



Interactor Company Limited v Diamond Trust Bank & another (Environment & Land Case E118 of 2024) [2024] KEELC 6663 (KLR) (23 July 2024) (Ruling)

Neutral citation: [2024] KEELC 6663 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E118 OF 2024**

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

BETWEEN

INTERACTOR COMPANY LIMITED PLAINTIFF

AND

DIAMOND TRUST BANK 1ST DEFENDANT

DALALI TRADERS AUCTIONEERS 2ND DEFENDANT

RULING

(In respect to the application dated 15th March, 2024 by the Plaintiff/Applicant seeking for an order of temporary injunction to restrain the Defendants/Respondents by themselves, workmen, their instructed agent, servants or any other person acting under their instructions from offering for the suit property for sale by public auction and or private treaty pending hearing and determination of the suit.)

Background

1. The Plaintiff in this case vide its Complaint dated 15th March, 2024 filed this suit seeking amongst other orders, an order of specific performance of the Memorandum of Sale dated 22nd November, 2023 and an order directing the 1st Defendant to receive the balance of the purchase price within 30 days after conclusion of the BPRT case NO. E261 of 2024. In the alternative, the Plaintiff prays for a refund of the sum of Kshs. 10,500,000/- together with interest at the rate of 30% per annum with effect from 23rd November, 2023 until payment in full and general damages for breach of contract.
2. It is the Plaintiff's case that on 22nd November, 2023 it entered into a Memorandum of Sale with the Defendants for purchase of the property known as L.R No. 209/34771 Dar es Salaam Road, Nairobi (hereinafter referred to as the suit property). The Plaintiff avers that pursuant to the Memorandum of Sale, and at the fall of the hammer, it was declared the successful purchaser of the suit property at



the price of Kshs.105,000,000/- and was therefore required to pay a deposit equivalent to 10% of the purchase price.

3. The Plaintiff states that it paid Kshs.9,500,000/- to the 2nd Defendant on 23rd November, 2023. It subsequently paid the balance of Kshs.1,000,000/- vide cheque numbers 046518 and 046521 to the 2nd Defendant making a total sum of Kshs.10,500,000/- (equivalent to 10% of the purchase price) being the deposit required of it in accordance with the provisions of the memorandum of sale.
4. The Plaintiff states that it was on 27th February 2024 served with a Court Order dated 23rd February, 2024 which was an interim injunction restraining the Respondents in that case from selling, alienating, assigning, transferring, disposing of or otherwise breaking into the suit premises, restricting the tenant's access, harassing the tenants or in any other manner interfering with the Claimant's tenancy in the suit property.
5. In spite of notifying the 1st Defendant of the said Order, it is the Plaintiff's assertion that the 1st Defendant insisted that the Order did not apply to the sale between them. The 1st Defendant insisted on payment of the balance of the purchase price in accordance with the memorandum of sale. The Plaintiff states that the 1st Defendant proceeded to instruct the 2nd Defendant to re-advertise the suit property for sale by public auction in spite of the Order from the Business Premises Rent Tribunal. The 1st Defendant went further to forfeit the Plaintiff's deposit of Kshs.10,500,000/-.
6. In its Notice of Motion dated 15th March 2024, the Plaintiff/Applicant prays for an order of temporary injunction restraining the Defendants from offering the suit property for sale either by way of a public auction or a private treaty pending the hearing and determination of the main suit. The application is premised on the grounds on the face of it and on the supporting affidavit of Vinesh Indubhai Patel which reiterates the averments in the Complaint and on the face of the application.
7. In the Replying Affidavit, the deponent deposes that she is aware that the 2nd Defendant herein under instructions of the 1st Defendant advertised the suit property for sale by way of a public auction. One express condition for the sale was that a deposit of 10% of the sale price was to be paid in cash, banker's cheque or electronic money transfer (RTGS) during the day of the auction and the balance thereof within 90 days.
8. The public auction took place on 22nd November 2023 whereby the Plaintiff was declared the highest bidder with an offer of Kshs.105,000,000/-. A memorandum of sale of even date was entered into between the Plaintiff and the Auctioneer, acting on behalf of the 1st Defendant. The Deponent acknowledges that the Plaintiff indeed paid the 10% deposit of the purchase price in accordance with the terms of the Memorandum of Sale.
9. It is further deposed in the Replying Affidavit that the Plaintiff did not attach the entire Memorandum of Sale to its Supporting Affidavit and failed to disclose material and express provisions of the Memorandum of Sale which it did not honour namely;
 - a. The balance of the purchase price was to be paid to the chargee within 90 days of the date of sale, time being of essence;
 - b. If the Purchaser failed to pay the balance of the purchase price within 90 days, the deposit paid was to be forfeited to the chargee absolutely and the chargee was at liberty to sell the property at such time, in such manner and subject to such conditions it deemed fit without notice to the purchaser.



