



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**HIGH COURT CIVIL CASE NO. 236 OF 2010**  
**KINGORA ESTATES LTD.....PLAINTIFF/APPLICANT**  
**VERSUS**  
**VICTOR KING MBITHI.....DEFENDANT/RESPONDENT**  
**RULING**

Before me is an application by way of Chamber Summons dated 8<sup>th</sup> November 2010 filed by the Plaintiff. It was brought under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules and Section 63, 1A, 1B and 3A of the Civil Procedure Act (Cap 21). The application seeks orders of prohibitive and mandatory injunctions against the Defendant pending hearing and determination of the suit. It also seeks that the OCS Embakasi Police Station be directed to assist to ensure compliance with orders to be issued by this court.

The application has several grounds on the face of the Chamber Summons. It is alleged in the grounds that the Defendant has no legal or equitable claim in the subject property and that his action in invading the Plaintiff's property was unlawful, unjustified and propelled by impunity.

The application was filed with a supporting affidavit sworn on 8<sup>th</sup> November 2010 by Peter Gedraph Njunge Nganga described as a Director of the Plaintiff. It is deponed in the affidavit, *inter alia*, that the Plaintiff acquired the land which initially belonged to Syokimau Farm Ltd through purchase and transfer of shares; that the land was subdivided into plots measuring ¼ acre each; that the Plaintiff engaged M/s Mwanzo Properties Ltd on 22/11/2004 as agent for the sale of the plots; the Plaintiff instructed the agents to sell the plots at a minimum of Kshs.380,000/=; that the said agents informed the Plaintiff that the Defendant had paid only a total of Kshs.350,000/= with the intention to purchase a plot; that because the Defendant did not pay the minimum price a formal agreement could not be entered into; that on 14<sup>th</sup> October 2010, the Defendant came to the Plaintiff and demanded to be given possession of the plot which he allegedly bought; that on 5<sup>th</sup> November 2010 the Defendant accompanied by a gang of about 30 youths descended on the Plaintiff's property, destroyed the fence and erected an iron-sheets structure on the portion he claimed to be his plot; and that the Plaintiff was now not interested in having anything to do with the Defendant and was willing to refund the amount of Kshs.350,000/= to the Defendant subject to the Defendant paying the costs of bringing this suit.

The Plaintiff through counsel filed written submissions on 10/11/2011. Reliance was placed on Section 3(3) of the Law of Contract Act (Cap 23), for the assertion that since there was no written contract signed by the parties, no interest in land had been created in favour of the Defendant. It was also contended that as there was no agreement concluded, there could be no trustee/beneficiary relationship between the

Plaintiff and the Defendant. Reliance was placed on the case of ALIBHAI & OTHERS –VS – KARIA & ANOTHER EALR (1995 – 1998) 2 EA (SCU) and the case of GEILLA –VS- CASSMAN BROWN LTD. (1973) EA 358.

The application is opposed. A replying affidavit sworn on 15/11/2010 by the Defendant was filed. It was deponed that the Defendant and others who had purchased plots on the said land were the actual beneficial owners of the plots, as they had paid the full consideration. However, the Plaintiff had refused to effect the transfer of the purchased portions. That the Plaintiff in fact did not change the ownership of the land from Syokimau Farm Ltd. That the Plaintiff's agent, Mwanzo Properties Ltd., had ostensible authority to sell the piece of land at whatever price. That the Defendant had no knowledge that the minimum sale price was Kshs.380,000/=. That he bought plot No. 12715/502/10 and the invoice reflected the said amount and that there was nil balance. That therefore the requirements of Section 3 of the Law of Contract Act (Cap 23) had been satisfied. That the Defendant was not privy to any contract between the Plaintiff and his agent. That the Defendant fenced the plot he bought in 2005, but the Plaintiff pulled down the said fence and put his fence in October 2010. That after discussions failed, the Defendant decided to reinstate the fence on 5<sup>th</sup> November 2010 but the Plaintiff went there armed with a gun and shot in the air to scare away workers. That the matter was reported to Embakasi Police Station.

