



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC CASE NO. 438 OF 2011

ESTENJER INDUSTRIES LTD.....PLAINTIFF

VERSUS

JORETH LIMITED.....DEFENDANT

RULING

1. The Plaintiff filed suit on 23rd August 2011 seeking in the main an order of permanent injunction to restrain the defendant and anyone acting for him(sic) from alienating, disposing, charging, selling and or in any manner whatsoever dealing with all that property known as L.R. NO. 13330/60 and a further order compelling the defendant to transfer the said suit land to the plaintiff and in default the Registrar of this court to execute all the relevant transfer documents so that the suit land be transferred to the plaintiff.

On the same date the Plaintiff took out a Notice of Motion under the provisions of Section 3A and section 63(e) of the Civil Procedure Act as well as under the Provisions of Order 40 Rules 1,2, and 3 and all other enabling provisions of the Law. By that application the plaintiff sought and obtained an interim order restraining the defendant from dealing with the suit until this application was heard and determined.

2. The grounds relied on are that the defendant had collected a deposit of the purchase price of the suit land from the applicant and was ready and willing to pay the balance of the purchase price yet the defendant was threatening to dispose of the suit land to third parties.

That the applicant has a good suit with high chances of success and it would suffer irreparable loss and damage if the orders sought were not granted as it would be dispossessed of its valuable land. That it would be in the interest of justice, it is fair and expedient in all the circumstances of the case that the orders sought be granted.

3. In the affidavit in support of the application a director of the applicant known as **Joseph Kahonge Kinoru** deposed that the applicant was the lawful proprietor of the suit land due to a letter of offer and payment of a deposit as part payment of the purchase price. He exhibited the offer letter and receipt. He deposed further that the applicant, upon payment of the deposit for the purchase price, took possession of the suit land and commenced utilisation of the same but that the defendant had refused to complete the sale without any justification and might dispose of the suit land causing irreparable loss and damage to the applicant and rendering the suit nugatory.

4. The application was opposed. Grounds of opposition were filed. They are that the application is without merit and is an abuse of court process. That no sale agreement was exhibited and in any event the applicant was in breach of any sale agreement. That the applicant had not met the conditions for the grant

of orders of injunction.

5. A Replying Affidavit was also filed wherein **James Njenga Karume** a director of the defendant deponed that it was the defendant who was since year 2000, the registered owner of a piece of land known as LR NO. 13330 of which the suit property was a subdivision. That subdivision too belonged to the defendant. That the plaintiff never entered into any sale agreement for the suit land and never complied with the conditions precedent to any sale spelt out in the offer letter relied on by the plaintiff. That the defendant has never given possession to the applicant. The defendant exhibited a copy of the title which was in the defendant's name.

6. Parties filed written submissions in support of their rival positions and left it to court to make a determination. I have considered those submissions alongside the pleadings and the affidavits filed.

7. The starting point shall, as in all cases of injunctions, start at the point whether or not the applicant has brought itself within the requirements of the celebrated case of **GIELLA –V- CASSMAN BROWN (1968) E.A. 358**, those requirements being that to succeed the applicant must show that it has a prima facie case with a probability of success at trial, that it would suffer irreparable loss not capable of being compensated by an award of damages and if the court be in doubt it would in that event determine the case on a balance of convenience.

8. Exhibits showed that the defendant is the registered proprietor of the suit land. The applicant relied on a letter of offer whose conditions it clearly did not comply with. This is a dealing in and with land. It is an alleged sale. No sale agreement was exhibited. Thereby the applicant failed to comply with the statutory requirements of **Section 3(3) of the Law of Contract Act cap 23** of our laws that provides:-

“3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless:-

(a) The contract upon which the suit is founded:-

(i) is in writing

(ii) is signed by all the parties thereof; and

(b)the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.....”

Further, the defendant's indefeasible interest in the suit land as provided under **Section 23(1) of the Registration of Titles Act cap 281** of our laws in the following words,

“The certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.”

9. In these circumstances can the Plaintiff/Applicant be said to have a prima facie case with a probability of success? Hardly. As for loss incapable of being compensated by way of an award of damages the applicant has not shown that the defendant cannot pay such damages as may be awarded and in any event the sum of Kes 2,000,000/= paid as deposit of purchase price cannot be described as irreparable loss not capable of being compensated by damages. I am in no doubt as for the plaintiff's failure to satisfy the above two principles and as such I need not consider the other principle of balance of convenience. In the result the Plaintiff's application under consideration is found to be lacking in merit and it is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH, 2012.

P.M. MWILU
JUDGE

In the presence of:-

..... Advocate for Plaintiff/Applicant
..... Advocate for Defendant/Respondent
..... Court Clerk

P.M. MWILU
JUDGE