



REPUBLIC OF KENYA



Gichuhi v Essen Holdings Ltd & another (Environment & Land Case 313 of 2019) [2025] KEELC 637 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEELC 637 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 313 OF 2019
AA OMOLLO, J
FEBRUARY 13, 2025**

BETWEEN

CHRISTOPHER KAGEMA GICHUHI PLAINTIFF

AND

ESSEN HOLDINGS LTD 1ST DEFENDANT

STEPHEN NG'ANG'A MUIGAI 2ND DEFENDANT

RULING

1. For determination is the Plaintiff's notice of motion dated 20th March 2024 brought under the provisions of section 1A, 1B, 3A and 63 of the [Civil Procedure Act](#) and order 51 of the Civil Procedure Rules. It is seeking for the following orders;
 - i. Spent
 - ii. That the 1st Defendant/Respondent be ordered to pay Kenya Shillings Seventy Four Million Two Hundred and Fifty Thousand (Kshs. 74,250,000/=), plus interest thereon at commercial lending rate of 19% p.a. effective from the 5th day of September 2019, until payment in full.
 - iii. That the 1st Defendant be ordered/directed to take over the management of its suit premises as is upon complying with order 2 above.
 - iv. That in default of complying with orders 2 and 3 above, the 1st Defendant be condemned to forfeiting its 10% deposit of the purchase price, amounting to Kenya Shillings Eight Million Two Hundred and Fifty Thousand (Kshs. 8,250,000/=)
 - v. That further in default of complying with orders 2 and 3 above, the 1st Defendant be ordered to pay interest on Kshs. 74,250,000/= at commercial lending rate of 19% p.a. effective from the 4th September 2019 until payment in full.



- vi. That and further in default of complying with orders 2 and 3 above, the 1st defendant be ordered to return the title to the suit premises to the Plaintiff in the same condition that it was before the registration of the transfer and charge in favor of the 1st Defendant.
 - vii. That the 1st Defendant be ordered to bear the cost of the process of returning the title to the suit premises back into the Plaintiff's/Applicant's name.
 - viii. That the Honourable Court be pleased to grant such other and further orders as it deems fit and just in the circumstances of this suit.
2. The motion was supported by an affidavit sworn by Christopher Kagema Gichuhi on 20th March, 2024 deposing inter alia that the failure by the 1st Defendant to pay monies due to him constitute theft under the provisions of section 268 and 272 of the Penal Code. The other grounds upon which the application is premised is et hereunder;
- i. 1st Defendant bought the suit premises for an agreed purchase price of Kshs. 82,500,000/ and paid down payment of 10%, 7 days after the execution of the agreement as agreed on execution day.
 - ii. That the 1st Defendant promised to pay balance within 14 days from the date of simultaneous registration of title and charge into the names of the purchaser and the chargee.
 - iii. The Applicant stated that advocates' correspondences dated 11th April 2019 and 12th April 2019 and the Irrevocable and Unconditional Professional Undertaking from the 1st Defendants/ Chargees advocate dated 22nd May 2019.
 - iv. That the Registration into the names of the 1st Defendant and the chargee was effected on 21st August 2019 and the balance of Kshs. 74,250,000/= ought to have been paid on or before 4th September 2019.
 - v. He averred that to date the balance has not been paid and despite several demands for payment.
 - vi. that two negotiations between 2 of 1st Defendant's advocates and the Plaintiff's advocates have failed.
 - vii. That Plaintiff/Applicant took the initiative to ask the 1st Defendant to pay the balance plus 50% of accrued interest but he refused stating it will only pay the principal amount of balance only.
3. The Applicant states that on 18th October 2022, his Lordship S. Okong'o J. dismissed 1st Defendant's application dated 15th February 2021 and cautioned them against interest accruing against the balance of the purchase price in hundreds of thousands every month. He also pointed out to the 1st Defendant that they are not entitled to rent because they are not in possession and Clause 6 of the agreement states they cannot get possession before paying the full purchase price.
4. The Plaintiff/Applicant contended that it has lost business and economic opportunity from many other buyers who want to buy the suit premises, but cannot because the title is in the Defendant's name. Thus, losing other economics and business opportunities in which he intended to invest the purchase price from the suit premises, e.g. the property he was buying in Kiserian Town.
5. In the supporting affidavit, the Applicant stated that on 26th February 2019, the Plaintiff sold a property to the 1st Defendant who before the sale, was aware that the property had been on the market for over a year and was fully occupied by tenants. That on the execution date of the agreement, the Purchaser



