



Kairima v Eris Property Developers Ltd & another (Land Case E090 of 2024) [2024] KEELC 6694 (KLR) (23 July 2024) (Ruling)

Neutral citation: [2024] KEELC 6694 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E090 OF 2024**

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

BETWEEN

BRENDA NKIROTE KAIRIMA PLAINTIFF

AND

ERIS PROPERTY DEVELOPERS LTD 1ST DEFENDANT

ERIS ESTATE LIMITED 2ND DEFENDANT

RULING

(In respect of the Plaintiff's Chamber Summons application dated 4th March, 2024 brought under the provisions of Articles 27 (1), (2), 28, 40 & 50 (1) of the *Constitution* of Kenya, Sections 1A, 1B, 3A & 63 (e) of the *Civil Procedure Act*, Order 40 rule 1, 2 and 3 of the *Civil Procedure Rules, 2010* & Sections 4 & 7 of the *Arbitration Act* and Rule 2 of the *Arbitration Rules, 1997*).

Background.

1. The Plaintiff/Applicant and the Defendants/Respondents entered into an agreement for purchase of an apartment number D10-02 Block D at Enkang Gardens on L.R No. Dagoretti/Riruta/7130. The purchase price was Kshs.7.5.million.
2. According to the Plaintiff/Applicant, she paid a deposit of Kshs.1.5 million at the execution of the agreement while the balance of the purchase price was to be paid fully and or funded through the Interested Party's mortgage scheme, upon successful registration of the sub-lease to the suit premises in favour of the Interested Party.
3. The Plaintiff/Applicant avers that in spite of the clear terms and conditions of the agreement between them, the Respondent in blatant breach thereof started demanding payment of the balance of the purchase price contrary to the said terms and conditions; without having performed their part of the



agreement. They have threatened to forcibly evict the Plaintiff from the apartment and or terminate the sale.

4. The agreement between the Plaintiff and the Defendants contained an arbitration clause which was at clause 10. The Plaintiff further stated that the agreement at clause 10 (e) expressly provided that a party would be entitled to seek preliminary injunctive relief of interim or conservatory measures from any court of competent jurisdiction pending the final decision or award of the arbitrator.
5. The Plaintiff's application is therefore premised on the law and on the provisions of clause 10 (e) of the agreement between her and the Defendants. It is an application for interim measures of protection pending referral of the dispute between her and the Defendants to arbitration in form of status quo orders, a temporary injunction and an inhibition order.

Response by the Defendants

6. The Defendants responded to the Plaintiff's application by way of a Replying Affidavit sworn by one Andrew Ndungu Mwaura, a Director of the 1st and 2nd Respondents. The deponent acknowledged the sale agreement with the Plaintiff dated 18th August, 2021 and the terms and conditions thereof including the purchase price of Kshs. 7.5 million. He too acknowledged the deposit of Kshs. 1.5 million paid to the Defendants by the Plaintiff leaving a balance of Kshs. 6.0 million. The said balance was to be paid by the Plaintiff's financier upon completion, in accordance with clause 32 of the agreement.
7. The deponent asserts that there was a clause 6.4 of the offer letter which provided that in the event that the balance of the purchase price was payable by way of financing by a financier, the Plaintiff as the purchaser was to provide the 1st Respondent with an appropriate professional undertaking or a letter of offer from the financier committing to pay the balance of the purchase price within 60 days after execution of the sale agreement. Failure to abide on the part of the purchaser would lead to the transaction being voided or in the alternative the sale would be treated and proceed as a cash sale.
8. According to the Defendants, the condition on the provisions of an appropriate professional undertaking was satisfied. The completion of the registration of the title in favour of the Interested Party was however delayed because the mother title had been listed for conversion of title in a gazette notice dated 17th June, 2022.
9. As a result of the unforeseen delay in completion, the Defendants in good faith granted the Plaintiff possession of the suit premises. The Plaintiff took possession and leased the suit premises to a tenant who is in occupation paying rent to the Plaintiff.
10. Amongst the completion documents for the transaction in accordance with the sale agreement was a sub-lease in respect of the suit premises duly executed by the purchaser and an undertaking by the interested party's Advocates to secure payment of the balance of the purchase price. The deponent of the replying affidavit asserts that the Defendant's Advocates forwarded the final version of the sub-lease to the interested party's Advocates who were also acting for the Applicant for the Applicant's execution but they never returned the duly executed sub-lease to date.
11. The deponent further states that due to the change in registration formalities at the lands office, from manual registration to the online registration system vide the Ardhisasa Platform, there was need to revise the undertaking previously issued by the Interested Party's Advocates. The Defendants' Advocates communicated this to the Interested Party's Advocates on 19th September, 2023 forwarding the revised terms of the undertaking for review. The Interested Party's Advocates did not respond to the email despite a reminder thereby delaying the securitization process. This forced the 1st Respondent to issue a 21 days' notice of default to the Applicant dated 24th January, 2024, demanding for payment



