REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE NO. 555 OF 2013

FRANCIS MUNYUAKI MUCHEE ……...……PLAINTIFF/APPLICANT

VERSUS

JENEM COFFEE LIMITED ……...……DEFENDANT/RESPONDENT

RULING

Coming before me for determination is the Notice of Motion dated 13th May 2013 in which the Plaintiff is seeking for orders of an interlocutory injunction restraining the Defendant from disposing, wasting, transferring, alienating, charging or in any other manner dealing in Land Reference No. 209/9369 (hereinafter referred to as the "Suit Property") pending the hearing and determination of this application and suit together with costs.

The Application is premised upon the grounds appearing on the face of it as well as the Supporting Affidavit of Francis Munyuauki Muchee sworn on 13th May 2013 in which he averred that on or about 14th February 2013, he together with one David Gitonga Amuru entered into an agreement with the Defendant to purchase the Suit Property at a cost of Kshs. 60 million. He further averred that the said Sale Agreement states that the purchase price had been paid in full. He further averred that he later came to learn from reliable sources that the Defendant's directors were in the process of selling the Suit Property to third parties in clear breach of their Sale Agreement. He further averred that he directed his lawyers, Messrs Kwengu & Co. Advocates to write to the Defendant demanding it ceases selling the Suit Property to third parties. He further disclosed that the Defendant acting through the firm of Z.N. Gathaara & Co. Advocates wrote back to the firm of Kwengu & Co. Advocates. He further stated that the completion date was on 15th May 2013 which had not yet reached.

The Application is contested. The Defendant filed the Replying Affidavit of Zipporah Mburu sworn on 23rd May 2013 in which she swore that it is true that the Plaintiff by a Sale Agreement dated 14th February 2013 had agreed to sell the Suit Property to the Plaintiff and one David Gitonga Amuru as joint purchasers at a consideration of Kshs. 60 million. She further stated that it was an express term of the Sale Agreement that the purchasers were to pay the consideration of Kshs. 60 million upon execution of the Sale Agreement which amount the purchasers had indicated was being sourced from a financier. She further averred that upon execution of the Sale Agreement, it became apparent that the purchasers were not in a position to raise the agreed consideration immediately and they only managed to raise Kshs.

300,000/-. She further stated that the Sale Agreement was subject to the Law Society Conditions of Sale which requires that the completion period be 90 days from the date of signing the agreement and that 99 days had already lapsed yet the purchasers had only paid Kshs. 300,000/- which represents 0.5% of the purchase price. She further averred that the Defendant came to learn that the purchasers had been unsuccessful in procuring a financier. She further stated that by a letter dated 9th May 2013, the Defendant notified the Plaintiff that he was in breach of the Sale Agreement for failure to pay the purchase price and gave him notice to pay up which was not done. She further stated that in the circumstances, the Defendant was within his rights to rescind the Sale Agreement entered into with the purchasers and that having done so, the Defendant was entitled to seek for an alternative purchaser of the Suit Property.

The application is further contested by David Gitonga Amuru, the co-purchaser of the Plaintiff, who filed his Further Replying Affidavit dated 23rd May 2013 in which he stated that he and the Plaintiff were to finance the purchase of the Suit Property through a joint credit facility which was to be obtained from Barclays Bank Ltd (hereinafter referred to as the "financier") and that they deposited with the Defendant Kshs. 300,000/-. He further stated that he and the Plaintiff were instructed by the financier to enter into a partnership for purposes of the financing which the Plaintiff declined to do, thereby making it impossible for the financier to finance the transaction. He further stated that ultimately, the Defendant elected to exercise its right under the Sale Agreement and rescinded it, leaving the Defendant at liberty to obtain an alternative purchaser for the Suit Property.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of ***GIELLA versus CASSMAN BROWN (1973) EA 358*** in which the conditions for the grant of an interlocutory injunction were settled as follows:

> "***The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

Has the Plaintiff made out a prima facie case with a probability of success? In the case of ***MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125***, a *prima facie* case was described as follows:

> ***"a prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case 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."***

Looking at the facts of this case, it emerges quite clearly that the Plaintiff and his co-purchaser clearly entered into a Sale Agreement with the Defendant for the purchase of the Suit Property at a consideration of Kshs. 60 million which was payable on the execution of the said agreement. It also emerges quite clearly that the purchasers did not have the Kshs. 60 million but intended to borrow the same from the financier. However, this was not successful. It remains uncontroverted that the purchasers only managed to raise Kshs. 300,000/- amounting to only 0.5% of the purchase price which they paid to the Defendant. As the Sale Agreement was expressed to be subject to the Law Society Conditions of Sale, we have to look at that document to ascertain whether the course of action undertaken by the Defendant was in order or not. Clause 4(7)(b) states as follows:

> ***"If the sale shall not be completed on the completion date, either party (being then himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition."***

It remains uncontroverted evidence that the Defendant, in exercise of this provision, did issue a notice to

complete to the Plaintiff through its lawyer's letter dated 9th May 2013.

Clause 4(7)(d)(ii) of the Law Society Conditions of Sale further provides as follows:

> ***"If the purchaser does not comply with a completion notice, without prejudice to any other rights or remedies available to him, the vendor may forfeit and retain any deposit paid and/or resell the property by auction, tender or private treaty"***

As the Plaintiff and his co-purchaser were unable to raise the purchase price for the Suit Property, this provision applies which permitted the Defendant to commence its search for another purchaser of the Suit Property.

In the circumstances, it is quite clear to me that the Plaintiff has failed to establish a prima facie case with a probability of success at the main trial. That being my finding, I see no need in further interrogating as to whether the other two conditions in the ***Giella*** Case have been met.

Arising from the foregoing, I hereby dismiss this application with costs to the Defendant.

SIGNED AND DELIVERED AT NAIROBI

ON THE 20TH DAY OF SEPTEMBER 2013.

MARY M. GITUMBI

JUDGE