



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Case 213 of 2011**

**JOSEPH ODHIAMBO OSWE  
T/A COSWE INVESTMENT CO LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**TAPLUNE CHEPKEMOI CHUMO.....1<sup>ST</sup> DEFENDANT  
JOEL KIPROTICH TONUI .....2<sup>ND</sup> DEFENDANT  
SAMUEL K TONUI.....3<sup>RD</sup> DEFEDANT  
RODAH CHERONO TANUI.....4<sup>TH</sup> DEFENDANT  
RICHARD CHEPTUM .....5<sup>TH</sup> DEFENDANT**

**RULING**

The Chamber Summons dated 10<sup>th</sup> August 2011 seeks among other orders, a temporary injunction to restrain the respondents by themselves, their servants and or authorized agents from selling, disposing off , alienating, transferring to 3<sup>rd</sup> parties or depositing building materials, constructing on and or interfering with the applicant's peaceful and quiet possession and use of the applicants 52 plots -1844-1895 on Njoro Ngata block 2/850 pending the hearing and determination of this suit.

The grounds upon which the application is premised are found in the body of the application and affidavit of Joseph Oswe sworn on 11<sup>th</sup> August 2011. He depones that he met the respondents in 2004 who agreed to sub-divide their 40 acres of land at Njoro/Ngata Block 2/850. The respondents would retain 7 acres, sell 12 acres to the Applicant to subdivide, sell to third parties and remit to them Kshs7,246,000/= . They entered into an agreement on 4<sup>th</sup> October 2004 and the applicant took possession, engaged a surveyor sold the plots and remitted a total of 6,115,000/= to the respondents. That the respondents have breached the agreement by refusing to transfer the property to him, collected money due to him and declined an order for set off. The respondents have now gone ahead and deposited building materials on parts of the suit property and now selling the same land to new parties.

The 5<sup>th</sup> respondent swore a replying affidavit on 8<sup>th</sup> September 2011 on his behalf and on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> , 3<sup>rd</sup> and 4<sup>th</sup> respondents. He strenuously opposed the application and deponed that on 4<sup>th</sup> October 2004, the respondents entered into an agreement with the Applicant to act as their agent to subdivide and sell off the suit property to third parties.

While the plaintiff application was still pending for hearing, the persons to whom the plaintiff sold the suit property filed a notice of motion seeking ,among other orders, a temporary injunction to restrain the Defendants by themselves, their agents, servants from entering, subdividing, selling, transferring, alienating, disposing, tilling, cultivating, leasing, cutting trees, erecting structures or in

any way interfering with the suit plots known as Njoro Ngata Block 2/1887,1888,1889,1890,1891,1892,1893,1894 and 1895 pending the hearing and determination of this suit.

The grounds upon which the application is premised are found in the body of the application, supporting and further affidavits of Joan Chelangat Rono, the fourth interested party, sworn on 15<sup>th</sup> May 2012 and 29<sup>th</sup> May 2012 respectively on her own behalf and on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties.

The applicant depones that the interested parties bought LR Njoro /Ngata/ Block 2/1892,1893,1887,1888,1889,1890,1891 and 1894 from the plaintiff: That portions of their plots were hived off by the Government for the expansion of the Eldoret Nakuru Highway which the Government agreed to compensate for through the plaintiff but the respondent without any legal rights proceeded to receive Ksh950,031/= as compensation due to them and have refused to surrender the money to them or the plaintiff despite the fact that the interested parties have already paid for these parcels and partially developed them.

The application is opposed by the 5<sup>th</sup> respondent's replying, supplementary and further affidavits sworn on 25<sup>th</sup> May 2012, 3<sup>rd</sup> July 2011 and 28<sup>th</sup> September 2011 respectively in which they termed the allegations contained therein as falsehoods and blatant lies. He maintains that all the parcels of land affected by the road expansion on parcels 1887-1895 belong to the 1<sup>st</sup> and 5<sup>th</sup> respondents who have not sold or transferred the suit property. They also contend that the plaintiff and the interested parties are trespassers who ought to be ejected from the suit properties.

I have considered the applications, affidavits sworn in support of each of the rival parties and submissions by counsels.

Being applications for temporary injunction the strictures enumerated in the famous ***Giella Vs Cassman Brown & Company Limited (1975) E.A 358*** and later in the ***Kenya Commercial Finance Company Limited vs. Afraha Education Society (2001) I EA 8*** must be satisfied.

The applicants must show that they have a prima facie case with a probability of success, secondly it must be demonstrated that the applicants might suffer irreparable injury if the injunctions are not granted and thirdly, should the court be in doubt, it will decide the applications on a balance of convenience. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the applicant has a prima facie case.

