**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MOMBABA**

**Civil Case 197 of 2010**

**1. ANNE WAMBUI MAINA**

**2. PATRICK KURIA MAINA ……PLAINTIFFS/APPLICANTS**

**-VERSUS-**

**SHADRACK MAJANI MALUSHA……DEFENDANT/RESPONDENT**

**RULING**

The plaintiffs moved the Court by Chamber Summons dated ***22nd June, 2010*** and brought under Order XXXIX, Rules 1,2, 3 and 9 of the former edition of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya).
The outstanding substantive prayer is set out as follows:

***"THAT pending the hearing and determination of this suit, an order of temporary injunction do issue restraining the defendant by himself, his servants, agents, or any other person howsoever from trespassing, occupying, transferring or selling the plaintiffs' property known as subdivision number 5025/341 to any other person."***

The application rests on the following grounds:

*(i) the plaintiffs purchased all that parcel of land known as Subdivision No.5025/341 from the defendant on **26th November, 2008**;*

*(ii) the suit property is a subdivision of a scheme, and the defendant was*

*(iii) under duty to obtain title, and to transfer the same in the plaintiffs' favour;*

*(iv) the defendant has not taken any steps to ensure that the transfer of the said property takes effect in favour of the plaintiffs;*

*(v) the defendant has subsequently purported to cancel the said transaction and demanded that the plaintiffs give vacant possession of the suit property, and that he refunds the purchase price already paid;*

*(vi) the plaintiffs stand to suffer irreparable loss if the defendant is not restrained from his actions as they may lose property purchased through a valid sale agreement;*

*(vii) it is in the interest of justice that the orders sought be granted.*

***Anne Wambui Maina***, 1st applicant, has sworn a 17-paragraph supporting affidavit on behalf of both applicants, of ***23rd June, 2010***, setting out the relevant information; and the affidavit bears several annexures including the agreement for sale dated ***26th November, 2008***, the deed plan for the suit property, and copy of a cheque dated ***15th March, 2010*** which had been paid pursuant to the agreement. Further evidence was given later by the same deponent, in an affidavit of ***7th September, 2010.***

When this matter came up before the Court on ***12th July, 2010*** learned counsel ***Ms. Mutungi*** for the respondent sought leave to file a replying affidavit; and on ***16th July, 2010 Shadrack Majani Malusha*** swore a 26-paragraph affidavit deponing, in brief, as follows: he is *not the registered owner* of the suit property which is owned by *Vipingo Homes Limited*, of which he is the director; he personally, as owner of L.R. No. 5025/341, had on ***26th November, 2008*** entered into a sale agreement with the plaintiffs, as joint purchasers; he made two other sale agreements with the plaintiffs, in respect of LR No. 5025/342 and L.R. No. 5025/329; 1st and 2nd plaintiffs jointly paid Shs.600,000/= for L.R. No. 5025/341; 2nd plaintiff paid Kshs.600,000/= for L.R. No. 5025/342; at the time of completion of the sale for L.R. No. 5025/341 and L.R. No. 5025/342, with the deponent acting as director of his company, he executed the transfer documents believing the transfer documents in favour of the plaintiffs were in respect of L.R. No. 5025/341 and L.R. No. 5025/342; but it turned out that the plot transferred in favour of 2nd plaintiff was L.R. No. 5025/329, and that in favour of both 1st and 2nd plaintiffs was L.R. No. 5025/341.

The deponent believes it to be true, as advised by his Advocate, that 2nd plaintiff *"had an equal opportunity to read the transfer documents and also did not realize the discrepancy between the plot numbers which was an inadvertent mistake on the transfer document."* He avers that owing to such common oversight, the proprietary interest in L.R. No. 5025/329 was registered in favour of 2nd plaintiff instead of the intended property, L.R. No. 5025/341 which was now registered in the joint names of 1st and 2nd plaintiffs. The deponent avers: "The execution of the said transfer document with respect to plot No. 5025/329 instead of plot No.5025/341 was upon a mistake by both the plaintiffs and wherein we ended up with a result that was not envisaged in the agreement." The intention had been "*to have plot No.5025/341 transferred to the plaintiffs jointly and not plot No.5025/329 to the 2nd plaintiff."*

