



**Capstone Heights Realtors Limited v Kigwor Kenya Ltd (Environment & Land
Case E296 of 2024) [2025] KEELC 2865 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2865 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E296 OF 2024**

**JA MOGENI, J
MARCH 27, 2025**

BETWEEN

CAPSTONE HEIGHTS REALTORS LIMITED PLAINTIFF

AND

KIGWOR KENYA LTD DEFENDANT

RULING

1. The Application by the Plaintiff/Applicant is dated 18/07/2024 and is brought under Order 40 Rule 2, 11 Order 51 Rule 1, 3, & 11 of the Civil Procedure Rules, 2010; Section 1A, 1B, 3 & 63 (e) of the Civil Procedure Act, Cap 21 Laws of Kenya, and all other enabling provisions of the law seeking the following Orders:-
 1. That this matter be certified urgent, a priority date and appropriate directions be issued for the expedited hearing of this Application;
 2. That this Honorable Court be pleased to issue a mandatory injunction compelling the Defendant/Respondent to immediately refund the Plaintiff/Applicant the sum of KES 66, 025,120.00 (Kenya Shillings Sixty-Six Million Twenty-Five Thousand One Hundred and Twenty);
 3. That in the alternative to Prayer 2 above, this Honourable Court be pleased to issue a mandatory injunction compelling the Defendant/Respondent to immediately deposit in a joint interest earning account in the names of the Counsels for the Plaintiff and the Defendant, the sum of KES 66, 025, 120.00 (Kenya Shillings Sixty-Six Million Twenty-Five Thousand One Hundred and Twenty);
 4. That this Court be pleased to issue any other and further orders as may be necessary to meet the ends of justice;



5. That the costs of this Application be provided for.
2. The grounds are on the face of the Application and are set out in paragraphs 1-12. I do not need to reproduce them here.
3. The Application is supported by the Affidavit of Joseph M. Kivai Director of the Plaintiff/Applicant herein sworn on the 18/07/2024.
4. The Application is opposed. There is a Replying Affidavit sworn by MaryAnn Wanjiku Kungu, the Defendant/Respondent on 9/10/2024. There are also Grounds of Opposition of even date. The gist of the Replying Affidavit and Grounds of Opposition is that the Applicant is not deserving of the prayers in the Notice of Motion Application of 18/07/2024 since the facts are highly contested.
5. The Defendant's Company states that it is the registered proprietor of the parcel of land LR No. 21072 and that it entered into an agreement for sale with the Plaintiff dated 6/10/2024. That on 10/03/2022 a Deed of Variation was executed by both parties.
6. The Defendant contends that the Plaintiff is in breach of the sale agreement and has been in breach since the year 2022 and that a mandatory injunction cannot issue at an interlocutory stage where the issues are highly contested.
7. It is the Defendant's averment that the amount of refund of Ksh 66,025,120 by the Plaintiff is disputed and that the Plaintiff is entitled to interest for delayed payments and damages as caused by the Plaintiff.
8. The Defendant contends that it has always been willing to complete the sale transaction but the Plaintiff has not put in any effort. Further that the Plaintiff/Applicant stands to suffer no loss since the value of the property is now in excess of Ksh 500,000,000.
9. The Defendant also filed a Replying Affidavit dated 9/10/2024 sworn by MaryAnn Wanjiku Kungu and denied all the allegations made by the Plaintiff and stated that it is the Plaintiff/Applicant who has frustrated completion of the sale agreement despite having been given several chances to complete the same.
10. That the amount of Ksh 66,025,120/- as the amount to be refunded is disputed since the Plaintiff is entitled to interest of the delayed payments. Further that the Plaintiff's conduct has led to loss of bargain on the part of the Defendant/Respondent.
11. On 14/10/2024 the Court directed that the Application be disposed by way of written submissions.

Plaintiff's Submissions

12. The Plaintiff filed two sets of submissions the first dated 19/11/2024 and the second one dated 11/12/2024. The gist of the submissions by the Plaintiff was that the Defendant had not demonstrated what loss it would suffer. Further that the Plaintiff has advanced its case for release of the funds held on stakeholder basis and the Defendant has not shown that the said funds were available. No bank statement was availed to show that the funds were on stakeholder basis were available.
13. Further that the Defendant has not presented any legitimate reason why the funds held should not be released. Also the Defendant has failed to mention the law that entitles it to damages for breach of contract as alleged.
14. They have relied on the cases of:
 - a. Hezron Kamau Gichuru vs Kianjoya Enterprises Ltd & Another [2022]eKLR;



- b. Kenya Breweries Limited & Another vs Washington O Okeyo [2002]eKLR;
 - c. National Bank of Kenya Ltd vs Pipeline Samkolit (K)Ltd & Another [2001] KLR;
 - d. Stanbic Bank vs Santowels Ltd (Petition No. E005 of 2023).
15. That the Plaintiff/Applicant has presented an exceptional case which makes for refund of Kesh 66,025,120/- and which gives the Court a chance to decide the matter at once.
16. The Application has met the threshold for grant of the orders sought and hence the Application ought to be allowed.

