclusive and absolute possession, occupation and use thereunder.

40. On the other hand, learned counsel for the 5th Respondent has also invited the court to take cognizance of the provisions of Section 24 and 25 of the *Land Registration Act*, 2012, as read together with Article 40 of the *Constitution* 2010, which underpins the extent and scope of the rights accruing to the registered proprietor of a property, namely the suit property.

41. Lastly, learned counsel for the 5th Defendant/Respondent has submitted that the Applicants herein have not laid a basis to warrant the grant and/or issuance of an order of specific performance or at all. In any event, learned counsel for the 5th Respondent has contended that an order of specific performance cannot issue where the sale agreement and/or contract alluded to is deficient and illegal.

42. At any rate, it has been contended that no basis has been demonstrated by the Applicants herein to warrant the grant of an Equitable order of specific performance or at all.

43. In support of the submissions that the Applicants herein are not entitled to the orders of specific performance, learned counsel for the 5th Respondent has cited and highlighted inter-alia the holding in the case of *Reliable Electrical Engineering Ltd v Mantrac Kenya Ltd* [2006]eKLR and *Nabro Properties Ltd v Sky Structures Ltd & 2 others* [2002]eKLR.

44. Premised on the foregoing, learned counsel for the 5th Respondent has thus contended that the application before the court is not only premature and misconceived but same [application] is legally untenable.

45. In short, learned counsel for the 5th Respondent has implored the court to find and hold that the application is devoid of merits and thus same [application] ought to be dismissed with costs.

Issues For Determination:

46. Having reviewed the application and the various responses thereto; and upon taking into consideration, the written submissions filed by and on behalf of the respective parties, the following issues do arise [emerge] and are thus germane for determination;

    i. Whether the Applicants herein have demonstrated the existence of a *prima facie* case with a probability of success.

    ii. Whether the Applicants herein have established the likelihood of irreparable loss, arising and/or accruing, unless the orders sought are granted.

    iii. Whether the Applicants herein are entitled to an order for specific performance either in the manner adverted to or otherwise.

Analysis And Determination:

Issue Number 1 Whether the Applicants herein have demonstrated the existence of a *prima facie* case with a probability of success.

47. The Plaintiffs/Applicants herein have approached the court seeking for a plethora of reliefs, inter-alia an order of temporary injunction to restrain the Defendants/Respondents from interfering with the Plaintiff/s possession, occupation and use of the suit property. Furthermore, the injunction under reference is also intended to prohibit the Defendants/Respondents from alienating, dealing with and/or transferring the suit property.

48. To the extent that the Plaintiffs herein are seeking for an order of temporary injunction, it is imperative to point out and underscore that same [Plaintiffs] are therefore obligated to demonstrate to the court the existence of a *prima facie* case with probability of success.

49. Suffice it to point out that it is the existence of a *prima facie* case with a probability of success which constitutes a precursor towards the consideration of whether or not an order of temporary injunction shall issue or otherwise.

50. To the extent that a *prima facie* case is a critical and integral ingredient towards the issuance [grant] of an order of temporary injunction, it is therefore paramount to discern the meaning, import and tenor of a *prima facie* case.

51. To start with, the definition of a *prima facie* case was highlighted and amplified by the Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya* [2003]eKLR, where the court defined a *prima facie* case in the following manner;

> 4. 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.

52. Similarly, the import and tenor of what constitutes a *prima facie* case was re-visited by the Court of Appeal in the case of *Nguruman Ltd v Jan Bonde Nielsen* [2014]eKLR, where the court stated and held thus;

> "*prima facie*" is a Latin phrase for "at first sight", whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like "a serious question to be tried", "a question which is not vexatious or frivolous", "an arguable case" have been adopted to describe the burden imposed on the applicant to demonstrate the existence of *prima facie* case. The leading English House of Lords case of the *American Cyanamid Co. Ethicon Ltd* [1975] AC 396 is a case in point. The meaning of "*prima facie* case", in our view, should not be too much stretched to land in the loss of real purpose. The standard of *prima facie* case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in *Ramanlal Trambaklal Hatt v Republic* [1957] E.A. 332.

53. Having discerned the meaning and tenor of what constitutes a *prima facie* case, it is now apposite to revert back to the instant matter and to ascertain whether the facts and evidence availed by the Plaintiff/ Applicants meet and/or satisfy the requisite threshold.

54. To start with, there is no gainsaying that the Plaintiffs/Applicants suit is premised and/or anchored on a sale agreement dated on the 28th October 2022; and which is stated to have been entered into between the administrators of the Estate of Hosea Sakwa Silunya [now deceased], on one hand and the 2nd Plaintiff herein. Nevertheless, even though the said sale agreement highlights the names of the various administrators of the Estate of the deceased as the vendors, it is worthy to underscore that the sale agreement has only been signed by two [2] persons namely Ann Kabeka Sakwa and Francis Amulioto Sakwa.

