



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL SUIT NO. 1069 OF 1998**

**ANNE MUMBI HINGA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**GAITHO OIL LIMITED.....DEFENDANT/APPLICANT**

**RULING**

On 9<sup>th</sup> August 2012, the Defendant herein filed a Notice of Motion dated 8<sup>th</sup> August 2012 expressed to be brought under the provisions of Order 40 Rule 1(a), 2(1), 4,10(1)(a), Order 51 Rule 3 of the Civil Procedure Rules, Section 1A, 1B and 3A, Section 63(c), (e) of the Civil Procedure Act, Sections 68, 69, 70 and 80 of the Land Registration Act No. 3 of 2012 and All Other Enabling Provisions of Law seeking the following orders:

1. **That this Application be heard most urgently during the High Court Vacation and Ex parte in the first instance.**
2. **That the Plaintiff, her agents, servants, employees and/or any other person whatsoever, be restrained by an urgent temporary injunction from selling, alienating and/or dealing with any manner whatsoever with the suit premises known as L.R. Number 12337/6 Kiambu Registered as No. I.R. 35251/1, while pending the hearing and determination of this suit.**
3. **That the Plaintiff, her agents, servants, employees and/or any other person whatsoever, be restrained by an urgent temporary injunction from interfering in any manner whatsoever with the Defendant's occupation and possession of the suit premises known as L.R. Number 12337/6 Kiambu Registered as No. I.R. 35251/1, while pending the hearing and determination of this suit.**
4. **That this Honourable Court do issue an urgent preservation Order of the suit premises known as L.R. Number 12337/6 Kiambu registered as No. I.R. 35251/1, so as to prevent any alienation of the same until the hearing and determination of this suit.**

**AND/OR**

5. **That an Order of Inhibition, inhibiting any alienation, transfer, sale, registration and interference of the suit premises (in any manner whatsoever) known as L.R. Number 12337/6 Kiambu Registered as no. I. R. 35251/1, do issue forthwith and the same to remain in force until the hearing and determination of this suit.**
6. **That the costs of this application be provided for.**
7. **That such other and/or further relief be granted as this Honourable Court might deem fit and just to grant in the unique circumstances of this matter.**

The application is based on the grounds on the following grounds:

1. **This suit is part heard, the same having been heard by the Hon. Lady Justice Rawal, as she then was.**
2. **The suit came before the said lady Justice Rawal last on 1<sup>st</sup> December 2011.**
3. **The Plaintiff and her one witness have already given their evidence.**
4. **The suit came for mention severally on 31<sup>st</sup> January 2012, 28<sup>th</sup> January 2012, 8<sup>th</sup> March 2012, 22<sup>nd</sup> May 2012 and 19<sup>th</sup> June 2012 and every time this suit came for mention aforesaid, the Plaintiff and her Advocates always requested for more time to enable them to file Further Witness Statements.**
5. **The suit was again scheduled to come for Mention on 25<sup>th</sup> July 2012, but the same was taken out.**
6. **Earlier on, a caveat has been registered against the suit premises known as L.R. Number 12337/6 Kiambu registered as No. I.R. 35251/1, and the same was registered on 4<sup>th</sup> May, 1998.**
7. **The said Caveat had been registered at the request of one Joseph Kiarie Mbugua (now deceased).**
8. **The said Joseph Kiarie Mbugua was a Director of the Defendant Company but he passed on sometimes on 22<sup>nd</sup> December , 2006.**
9. **The Defendant/Applicant Company came to know later that the said caveat had been removed without any Notice to the Defendant Company.**
10. **The said Caveat was so removed illegally, unlawfully and through conspiracy and to abuse the process of this honourable Court by the Plaintiff.**
11. **The defendant/Applicant has now learnt that the Plaintiff (who has been requesting for further time to file further witness statements as stated hereabove) is marketing the suit premises for purposes of selling the same.**
12. **This Honourable court should assert its authority and dignity by issuing an urgent Injunction Order and/or conservatory Order to prevent any further alienation of the suit premises, while pending the hearing and determination of this suit.**
13. **It is the worst form of abuse of the court process and also the worst form of contempt of Court proceedings, for the Plaintiff to interfere with the suit premises when this suit is part heard and when the same is pending for hearing and determination before this Honourable Court.**
14. **The defendant/Applicant herein has been in occupation and possession of the suit premises since way back on 30<sup>th</sup> April, 1997 (i.e. 15 years) and continues to be in occupation and possession of the same to date.**
15. **The Defendant/Applicant herein has a Counter-Claim against the plaintiff in which the Applicant seeks for an Order of Specific Performance to order the Plaintiff to transfer the suit premises to the defendant/Applicant.**
16. **The Defendant/Applicant has also pleaded Limitation of Actions against the Plaintiff's Claim, having been in possession and occupation of the suit premises for a period of more than fifteen (15) years.**