Defendant's Submissions

17. In their submissions dated 29/11/2024, the Defendant/Respondent submitted that they are the registered proprietors of the suit property. He does not dispute that the parties entered into a sale agreement dated 6/10/2021 and he reiterated the salient feature of the sale agreement.
18. The gist of the Defendant's submissions was that after the Plaintiff paid Kesh 25,000,000/-, thereafter it sought an extension to enable them pay the balance of the deposit which was initially to be paid on 8/10/2021 but the Kesh 8,012,056 ended up being paid in November.
19. That thereafter the Defendant did not honor the other obligations required to finalize the outstanding payments which made the Defendant exchange several letters with the Plaintiff as annexed to the Replying Affidavit, MK2, MK3, MK4 and MK5.
20. The parties after negotiations into a Deed of Variation dated 10/03/2022 which varied some of the terms of the Sale Agreement dated 6/10/2021 the Plaintiff paid a further Kesh 66,025,120. It is the Defendant's contention that the Plaintiff still breached the Deed of Variation and which has led to huge losses to the Defendant and loss of bargain.
21. They have relied on the cases of:-
- a. Joseph Kaloki T/a Royal Family Assembly vs Nancy Otieno Ouma [2020] eKLR;
 - b. Hezron Kamau Gichuru vs Kianjoya Enterprises Ltd & Another [2022] eKLR;
 - c. Sharif Abdi Hassan vs Nadhif Jama Adan [2006] eKLR;
 - d. Robert Ng'ang'a Marubu & Another vs Julius Mboya Munyora alias Wamunyora & 3 Others [2015] eKLR.
22. It is their prayer that the Application should be dismissed and the Court allows the matter to proceed for hearing.

Determination

23. I have considered the rival submissions. I have also read through the Replying Affidavit as well as both the Supporting Affidavit sworn by the Plaintiff and further submissions. Foremost, I would like to point out that the principles laid out in *Giella Vs. Cassman Brown Ltd* EA 358 would not be substantially relevant as *Giella* dealt with an interlocutory prohibitory injunction. The Plaintiff on the other hand is seeking a mandatory injunction at an interlocutory stage. Whilst prohibitory injunctions seek to maintain and preserve the status quo: see *Bonde –vs- Steyn* [2013]2 EA 8, mandatory injunctions are intended to completely undo situations: see *Despina Pontikos* [1975] EA



