



Gichuhi v Homes By Sung & another (Environment & Land Case E031 of 2023) [2024] KEELC 13763 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13763 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E031 OF 2023**

JG KEMEI, J

DECEMBER 6, 2024

BETWEEN

STEPHEN KARANJA GICHUHI PLAINTIFF

AND

HOMES BY SUNG 1ST DEFENDANT

LYONS BY SUNG 2ND DEFENDANT

RULING

1. The Plaintiff/Applicant filed the instant Application dated 3/4/2024 craving for orders THAT;
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this suit; an order of injunction be and is hereby issued against the Defendants restraining the Defendants, their agents, assigns, successors, and /or any persons howsoever acting on their behalf or under their instructions from dealing with or interfering with the suit property be sale, or any further subdivisions, transactions or sales, trespassing, re-alienating, transferring, charging, developing or in any manner dealing with the Original Title no. Ondiri Farm Scheme/287 currently Ondiri Farm Scheme/1536 or any subdivisions therefrom.
 - d. Spent.
 - e. That pending the hearing and determination of this suit, an Order of injunction be and is hereby issued against the Defendants restraining the Defendants, their agents, assigns, successors and/or any person howsoever acting on their behalf or under their instruction from dealing with or interfering with the suit property by sale or any further subdivisions, transactions or sales trespassing, re-alienating, transferring, charging, developing or in any



manner dealing with original Title No. Ondiri Farm Scheme/287 currently Ondiri Farm Scheme/1536 or any sub-divisions therefrom.

- f. That an injunction do issue against the Defendants directing them or their agents and/or servants to immediately stop and/or cease all further developments or acts of subdividing, transacting or selling, encroaching and/or trespassing, interfering, wasting, constructing or further dealing in whatsoever manner with the Land Title Original No. Ondiri Farm Scheme/287 now Ondiri Farm Scheme/1536 pending the hearing of the application and/or further Orders of this Honourable Court.
 - g. That the Orders herein be enforced by the OCPD/OCS Kikuyu Police Station to avoid any breach of the peace.
 - h. The costs of this Application be provided for and paid by the Defendants in any event.
2. The Application is based on the grounds that by an Agreement dated 3/3/22 (the Agreement), the Plaintiff agreed with the 1st Defendant as a development partner to transfer the suit land to the 2nd Defendant as a developer upon payment of Kshs. 30 Million and making the Plaintiff a 15% shareholder and Director of the 2nd Defendant and eventual allocation of one housing unit from the Development valued at Kshs. 6.5 Million; vide the aforesaid Agreement and Addendum dated 14/5/22 the Defendants obtained spousal consent from the Plaintiff's wife (Judith Karanja) on even date for the said transaction to enable them service a family loan through their family company Lyons Highlands Annexe Ltd to which the funds were to be paid to liquidate the loan secured by their family home; the Defendants took advantage of the Plaintiff's illness and treatment in India and fraudulently obtained his signature to transfer and sub-divide the suit land without honoring the terms of the Agreement which was to be completed within 12 months; that the Plaintiff and his spouse through their family company have defaulted in repaying the loan from Eazy Credit Ltd and now risk sale of their charged home in Lavington L.R no. 20175/8 due to the Defendants' breach of the Agreement and that the Plaintiff is ailing and undergoing dialysis twice a week while the Defendants are developing and subdividing the suit land without paying the Plaintiff his balance of Kshs. 5.7 Million.
 3. The application is supported by the Affidavit of even date of Stephen Karanja Gichuhi the Plaintiff. Rehashing the above grounds, he annexed copies of the Agreement, addendum dated 14/5/22 and Judith Karanja's spousal consent.
 4. The Application is opposed by the Defendants/Respondents. On behalf of both Defendants, John Ngote Rukwaro the 2nd Defendant's director swore his Replying Affidavit on 25/4/24. He conceded that the fact of the Agreement between the parties to develop maisonettes on the land formerly known as Ondiri Farm Scheme/287. That pursuant to that Agreement, the Applicant and 1st Defendant incorporated the 2nd Defendant Company whereby the Plaintiff is a director – see copy of CR12 marked JNK-1. That it was a term of the Agreement (JNK-2) that the consideration of Kshs. 30 Million to the Plaintiff was to be defrayed at the rate of 15% of the pre-sales of units until full payments. That the term pre-sales refers to the maisonette units being sold off-plan (See JNK-3). That pursuant to the Agreement, the 1st Defendant caused the amalgamation of Ondiri Farm Scheme/287 and Ondiri Farm Scheme/286 into Ondiri Farm Scheme/1236 which has now been subdivided into 13 parcels and sold to third parties. That the said 3rd parties will be prejudiced if the application is allowed.
 5. On 21/5/24 directions were taken and parties elected to dispense the application by way of submissions.
 6. The firm of T.O K'Opere & Co. Advocates filed submissions dated 4/6/24 on behalf of the plaintiff.