The same application is supported by an affidavit sworn by **Florence Wairimu Mbugua**, a director of the Applicant on 8<sup>th</sup> August 2012. According to her she is the second widow of one **Joseph Kiarie Mbugua** (hereinafter referred to as the deceased) who passed away on or about 22<sup>nd</sup> December 2006 and is authorised by the Applicant to swear the affidavit. In her affidavit she deposes that the deceased was also a Director of the Applicant Company and that the suit premises known as **LR No. 12337/6 Kiambu IR No. 35251/1** initially belonged to the plaintiff's deceased husband, one **Stephen Ngethe Hinga**. Sometimes on 20<sup>th</sup> December 1996, the Plaintiff's said husband entered into a Sale Agreement with the Applicant for the sale of the suit premises at Kshs 7 million which agreement was duly executed by the parties. The suit land being an agricultural land, the consent of the relevant Land Control Board was procured and the Applicant paid a total of Kshs 5,208,000.00 and through the deceased proceeded to lodge a caveat against the suit property. Later the deponent learnt that the Plaintiff had caused the said caveat to be removed without the knowledge of the deponent and had the property transferred into her

name on or about 28<sup>th</sup> January 2010 by way of Assent. This suit is however partly heard and has been unable to further proceed in the past due unpreparedness on the part of the plaintiff. The last time the matter was heard was on 1<sup>st</sup> December 2011 before **Lady Justice Rawal** and the last time the same was scheduled to come for mention was on 25<sup>th</sup> July 2012 when the same was, according to the deponent, taken out. The deponent's attempt to register to a caveat on discovering that the earlier caveat had been removed was however rejected on the ground that the property had changed hands. While putting off the hearing, the deponent has learnt that the plaintiff is marketing the suit premises for purposes of alienating the same. It is therefore the deponent's view that the plaintiff has been hoodwinking the court into adjourning the matter with a view of selling the suit premises in order to defeat the cause of justice, an action which in the deponent's view amounts to an abuse of the Court process. In order to prevent such eventuality the deponent urges the court to grant the orders sought herein so as to prevent the intended sale of the suit property in which the defendant has been in occupation and possession since 30<sup>th</sup> April 1997. The Applicant, it is deposed, has a counterclaim against the plaintiff for specific performance hence stands to suffer irreparable loss and damage which cannot be compensated by an award of damages hence the orders sought.

In opposition to the application the respondent filed the following grounds of opposition:

1. **The Defendant/Applicant has not shown any evidential proof that the Plaintiff is fraudulently and dishonestly scheming to sell the suit property to defeat justice as alleged or at all to entitle it to the reliefs sought.**
2. **The Defendant/Applicant is not entitled to the reliefs sought as its' action in entering onto the land, taking possession thereof, cultivating it and doing other developments on the same amount to intermeddling as per section 45 of the Law of Succession Act and it therefore does not deserve any discretionary remedies.**
3. **The defendant/Applicant has not demonstrated that it will suffer irreparable loss if the orders sought in the application are not granted and/or that the Plaintiff/respondent will be incapable of compensating the defendant if the suit property is sold and later the applicant succeeds in this suit.**
4. **The Applicant has not shown that it has a prima facie case with a probability of success.**
5. **The defendant's supporting affidavit and in particular paragraphs 18, 19 and 20 ought to be struck out as they contravene order 19 Rules 3 of the Civil Procedure Rules.**
6. **The Defendant's grounds in support of the Application are irrelevant to the reliefs sought.**
7. **The Defendant has no legal or equitable claim and the only redress available if any is to recover the money or valuable consideration paid in the course of the void transaction as per section 7 of the Land Control Act (Cap 302) Laws of Kenya.**
8. **The Counterclaim is incompetent in so far as the Defendant seeks specific performance in that a Court of law cannot give the remedy of Specific performance on a transaction made void by Virtue of a statute of Law.**

