



Stroutel Africa Limited v Savanah Land Developers Limited (Environment & Land Case E277 of 2024) [2024] KEELC 13367 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13367 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E277 OF 2024
LN MBUGUA, J
NOVEMBER 14, 2024**

BETWEEN

STROUDEL AFRICA LIMITED PLAINTIFF

AND

SAVANAH LAND DEVELOPERS LIMITED DEFENDANT

RULING

1. Before me is the Plaintiff's Notice of Motion application dated 1.7.2024 seeking the following orders;
 - i. That this Honourable court be pleased to issue an injunction stopping the sale and or the transfer and or handing over possession of apartment No. A301 erected on L.R. No. 209/2940 Nairobi to the interested party or his nominee pending the hearing and determination of this application and suit.
 - ii. That in the alternative the defendant's financier, Bank of Baroda (Kenya) Limited to be stopped from releasing the partial discharge, sub lease, sectional properties title and/or any completion documents relating to Apartment A 301 erected on L.R. No 209/2940 Nairobi to the interested party or their nominee pending the hearing of this application and suit.
 - iii. That the costs of this application be provided for."
2. The application is premised on grounds on the face of the application and on the supporting affidavit of Nathan Njenga a director of the plaintiff. He contends that on 20.7.2018, the plaintiff and the defendant entered into a sale agreement for the sale of an apartment no. A 301 erected on parcel L.R NO. 209/2940 (hereinafter the suit unit) for a sum of Ksh. 22 million on off plan basis.
3. That vide an addendum agreement of 15.6.2021, the plaintiff was given a discount of Ksh. 600 000 and the balance of the purchase price was to be off set from the engineering professional services fees that the plaintiff company was rendering to the defendant in construction of the apartments. That the



- apartments were built to completion, but the defendant did not pay the plaintiff its professional fees, and they also proceeded to illegally and unilaterally enter into a sale agreement with another party for the sale of the suit unit. He added that the plaintiff has so far paid to the defendant Ksh. 2,350,000.
4. The plaintiff therefore contends that they are the bonafide purchasers of the suit unit, hence the injunctive orders sought are merited.
 5. In their submissions dated 25.9.2024, the plaintiff has reiterated the averments set out in their application relying on various authorities including *Nguruman v Jan Bonde Nielsen & 2 Others CA NP.77 of 2012 [2014] eKLR* and *Mrao Ltd v. First American Bank of Kenya Ltd [2003] eKLR* to submit that they have established a prima-facie case with a probability of success, and that the injury suffered is irreparable and continuous.
 6. The defendant opposes the application vide the Replying Affidavit of their director, one Peter Joseph Kimundi dated 30.8.2024. He admits that indeed the parties entered into a sale agreement of 1.7.2018, in which the plaintiff was to buy the suit unit at a cost of Ksh. 22 million. He contends that the applicant never paid the agreed amount as per the payment schedule and cumulatively, he only paid Ksh. 2.35 million.
 7. That vide the addendum agreement, dated 15.6.2021, the amount of Ksh. 5,890,000 was agreed as the set off from plaintiffs professional services, plaintiff was given a discount of Ksh.610,000 and was required to pay the balance of the purchase price amounting to Ksh. 13 million by 15.7.2022.
 8. That the plaintiff did not comply with the terms of the agreement, thus the defendant proceeded to sell the suit unit on 12.3.2024 to another person.
 9. In their submissions dated 11.10.2024, the defendant has similarly reiterated the averments set out in its Replying Affidavit and has relied on the case *inter alia*; *Nguruman and Mrao Nguruman v Jan Bonde Nielsen & 2 Others CA NP.77 of 2012 [2014] eKLR* to define the criteria in issuance of injunctive orders.
 10. I have considered all the arguments raised herein. To grant or not to grant the injunctive orders sought by the plaintiff is the main issue for determination.
 11. The protagonists have restated the correct position of the law in matters “issuance of injunctions”, that a claimant needs to show that they have a prima facie case with a probability of success for the courts to grant injunctive orders and that such a claimant must also establish that he would suffer irreparable damage that will not likely be compensated by an award of damages. And in the event that the court is in doubt, it shall determine the case on a balance of convenience. These were the principles which were comprehensively set out in the case of *Giella v Cassman Brown Co Ltd [1973] EA 358* and reinforced by the Court of Appeal in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others [2014] eKLR*.
 12. There is no controversy that the protagonists had entered into agreements in which the defendant was to sell the suit unit to the plaintiff at a cost of Ksh.22 million of which the plaintiff has so far paid Ksh.2,350,000. It is also not in dispute that the plaintiff was offering professional services in engineering to the defendant in the construction of the various apartments. And finally, it is quite apparent that the primary documents relied upon by both parties to buttress their rival arguments in the contract are the two sale agreements, the initial one of year 2018 and the addendum dated 15.6.2021.
 13. Nowhere in the affidavit of Nathan Njenga has the plaintiff given an account of their compliance with the two agreements. In particular, at paragraph 3 of his supporting affidavit Njenga has simply



made a general statement that “the balance of the purchase price was to be set off from the engineering professional services they were offering”.

14. As it were, the addendum agreement of 15.6.2021 contained specific clauses that the set off in respect of professional services offered by the plaintiff amounted to Ksh.5 890,000. Further the balance of ksh.13 million was to be paid in monthly instalments of ksh.1 million as from 15.7.2021.
15. None of the documents availed by the plaintiffs support the compliance with the addendum agreement particularly in terms of payments. The invoice availed by the plaintiff for Ksh. 10,752,000 as amount due to the plaintiff and being termed as a set off is a document dated 15.4.2024. However, this document is not anchored on any further agreement and it cannot therefore be construed as a variation of the agreement dated 15.6.2021. What more, this document was made a month after the suit unit was sold to another party in March 2024!
16. It has been held that courts cannot re-write contracts for parties and courts are also bound by what parties agreed to. The Court of Appeal in the case of Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR cited in agreement the case of Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR which stated that;

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.”
17. If the protagonists arrived into other figures beyond Ksh. 5,890,000 as set off of the professional services offered by the plaintiff after the addendum agreement, then that is an issue which the court cannot wade into at this stage of the trial, there being no other agreement, post the addendum agreement of 15.6.2021. In the circumstances, I find that the applicant has not established a prima facie case to warrant protection from the court.
18. In Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR, the court held that;

“An injunction is an equitable remedy, meaning the court hearing the application has discretion in making a decision on whether or not to grant the application. The court will consider if it is fair and equitable to grant the injunction, taking all the relevant facts into consideration.”
19. In the case at hand, it has emerged that the property has since been sold, and it would be unjust for the third party to be entangled in the disputes between the plaintiff and the defendant herein.
20. In the end, I find that the application is not merited, the same is hereby dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14th DAY OF NOVEMBER 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:

Odera for Plaintiff

Awour for Defendant



Court Assistant: Vena