55. On the contrary, the sale agreement has not been signed by Ruth Amimo Muhaka and Charlse Temba Hosea Sakwa, who are also stated to be the administrators of the deceased.

56. Quite clearly, if the suit property was being sold to and in favour of the 2nd Plaintiff/Applicant by the administrators of the Estate of the deceased, then it was incumbent upon all the administrators to sign and/or execute the sale agreement so as to give same [sale agreement] the requisite validity and legality.

57. In any event, it is not lost on this court that where a grant of letters of administration is issued to two or more persons; such persons [administrators] have a collective responsibility to act on the basis of the inseverable grant. To this end, none of the four administrators can therefore purport to alienate and/or dispose of a property that forms part of the estate of the deceased, without the sanction and/or concurrence of the rest of the administrators. [See Section 82 of the *Law of Succession Act*, Chapter 160 Laws of Kenya].

58. Other than the foregoing, it is also worthy to underscore that where the transaction touches on and concerns an immovable property; then it is incumbent upon the parties to the transaction to ensure that the impugned transaction/contract is reduced into writing and thereafter signed by all the parties chargeable thereto.

59. Additionally, it is also important to point out that the signatures of the parties to the transaction, namely, the Vendors and the Purchasers, must also be attested to by a witness/person, who was present at the time when the parties to the transaction signed and/or executed the contract.

60. To this end, it is worthy to take cognizance of Section 3[3] of the *Law of Contract Act*, which stipulates as hereunder;

    (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. (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:

        Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

61. Pertinently, the import and tenor of the said provisions, namely, Section 3[3] of the *Law of Contract Act* [supra], have since been highlighted and elaborated by the Court of Appeal in the case of *Peter Mbiri Michuki v Samuel Mugo Michuki* (2014) eKLR, where the court held thus;

    24. Section 3(3) of the *Law of Contract Act* provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested. Section 3(7) of the *Law of Contract Act* excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the *Law of Contract Act*, came into effect on 1st June, 2003. The trial court found that the sale agreement between the parties was an oral agreement made in 1964 between the appellant and the plaintiff.

    Prior to the amendment of Section 3(3) of the *Law of Contract Act* in 2003, the subsection read as follows:

(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

(1) Has in part performance of the contract taken possession of the property or any part thereof; or

(11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract. '

62. Taking into account the ratio decidendi in the decision [supra] and the various observations highlighted in the preceding paragraph[s], the question that must then be answered is whether the sale agreement which underpins the suit beforehand is legally tenable and espouses a *prima facie* case with a probability of success.

63. Nevertheless, it is my humble view that without compliance with the provisions of Section 3[3] of the *Law of Contract Act* and Section 38 of the *Land Act*, the instant suit does not appear to espouse a *prima facie* case. For good measure, it is worth reiterating that a *prima facie* case is a genuine and arguable case which espouses some degree of success taking into account the applicable and obtaining law which underpin [sic] the cause of action being ventilated by the Applicant.

64. In the absence of a *prima facie* case and to the extent that the Applicants herein have neither demonstrated nor established a *prima facie* case, it is difficult to discern or decipher on what basis, the Applicants herein would be entitled to an order of temporary injunction.

65. Further and at any rate, it is common ground that where an Applicant has failed to establish and or demonstrate the existence of a *prima facie* case; then the court of law is obligated to pause and dismiss the application seeking temporary injunction without venturing forward to interrogate the question of irreparable loss or otherwise. [See *Kenya Commercial Finance Co. Ltd v Afraha Education Society* [2001] Vol. 1 EA 86].

66. In a nutshell, my answer to Issue Number one [1] is to the effect that the Applicants herein have neither demonstrated nor proven the existence of a *prima facie* case with a probability of success taking into account the implication of the provisions of Section 82 of the *Law of Succession Act*, Chapter 160 Laws of Kenya and Section 3[3] of the *Law of Contract Act*, respectively.

Issue Number 2: Whether the Applicants herein have established the likelihood of irreparable loss, arising and/or accruing, unless the orders sought are granted.

67. Other than the requirement that an Applicant seeking to procure an order of temporary injunction must demonstrate the existence of a *prima facie* case, it is important to highlight that a *prima facie* case by itself [per se] is not a guarantee to obtaining an order of temporary injunction.

68. Instructively, once an Applicant has demonstrated and/or proved the existence of a *prima facie* case, such an Applicant is obligated to venture forward and demonstrate the likelihood of irreparable loss arising and/or accruing, unless the orders sought are granted.

69. Pertinently, proof of irreparable loss is essential and paramount and indeed same [irreparable loss] forms the basis upon which the orders of temporary injunction do issue.

70. Arising from the foregoing, I beg to point out that had the Applicants herein established a *prima facie* case [which is not the case], same would still have been called upon [read, obliged] to demonstrate that irreparable loss would accrue unto them.