Apart from the said grounds the respondent also filed a replying affidavit on 27<sup>th</sup> September 2012 in which she conceded that on or about 20<sup>th</sup> December 1996 her husband **Stephen Ngethe Hinga**, sold the suit property in the sum of Kshs 7 million to the defendant. The said sale agreement had a condition that the completion was to be within 90 days from the date of the agreement and time was of the essence. As at the expiry of the said period and just about a month after her husband passed away, the Defendant had only paid Kshs 1,400,000 towards the said purchase price and the 90 days period passed without the transaction being completed. By a letter dated 9<sup>th</sup> June 1997 the defendant expressly cancelled the sale agreement. In the plaintiff's view, the total amount of money paid towards the purchase price was Kshs 3,100,000.00 and not the alleged Kshs 5,208,000.00. While admitting that the adjournment was being granted to her, it is her contention that the same was being granted to enable her file additional witness statements due to difficulties she was experiencing in procuring the signatures of her witnesses and tracing the relevant documents. It is further contended that the allegations of the intended disposal of the suit property are speculative and unsubstantiated with no evidence to support the same. Accordingly the allegations that she has been hoodwinking the Court are untrue. To the contrary, she contends that she has instructed her advocates to have the suit set down for hearing on a priority basis to prevent further delay.

According to her the Defendant has been unlawful occupation of the suit premises since February 2006 and not 30<sup>th</sup> April 1997 as alleged. In her view this application ought to be dismissed with costs.

To the replying affidavit, the said **Florence Wairimu Mbugua** filed what was entitled a “Responding Affidavit” sworn on 22<sup>nd</sup> October 2012 in which she averred that the respondent neither agreed to cancel the deal nor refund the payments made to her and has in fact accepted further payments of the purchase price thus indicating that the letter has been overtaken by events. In her view the Sale Agreement could not be unilaterally cancelled when the plaintiff continued to uphold the agreement by receiving further payments to the tune of Kshs 2,108,000.00 towards the purchase of the suit premises. According to information received from her Farm Manager several people approached him at the suit premises purporting to have been sent by the plaintiff to buy the suit land. Apart from that the deponent states that she has been approached by one **Nelson Waithaka**, a land broker with allegations that he was looking for a buyer of the suit premises.

The application was prosecuted by way of written submissions. While reiterating the contents of the affidavits filed in support of the application, the applicant invited the Court to paragraph 6 of the re-amended plaint in which it was averred that the defendant unlawfully, forcibly and wrongfully trespassed onto the subject land and has remained therein since then, which action is unlawful and hence the respondent has lied to the Court by stating otherwise. It is therefore submitted that a party is bound by his pleadings and the Court ought to find that the Defendant took possession of the suit premises at least on 22<sup>nd</sup> April 1998. It is further submitted that the allegation that the plaintiff has attempted to sell the suit premises has not been denied but has rather contented herself with stating that there is no evidence to that effect. The Court is therefore urged to find that the allegation that the plaintiff is trying to sell the property is true. In the Applicant’s view, it is in the interest of justice that the suit premises should be preserved and not sold and/or alienated by any of the parties until the hearing and determination of the suit before the Court otherwise our legal system and jurisprudence would not only be lacking and deficient, but the same would be extremely chaotic to imagine. The orders sought according to the applicant are merited considering that the title documents are held by the plaintiff; that the applicant is in possession of the suit premises; that the suit has been pending for a period of 14 years and is part heard; that no prejudice will be suffered by the plaintiff if the orders sought are granted; and that the suit premises is an agricultural land in which the consent of the relevant Land Control Board has been obtained, a sensitive commodity in this country. In the applicant’s view a prima facie case has been made out and the applicant has established that damages would not be adequate taking into account the nature of the land in dispute. It is further submitted that since the applicant has been in possession of the suit land for the last 14 years without interference, the balance of convenience tilts in favour of the applicant. In support of the application, the applicant has relied on **Giella vs. Cassman Brown; Mawji vs. International University and Another [1976] KLR 185; Bananahill Investment Limited vs. Panafrican Bank Limited & 2 Others [1987] KLR 351; Russel Co. Ltd vs. Commercial Bank of Africa Ltd & Another [1986] KLR 633.**

On the part of the plaintiff/respondent it is submitted that the transaction for sale of land was not completed as stipulated in the sale agreement or at all since the defendant neither paid the purchase price in full nor completed its obligations within the stipulated period or at all. Relying on **Openda vs. Ahn Civil Appeal No. 42 of 1981**, it is submitted that a condition precedent for specific performance of an agreement is that the purchaser must pay or tender the purchase price to the seller or such person as he directs at the time and place of completing the sale. In the plaintiff’s submissions, the defendant did not tender the balance of the purchase price to the seller at the time and place of completing the sale and consequently is not entitled to the order for specific performance of the sale agreement. Based on the same decision, it is submitted that a contract for sale of land creates no interest or charge upon the land hence the defendant does not have any known interest in law in the suit land and his only available remedy is in damages or refund of the money paid. It is therefore submitted that the defendant has not established a prima facie case with probability of success. Since the defendant has no proprietary interest in the suit land, it is submitted that it cannot suffer irreparable loss and damage which cannot be compensated by an award of damages. Since the suit is based on breach of contract if the terms are breached damages will be payable as stipulated in the agreement for sale. In the plaintiff’s view since the defendant has trespassed onto the suit property which action amounts to intermeddling with the property