10. The Defendants averred that, after the Memorandum of Sale was executed, the Plaintiff on 31st January 2024 sought an extension of their completion period to 120 days highlighting inability to pay in 90 days. The request of the Plaintiff was however declined by the 1st Defendant.
11. The Plaintiff again sought an extension for 15 more days on 19th February 2024 which was also declined.
12. The 1st Defendant asserts the position that upon expiry of 90 days from the date of the auction, the sale automatically terminated and the deposit of Kshs. 10,500,000/- was forfeited.
13. The Defendants further insist that the Order of the BPRT referred to by the Plaintiff could not restrain the 1st Defendant, a bank, from exercising its statutory power of sale under the law. In any event, a dispute between a Landlord and a Tenant is inconsequential to the bank's exercise of its statutory power of sale. The deponent of the Replying affidavit asserts that the suit property was sold without vacant possession. The bank was not a party in the case before the BPRT anyway. The deponent further reiterated that the BPRT has no jurisdiction to restrain the bank from exercising its statutory power of sale.
14. The Defendants assert that the Plaintiff was never in a position to complete the sale in accordance with the terms of the memorandum of sale.

Court Directions.

15. The court's directions were that the Plaintiff's application be canvassed by way of written submissions. Both sides complied and the court has had the opportunity to read the submissions which now form part of the record of this court.

Issues for determination.

16. The sole issue for determination is whether the Plaintiff/Applicant has satisfied the conditions for grant of a temporary Injunction.

Analysis and Determination.

17. It is not in dispute that the 1st Defendant through the 2nd Defendant, its authorised agent, advertised the suit property for sale by public auction in exercise of its statutory power of sale. It is also not disputed that the Plaintiff bade and was declared the successful bidder. The memorandum of sale dated 22nd November, 2023, was executed pursuant to the sale by public auction. The terms and conditions of the sale are not in contention either.
18. The Plaintiff paid the 10% deposit of the purchase price which is acknowledged by the Defendants. The balance of the purchase price being 90% of the purchase was payable in 90 days from the date of execution of the memorandum of sale, i.e. on or before the close of business, 21st February, 2024.
19. From the evidence before the court, the Plaintiff did not honour the condition on payment of the balance of the purchase price within the timelines stipulated in the memorandum of sale.
20. In its submissions, the Plaintiff alludes to what he refers to as 'unforeseen turn of events' when he was allegedly served with an Order from the BPRT on 27th February 2024, as his reason for failing to comply with a condition on the payment of the balance of the purchase price on the due date.
21. As both sides have rightly submitted; the conditions for the grant of orders of a temporary injunction are well settled, as spelt out in the well-known case of *Giella – vs – Cassman Brown* (1973) EA 358.



22. The Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, while affirming the 3 conditions stipulated in the Giella – vs – Cassman Brown case (Supra) stated that the 3 conditions are to be applied as separate, distinct and logical hurdles that an Applicant for an order of temporary injunction has to surmount sequentially; one after the other. By way of an explanation, if a prima facie case is not established, the court need not go further to consider if the Applicant has established the irreparable harm he is likely to suffer if the order is not granted or assess the balance of convenience for that matter.
23. I will therefore proceed to assess the Plaintiff’s application against the said parameters.
24. On whether the Plaintiff has established a prima facie case, the lingering question is whether the Plaintiff honoured the terms and conditions of the agreement between him and the Defendant. The agreement was in the form of a memorandum of sale as the Plaintiff himself has pleaded.
25. A prima facie case, as elaborated by the Court of Appeal in Mrao Ltd – vs – First American Bank of Kenya Ltd & 2 Others (2003) eKLR, is more than an arguable case. The court stated: -
- “A prima facie case is more than an arguable case. It is not sufficient to raise issues but 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.”
26. From his own admission, the Plaintiff did not honour the condition on the payment of the balance of the purchase price on the due date. I agree with the Defendants’ submissions that time was of the essence as categorically stipulated in the memorandum of sale. What right then has been infringed by the Defendants while the Plaintiff is clearly the defaulter?
27. I am not the least persuaded that the Plaintiff has established a prima facie case. Even if he had established one, he has a herculean task surmounting the 2nd condition of establishing that he stands to suffer irreparable harm/injury that cannot be adequately compensated by an award of damages.
28. The Court of Appeal in Nguruman Ltd – vs –Jan Bonde Nielsen & 2 others (supra) in no uncertain terms stated that the burden was upon the Applicant to demonstrate the nature and extent of injury he is likely to suffer if an injunction is not granted. The Court was categorical that: -
- “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 adequately remedy.”
29. The Plaintiff in his submissions at Paragraph 16 thereof submits that: -
- “The Plaintiff/Applicant has already paid a deposit amount of Kshs.10,500,000/-. The Defendant/Respondent even wrote to the Plaintiff/Applicant that its deposit of Kshs. 10,500,000/- is now forfeited simply because the Plaintiff/Applicant did not pay the balance of the purchase price even after extension on the 7th March, 2024 was allowed. The Plaintiff suffering harm and by losing the deposit amount of Kshs.10,500,000/- is real and



imminent and that only by the court order will the Plaintiff/Applicant be protected from the Defendants' actions.”

30. While I agree that the Plaintiff/Applicant is likely to suffer loss through forfeiture of the deposit amount of Kshs. 10,500,000/, that loss would not amount to an irreparable injury. It is the kind of injury that is ascertainable, quantifiable, and measurable, and which is capable of being compensated monetarily.
31. Accordingly, my finding is that the Plaintiff/Applicant has not established the conditions for the grant of orders of temporary injunction. Its application is hereby dismissed with costs.

It is 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:

Mr. Kibet for the Plaintiff/Applicant

Mr. Shah for the Defendants/Respondent

Court Assistant: Yvette

M.D. MWANGI

JUDGE