The deponent avers that he believes to be true the advice of his Advocate, that "*the 2nd plaintiff did not pay Kshs.600,000/=, the full purchase price for plot No.5025/329 within the contractual time."* On that account, the deponent "*instructed the aforesaid Advocate to notify the purchasers of rescission and refund [of] the Kshs.600,000/= paid by the 2nd plaintiff herein…"* The company rescinded the agreement for sale of plot No.5025/329 and refunded the full purchase price of Kshs.600,000/=; and the company, through the said Advocate, ***Janet Katisya***, advised *2nd plaintiff* to transfer the plot No.5025/329 back to the company which, in turn, would execute a transfer in respect of plot No. 5025/341 to *both plaintiffs.*

The deponent deposed that 2nd plaintiff either on his own, or with the knowledge or approval of 1st plaintiff, declined to transfer plot No.5025/329 back to the company; and he believes that *"the 2nd plaintiff seeks to falsely enrich himself by holding plot No.5025/329*". The company, as a scheme of safety-measures, now "*holds the said plot No.5025/341 in lien until the 2nd plaintiff reverts…plot No.5025/329 to the registered proprietor."*

Learned counsel, ***Mr. Adhoch*** for the applicants, entered upon his submissions by outlining the facts he considered material in this matter, as follows:

(i) by the agreement of ***26th November, 2008*** "the defendant agreed to sell and the plaintiffs to purchase

all that portion of land known as Subdivision No.5025/341 situate at Takaungu;

(ii) the plaintiffs jointly paid the sum of Kshs.600,000/- being the purchase price and stamp duty, and the same was duly acknowledged by the defendant's lawyer then;

(iii) since plot No.5025/341 was a sub-division of a larger scheme, the plaintiffs who had made full payment of purchase price, trusted the defendant's lawyer to ensure transfer in favour of the plaintiffs;

(iv) the defendant "alleges that due to a mistake, he effected the transfer of….plot No.5025/329 to 2nd plaintiff believing….he was [transferring] plot No.5025/341";

(v) the plaintiffs deny that the purchase price for plot No.5025/329 had not been paid by 2nd plaintiff;

(vi) the dispute has led to the defendant declining to transfer plot No.5025/341 in favour of both plaintiffs; and the defendant insists he can only effect that transfer if 2nd plaintiff transfers back plot No. 5025/329 the registration of which is now being attributed to mistake;

(vii) the defendant has purported to cancel the sale transaction involving plot No.5025/341 between the plaintiffs and himself; and he demands that the plaintiffs give vacant possession of plot No.5025/341, in return for refund of monies paid;

(viii) the applicants pray for an injunction order "*barring the defendant from interfering with the suit property pending the hearing and determination of the suit as they are likely to suffer irreparable loss."*

Learned counsel submitted that the facts of this matter would indicate that the plaintiffs have satisfied the basic tests for injunctive relief set out in the model authority, ***Giella v. Cassman Brown & Co. Ltd***. [1973] E.A. 358.

***Mr. Adhoch*** urged that the applicants had shown that a *prima facie* case is in hand, with a probability of success. This case rests on the foundation that the plaintiffs had indeed purchased ***plot No.5025/341*** [the suit property], and fully paid the agreed price: so it is now incumbent on the defendant to effect transfer. And this fact alone, it was submitted, gives *"a strong basis for the full grant of an injunctive order."* Counsel submitted that the case of ***plot No.5025/329*** is not to be confounded, as the defendant does, with that of plot No.5025/341; because even the averments made by the defendant in respect of plot 5025/329 do not, at this stage, stand up and must be determined only at the ***trial;*** while disputing the question whether any purchase price was paid at all for plot 5025/329, the deponent in the replying affidavit (para.15) "*contradicts himself by stating that [the purchaser] paid the purchase price out of time*"; and there is no evidence tendered to show that, in respect of plot No. 5025/329 *"payment was to be made within a specified time."*

The argument here, I think, is that the factual position in respect of plot ***No.5025/329*** is so hazy as to be an inappropriate basis for declining to transfer the suit plot to the purchasers.

In these circumstances, counsel urged that the applicants have a legitimate claim in respect of the suit property, amounting to a *prima facie* case giving signals of a serious trial with a high probability of success, as contemplated in ***Giella v. Cassman Brown.***

Learned counsel, for effect, introduced a further element to the ***Giella v. Cassman Brown*** principle; he invoked this Court's decision in ***Suleiman v. Amboseli Resort Limited*** [2004] 2KLR 591, which propounded the intrinsic test in injunction cases: that *the Court should always opt for the lower, rather than the higher risk of injustice* should the Court turn out to have been wrong. That principle is the foundation of counsel's submission that:

***"considering…the circumstances of this matter, where full purchase price and incidental expenses for transfer have been paid and acknowledged, and that the plaintiffs have eagerly waited for transfer of the title in their favour, they would suffer irreparable loss and damage if the Orders sought herein are***

***not granted. We submit that following this [****Suleiman v. Amboseli Resort****] principle, the injustice that would be [wreaked upon] the plaintiffs would be higher if the orders were not granted, than if they were granted – in the sense that....the applicants' legitimate expectation of ownership of the suit property would not be achieved [on account of] the unilateral, unlawful and illegal decision of the defendant to cancel the transaction."***

Counsel urged that it would be *"fair, just and equitable to grant the Orders of injunction to preserve the suit property pending the hearing and determination of the suit filed by the applicants."*

Lastly, counsel urged that the balance of convenience tilts in favour of the applicants: as the inconvenience such as would be occasioned by loss of the suit property which remained only to be transferred, would be substantial. By contrast, counsel submitted, "*the defendant would not suffer any loss as he has already received [the] purchase price from the plaintiffs."*

Learned counsel, ***Ms. Katisya*** for the defendant contested the application, in the first instance, on the ground that "*the defendant is not the registered proprietor of plot No.5025/341"* – the suit property; ownership is registered in the name of *Vipingo Holiday Homes Limited*. But, consistent with the averments in the replying affidavit, counsel acknowledged that the defendant had entered into a sale agreement with 1st and 2nd plaintiffs jointly and severally for three properties: Plot No. 5025/341; plot No.5025/342; and plot No.5025/329.

Learned counsel submits that a mistake made by both parties had led to the transfer of Plot No.5025/329 to 2nd plaintiff when the common intention had been to transfer plot No. 5025/341 jointly to 1st and 2nd plaintiffs; and she further submits that 2nd plaintiff, at that time of transfer, "had not paid any consideration or purchase price" and that this was a *basis for repudiating the contract as at that date.* Such repudiation took the form of "*several requests [being] made by the company through their Advocate to have the property 5025/329 transferred back to the defendant…in order to effect the proper transfer of plot No.5025/341 to the 1st and 2nd plaintiffs."*

Counsel submitted that 1st plaintiff has "*refused to ensure the re-transfer of the property in order to get [Plot No.] 5025/341 giving rise to the counterclaim by the defendants."*

Learned counsel submitted that the plaintiffs are not entitled to the remedy of injunction: because "*an injunction is a remedy in equity governed by written law and the maxims of equity*", and equity regards as done that which should be done. The intention, which failed due to error, was to transfer *plot No.5025/341 to both plaintiffs,* and not plot No.5025/329 to 2nd plaintiff.

Counsel further urged, as a matter of equity, that "*2nd plaintiff has been unwilling to show good faith and/or equity by continual refusal to transfer the property 5025/329 to the registered proprietor for the proper transfer of 5025/341 to himself and 1st plaintiff"; "contrary to the maxim that one who seeks equity must do equity the 2nd plaintiff has not fulfilled this requirement and does not have the right to benefit in equity."*

Counsel submitted that 2nd plaintiff *"has come to Court with unclean hands"; "the plaintiffs have not disclosed to the Court that they entered into a sale agreement with the defendant, and again into two [agreements] with the 2nd plaintiff for the sale of plots Nos.5025/342 and 5025/329*"; and "*the plaintiffs failed to disclose to the Court in their affidavit that the execution of the transfer document with respect to plot No.5025/329 instead of plot No.5025/341 was upon a mistake of both the plaintiffs and the defendant as the same was not envisaged in the agreement."*