of a deceased person contrary to section 45 of the Law of Succession Act, the defendant has not come to court with clean hands and does not deserve the equitable relief sought. It is further contended that there is neither evidence of irreparable loss nor evidence that the plaintiff intends to dispose of the property. However, there is no evidence that any such sale would be illegal or unlawful. Accordingly, it is submitted that the balance of convenience tilts in favour of denying the grant of the injunction. In the plaintiff's view this application is an activity aimed at bringing sideshows and delaying and frustrating efforts to have the matter proceed to hearing and hence ought to be dismissed with costs.

As rightly submitted by the plaintiff the principles guiding the grant of interlocutory injunctions are firstly, an applicant must show a *prima facie* case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and thirdly, if the court is in doubt, it will decide an application on the balance of convenience. See **East African Industries vs. Trufoods [1972] EA 420; Giella vs. Cassman Brown & Co. Ltd [1973] EA 358.**

In an interlocutory application, however, the Court is not required to make any conclusive or definitive findings of fact or law, on the basis of contradictory affidavit evidence or disputed propositions of law though it is properly entitled to express a *prima facie* view of the matter and to consider what else the deponent to the supporting affidavit has stated on oath which is not true. A *prima facie* case 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 to call for an explanation or rebuttal from the latter. See **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125.**

It is now well recognised that in exercising its discretion under the Civil Procedure Act or in determining whether or not to grant the injunction sought the Court is enjoined to consider what has become known as the principle of proportionality under the overriding objective which objective the Court is enjoined to give effect to in the exercise of its powers under the Act or the interpretation of any of its provisions. In **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589 Ojwang, AJ** (as he then was) expressed himself as follows:

**“It is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice...The argument that the law governing the grant of injunctive relief is cast in stone is not correct, for the law has always kept growing to greater levels of refinement, as it expands, to cover new situations not exactly foreseen before. Traditionally, on the basis of the well-accepted principles, the Court has had to consider the following questions before granting injunctive relief: (i) is there a *prima facie* case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied? (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice...Although the court is unable at this stage to say that the applicant has a *prima facie* case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant”.**

# **In Siteyia vs. Gitome & 3 Others Nairobi HCCC No. 4321 of 1991 [1993] KLR 801, Kuloba, J expressed himself as follows:**

**“Whether a temporary injunction should or should not issue will depend on the facts of the case. It is not possible to lay down one general rule on which the Court shall act in all cases. A variety of circumstances may have to be considered. According to many cases decided on questions of temporary injunctions, in deciding whether to grant or deny an application for a temporary injunction, a Court considers the following factors: (1) Has the applicant made a strong showing that he is likely to prevail on the merits at the trial of the suit itself? (2) Has the applicant shown that without a temporary injunction he will be irreparably injured? (3) Has the applicant shown that taking into consideration the comparative mischief or inconvenience to the parties, the balance of convenience is in his favour? (4) Would the issuance of the injunction substantially harm other parties interested in the proceedings, but not brought before the Court? (5) Where does the public interest lie? (6) Would the withholding of the temporary injunction be in the interest of conserving judicial time? (7) Is there a clear necessity for affording immediate protection to the applicant’s alleged right or interest which would otherwise be seriously injured or impaired”.**

What comes out from the foregoing is that whereas the traditional considerations in applications for injunctions will remain relevant, the Court must develop the law in such a way as to meet the emerging trends in tandem with the ever changing circumstances.