71. As pertains to what constitutes irreparable loss, I can do no better than to cite and reference the holding of the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the court stated as hereunder;

> On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.

72. Taking into account the definition of what constitutes irreparable loss, the question that does arise is whether the Applicants herein had accrued any legal and/or equitable rights to and or in respect of the suit property or otherwise.

73. However and to my mind, the sale agreement which anchors the claim by and on behalf of the Plaintiffs/Applicants herein was not concluded and hence no legal rights arose thereunder or accrued there from. In this regard, the Plaintiffs/Applicants herein [sic] appear not to have accrued any lawful title and/or rights to the suit property.

74. In the absence of legal rights and/or interests to the suit property, I am unable to discern what rights, interests and or stake the Applicants have on the suit property that is capable of being infringed upon and or violated, to warrant a contention of loss of whatsoever nature.

75. At any rate, I hold the view that the loss, if any, that the Applicants herein are likely to suffer and/ or accrue is capable of being quantified and ascertained. Furthermore, such loss once quantified and ascertained is capable of being remedied and/ or compensated monetary terms.

76. Notwithstanding the foregoing, it is not lost on this court that the Plaintiffs/Applicants herein have even ventured forward and quantified the loss that same are likely to accrue on the basis of breach of the contract. For good measure, the Plaintiffs/Applicants have sought for monetary recompense as highlighted in terms of prayers [f], [h] and [i] of the Plaint dated the 4th March 2024.

77. Simply put, it is my finding and holding that the Plaintiffs/Applicants herein are not disposed to suffer any irreparable loss which is not compensable in monetary terms or at all.

Issue Number 3 Whether the Applicants herein is entitled to an order for Specific Performance either in the manner adverted to or otherwise.

78. The Plaintiffs/Applicants herein have also sought for an order of specific performance. For good measure, the Plaintiffs/Applicants contend that having entered into and executed the sale agreement dated the 22nd October 2022, same [Plaintiffs/Applicants] are now entitled to the completion documents and perfection of the transfer and registration of the suit property in their [Applicant's] name.

79. As pertains to the claim for specific performance, it is instructive to note that such an order is a substantive and precipitate relief, which can only issue after the plenary hearing and subject to proof that there was indeed a valid and lawful contract between the Applicants on one hand and the Respondents on the other hand.

80. To the contrary, an order of specific performance cannot be sought for and/or be granted on the basis of an interlocutory application like the one beforehand. In this regard, I hold the view that the prayer for specific performance, which has been adverted to and highlighted in the body of the application beforehand, is not only premature and misconceived; but same is legally untenable.

81. Furthermore, the pleading of an order for specific performance at the foot of the current application, long before the plenary hearing constitutes and amounts to placing the wagon before the horse. Such an act, is inimical to the rule of law and portends a legal absurdity.

82. Before departing from the issue of specific performance, it suffices to adopt and reiterate the holding of the Court [per D.K Maraga, J, as he then was] in the case of *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited* [2006] eKLR, where the court stated and held thus;

> Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.
>
> The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.
>
> Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

83. Quite clearly, it is evident that before an order of specific performance can issue, the Claimant must tender and place before the court plausible evidence demonstrating inter-alia that there exists a valid and legal contract; that the Claimant has duly performed his/her part of the bargain; that damages are not appropriate and above all; it must be demonstrated that the obtaining circumstances necessitate the invocation and application of the equitable relief of specific performance.

84. Sadly, the Applicants herein have prematurely sought for an order of specific performance and in any event, long before demonstrating that same [Applicants] have a valid and lawful contract in existence.

Final Disposition:

85. Flowing from the discussion [details that have been highlighted in the preceding paragraphs], it must have become crystal clear that the Applicants herein have neither established nor demonstrated the requisite ingredients underpinning the grant of an order of temporary injunction.

86. On the other hand, it is also common ground that the order for specific performance, which was also being sought for at the foot of the application beforehand, is premature and misconceived. Notably, such an order cannot issue and/or be granted at an interlocutory stage.

87. Consequently and in the premises, the application dated the 4th March 2024; is clearly devoid and bereft of merits and hence same [Application] be and is hereby dismissed with costs to the Defendants/ Respondents [save for the 6th Defendant/Respondent].

88. Furthermore, the orders of *status quo* that had hitherto been granted and thereafter variously extended, be and are hereby vacated.

89. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2024.

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson/ Brian: court Assistant.

Mr. Nduhiu for the Plaintiffs/Applicants.

Mr. Kusow for the 1st, 2nd, 3rd and 4th Defendants/Respondents.

Ms Amonde h/b for Mr. Salim Omar for the 5th Defendant/Respondent.

Ms Ayieko h/b for Mr. David B. Wati for the Proposed Citee.

N/A for the 6th Defendant/Respondent.