



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 337 of 2012

DAVID WAINAINA1ST PLAINTIFF

JAMES WAIRIRE WANGANGA.....2ND PLAINTIFF

LEONARD NJENGA WANGANGA.....3RD PLAINTIFF

-VERSUS-

ERNEST NGUGI KARUGA.....1ST DEFENDANT

JANE NJERI GEORGE.....2ND DEFENDANT

RULING

The plaintiffs instituted the instant suit vide a plaint dated 12th June 2012 and filed on the same date seeking inter alia judgment for specific performance of a contract for purchase of land and/or damages for breach of contract.

Simultaneously with the plaint the Plaintiffs filed a Notice of Motion application expressed to be brought under Order 40 rules and 1 and 2 Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya, and inter alia sought the following orders

1.

2. That a temporary injunction do issue to restrain the 1st Defendant whether by himself, his servants, agents or employees from selling, transferring, disposing of, or dealing with the plaintiffs property title No. KIAMBAA/THIMBIGUA/2002 in anyway or interfering with the plaintiffs quiet possession of the suit property pending he hearing and determination of this application.

3. That a temporary injunction do issue in terms of prayer 2 above pending the hearing and determination of this suit.

4.

The application was supported by tHe annexed affidavit of DAVID WAINAINA the 1st Plaintiff and further on the grounds that:

a) The plaintiffs entered into a sale agreement with the defendants to purchase a one (1) acre sub-divided

portion of Title NO. KIAMBAA/THIMBIGUA/2002 for a sum of kshs. 700,000/=.

- b) That the plaintiffs have paid a total of Kshs. 600,000/= and are presently in possession of the said property.
- c) The defendants blatantly failed to honour their part of the contract by refusing to accept the remainder of the purchase price, being Kshs. 100,000/= despite numerous requests from the plaintiff to do so, whereby frustrating the implementation of the said contract.
- d) The defendants intend to sell and transfer the suit property to a third party in breach of their contract with the plaintiffs.

The defendants on their part oppose the plaintiffs application and the 1st defendant has sworn a replying affidavit dated 1st October 2012 and the 2nd Defendant has filed ground to position also dated 1st October 2012; additionally the defendants have raised a preliminary objection to the suit vide their preliminary objection dated 1st October 2012 where they have raised two points namely:-

1. That the plaintiffs suit contravenes the mandatory provisions of section 4 of the Limitation of Actions Act Cap 22 Laws of Kenya by which the plaintiffs were required to have instituted the suit on or before 5th September 2009 being the statutory 6 years after the purported contract in question in this suit.
2. That by virtue of the provisions for Sections 6 and 8 of the Land Control Act, Cap 302 Laws of Kenya, the purported transaction is null and void for lack of the land control board consent.

The parties appeared before me on 19th November 2012 for the hearing of the plaintiffs application dated 12th June 2012 when the counsels elected to file written submission and on 4th December 2012 when the parties counsel appeared again before me they agreed to rely on the affidavits and the submissions that each of them had filed on behalf of their clients. The court reserved its ruling to be delivered on 13th February 2013.

I have perused the application, the affidavit sworn in support and the replying affidavit and the respective parties submission and the following are the brief facts:-

The plaintiffs vide a sale agreement dated 5th September 2003 entered into a contract with the defendants to purchase a portion measuring 400ft by 400ft from the defendants' parcel of land Title No. KIAMBAA/THIMBIGUA/2002. The plaintiffs paid to the defendants a sum of Kshs. 600,000/= and the balance of Kshs. 100,000/= was to be paid after three months from the date of execution of the agreement. Under Clause 4 of the Sale agreement the defendants were to transfer, the said property to the plaintiffs forthwith and as per the agreement the vendors were to obtain all the appropriate consent and do everything necessary to facilitate the transfer of the said property to the purchaser's name. The sale agreement was to be subject of the law Society's conditions of sale 1992.

It is contended on behalf of the defendants that the 1st Defendant did not sign the alleged sale agreement of 5th September 2003 and states he has never sold any land to the plaintiffs. This averment by the defendants cannot as it were be determined or verified at this stage of the proceedings and is indeed a matter for determination at the trial.

The issue for determination at this stage is whether or not the plaintiffs are entitled to an injunction in terms of their notice of motion dated 12th June 2012. The principles on which an injunction may be granted are well settled and the case of *GIELLA VS. CASSMAN BROWN* (1973) EA 3358 laid the principles which have stood the test of time.

An applicant for an injunction has to satisfy the following conditions:-

- i) That the applicant has a prima facie case with a probability of success;
- ii) That unless the applicant is granted an injunction would otherwise suffer irreparable injury that cannot be adequately compensated by an award of damages;
- iii) In case the court is in any doubt to determine the matter on the balance of convenience having regard to all the attendant circumstances.

On the availed information and facts in this case the sale agreement relied upon by the plaintiffs was executed on 5th September 2003 and under the agreement the balance of the purchase price of Kshs. 100,000/= was to be paid within 3 months of execution of the agreement meaning by 5th December 2003. The transfer under the contract was to be forthwith (though no time line was provided) but realistically it would have been expected the transfer would have been effected immediately the balance of the purchase price was paid by or about 5th December 2003.

The defendant has taken up the point that the institution of the suit is statute barred having been instituted well over 6 years since the cause of action arose. In their submissions the plaintiffs advocates contend that the cause of action arose on the 17th August 2007 when the defendants purportedly brought a prospective purchaser of the property. With respect I do not think this is the case since the agreement did provide for payment of the purchase price and for the transfer.

The breach of the agreement therefore ought to have been after 3 months after execution and hence indications are that the plaintiffs action may infact be statute barred but I do not wish to making a finding on that point at this stage.

More significantly however is that the sale of the property related to agricultural land and hence the mandatory provisions of the land control Board Act Cap 302 laws of Kenya would apply.

Under Section 6(a) and (b) of the land Control Act Cap 302 Laws of Kenya the sale and transfer of agricultural land situate within a land Control area requires the consent of the Land Control Board and if such consent is not obtained the transaction is void for all purposes.

Under Section 8 of the Land Control Act an application for consent has to be made in the prescribed form to the appropriate land Control Board within six (6) months of the making of the agreement for the controlled transaction by any party thereto. Hence the Plaintiffs or the Defendants could each have made the application for the consent of the Land Control Board.

In the present case neither party has made an application for consent to the appropriate land Control board and hence the agreement for sale dated 5th September 2003 became void for all purposes after the expiry of 6 months from the date of execution of the Agreement for Sale.

In the premises therefore there is no agreement that can be specifically performed as the plaintiff seeks in their plaint. The court therefore finds that the plaintiffs do not have a prima facie case with a probability of success.

On the second limb of the GIELLA case the court finds that damages would be an adequate remedy in case the plaintiffs succeed and this is attested to by the plaintiffs under prayer (b) in their plaint where they pray for damages for breach of contract. The plaintiff's loss/damage can be quantified.

As I have no doubt at all in regard to the above 2 principles for grant of injunction I do not need to consider the balance of convenience as I am satisfied that the plaintiffs do not in the circumstances of the matter deserve to be granted an injunction and I accordingly order the plaintiffs notice of Motion dated 12th June 2012 dismissed with costs to the Defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the 1st Plaintiff

..... for the 2nd Plaintiff

..... for the 3rd Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant