Kariuki v Ringsview Apartments Limited & another (Environment & Land Case E140 of 2021) [2022] KEELC 3823 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KEELC 3823 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E140 OF 2021

LC KOMINGOI, J

APRIL 28, 2022

BETWEEN

MACHARIA KARIUKI ..... PLAINTIFF

AND

RINGSVIEW APARTMENTS LIMITED ..... 1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED ..... 2ND DEFENDANT

RULING

1. This is the notice of motion dated April 23, 2021 brought under article 40 of the *Constitution* of Kenya, 2010, order 40 rule 1 and 2 section 3, 3A and 63 (e) of the Laws of Kenya and any other enabling provisions of law.

2. It seeks orders;

    1. Spent

    2. Spent

    3. That pending the hearing and determination of the main suit, a temporary order of injunction do issue restraining the defendants/respondents from disposing off by selling in a public auction or in any manner whatsoever and/or in any other manner whatsoever interfering with or otherwise dealing with all that property known as Apartment C6 erected on Land Reference Number 4858/11.

    4. That the costs of the application be in the cause.

3. The grounds are on the face of the application and are set out in paragraphs (a) to (i).

4. The application is supported by the affidavit of Macharia Kariuki the plaintiff/applicant herein sworn on the April 23, 2021.

5. The application is opposed. There are grounds of opposition filed on behalf of the 1st defendant dated May 13, 2021. There is also a replying affidavit sworn by dr Mbira Gikonyo a director of the 1st defendant/respondent on the May 17, 2021.

6. There is also a replying affidavit sworn by Beatrice Chesano, a platinum banker with the 2nd defendant/ respondent sworn on the July 8, 2021.

7. On the June 28, 2021, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

The Plaintiff's/Applicant's Submissions

8. They are dated July 28, 2021. It is not in contention that the plaintiff/applicant has not received the completion documents listed in paragraph 9 of the agreement. It is also not in contention that he is in possession of the suit property by virtue of his tenant being in occupation of the suit property.

9. The 1st defendant/respondent obtained a loan facility of Kshs 90,000,000/= from the 2nd defendant/ respondent to which the security is the property known as LR No 4858/11 being the parent property to the suit property. The loan facility was obtained in July 2018. The 2nd defendant/ respondent is in the process of realizing the security to the loan facility and intends to sell by public auction the parent property which sale would inevitably include selling of the suit property.

10. They raise two issues for determination:-

    (a) Whether the application meets the threshold of granting of the prayer of interim injunction for preservation of the suit property pending hearing and determination of the suit; and

    (b) Whether the orders sought should be granted.

11. This honourable court is empowered to issue the order of preservation of the suit property pending the hearing and determination of the suit. It has put forward the cases of *Nguruman Ltd vs Jan Bonde Nelsen & 2 Others* [2014] eKLR; *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] e KLR. The applicant has a *prima facie* case against the defendants/respondents.

12. The 2nd defendant/respondent is at an advanced stage of processing the parent property for sale by public auction. He has put forward the case of *Marple Brooks Project Company Ltd & Another vs I & M Bank Ltd* [2019] e KLR. The applicant has invested in the suit property and it is only just that he should be let to enjoy his investment. He will suffer irreparable harm if the interim injunction is not granted.

13. The suit will be rendered moot and an academic exercise if the application is not allowed. The balance of convenience tilts in favour of applicant. He has put forward the case of Marple Brooks Projects Company Ltd (*supra*).

14. The purpose of the interim injunction is to preserve a suit property to ensure that the suit is not defeated. Courts have numerously stated that in determining an application of injunction as this one, the court should opt for the option that offers a lower risk of injustice to any of the parties. He has put forward the case of *Royal Mabati Factory Ltd vs Imarisha Mabati Ltd* [2018] e KLR. He prays that the application be allowed.

The 1st Defendant/Respondent's Submissions**

15. They are dated September 2, 2021. They raise four issues for determination:-

(i) Whether this honourable court has jurisdiction to hear and determine the suit in the first instance in view of the arbitration agreement.

(ii) Whether the sale agreement dated October 31, 2013 is properly produced as evidence in the matter.

(iii) Whether the applicant has satisfied the grounds for grant of injunction orders sought.

(iv) Whether the financial facility procured by the 1st respondent from the 2nd respondent and the securitization thereof were fraudulent and illegal.

16. Clause 2.1 of the sale agreement dated October 31, 2013 contains an arbitration agreement. The arbitration agreement provides for reference of any disputes arising between the parties thereto to arbitration. Article 159 (1) of the *Constitution* implores courts to promote alternative forms of dispute resolution including reconciliation, mediation arbitration and traditional disputes resolution mechanism. Section 10 of the *Arbitration Act*, No 4 of 1995 Limits this honourable court's intervention in arbitral process. It has put forward the case if *Nyutu Agrovet Limited vs Airtel Networks Kenya Limited & another*; *Ann Mumbi Hinga vs Victoria Njoki Gathara* [2009] e KLR; *Safaricom Ltd vs Ocean View Beach Hotel Ltd & 2 Others* [2010] eKLR.