- of the balance of the purchase price failure to which the sale would be voided pursuant to clause 8 of the agreement.
12. Arising from the default by the Plaintiff/Applicant, the sale was converted into a cash sale in the absence of an undertaking from the financier. The 1st Respondent therefore expected cash payment of the balance of the purchase price within the 21 days' notice period, that was set to expire on 17th February, 2024.
 13. Since the Plaintiff/Applicant did not comply with the 21 days' notice, the 1st Respondent issued the Applicant with a further 14 days' notice on 20th February, 2024 to vacate the premises and handover the keys to the 2nd Respondent. The Applicant did not comply with the vacation notice and continues to occupy the suit premises without any colour of right and at great prejudice to the Respondents. The Respondents neither receive income from the premises nor is the Applicant in a hurry to facilitate the completion of the transaction as she continues to enjoy the benefits of a property she has not paid for.
 14. The Defendants/Respondents aver that the Applicants' application to maintain the status quo is not justified. The Applicant is not the legal owner of the premises. Her failure to vacate the premises or to pay rent for it occasions the 1st Respondent losses. In any event, the Plaintiff/Applicant was to be granted possession of the premises only upon completion of the payment of the full purchase price as per the provisions of clause 4 of the agreement. She has not completed payment of the purchase price to date, yet she continues to occupy the premises.
 15. It is the Defendants' position that the Applicant's application is an abuse of the court process as there is a provision in the agreement which stipulates that in case of default the vendor may give notice to the purchaser to make good the default within 21 days which notice was duly issued by the 1st Respondent and has since expired. Granting the orders sought will greatly prejudice the 1st Respondent who will continue to suffer loss while the Applicant continues to enjoy the benefits derived from the sweat of another person.

Court's Directions.

16. The court's directions were that the application be canvassed by way of written submissions. Parties complied and filed their respective submissions. The court has had an opportunity to read and consider the submissions.

Issues for Determination.

17. As pointed out at the very onset of this ruling, the Plaintiff/Applicant's application is for interim measures of protection pending referral of the dispute between her and the Defendants to arbitration. The key issue therein for this court to determine is whether the Plaintiff/Applicant is entitled to the interim measures of protection in the form of status quo orders, a temporary injunction and a prohibition order.

Analysis and Determination

18. The dissenting judgment by Nyamu, JA in the case of *Safaricom Ltd – vs – Ocean View Beach Hotel Ltd & 2 others* (2010) eKLR set out the principles governing the grant of interim measures of protection under the *Arbitration Act*. He stated as follows:-

“Whatever their description however, they are intended in principle, to operate as holding orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation.....”



An intended measure of protection such as that sought in the matter before us is supposed to be issued by the Court under Section 7 in support of the arbitral process not because it satisfied the Civil Procedure requirements for the grant of injunctions as the High Court purported to do in this matter.”

19. In the case of *CMC Holdings Ltd – vs – Jaguar Land Rover Exports Ltd* (2013) eKLR, the Court discussed the purpose of interim measures of protection and stated that:-

“They provide a party to the arbitration an immediate and temporary injunction if an award subsequently is to be effective. The measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during arbitral proceedings. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.”

20. In the *Safaricom case* (*supra*), the Court outlined the considerations to be made in granting interim measures of protection, in the following words;

“Under our systems of the law on arbitration the essentials which the court must take into account before issuing interim measures of protection are:-

- i. The existence of an arbitration agreement;
- ii. Whether the subject matter of arbitration is under threat;
- iii. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application; and
- iv. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal’s decision-making power as intended by the parties.

21. In this case, it is not in dispute that there was an arbitration clause in the agreement between the parties. The parties in their agreement chose their dispute resolution mechanism in case of a dispute arising out of the transaction.

22. Where parties mutually agree and contract their own forum of choice and process of dispute resolution, the court has no choice but to allow the parties pursue the alternative dispute resolution mechanism, in this case, arbitration.

23. My task is only to determine whether the Plaintiff/Applicant is entitled to interim measures of protection pending referral and constitution of the arbitral tribunal. In doing so the key consideration is whether the suit premises is under any threat.

24. The Applicant in her submissions avers that the Respondent’s vide a notice dated 20th February, 2024 demanded payment of the balance of the purchase price and threatened to forcibly evict her from the suit premises which she has been occupying as a purchaser since 2021. She asserts that the threatened eviction and the Respondents’ acts and omissions go against the Plaintiff’s/Applicant’s legitimate expectation to have the sub-lease registered in favour of the Interested Party upon completion and subsequently to herself off course.



25. The question then for me to answer is; what is the threat to the suit premises?
26. I will not pretend to look into the merits of the Plaintiff's case but there are certain facts that are obvious even from the Plaintiff's own assertions in her application. One such fact is that the purchase transaction has not been completed meaning that the Plaintiff has not acquired ownership of the suit premises.
27. The 2nd fact is that the Plaintiff has defaulted in that she has not paid the balance of the purchase price in accordance with the provisions of the agreement. Thirdly, the Plaintiff has been in occupation of the suit premises since 2021 in spite of the fact that she has not paid the full purchase price. She is reaping a benefit from the suit premises despite her default. Granting her orders of status quo and or an order of temporary injunction as an interim measure will enable the Plaintiff to continue enjoying occupation of the suit premises despite not having paid the consideration in full.
28. The only threat that I see, to the suit premises would be the sale of the same to a 3rd party before the arbitral tribunal renders its decision on the dispute between the parties..
29. Having considered the arguments from both sides, the applicable law and the above cited decisions, the court is not persuaded that the orders of status quo and temporary injunction sought by the Applicant are appropriate in the circumstances of this case. The only interim measure of protection that the court considers just and appropriate in this case is an order of prohibition to prevent the transfer of the suit property to a third party awaiting the outcome of the arbitration.
30. Consequently, this court makes the following orders:-
- a. The dispute between the Applicant and the Defendants be and is hereby referred to arbitration.
 - b. An order of inhibition be and is hereby issued inhibiting the registration of any dealing with the suit property, D10-02 Block D at Enkang Gardens on L.R No. Dagoretti/Riruta/7130, pending the determination by the arbitral tribunal.
 - c. The costs of this application shall abide the outcome of the arbitration.
 - d. This file is closed as the court has nothing else to do with it.

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. Otieno for the Plaintiff/Applicant

Ms. Meruaki h/b for Mr. Gitonga for the 1st and 2nd Defendants/Respondents

Court Assistant: Yvette.

M.D. MWANGI

JUDGE