- was unable to pay the required 10% deposit but requested to proceed with the agreement, promising to pay within seven days. The Plaintiff stated that the 1st Defendant also sought to use title to the suit property to secure a loan for the balance and an agreement was reached to that effect.
6. That Justice Okongo delivered a ruling where he dismissed the Defendant's application seeking for an order to deposit rent collected from the suit premises in the joint account to be opened and affirm that he legally owned the property. The Plaintiff stated that to resolve the matter, he offered to waive 50% of the accrued interest, but the 1st Defendant refused insisting on paying only the balance.
 7. The 2nd Defendant filed a replying affidavit sworn on 15th April 2024 by Stephen Ng'ang'a Muigai, who is the 2nd Defendant and the Managing Director of the 1st Defendant in opposition to the application. He deposed that the application is misleading and an attempt to reintroduce issues already determined by the court, thereby delaying the case as a similar application was dismissed on 3rd February 2022.
 8. The 2nd Defendant acknowledged the existence of a sale agreement dated 26th February, 2019 but refutes the Plaintiff's claims regarding its terms. He avers that the Plaintiff is attempting to unilaterally amend the agreement as he pointed that Clause 25 of the agreement explicitly requires any amendments to be in writing and signed by both parties, which action has not been done. That the primary issue in the dispute is the Plaintiff's failure to provide vacant possession of the suit property, a condition precedent for the release of the balance of the purchase price.
 9. The 1st Defendant avers that Equity Bank has always been willing to pay the balance of KSHS 74,250,000 upon confirmation of vacant possession. He contended that the Plaintiff misrepresented the contents of the ruling by Justice Okongo delivered on 18th October 2022, which did not award interest to the Plaintiff and that they chose not to appeal the ruling to avoid prolonging the dispute. Instead they sought an out-of-court settlement.
 10. That the mediation was initiated on 27th September, 2023, with a mediator appointed on 9th October 2023. However, the Plaintiff failed to attend the scheduled virtual mediation session fixed for 26th October, 2023, effectively abandoning the process. The Defendant deposed that the Plaintiff has acted in bad faith by frustrating settlement efforts while benefiting financially from the suit property. Hence, they argue that the Plaintiff has not approached the court with clean hands and is guilty of material non-disclosure.

Submissions

11. The Plaintiff filed submissions dated 25th November 2024 which was responded to by the Defendant's submissions dated 9th December 2024. The Plaintiff submitted that he seeks payment of Kshs. 74,250,000, being the 90% balance of the purchase price under the sale agreement dated 26th February 2019, for the suit property.
12. The Plaintiff argued that the 1st Defendant has held onto both the property and the purchase balance for over five years, using the funds for business while denying the Plaintiff his rightful payment. That Interest on the balance has accrued significantly to Kshs. 28,290,322.90 at commercial lending rates of 19% and Kshs. 15,522,206.52 at court rates (12%). He also stated that in a ruling dated 18th October 2022, Hon. Justice S. Okong'o noted that interest on the unpaid balance was accruing in thousands of shillings per month.
13. That the Plaintiff attempted to negotiate a settlement, offering to forgo 50% of the accrued interest but the 1st Defendant insisted on paying only the principal amount without any interest, despite withholding the funds for five years. The Plaintiff also alleges bad faith and deception by the 1st



Defendant, who provided an irrevocable letter of undertaking promising payment within 14 days but failed to honor it.

