



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 136 OF 2014**

**(FORMERLY COMMERCIAL CASE NO. 207 OF 2014)**

**NICHOLAS REUBEN NYAMAI <sup>T</sup>/A N.R. NYAMAI AND COMPANY  
ADVOCATES.....PLAINTIFF**

**VERSUS**

**TIMOTHY NDUVI MUTUNGI.....DEFENDANT**

**RULING**

1. The plaintiff has filed a Notice of Motion dated 20<sup>th</sup> May, 2014 seeking:

“

- i. ***An injunction restraining the defendant from selling, transferring, charging, interfering with and/or doing anything whatsoever with Land Reference Number 25799/3 pending hearing and determination of this suit.***
- ii. ***That pending the hearing and determination of this suit, an order do issue compelling the defendant and/or his agents to jointly participate in the selling process of Land Reference Number 25799/3 with the plaintiff in order to arrive at the highest purchase price of the said parcel of land /or in order to arrive at the best offer and/or in order to justly assess and/or arrive at the just legal and consultancy fees payable to the plaintiff by the defendant in respect of “the extra/additional legal and consultancy fees chargeable if the purchase price of Land Reference Number 25799/3 exceeded/exceeds KShs.200 Million.***

2. It is the plaintiff’s case that he and the defendant entered into a retainer agreement on 4<sup>th</sup> September, 2012. The parties herein subsequently entered into further agreements on 5<sup>th</sup> September, 2013 and 19<sup>th</sup> September, 2013. The plaintiff offered the defendant legal and consultancy services between the year 2010 and 2013 whereupon he represented the defendant in court cases relating to the defendant’s Land Reference Number 25799/3 (***‘the property’***) i.e. *High Court Civil Suit No. 501 of 2009, Wilson K. Kipkoti and Another v. Timothy Nduvi Mutungi* and *Judicial Review Miscellaneous Cause No. 105 of 2011, Republic v. Kenya Civil Aviation Authority and Another ex parte Timothy Nduvi Mutungi*. He further represented the defendant in an out of court settlement discussion with Kenya Civil Aviation Authority and Kenya Airports Authority and in the Ministry of Lands in protecting the defendant’s interest in the property. The fees payable to the plaintiff for the said services was governed by the terms of their agreement. Amongst the terms of the agreement was that the defendant would deposit the original title deed for the suit property with the plaintiff as security for the basic/minimum automatic legal and consultancy fees chargeable in the price of the suit property exceeded KShs. 200 Million.

3. It is the plaintiff's gravamen that defendant has failed to make good the said terms of the agreement, particularly that the defendant has failed to deposit the title deed with the plaintiff. He further stated that the defendant has in the last four (4) years been aggressively offering the land for sale to prospective buyers. The plaintiff is apprehensive that the defendant shall at any time sell, charge and/or transfer the suit land to a third party in order to defeat the plaintiff's claim.
4. A preliminary objection dated 28<sup>th</sup> May, 2014 and replying affidavit sworn on 11<sup>th</sup> June, 2014 was filed by the defendant in opposition to the application. I shall only consider the replying affidavit considering that the preliminary objection was overruled by the ruling of Waweru J of 13<sup>th</sup> August, 2014.
5. The defendant contended that he paid the plaintiff's legal fees in instalments but he was never issued with any receipts. He stated that he sometime in the year 2013 learnt that the plaintiff had no practicing certificate and he thereafter appointed M/s. Alphonse Mutinda & Company Advocate to represent him further. He particularly stated that the plaintiff only registered the court order on 23<sup>rd</sup> November, 2011. He contested that the retainer agreement dated 19<sup>th</sup> September, 2012 was not effective since the plaintiff did not get a successful purchaser; that the retainer agreement dated 4<sup>th</sup> September, 2013 cancelled that of 19<sup>th</sup> September, 2012 making it non-effective; that the retainer agreement dated 5<sup>th</sup> September, 2013 also changed the terms of that dated 4<sup>th</sup> September, 2013. He averred that the agreements dated 4<sup>th</sup> and 5<sup>th</sup> September, 2013 were unenforceable. He further stated that the agreements made in the year 2013 were null and void since the plaintiff bore no practicing certificate. The defendant denied being aware of any basic/minimum automatic legal and consultative fee. He contended that all the prospective buyers who tendered their interest in the property never purchased it thereby no basis of legal or consultative fee can be formed.
6. The plaintiff swore a further affidavit dated 30<sup>th</sup> October, 2014 in response to the defendant's replying affidavit. He denied the defendant's allegations that he had no practising certificate and exhibited copies of his practising certificates for the years 2010 to 2014. He contended that the advocate referred to in the letter by the Law Society of Kenya dated 16<sup>th</sup> October, 2014 someone other than him since his personal number is P. 105/2233/91 and not P. 105/2924/95. He averred that the defendant's current advocate K. Onserio Mogire participated in the preparation and registration of documents under his instructions and that he did the actual registration thereafter. He denied that the payment of his fees was dependant on the sale of the property. The plaintiff also contended that the subsequent agreements modified/reviewed that of 19<sup>th</sup> September, 2012 and did not cancel it thereby the agreements are valid.
7. I wish to preliminarily deal with the defendant's contention that the plaintiff bore no practising certificate in the year 2013. The plaintiff exhibited his practising certificates for the years 2011 to 2014. I find that he established that he is not the person referred to in the letter by the Law Society of Kenya dated 16<sup>th</sup> October, 2014 since their personal number differ. To that extent the agreements of 2013 are not null and void.
8. Parties agreed to canvass the application by way of written submissions. This being an interlocutory application for injunction, the court is concerned with the plaintiff showing *prima facie* case that he has a right to the property, that the property is at a risk of being disposed and that the disposal shall occasion the plaintiff irreparable loss which would not be compensated by costs. In the event the court is in doubt, the application will be decided on a balance of convenience. See: ***Giella v. Cassman Brown & Co. Ltd(1973) E.A.358.***
9. In deciding whether a prima facie case has been established, the court must not make definite findings of fact or law. **Black's Law Dictionary, 8<sup>th</sup> Edition** defines *prima facie* as "**sufficient to establish a fact or raise a presumption unless disproved or rebutted**". This definition is fortified by the Court of Appeal's pronouncement in ***Mrao Ltd v. First American Bank Ltd & 2 Others(2003) KLR 125*** where it was stated:

