



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lesedi Developers Limited v Mwangi (Environment & Land Case  
E015 of 2022) [2023] KEELC 16715 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16715 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE E015 OF 2022**

**LN GACHERU, J  
MARCH 29, 2023**

**BETWEEN**

**LESEDI DEVELOPERS LIMITED ..... APPLICANT**

**AND**

**FRANCIS NJOROGE MWANGI ..... RESPONDENT**

**RULING**

1. The Applicant filed the instant suit against the Respondent by way of Originating Summons, seeking a refund of a consideration of Kshs 3,500,000 plus all sums paid by the Purchaser to the Vendor towards purchase of the property stated in an alleged sale agreement over a parcel of land known as Kakuzi/kirimiri Block 7/162, supposedly owned by the Respondent. Contemporaneously, it filed a Notice of Motion Application date August 23, 2022 and sought for the following orders:
  1. Spent;
  2. Spent;
  3. That pending the hearing and determination of the main suit herein, this Honourable Court be pleased to issue an Order of Injunction against Francis Njoroge Mwangi, the Respondent herein from selling and/ or otherwise dealing in the ten (10) Acres that were to be excised from all that property known as Kakuzi/kirimiri Block 7/162 and/or the subdivided portions thereof known as Kakuzi/kirimiri Block 7/1382,1383 and 1384 to third parties
  4. That the costs of this Application be provided for
2. The Application is based on the facts deponed in the Supporting Affidavit of Geoffrey K Kiragu, the Applicant's sole Director sworn on the August 23, 2022. He contends that the Applicant is a land buying and selling Company; that in the course of its business, it identified the Respondent's parcel



of land known as Kakuzi/kirimiri Block 7/162, measuring 6.4 Ha. He added that they engaged the Respondent and expressed their interest to purchase 10 acres from the suit property.

3. Further, he averred that the Company and the Respondent entered into a Sale Agreement on the April 21, 2022, for a consideration of Kshs 35,000,000 which all the parties dully executed. That it was a term of the agreement that the Applicant was to deposit Kshs 3,500,000 at the execution of the said sale agreement and the balance was to be paid in two instalments by: issuing Seven Post-dated cheques each of Kshs 500,000 within 14 Days of the execution of the agreement and the final instalment of Kshs 28,000,000 was to be paid on or before the completion date.
4. The Applicant contended that on May 9, 2022, the Respondent served it with a Notice of Completion and in compliance, it issued the Respondent the seven post-dated cheques. It further contended that, in total disregard of the provisions of the sale agreement, the Respondent terminated the transaction, thereby breaching the terms of the agreement. It is the Applicant's claim that the Respondent went ahead and sub-divided the suit property without due consideration of the Applicant's share of the suit land which it had already invested on. Further that the Respondent's actions occasioned the Applicant massive economic loss.
5. In response to the Notice of Motion Application, the Respondent filed a Replying Affidavit sworn on the September 12, 2022, by Francis Njoroge Mwangi. The Respondent agreed to entering into a Sale Agreement with the Applicant and averred that he dully terminated the sale agreement as per Clause 8 of the said agreement. He contended that the Applicant, breached the terms of the sale agreement by failing to deposit the instalment of Kshs 3,500,000 in the form of post-dated cheque and also by issuing bad cheques which caused him to incur penalties. He further deponed that the agreement did not in any way bar him from sub-dividing his land. Further that the Applicant failed to disclose that he issued bad cheques, and also that the agreement provided for mechanisms for resolving disputes which the Applicant has not exhausted.
6. The Applicant filed a Further Affidavit sworn on the October 28, 2022, and contended that despite issuing bad cheques, he remedied by making direct debits, but the Applicant refused. It is his case that the Respondent actioned on the bounced cheques by filing a complaint leading to Kigumo MCCR No E637 of 2022 which was withdrawn after he paid Kshs 100,000/ to the Respondent herein. He asserted that the termination notice was premature, necessitating the filing of this application.
7. The application was dispensed by way of written submissions. The Applicant filed its submissions on January 18, 2023, through the Law Firm of Muchui Mwendwa & Co Advocates. It raised three issues for determination by this Court.
8. On whether injunction orders should be granted, the Applicant submitted that it meets the principles for grant of injunction set out in the case of *Giella v Cassman Brown Co Ltd* {1973}EA 358, as elaborated in *Kibutiri v Kenya Shell*, Nairobi High Court, Civil case No 3398 of 1980 {1981} KLR.
9. The Applicant submitted that he has a prima facie case on the premise that the Respondent breached their sale agreement despite the Applicant having complied with the Sale Agreement. Reliance was placed on the case of *Eldo City Limitd v Corn Products Kenya Ltd & Another* {2013} eKLR, where the Court held:

“Prima facie case has been defined in the Black's Law Dictionary, 2<sup>nd</sup> edition as

At first sight; on the first appearance; on the face of it.... A prima facie case is one which is established by sufficient evidence and can be overthrown lonely by rebutting evidence adduced on the other side”



10. The Applicant also relied on the meaning of prima facie case as was defined in *Mrao v First American Bank Ltd & 2 Others* {2003} KLR 125 as

“A case where on the material presented to the Court, a tribunal properly directing itself will conclude that there was a right that had been breached by the other party as to call for a rebuttal”
11. The Applicant further submitted that the Respondent’s action will jeopardize his work and will cause him to suffer irreparable loss. He also submitted that the balance of convenience tilts towards preserving the subject matter of the suit.
12. On whether the Respondent issued premature termination notice; the Applicant submitted that he complied with the terms of the sale agreement, but the Respondent went ahead to terminate the agreement. He also submitted that having been willing to remedy the breach, he gave a sign of goodwill, and he is thus entitled to specific performance as was held by the Court in the case of *Eric Mwenda Kanyuuru v Charles Mwiti Mugamabi & 3 Others* {2020}eKLR. Further, it submitted that the Respondent acted in bad faith and it is apprehensive that he will proceed to sell the suit property.
13. Through the Law Firm of Kihara Njuguna & Co Advocates, the Respondent filed his written submissions urging this Court to dismiss the application. He raised one issue for determination by this Court being whether the application meets the threshold for grant of injunction. He pointed out the principles of granting injunction as submitted by the Applicant above. He also submitted that the Applicant breached the sale agreement and it has failed to demonstrate how it remedied the breach.
14. Further, he submitted that the Applicant has not demonstrated the injury it will suffer, noting that it is not claiming ownership of the suit property. It was his further submissions that the damages if any, can be quantified and adequately compensated. In the end he submitted that the Applicant has not demonstrated that it will suffer inconvenience if the injunction is not granted.
15. It is evident that the instant suit results from a Sale Agreement between the parties herein dated April 21, 2022. The Sale Agreement was for purchase of ten (10) Acres to be excised from land parcel No Kakuzi/ Kirimiri Block 7/162, for a consideration of Kshs 35,000,000. The consideration was to be paid in three instalments being: Kshs 3,500,000 payable at the execution of the Sale Agreement, Kshs 3,500,000 payable through five post-dated cheques each of Kshs 500,000 to be paid 14 Days from the date of execution of the agreement and Kshs 28,000,000 payable on or before the date of completion, which was 90 Days from the date of execution of the sale agreement.
16. The Applicant admits having defaulted in the second instalments, which was to be made through post-dated cheques. The Respondent admits having received the cheques, though he received them after issuing a reminder to the Applicant. Sadly, the cheques bounced. The Respondent went ahead and terminated the Sale Agreement as per the letter dated June 10, 2022. From the contents of the letter, the Respondent terminated the Sale Agreement because the Applicant failed to comply with the 21 Days’ Notice that was issued to it by the Respondent.
17. This Court has perused a letter dated May 9, 2022 ,which was addressed to Muchai Mwendwa & Co. Advocates, who was the Applicant’s counsel in the Sale Agreement. The said letter invoked the terms of Clause 8(a) and gave the Applicant 21 Days, to remedy the breach, failure to which the Respondent would terminate the Sale Agreement. Attached to application are copies of Seven Cheques drawn in favour of the Respondent each of Kshs 500,000 drawn on diverse dates, May 28, 2022- May 31, 2022.
18. It is not clear whether the Respondent received them or not, but from the Applicant’s Further Affidavit, the Respondent did not accept them. The Applicant thereafter wrote a letter to the



Respondent's counsel dated June 13, 2022, notifying them that the Notice of Termination of the Sale Agreement was premature by dint of application of Clause 8(b) of the Sale Agreement.

19. As per the sale agreement, the seven post-dated cheques were to be dated May 5, 2022. The Cheques attached were issued way beyond the stipulated timelines. The Applicant being aggrieved by the Respondent's actions opted to file the instant suit seeking refund Kshs 3,500,000 together with the entire incidental sums stated in the Originating Summons. It also sought orders for compensation for unprocedural termination of contract. Alongside the Summons, the Applicant sought orders for injunction barring the Respondent from selling or dealing with the suit property, the subject matter of this ruling.
20. It is relevant to point out from the pleadings that the Applicant is not claiming specific performance in the terms of Clause 8(a) which provided that it shall be entitled to the portion of property paid for. Its claim is for refund of the monies already paid for, which is Kshs 3,500,000/. The Respondent averred that the Applicant did not exhaust the dispute resolution mechanism as provided for in the sale agreement. The Applicant did not submit on the issue of exhaustion.
21. It is important for this Court at this point to determine whether this Suit is properly before it or not. Clause 20 of the Sale Agreement makes provision for Dispute Resolution, it provides:

Should any dispute arise between the Parties hereto with regards to the interpretation, rights, obligations and/ or implementation of any or more of the provisions of this Agreement, the Parties shall in the first instance attempt to resolve such dispute by amicable negotiation. Should such negotiations fail to achieve a resolution within Fifteen (15) days of notification (in writing) of the dispute to the other Party, either party may declare a dispute by written notification to the other, whereupon such dispute shall be referred to Mediation under the following terms:

- I. The Parties shall appoint a single Accredited Mediator by Agreement within Fourteen (14) days thereof. If no such agreement is reached between the parties, either party may in writing request for an accredited Mediator from the Mediation Committee;
- II. Such Mediation shall be conducted un Nairobi in accordance with the Mediation Rules, 2015 or the law for the time being in force
- III. To the extent permissible by law, the determination of the Mediator shall be conclusive and binding upon the Parties hereto with the option for an aggrieved party appealing to a Court of competent jurisdiction

Notwithstanding the above provisions of this Clause, either party being aggrieved is entitle to seek preliminary or interim injunctive relief or conservatory measures from any Court of competent jurisdiction pending the outcome of the mediation

22. As per clause 21 of the said Sale Agreement, parties expressed their intentions to be bound by the contents of the said agreement. The Applicant's main claim is that the Respondent disregarded the provisions of Clause 8 of the Sale Agreement on the procedure for issuing a termination Notice. Clause 8 of the said agreement made provisions for Failure to Complete part (a) of the said Clause made provisions for circumstances when the Applicant defaulted.
23. It is right to conclude that parties had an obligation under the said clause to comply with either methods stated therein to remedy the breach. Based on Clause 20 on Dispute Resolution, parties



agreed to only come to Court on two instances; one being on appeal from the decision of a Mediator and secondly to seek interim or conservatory orders pending the outcome of the mediation.

24. The Applicant's claim seeks to challenge the Respondent's failure to comply with the obligations contained in clause 8(a). Section 6 of *Arbitration Act* states as follows:

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- (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-
  - a That the arbitration agreement is null and void, inoperative or incapable of being performed; or
  - b That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
- (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
- (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

25. The dispute between the parties herein arises from implementation of Clause 8 of the Sale Agreement and seeks to challenge the failure by the Respondent to discharge his obligations as per Clause 8. There is no formal application seeking to have the matter referred for Mediation, but the Respondent has raised the said issue. Presently, parties expressed their intentions in the agreement and it is only fair that this Court breathes life to their intention.

26. Parties are bound by the Sale Agreement, and this Court has no business of re-writing the contract on behalf of the parties herein. This position was well settled in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR when the Court held:

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

27. This is not a matter on appeal and even though the Applicant is seeking interim orders, there is no evidence of a pending Mediation case. There is no ambiguity in the sale agreement and applying the literal principle of interpretation, this Court can clearly see the intentions of the parties was not to rush to Court, but to seek Alternative Dispute Resolutions of settling disputes first.

28. The upshot of the foregoing is that the suit is not properly before this Court and cannot therefore be entertained. Parties are referred to Mediation as per Clause 20 of the Sale Agreement. In the interest of justice, the matter should be referred to Mediation within 21 Days from the date hereof.

29. As a recommendation, parties have an option of pursuing the Court Annexed Mediation, which Court Annexed Mediation was recently launched in this Court and is ongoing.



30. Having found that this suit is not properly before this Court, then the Court will not grant any of the prayers sought in the instant Notice of Motion Application dated August 23, 2022, and the said Application is dismissed entirely.

31. It is so ordered.

**DATED, SIGNED, AND DELIVERED VIRTUALLY IN MURANG'A THIS 29<sup>TH</sup> DAY OF MARCH, 2023.**

**L. GACHERU**

**JUDGE**

**Delivered virtually in the presence of:**

Joel Njonjo/Ms Mwende - Court Assistants

Mrs Mwendwa for the Plaintiff/Applicant

Mr Munaawa for Defendant/Respondent