    The application is fatally incompetent for offending the express provision of the *Arbitration Act* and should be dismissed accordingly. The suit herein is premature as it contravenes the arbitration agreement.

17. The sale agreement dated October 31, 2013, is inadmissible in court as it has not been duly stamped contrary to section 19(1) of the *Stamp Duty Act*. It has put forward the case of *Maxam Ltd vs Heineken East Africa Import Co Ltd & Another* [2019] eKLR.

18. As to whether the applicant has satisfied the grounds for grant of injunction, it has put forward the case of *Giella vs Cassman Brown & Co Ltd* [1973] EA 358; *American Cynamid Co Ltd vs Ethicon Limited*; *Mbuthia vs Jimba Credit Corporation Ltd*; *Moses C Muhia Njoroge & 2 Others vs Janes W Lesalai & 5 Others*; *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & Another*. The applicant has failed to disclose to this honourable court the reason for his failure to complete the purchase of the suit property from October 2013. The applicant acquired possession without the authority and permission of the 1st respondent. The applicant's rights over the suit property have not crystalized. The applicant's claim over the suit property is misplaced and unsubstantiated intended to depriving the 1st respondent of its rightful property.

19. The applicant has not demonstrated that he will suffer irreparable harm that cannot be compensated by way of damages. On the contrary the 1st respondent has suffered real significant loss in terms of mesne profits on account of the applicant's unlawful occupation of the suit property. The 1st respondent has to date suffered a loss of Kshs 11,592,000 in terms of mesne profit plus interest thereof at 12% per annum and continues to suffer loss.

20. The balance of inconvenience tilts in favour of the 1st respondent who has been divested of income in form of rent for over 7 years during which period the applicant has unjustly enriched himself and continues to unlawfully occupy the suit property.

21. The procurement of the loan facility from the 2nd respondent was done transparently, in good faith and for cause. The project faced financial challenges when one Vijay Morjoria purported to collude with one of the project contractors Vishnu Builders and Developers Ltd to defraud the 1st respondent of 8 apartment units through direct payment of purchase money to the said contractors and or a set

off arrangement to the exclusion and without approval of the 1st respondent. The fraud divested from the 1st respondent by the said unscrupulous purchaser was an aggregate amount of Kshs 92 million which is a colossal amount and as a result in the year 2017, the 1st respondent defaulted in repayment of the loan advanced by I & M Bank Ltd which led to the said lender threatening to institute recovery proceedings including the exercise of its statutory power of sale.

22. This led to the 1st respondent to seek a mortgage facility of Kshs 90,000,000/- from the 2nd respondent which was utilized in settling the outstanding loan due to I&M Bank Ltd on the November 6, 2018 and 2nd respondent accepted to take over the loan facility from I & M Bank Ltd.

23. The 1st respondent has maintained full disclosure of its indebtedness to the 2nd respondent to the purchasers of the apartment units and has been actually engaging with them on the various options of repayment of the loan and the discharge of the respective units.

24. The applicant has not completed the purchase of the suit property to enable the 1st respondent to effect transfer of the lease to him. The applicant's allegations of fraud and illegality are frivolous and have not been proved by the applicant. It prays that the application be dismissed with costs.

The 2nd Defendant/Respondent's Submissions

25. They are dated August 2, 2021. They raise two issues for determination.

    (i) Whether the applicant is entitled to seek an injunction against the 2nd respondent.

    (ii) Whether the respondent is justified in exercising its statutory power of sale.

26. The 1st respondent approached the 2nd respondent expressing interest in acquiring a loan facility evidenced by the letter of offer dated July 25, 2018 on all that suit property known as LR NO 4858/11 Ring Road Kileleshwa, Nairobi County registered in the name of the 1st respondent. The applicant was neither privy to this arrangement nor a party to the transaction and can therefore not purport to be aggrieved by the decision of the 2nd respondent in exercising its powers as the chargee.

27. The applicant has failed to demonstrate that he has a prima facie case as he has never been registered as the proprietor of the suit property. It has put forward the cases of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] 1KLR 125; *Maltex Commercial Supplies Ltd & Another vs Euro Bank (in liquidation)* 2007 e KLR; *Bii vs Kenya Commercial Bank Ltd* [2001] KLR 458.

