



**Ali & another v C.M. Advocates LLP & 3 others (Environment & Land
Case 030 of 2024) [2024] KEELC 6635 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 6635 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 030 OF 2024**

**MD MWANGI, J
JULY 23, 2024**

BETWEEN

IMAW ADAN SHEIKH ALI 1ST PLAINTIFF

ABDIRAHHMAN ABUKAR HASSAN 2ND PLAINTIFF

AND

C.M. ADVOCATES LLP 1ST DEFENDANT

**LILIAN WAIRIMU NGATHO (SUED THE ADMINISTRATOR OF THE ESTATE
OF THE LATE WANJIKU NJAU) 2ND DEFENDANT**

**ELIZABETH MURANGIRI NJOROGE (SUED AS THE ADMINISTRATOR OF
THE ESTATE OF THE LATE WANJIKU NJAU) 3RD DEFENDANT**

I & M BANK LIMITED 4TH DEFENDANT

RULING

(In respect of the Notice of Motion dated 24th April, 2024 seeking that the 1st, 2nd and 3rd Defendants be restrained from disposing, charging, selling and or leasing to third parties the property known as L.R.No.36/11/24 (Nrb/Block/49410) pending the hearing of this suit)

Background

1. The Plaintiffs vide their Notice of Motion dated 24th April, 2024, pray for an order restraining the 1st – 3rd Defendants from disposing, charging, selling and or leasing to third parties the property known as L.R number 36/11/2024 (Nairobi Block 49410). The application is premised on the grounds on the face of it and the supporting affidavits of Imawadan Sheikh Ali & Abdirhaman Abukar Hassan.
2. The Plaintiffs assert that they entered into a contract to purchase L.R number 36/11/2024 (Nairobi/Block/410) from the 2nd and 3rd Defendants at a consideration of Kshs.140 million.



3. It was a term of the same contract that the purchase price would be held by the 1st Defendant (CM Advocates LLP), as stakeholders pending the registration of the transfer of the suit property in the name of the Plaintiffs and would in any event be released to the 2nd and 3rd Defendants upon lapse of 30 days from the date of release of the completion documents to the Plaintiffs' Advocates.
4. The suit property was sold free from encumbrances and the 2nd and 3rd Defendants gave a warranty in the agreement for sale that the property was not subject of any threatened or pending litigation. The plaintiffs however, allege that after the payment of the balance of the purchase price to the 1st Defendant on the 22nd March 2024, they discovered that the suit property was encumbered and subject to litigation in Nairobi ELCC/E389/2022 (Lilian Wairimu Ngatho & Elizabeth Murungari Njoroge (both suing as administrators of the estate of Wanjiku Njau- deceased) -vs- Stephanie Kigo & Chief Land Registrar. The plaintiffs aver that there is an order made on the 28th September 2023 in the said case restraining the registration of any transfer in respect of the suit property.
5. The Plaintiffs assert that the Defendants constructively deceived them in the contract, that the suit was free of litigation and pending third party claims by failing to disclose to them the above cited case and the court orders issued therein directly and adversely affecting the disposition of the suit property. The Plaintiffs assert that they were duped into parting with Kshs. 140 million which they paid to the 1st Defendant, and which amount is held in a bank account with the 4th Defendant's bank.
6. Under the provisions of the agreement for sale, the 1st Defendant is authorized to release the whole of the purchase price to the 2nd and 3rd Defendants within 30 days of delivery of completion documents to the Plaintiff i.e. by the 25 April 2024. They stand to suffer irreparable loss if the sum of Kshs. 140 million is released to the 2nd and 3rd Defendants in view of the court orders barring the transfer of the suit property. They stand to lose the money and the suit property unless the court intervenes. They accuse the 1st Defendant of professional misconduct in the conduct of the transaction with the intention of defrauding them.
7. The Plaintiffs state that it is lawful and just that the 1st and 4th Defendants be restrained from releasing the sum of Kshs. 140 million until after the determination of the claim in Nairobi, ELCC/E389/2022. The Plaintiffs expressed their fear that if the orders are not granted, the subject matter comprising of Kshs. 140 million shall be wasted away with no likelihood of ever being refunded to the Plaintiffs in the event that the 2nd and 3rd Defendants are unsuccessful in ELCC/E389/2022.

Response by the Defendants

8. The Defendants in their response filed a replying affidavit sworn by the by one Cyrus Maina on 7 May 2024 and further filed their own Notice of Motion application dated 27 May 2024 seeking first and foremost that the court vacates the orders issued on 26 April 2024; secondly, that the suit be struck out and finally, and in the alternative, the 1st and 4th Defendants be struck off from the suit.
9. The Defendants categorically asserted that the Plaintiff's suit has been overtaken by events since the suit property has already been transferred to the Plaintiffs as of 2nd May, 2024. There is therefore no encumbrance on the suit property as alleged by the Plaintiffs or at all. The suit property was transferred to the Plaintiffs' nominee company known as 'Aflah Point Investments Ltd'.
10. The Defendants further claimed that the Plaintiffs were aware of ELCC/E389/2022 prior to the execution of the sale agreement. In any event, the Defendants averred that the suit, ELCC/E389/2022 had already been withdrawn as at 26th April, 2024. Since the plaintiffs' suit is predicated on the determination of the suit, it has no basis upon the withdrawal of that suit.