***Ms. Katisya***, for the respondent, submitted that the plaintiffs have not demonstrated they stand to suffer irreparable loss and damage, nor that, in the terms of the applicable precedent, ***Giella v. Cassman Brown*** [1973] EA 358, they cannot be compensated in damages and will suffer irreparable injury; and that "*no evidence of loss or damage has been shown which would not be adequately compensated by an*

*award of damages."*

Counsel urged that the plaintiffs have not made out a *prima facie* case with a probability of success; that "*the balance of convenience tilts in favour of the defendant"*; and that "*the [applicants have] not given any undertaking as to damages....being suffered by the …[respondent] if an injunction were to be issued."*

Counsel sought orders for a retransfer of plot No.5025/329 to the ***defendant,*** to enable him to effect a transfer of plot No.5025/341 to the ***plaintiffs jointly***; that, in the alternative, the *status quo* be maintained "*until the determination of the suits"*; and that *"both parties deposit [the] title deeds for plot No.5025/341 and plot No.5025/329 [in] Court until the hearing and final determination of the suit."*

The exceptional element in this application for injunctive relief pending full hearing, is that it involves complex and unascertained matters of: status of the *parties;* terms of the *contractual negotiations*; presence or absence of *consensus ad idem;* acts of legal import by *those not parties*, notably the registrar of lands. Is this a case for a differing joinder of parties? a case with *new pleadings?*

I have to ask at the very beginning, whether this is a proper interlocutory matter. Interlocutory matters, as they are canvassed on *prima facie* perceptions of evidence; on the emerging merits of argument; and on apparent *direction of equity,* invariably rest on the foundation of *clarity of the primary case* –though that case is yet to be resolved on the basis of the pleadings in the main cause. While the suit is specifically against the defendant, and with respect to ***plot No.5025/341***, it is the defendant's position that the suit property is *registered in the name of a different person,* namely, Vipingo Homes Limited (which has not been named as a party). And in the background to the instant application, there is both a *plaint*, and a *defence and counterclaim*: with the sharply contradictory claims in the pleadings, interlocutory relief may be inappropriate, in the absence of clear *prima facie* scenarios emerging at the very beginning.

At this stage, it emerges that the respondent is or was the registered owner of plot No.5025/329 but, by mistake common to both vendor and purchaser, got the *registrar of lands* [clearly, a potential party to the suit] to transfer it to *2nd plaintiff.* Can such an error be redressed by an interlocutory application? I think, not: it is a matter for a substantive cause. And if plot No.5025/329 was transferred specifically to *2nd plaintiff*, how does that relate to the two plaintiffs? The 1st and 2nd plaintiffs do stand together in respect of the claim in respect of plot ***No.5025/341*** – but not in respect of ***plot No. 5025/329***. I must draw the conclusion that the attempt to link the claims in respect of the two plots is improper, in law: hence the contention is a matter for evidence and proof in a *fresh suit*, and is not naturally part of the instant case; and on that account, there is no clear *prima facie* state of facts such as would lend itself to interlocutory relief, such as that sought by the applicants herein.

From the evaluation herein, it emerges that this is not a proper matter for the grant of interlocutory injunction, especially because the foundations of fact, and of the real controversy, are completely unclear, and so substantially uncanvassed, as to nullify the *prima facie* foundations upon which such an injunction may be granted. It is evident that the suit as conceived, could resolve into *several different suits*; or alternatively, the main issues in the pleadings would require the joinder of other parties. The lines of obligations, therefore, are not so clear as reveal the nature of *equitable obligations* at this stage. The plaintiffs' prayer for the equitable remedy of injunction is *premature,* and cannot be granted.

I will, instead, set the stage for due prosecution of the case, by making Orders as follows:

***(1)The plaintiffs have the liberty to amend and serve their pleadings within 14 days of the date hereof.***

***(2)In the event the plaintiffs amend their pleadings as contemplated in Order No.1, the defendant has the liberty to amend his pleadings and to serve within 14 days of receiving service.***

***(3)The parties shall maintain the status quo.***

***(4)This matter shall be listed for mention and directions within 30 days of the date hereof.***

***(5)Costs shall be in the cause.***

**SIGNED** at **NAIROBI** ……..

**J.B. OJWANG**
**JUDGE**

**DATED** and **DELIVERED** at **MOMBASA** this 13th day of February, 2012.

**H.M. OKWENGU**
**JUDGE**