38. The considerations to be placed, as the Court considers whether or not to grant either injunction, will certainly also be different.
24. The principles as to the grant of mandatory injunctions at all interlocutory stage if one reviews the various authorities may be summarized as follows.
25. Firstly, the overriding consideration is which cause is likely to involve the least risk of injustice if it turns out to be 'wrong'. Is it the granting of an interlocutory injunction to a party who fails to establish his right of trial (or would fail if there was a trial) or alternatively, the failing to grant an injunction to a party who succeeds (or would succeed) at trial? Secondly, the Court when considering whether to grant a mandatory injunction must keep in mind that an order which requires a party to take some positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action thereby preserving the status quo. Thirdly, it is quite legitimate where a mandatory injunction is sought to consider whether the Court does feel a higher degree of assurance that the claimant will be able to establish his right at trial. That is because the greater the degree of assurance that the claimant will ultimately establish his right, the lesser will be the risk of injustice if the injunction is granted. There is need to establish a special case in favour of the Plaintiff at the interlocutory stage. Finally, even where the Court is unable to feel any high degree of assurance that the Plaintiff can establish his right, there may be still circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if the injunction is refused sufficiently outweighs the risk of an injustice it is granted.
26. These principles run through and could be threaded together in the cases of *Films Rover International Ltd -v- Cannon Film Sales Ltd* [1987]1 WLR 670, 680; *Locabail International Finance Ltd -v- Agroexport & others* [1986]1 All ER 901. *The Siskina* [1979] AC 2010, *Shepherd Homes Ltd -v- Sandham* [1970]3 All ER 412; *Hassan -v- Adan* [2007]2 EA 178, *Mwangi -v- Braeburn Ltd* [2004]2E.A 196 and the *Despina Pontikos* [1975] E.A 38. A good summary may also be obtained from *Halsbury's Laws of England Vol. 24, 4th Edition paragraphs 946 – 952*.
27. Nonetheless, it is still clear from a reading of the mandatory injunction authorities that the first principle enunciated in *Giella -v- Cassman Brown* [supra] as to establishment of a prima facie case and now more settled in *Mrao Ltd -v- First American Bank of Kenya & 2 Others* [2003] eKLR would still be applicable save that the case established must be beyond the mere calling upon the Respondent to retort but rather it must be so special as to let the Court have the feeling that the orders ought to be made at once. Evidently the standard is higher than is required for prohibitory injunctions: see *Kenya Breweries Ltd -v- Washington Okeyo* [2002]1 EA 109.
28. On the basis of the foregoing principles and the facts of the case, in my Judgment, fairness, justice and convenience do not weigh clearly as it should in favour of the relief sought. I have my doubts and also lack the requisite assurance that if I granted the relief sought and this matter went on trial with only the evidence now before me I would still be vindicated and the Plaintiff found to be deserving of the mandatory relief. The reason is this. The Plaintiff has submitted and exhibited the evidence of payments made and Deed of Variation, but it is not lost to me that the Plaintiff claims that the money it had paid totaling Kesh 99,037,680.00 part of it had been released to the Defendant and the remainder had been utilized.
29. No evidence was placed before the Court to lend credence to this claim. The Deed of Variation did not provide that Kesh 66,025,120 was to be refunded upon termination although that is what the Plaintiff has claimed and submitted.



30. The Plaintiff had claimed at some point vide their letter dated 7/02/2022 that they had not managed to get a suitable bank to give the undertaking of the outstanding balance of Kes 297,113,040 and sought extension of time for a further 90 days. This led to an exchange of letters culminating to the last letter from the Defendant giving the Plaintiff non-negotiable conditions which included the issue of interest at 14% from 06/02/2022 and the Deed of Variation dated 16/03/2022 which gave a completion date of 120 days from 6/02/2022.
31. The interest of 14% was to be paid before 6/05/2022 and a total of Kesh 66,025,120 being 20% of the purchase price was to be paid and held by the Vendor's Advocates under Stakeholder terms pending completion. The Plaintiff has expressed apprehension that the said money has been paid out to the Defendant and the remainder utilized. No evidence has been presented to this effect.
32. The recovery of party payment of the purchase price and the sum of Kesh 66,025,120 is the reason for this suit. I do see that there will be need for additional explanation on where if at all the said Kesh 66,025,120 is since it was to be held under Stakeholder terms pending completion. That it needs to be established as claimed by the Plaintiff that indeed the money is not available. I note however that it was to be held by Vendor's Advocates under Stakeholder terms pending completion.
33. I am persuaded that this money needs to be preserved since from the ongoing the parties are not in agreement on where the money is or who exactly is holding the money. From the Plaintiff's claim the money belongs to a group of people who were seeking to buy the Defendant's property. Whereas I am not persuaded to issue a mandatory injunction to settle the matter I am however persuaded to issue a mandatory injunction to preserve the Kesh 66,025,120 being 20% of the purchase price which has been paid out. This is because the Vendor's Advocate was aware he was holding it under Stakeholder terms.
34. A mandatory injunction as prayed in Prayer 2 if granted now and is not ultimately vindicated at trial would cause more injustice in the circumstances.
35. For the foregoing, the Applicant's Application dated 18/07/2024 succeeds in part and I issue the following prayers:
 - i. A mandatory injunction be and is hereby issued compelling the Defendant/Respondent to immediately deposit in a joint interest earning account in the names of the Counsels for the Plaintiff and the Defendant, the sum of KES 66, 025, 120.00 (Kenya Shillings Sixty-Six Million Twenty-Five Thousand One Hundred and Twenty) until the hearing and determination of the suit.
 - ii. The costs shall be abide the outcome of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27TH DAY OF MARCH 2025 VIA MICROSOFT TEAMS.

.....

MOGENI J

JUDGE

Judgement read in virtual Court in the presence of:

..... for the Plaintiff

..... for Defendant



Melita - Court Assistant.

.....

MOGENI J

JUDGE