14. That the Defendant further refused to disclose the terms of its charge with the financier, making it difficult for the Plaintiff to confirm whether the borrowed funds were indeed used to pay the purchase balance, unjustly enriched itself at his expense, using the suit property title to obtain financing while withholding payment.
15. On its part, the Defendant outlined the background of the dispute stating that its genesis is from the Sale Agreement dated 26th February 2019 for sale of suit property. That the agreement stipulated that the balance of the purchase price would be financed by Equity Bank Limited through an irrevocable letter of undertaking and payable within fourteen days of the simultaneous registration of the transfer and charge.
16. However, the Plaintiff failed to deliver vacant possession of the property, a fundamental contractual obligation required for the release of funds by the financier and filed in court an application seeking payment. The Defendant submitted that the Plaintiff's earlier application dated 27th September 2019 was dismissed by the court for lack of merit, yet the current application essentially seeks the same reliefs.
17. While relying on the case of Tom Otieno Odongo v Cabinet Secretary Ministry of Labour Social Security Services & another [2013] eklr and Emo Investment Ltd V Stephanus Petrus Kruger [2010] eklr the Defendant submitted that the Plaintiff is attempting to have the court rewrite the contract by compelling the 1st Defendant to take over the property when it is still occupied. Further, the Plaintiff has not demonstrated that the 1st Defendant received the purchase balance from Equity Bank and refused to remit it.
18. It is Defendants' submission that in the circumstances, the Plaintiff is not entitled to interest on the balance of the purchase price, as he has suffered no financial loss, continues to benefit from rental income, and retains the deposit.

Analysis and Determination:

19. This application is brought under the overriding objectives sections of the [Civil Procedure Act](#). The Defendants have opposed the motion stating that the same is misleading and an attempt to reintroduce issues already determined by the court thus delaying the case.
20. On the face of the current pleadings, It is not disputed that the parties, entered into an agreement for the sale of the suit property and a deposit of 10% was paid. It was also agreed the Defendants were allowed to use the suit property as security to secure the 90% balance of the purchase price. The property was transferred into the Defendants' name and a charge duly registered on the title but the Defendant is yet to pay the balance of the purchase price. This has caused the Plaintiff to bring the present application.
21. The Defendants argue that the orders sought here are similar to what was prayed for in the application dated 27th September 2019 filed by the Plaintiff. I have looked at a copy of the Ruling rendered in respect to that application and it set out the issues that were due for determination thus;
 - i. Injunction to stop the 1st Defendant from dealing with the property.
 - ii. An order allowing the Plaintiff access to collect rent.
 - iii. An order for the Defendants to be given 21 days to pay the balance of the purchase price and interest
 - iv. In the alternative to (iii), payment of general damages.



22. After hearing of the application inter parties, the said application was dismissed with costs in the cause by a ruling rendered by Justice Okongo on 3rd February, 2022. Prayer (ii) and (v) of the present motion is also asking for payment of the balance of the purchase price and interest on that balance at 19% from 4th September 2019. The prayer for an order directing the Defendants to take over the management of the suit premises are dependent on the payment of the balance of the purchase price.
23. The application as framed is not seeking to review the findings of Justice Okongo dated 3rd February, 2022. The Plaintiff has not explained any distinguishing factors between this application and the facts that were presented in support of the application. Consequently, being a court of concurrent jurisdiction and having taken over the docket of Okong'o J. after he left Nairobi, I am not empowered by law to hear and determine issues that had already been determined by him.
24. Secondly, some of the orders sought are for a mandatory injunction directing the Defendants to take over the management of the suit premises and or forfeiting the 10% deposit. In the case of in Kenya Breweries LTD V. Washington Okeyo, CA No. 332 of 2000 it was held that mandatory injunction can only be granted in special circumstances or in clear cases.
25. In this case, the Plaintiff is collecting rent from the suit premises and the court has not been told what is the special circumstance. Further, the order for the Defendants taking over the suit premises is conditioned by the Plaintiff to be upon payment of the balance of the purchase price together with interest. On its part, the Defendants argued that paying the balance was conditional to surrender of vacant possession and they deny any interest is payable to the Plaintiff. Thus, this is not a clear case.
26. Consequently, this court hold that the application is unmerited for the two reasons that; the main orders in the application were already canvassed in the application of 29th September 2019 hence this court is restricted by law to re-hear them in the manner the court has been approached. Secondly, that the orders sought are in the nature of a mandatory injunction but the threshold for granting them has not been met. The application is dismissed with an order that each party bears the costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025

A. OMOLLO

JUDGE