In this case it is not in dispute that there was an agreement for sale made between the plaintiff’s deceased husband on the one hand and the defendant on the other hand in respect of the suit property. That sum money was disbursed towards the satisfaction of the purchase price is similarly not disputed. However according to the plaintiff it was expressly agreed that completion was to take place 90 days from the date of the agreement and that there was no such completion. It was further contended that the defendant rescinded the said agreement vide its letter dated 9<sup>th</sup> June 1997. However, there is evidence that payment was made and acknowledged outside the period of completion. No explanation has been advanced by the plaintiff to explain why this money was received outside the said period. Without such an explanation the defendant’s contention that it is entitled to the remedy of specific performance cannot be wished away simply on the basis that the completion date elapsed. The issue whether or not the plaintiff is no longer bound by the terms of the contract even after receiving the money outside the said period is alive one and is a matter whose effect cannot be adequately resolved in this application. Whereas the Court cannot and is not entitled to make a definitive finding as to whether the defendant has a legal interest in the suit land at this stage, the Court is perfectly entitled to express a *prima facie* view of the matter whether there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. I am satisfied that in the circumstances of this case, taking into account the fact that the existence of the agreement for sale is undisputed; the fact that the defendant is in possession of the suit property for whatever period and under whatever circumstances; the fact that the consent of the Land Control Board has been obtained; as well as the fact that the plaintiff denies that she intends to dispose of the suit property cumulatively establish a *prima facie* case for the purposes of an interlocutory injunction. As was rightly propounded by **Ojwang, AJ** (as he then was) in **Suleiman vs. Amboseli Resort Limited** (supra) the argument that the law governing the grant of injunctive relief is cast in stone is not correct, for the law has always kept growing to greater levels of refinement, as it expands, to cover new situations not exactly foreseen before.

With respect to the issue whether or not the defendant stands to suffer irreparable loss, it is a matter of notoriety which the Court can take judicial notice of that land matters in this country are very sensitive and more often than not explosive. Whereas the mere fact that a matter revolves around land does not

automatically lend itself to a grant of interlocutory injunction, the fact that the dispute is a land dispute is a relevant matter for consideration in such applications. Again the law is not that in all cases where the damage is capable of being quantified injunction will not be granted but rather that normally injunction will not be granted in such cases. As was held by **Ringera, J** (as he then was) in **Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540:**

**“the law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them. That is the normal course but not the invariable course. The court has to take into account the conduct of the Respondent and the gravity of the breaches of law or contract alleged otherwise it would confer a carte blanche on those who are rich enough to pay all quantum of damages to ride roughshod over the rights of other persons. The rich do not fear to pay damages and they must be compelled to submit to the authority of the law by being put to other perils”.**

In other words each case must be considered against the background of its peculiar circumstances.

On the issue whether the defendant stands to suffer irreparable loss unless the injunction is granted, the defendant contends which contention has not been controverted that it is in possession of the suit premises.

Again the court is enjoined, in the exercise of its powers under this Act or the interpretation of any of its provisions, to seek to give effect to the overriding objective specified in subsection (1) of section 1A of the Civil Procedure Act. That objective requires that the Court must aim at *inter alia* the facilitation of the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Accordingly the court must consider the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing. See **Harit Sheth T/A Harit Sheth Advocate vs. Shamascharania Civil Application No. NAI. 68 of 2008.**

Considering the said objective with respect to the facts of this case as disclosed at this stage of the proceedings, it is my view that the interest of justice dictates that the status quo with respect to the suit property be preserved pending the hearing and determination of this suit whose hearing is already on course and has been derailed admittedly due to the inability of the plaintiff to marshal her witnesses and documents.

In **Muhuddin Mohamed Muhiddin vs. C F C Bank Limited & 2 Others [2011] eKLR**, it was held that the Court must give effect to the policy that the law is not to be used as subterfuge, or pure technicality, to validate unjust gains by a party. In this case the plaintiff is in possession of both the title to the land and to part of the purchase price as well.

Let her retain both for the time being but allow the defendant to continue enjoying the possession of the suit property so as to avoid the risk of further litigation in the event that the property changes hands during the pendency of this suit. The overriding objective, in my view, is tailored to enable the court deal with cases justly which includes allotting appropriate share of its resources while allotting resources to other cases. Accordingly the Court ought to avoid as much as possible acts or omissions which are likely to lead to multiplicity of suits by ensuring that the subject matter of litigation is preserved pending the determination of conflicting interests therein where it is shown to the satisfaction of the court that the issues involved warrant the grant of such orders.

Accordingly, the application dated 30<sup>th</sup> July 2012 is allowed with the result that the Plaintiff, her agents, servants, employees and/or any other person whatsoever, are hereby restrained from interfering in any manner whatsoever with the Defendant's occupation and possession of the suit premises known as L.R. Number 12337/6 Kiambu Registered as No. I.R. 35251/1, while pending the hearing and determination of

this suit.

**Dated at Nairobi this 30<sup>th</sup> day of January 2013**

**G V ODUNGA**

**JUDGE**

Delivered in the presence of:

Mr. Bosire for Mr. Ndege for the Plaintiff

Mr. Enonda for the Defendant