***"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 right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."***

10. A reading of the agreements reveal that the agreements are to be read together since the

subsequent ones merely modified and did not cancel the earlier ones. The plaintiff and the defendant agreed on a percentage of fees to be paid. The agreements of 4<sup>th</sup> and 5<sup>th</sup> September, 2013 provided that the defendant would deposit the original title deed with the plaintiff as security. The defendant has on the other hand merely denied owing the plaintiff any money and stated that he paid the plaintiff in instalments without being issued with receipts. He has however, not attempted to indicate how much he paid and around what period he made the said payments. Further, the defendant has not controverted the plaintiff's averment that he has failed to deposit the title deed. He instead contended that the plaintiff was only entitled to fees if he availed a purchaser. There is however no such clause in the agreements. From the foregoing, I find that the plaintiff has prima facie asserted his right to the property.

11. As regards the second limb, the plaintiff argued that the defendant is likely to dispose of the property and such disposal shall occasion him irreparable loss. Irreparable loss was defined in **Robinson v. Pickering (1881) 16 Ch. D. 660** as follows:

***"...irreparable injury does not mean an injury which is not physically capable of being remedied but one which cannot be adequately remedied by damages."***

I am however of the view that since prima facie case has been established, an injunction should issue to preserve the subject matter of this suit. The plaintiff has prima facie established that the defendant acted in an oppressive manner by refusing to deposit the title deed with him as agreed. In this regard I share the same opinion as Ringera J (as he then was) in **Waithaka v. Industrial and Commercial Development Corporation (2001) KLR 374 at page 381** where he held:

***"As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages maybe an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy...if the adversary has been shown to be highhanded or oppressive in its dealings with the applicant this may move the court of equity to say: 'money is not everything at all times and in all circumstances and don't you think you can violate another citizen's right only at the pain of damages.'"***

12. The second prayer seeks a mandatory injunction which I cannot grant at an interlocutory stage. Such an order can only be granted in clear cases where facts are not controverted. Such is not the case in this application. (See: **Kenya Breweries Limited v. Okeyo EALR (2002) 1 EA 110** where it was held:

***"A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover before granting a mandatory injunction, the court had to feel a high degree or assurance that of assurance that at the trial it would appear that the injunction had rightly been granted that being on a different and higher standard than was required for a prohibitory injunction."***

13. In view of the foregoing I grant prayer (i) herein and decline to grant prayer (ii) herein. Orders accordingly.

Dated, Signed and Delivered in open court this 18<sup>th</sup> day of December, 2014.

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Plaintiff

.....for the Defendant