7. Urging the court to answer in the affirmative the preconditions set out in the case of *Giella Vs. Cassman Brown & Company Limited* (1973) E.A 358 for granting temporary injunction, the plaintiff posited that it had established a prima facie case with a probability of success. That the Defendants has conceded in its Replying Affidavit a breach of their obligations as outlined in the Agreement. That there is no rebuttal to his claim noting that the defendants annexed a copy of Agreement between them and one Robinson Kamau Gichuhi as JNK2. That if the reliefs sought are not granted the plaintiff will suffer irreparable harm in particular loss of his family home. Lastly that the balance of convenience tilts in favour of allowing his application as prayed.
8. The Defendants through the firm of Githui & Partners filed submissions dated 25/7/24. Citing the case of *Giella Vs. Cassman Brown & Company Limited* (1973) E.A 358, the Defendants submitted that for a party to succeed in an application of this nature, they must satisfy the guiding principles set out there in namely; establish a prima facie case with a probability of success; demonstrate irreparable injury if a temporary injunction is not granted and ally any doubts by showing that the balance of convenience is in his favour. That the said requirements must be proven sequentially as stated in the Court of Appeal case of *Kenya Commercial Finance Co. Ltd Vs. Education Society* [2001] EA 868 and *Nguruman Ltd Vs. Jan Bonde Nielesen & 2 Others* [2014] eKLR.

Analysis & Determination

9. The germane issue for determination is whether the application is merited.
10. The relevant law on temporary injunction is stipulated in Order 40 rule 1 of the Civil Procedure Rules that; -

“Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”

11. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Vs. Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan Courts and more particularly in the case of *Nguruman Limited Vs. Jan Bonde Nielsen & 2 Others* [CA No.77 of 2012](#) (2014) eKLR where the Court of Appeal held that;

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.



These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the Applicant is expected to surmount sequentially.”

12. Consequently, the Plaintiff ought to, first, establish a prima facie case. In the case of *Mrao Ltd Vs. First American Bank of Kenya Ltd (2003)* eKLR in which the Court of Appeal gave a determination on a prima facie case. The Court stated that:

“... in civil cases, it is a case in which, on the material presented to the Court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

13. Later on the same Court in the case of *Moses C. Muhia Njoroge & 2 Others Vs. Jane W. Lesaloi and 5 Others [2014]*eKLR, defined prima facie in the following terms;

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

14. It is commonly agreed that the Applicant and the 1st Defendant entered into an agreement dated the 3/3/2022 in which the parties inter alia agreed to incorporate themselves into a joint venture company in form of the 2nd Respondent; project land was transferred to the 2nd Respondent in consideration of payment of Kshs 30 Million to the Applicant ; agreed to develop the housing project together; the Applicant was to be paid the deposit in the sum of Kshs 2.2 Million and a further 3 Million upon the signing of the Joint Ventrue agreement and the balance of Kshs 24.7 Million would be paid at the rate of 15% of the presales until payment in full within 12 months from the ground breaking date; upon full payment of the monies to the Applicant the Applicant would relinquish shares and directorship in the 2nd Respondents company; the Applicant would be entitled to one house unit valued at Kshs 6.5 Million;
15. It is the Applicants case that the Respondents have breached the agreement by failing to pay the outstanding sum of Kshs 5.7 Million and deliver the housing unit valued at Kshs 6.5 Million within the period of 12 months of the agreement and that despite demand and several deliberations the Respondents have continued in their breach.
16. The Respondents have not denied the Applicants claim save to state that the project was slowed by other things including Covid 19 and there has been delay in the payment of Kshs 60 Million outstanding from the third party buyers. That they have made alternative arrangements to settle the amount including selling part of the project land.
17. The Court has perused the agreement and find that the payment was to be made from the presales of the houses to third parties and it has not been contested that there is a balance of Kshs 60 Million and that the 1st Respondent is yet to receive all the payments; the Applicant has so far received 81% of the amounts owed to him and the balance is 19%; It has not been contested that the project is incomplete and that third party off takers are still making payments for the purchase of the houses in any event the payment was pegged on 15% reducing balance; according to the agreement the amounts due to the Applicant were to be made within 12 months from ground breaking. A reading of the agreement



does not disclose when the construction commenced and therefore the Court is unable to hold that the 12 months has expired.

18. For the above reasons the Court finds that the Applicant has not established prima facie against the Defendants
19. Has the Applicant established irreparable harm he stands to suffer in the event the orders sought are not granted? The Applicant decried the default in servicing the loan facility obtained from Easy Credit Limited. In addition the Applicant stated that the Respondents are in breach of the agreement to the tune of Kshs 5,700,000/- in addition to one housing unit. To that end I am of the view that the loss likely to be suffered by the Applicant is quantifiable. It is not in dispute that the Applicant is a director of the 2nd Defendant and therefore issuing an injunction will therefore have the effect of tying the hands of the developer who will not be able to comply with the provisions of Clause 8 of the agreement which required that as the housing units are completed 15% of the sales are released to the Applicant in satisfaction of the amounts due to it under clause 4 and 7 of the agreement of the parties.
20. This Court is guided by the decision of the Court in Suleiman Vs. Amboseli Resort Limited (2004)2 KLR 589 where the Court ought to look at the risk of injustice in granting the injunction. In this case the injustice lies in the project stalling and third parties who purchased the properties and hence acquired rights thereon will be prejudiced. The Applicant also stands to be prejudiced by the injunction as the stalling of the construction will lead to no sales from which the Applicant is to be paid.
21. Last but not least, the Plaintiff has to demonstrate that the balance of convenience tilts in his favour. In the case of Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai (2018) eKLR the concept of balance of convenience was defined as: -

“The meaning of balance of convenience will favour of the Plaintiff’ is that if an injunction is not granted and the suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting.”

22. In my view the balance of convenience herein lies in favor of not issuing the injunction for the reasons given above. The application is disallowed.
23. Costs shall be in the cause.
24. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 6TH DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of ;

Ongocho HB K’opere for the Plaintiff



Kori HB Githui for 1st and 2nd Defendants

Court Assistant – Phyllis