In considering whether the applicant has established a prima facie case I shall not dwell into the merits of the case but merely look to see whether the applicant's rights have been violated by the respondent to warrant calling upon the Respondents to rebutt the allegations. see ***Mrao Limited Vs First American Bank of kenya ltd (2003) KLR125***

It is common ground that the respondents vide an agreement made on 4th October, 2004 engaged the plaintiff (the applicant in the application dated 10th August, 2011 (hereinafter called "the 1st applicant) to subdivide and sell the suit properties to interested parties. It is also common ground that pursuant to the said agreement the 1st applicant took possession of the suit property and began conducting the assigned responsibilities, namely subdividing and selling to interested persons portions of the suit property. However, before the 1st applicant completed his assigned duties, the respondents vide a letter dated 14th April, 2008 purported to terminate the agreement he had signed with the 1st applicant.

Whereas the respondents have vehemently denied the existence of any contract of sale between them and the 1st applicant, the contents of the above mentioned letter militates against that denial. Paragraph 2 of the said letter clearly indicates that the 1st applicant and the respondents had agreed on the purchase price and that they had received Kshs. 5,865,000/= pursuant to the said agreement.

Through the said letter the respondents expressed their willingness to process ownership documents for the plots that the 1st applicant had sold to interested parties. The relevant portions reads:-

**“Our meeting in the farm on 2nd April 2008 refers.**

**The agreed amount entered between you and me on 4th October, 2004 to be paid by you was Kshs.7,246,000/= (Seven million two hundred and forty six thousand only).**

**The amount you have paid so far for the plots sold is Kshs. 5,865,000 (Five million eight hundred and sixty five thousand only).**

**The amount outstanding as from the last payment made on 25th April, 2007 is Kshs. 1, 381,000/= (One million three hundred and eight one only).**

**In view of the period this process has taken, the value of land surrounding appraised, I wish to inform you that the agreement is no longer valid.**

**I therefore request you to show me on the ground the TEN (10) or so plots unsold. Also give me particulars of the people who have bought the plots for ease of processing the ownership documents.”(emphasis mine).**

From the contents of the above letter it is clear that the agreement entered into between the 1st applicant and the respondents was not merely an agency agreement as contended by the respondent.

Whereas in the initial agreement, it is clear that an agency relationship was contemplated, a reading of the said agreement with the above letter clearly demonstrates that the intended relationship was beyond that of an agent and his principal.

Given that the contents of an agreement need not be in one single document for it to be valid, upon reading the agreement signed between the 1st applicant and the respondents, I am persuaded that the agreement was beyond a mere agent-principal relationship.

In my view, notwithstanding the fact that the 1st applicant is not the registered owner of the suit properties, the agreement signed with the respondents conferred on him sufficient reasons to bring this suit against the respondents. However, given that the agreement signed between the 1st applicant and the respondents had a clause for payment of damages, in the event of breach, I find his prayer for an injunction unsustainable as an order of temporary injunction will normally not issue if damages can adequately compensate a claimant.

As pointed out earlier, some of the persons who bought portions of the suit property from the 1st respondent moved the court, through the application dated 11th August, 2011 for a temporary injunction to restrain the respondents as pointed out herein above. Whereas through the filed affidavits and documents there is no doubt that the applicants in this application (hereinafter called 2nd application) acquired rights over certain portions of the suit property, the respondent contrary to his admission in the letter addressed to the 1st applicant has termed them trespassers.

Although the applicants in the 2nd application did not deal directly with the respondents, their dealings with the 1st respondent having been sanctioned by the respondent, I find no legal basis for the respondents to disown them or make nonsense their beneficial interest in the suit property. The respondents having admitted that they had sanctioned the activities of the 1st respondent through which the applicants in the 2nd application obtained their interest to the suit property are estopped from denying the applicant's beneficial interest in the suit properties. This is particularly so because an agent binds a principal in actions done by the him on the authority of the principal or those done without authority but later on ratified by the principal.

In the affidavit sworn by the applicants in support of the 2nd application the applicants have averred

that the respondents are interfering with their interest and possession of the suit property. This averment has by implication been admitted by the respondents through paragraph 12 of the respondents' affidavit sworn on 25th May, 2012 where the respondents allege that the interested parties are trespassers.

Having already found that the applicants' in the 2nd application, had valid claims against the respondent I am persuaded that the applicants have demonstrated a *prima facie* case with a probability of success. Although the respondents are the registered owners of the property I find and hold that, the respondents' ownership of the suit properties is subject to the applicants' beneficial ownership thereon. See Section 30 of the Registered Land Act, Chapter 300 laws of Kenya (now repealed). I also find and hold that, as beneficial owners of the suit properties, the applicants stand to suffer irreparable injury, unless the court grants the orders sought. The balance of convenience also tilts in their favour.

The upshot of the foregoing is that the plaintiff's application dated 11th August, 2011 is dismissed and that of the interested parties dated 10th May, 2012 is allowed.

**Dated Signed and delivered in open Court this 17<sup>th</sup> day of May 2013.**

**L N WAITHAKA  
JUDGE**

**Present**

Mr Koech holding brief for Mr Kurgat for defendant

Mrs Ayuna holding brief for Mr Ghai for plaintiffs

Mr Ongeru for Interested parties

Stephen Mwangi : Court clerk