28. The Applicant has not demonstrated what substantial loss he stands to suffer that cannot be compensated by an award of damages if these orders are not granted. He has not demonstrated any breaches or contraventions by the 2nd respondent. The 2nd respondent which is a lending institution will suffer substantial loss as it ought to hold and be held accountable for handling public monies. It has put forward the case of *Kenya Shell Ltd vs Kibiru* [1986] KLR 410 which was quoted in *Socfinac Company Limited vs Nephat Kimotho Muturi* [2013] e KLR; *Equatorial Commercial Bank Ltd & 2 Others vs Retreat Villas Ltd*.

29. The 2nd respondent stands to suffer more harm if the application is allowed. The balance of convenience tilts in favour of the 2nd respondent. It has put forward the case of *Paul Gitonga Wanjau vs Gathuthis Tea Factory Co. Ltd & 2 Others* [2016] e KLR.

30. The applicant has failed to adduce any evidence by way of a registrable document to prove his proprietorship in the suit property.

31. The 2nd defendant followed due process, issued all statutory notices as mandatorily required by statute is well within its rights to attach and sell the 1st Respondents property so as to realise its security. It prays that the application be dismissed with costs.

32. I have considered the pleadings, the notice of motion, the affidavit in support and the annexures. I have also considered the grounds of opposition and affidavit in response, the rival submissions and the authorities cited. The issue for determination are:-

    (i) Whether the plaintiff/applicant's application meets the threshold for grant of temporary injunction.

    (ii) Who should bear costs of this application?

33. In an application for injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were laid down in the precedent setting case of *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358. In the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 the Court of Appeal stated what amounts to a *prima facie* case.

    I am guided by the above authorities.

34. The plaintiff/applicant relies on the sale agreement between him and the 1st defendant/respondent dated October 31, 2013. It is for the sale of apartment C-6. The purchase price is Kshs 11,500,000/-. Under clause 2.2 of the sale agreement an initial deposit Kshs 5,000,000 was payable on or before execution of the letter of offer.

    Clause 2.3

    > "A subsequent instalment of Kenya Shillings Five Million (Kshs 5,000,000) payable on or before the September 30, 2012 (now past)

    Clause 2.4

    The balance of Kenya Shilings Four Million Five Hundre Thousand (Kshs 4,500,000) shall be payable on or before completion of the project (receipt of which the vendor acknowledges)"

35. In paragraph 2 of his supplementary affidavit the plaintiff/applicant states that the purchase price has been paid in full. He has however not attached any document in terms of deposit slips to confirm that he paid the full purchase price.

36. The 1st defendant's/respondent's case on the other hand is that the plaintiff/applicant failed to pay the purchase price in full. In paragraph 5 of the replying affidavit dr Mbira Gikonyo, the director deposes that:-

    > " That the applicant failed to pay the full purchase price to the 1st respondent's company. Indeed the applicant has failed to attach any proof of payment as an annexure to the application".
    >
    > In paragraph 8 he depones
    >
    > > " "That despite the applicant's failure to fulfil his obligations under the sale agreement, he acquired possession of the suit property without the authority and permission of the 1st respondent's company. accordingly, the applicant has been in occupation of the suit property unlawfully and at a great loss to the 1st respondent's company."

37. These averments have not been challenged by the plaintiff/applicant. I find that he has failed to demonstrate that he paid the full purchase price to the 1st respondent.

38. The plaintiff/applicant has not disclosed the reason for failure to complete the purchase of the suit property. I agree with the 1st defendant'/respondent's submissions that his right over the suit property has not realized.

39. I find that the plaintiff/applicant has failed to establish a *prima facie* case with a probability of success at the trial.

40. In the case of *Kenleb Cons Ltd vs New Gatitut Service Station Ltd & Another* [1990] KLR 557 Bosite J (as then was) held that;-

> " to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction".

41. I find that the plaintiff/applicant has failed to demonstrate that he deserves this court's protection.

42. I find that the plaintiff/applicant has failed to demonstrate that he will suffer substantial loss that cannot be compensated by an award of damages if these orders are not granted.

43. I agree with the 2nd defendant/respondent's submissions that the plaintiff/applicant is not privy to the arrangements between the 1st and 2nd defendant/respondent. The 2nd respondent has a registered charge over the suit property. The plaintiff/applicant has failed to demonstrate that the same was done irregularly, illegally and fraudulently.

44. I find that the balance of convenience tilts in favour of the 2nd defendant/respondent. In the case of *Paul Gitonga Wanjau vs Gathuthi Tea Factory & 2 Others* [2016] e KLR the court expressed itself thus:-

> " Where any doubt exists as to the applicants' right or if the right is not disputed, but its violation is denied, the court, in determining whether on interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right…Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion……."

45. In conclusion I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 28TH DAY OF APRIL 2022.

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

Ms Mbaabu for the 1st defendant

Mr. Otieno for the 2nd Defendant

Steve - Court Assistant