11. It is further deposed on behalf of the Defendants that the 1st Defendants merely acted for the 2nd and 3rd Defendants as Advocates in the agreement for the sale dated 6th November 2023. The role of the 1st Defendant was to simply hold the money as a stakeholder while the transaction came to a close. They were merely agents and stakeholders in this transaction. The Plaintiffs therefore have no cause of action against them. Any dispute arising from the agreement is between the parties to the agreement. The 1st Defendant is not a party to the agreement. They have dutifully held the money in their account and have not been in breach of any of their duties. No prayers have been sought against them anyway in the Originating Summons.
12. The 4th Defendant, on the other hand, is a financial institution unaware of the dispute or details of the sale transaction between the plaintiffs and the 2nd and 3rd Defendants. The Plaintiffs have no cause of action whatsoever against them.
13. I see from the record of the Court that the Advocates for the Defendants filed their Notice of Appointment dated 30th April, 2024 on 9th May 2024; after filing their replying affidavit and the application dated the 7th May 2024 on the 8th May 2024. This issue was raised by the Plaintiffs in their submissions before the court. They submitted that the application and the Replying affidavit were therefore incompetent. They prayed that the same be expunged from the record of the Court.
14. Both applications were hard concurrently. I will address the Defendant's application first due to its nature alongside the issue raised by the Plaintiff to the effect that the application as well as the replying affidavit was filed prior to the Advocate formally coming on record for the Defendants in violation of the mandatory provisions of Order 6 rule 1 of the Civil Procedure Rules.
15. Mr. Waigwa, Advocate for the Defendants, responding to the Plaintiffs' claim submitted that under Order 6 rule 2 of the Civil Procedure Rules, where a statement of Defence contains information required in a memorandum of appearance, it ought to be considered as a memorandum of appearance. He asserted that the rule was applicable in this matter because the Defendants' Advocates had included in their application and replying affidavit all the information required to be included in a memorandum of appearance.
16. The Defendant's Advocate further urged the court to disregard procedural technicalities as enjoined under Article 159 of *the Constitution* and consider his application on its merits.
17. I note that the Defendants' Advocates indeed admitted that they filed the application and the replying affidavit before they filed their notice of appointment.
18. Pleadings in a civil suit, as provided under Order 9 of the Civil Procedure Rules may only be filed by a party in the suit in person or through his authorized agent, or by an Advocate duly appointed to act on his behalf. An advocate is duly appointed upon filing the notice of appointment or entering appearance on behalf of a party in the manner contemplated under Order 6 of the Civil Procedure Rules.
19. At the time that they filed the Replying Affidavit on behalf of the Defendants and the application dated 7th May 2024, the Defendants' Advocates had not been duly appointed as Advocates for the Defendants. The said application and the Replying Affidavit are therefore not properly on record. Consequently, the application dated 7th May 2024 is struck out and the Replying Affidavit expunged from the record of the courts.
20. I now proceed to the plaintiffs' application dated 24th April 2024.



21. The law on the grant or otherwise of temporary injunctions is well settled since *Giella versus Cassman Brown & Company Ltd* (1974) EA 358. The conditions for the grant of orders of temporary injunction are:
 - a. The Applicant must show a prima facie case.
 - b. An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which might not be adequately compensated by an award of damages.
 - c. If the Court is in doubt, it will decide the application on a balance of convenience.
22. In *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* CA No.77 of 2012 (2014) eKLR, the Court of Appeal was explicit that the three conditions must be applied as separate, distinct and logical hurdles which are to be surmounted sequentially; one after the other. The import being that if a prima facie case is not established, the court need to go further to consider if the Applicant has established irreparable injury that he would suffer if the order of temporary injunction is not granted.
23. The Plaintiffs' case was initiated by way of an Originating Summons dated the 24th April 2024. In the said Originating Summons, the Plaintiff seek one main prayer of a declaration that the sale and transfer of the suit property under the agreement for sale dated 6th November 2023 between the 2nd and 3rd Defendants on one hand, and the 1st and 2nd Plaintiffs on the other hand, is subject to the determination of the claim in Nairobi ELCC/E389/2022. The temporary orders sought in the application before me sought pending the hearing and determination of the case ELCC/E389/2022.
24. I have had an opportunity of perusing the file ELCC/E389/2022. The file was closed on 15th July 2024 pursuant to a preliminary objection by the Plaintiffs therein dated 15th July 2024 on the premise that the suit was withdrawn under Order 25 rule 1 of the Civil Procedure Rules vide a notice of withdrawal dated 26th April 2024.
25. That being the position, the Plaintiffs' Originating Summons is for all intents and purposes spent. The Plaintiffs have no prima facie case to justify the grant of the interim injunction orders sought in their application dated 24th April, 2024. The application is therefore dismissed.
26. The court exercising its discretion under Section 27 of the [Civil Procedure Act](#) directs that each party bears its own costs in respect to the application dated 7th May, 2024 by the Defendants and the application dated 24th April, 2024 by the Plaintiffs.
27. I leave it upon the Plaintiffs to decide on the appropriate action in respect to their Originating Summons.
28. It so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JULY, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Sheunda holding brief for Mr. Osundwa for the Plaintiffs.

Mr. Waigwa for the Defendants.