The Defendants through their Counsel filed written submissions on 9/9/2011. It was contended that the Plaintiff had admitted receipt of the money for the sale of a plot through his agent. Though there was no formal sale agreement signed, the invoice and receipt are evidence of that transaction. In any case, Section 3 (3) of the Law of Contract Act does not state that a verbal contract relating to land is void. It merely says that the same is not enforceable through litigation. Reliance was placed on the case of METRA INVESTMENT LTD –VS- GAKWELI MOHAMMED WARRAKAH HCCC NO. 54 of 2006 and the case of RAINALD SCHUMACHER –vs- AUBREY GARETH MAUSELY (2008) e KLR. It was contended that this being a case in which the agent of the Plaintiff accepted the purchase price for a specific plot on behalf of the Plaintiff, a resulting trust in favour of the Defendant was created. It was also contended that the Plaintiff did not come to court with clean hands. At the same time, the Plaintiff did not satisfy the requirements for grant of injunction set down in the case of GIELLA –VS- CASSMAN BROWN LTD (supra).

Mr Ngumbau Mutua for the Plaintiff and Mr Muli for the Defendant adopted the written submissions.

I have considered the application, documents filed and the submissions of counsel on both sides. I have also perused the suit documents. In the Plaintiff's request, *inter alia*, the following:-

- 1. A declaration that the Plaintiff is the legal proprietor and therefore entitled to exclusive possession of all the parcel of land known as LR No. 12715/502 situate in Syokimau Nairobi.**
- 2. A permanent injunction to restrain the Defendant whether by himself, his servants, employees or agents or otherwise howsoever from entering the suit premises or in any way interfering with the Plaintiff's quiet possession of the suit premises.**
- 3. A mandatory injunction to compel the Defendant to deliver vacant possession of the suit property to the Plaintiff.**

The application before me is an interlocutory application. As such, it is not meant to have the effect of determining or granting the prayers in the plaint. The prayers which I have before me for injunction in the application are (vi) and (vii). I will reproduce them verbatim hereunder for clarity. They are:-

**vi. THAT pending the hearing and determination of this suit the Defendants through themselves, their servants, employees, nominees, assigns, agents, or any other persons or authority connected therewith be restrained by an order of prohibitive injunction from continuing to trespass, to enter into, to deal with or in any other way interfering with the Plaintiff's quiet possession of land LR No. 12715/502/10 situate in Syokimau within Machakos.**

**vii. THAT pending the hearing and determination of this suit the Defendants through themselves, their servants, employees, nominees, assigns, agents, or any other persons or authority connected be compelled by an order of mandatory injunction to vacate the Plaintiff's property and to take away, pull down or otherwise remove whatever structures, fences or poles that he has erected on the Plaintiff's premises and to deliver to the Plaintiff quiet and vacant possession of land LR No. 12715/502/10 situate in Syokimau within Machakos.**

In my view, both the above prayers, have the effect of determining the main prayers in the plaint. The prayers also presume ownership. Prayer (vi) also presumes that the Defendant is outside the plot and a trespasser, while prayer (vii) presumes that he is on the land. The two prayers are in conflict.

In a case where parties are agreed that there was a transaction for sale of property (the plot) between them, purchase price was paid (though one says it was not the whole amount while the other says it was), with allegations that the seller (Plaintiff) is the one who is now frustrating the transfer, such prayers cannot be granted by a court of equity. Such prayers do not serve any equitable purpose at all. They cannot be considered for grant at this preliminary stage. Granting the prayers will predetermine the substantive matter before the parties are heard substantively for a determination to be made on merits regarding the rights and obligations of the parties in the alleged sale transaction.

In my view, the Plaintiff has also not demonstrated that he will suffer irreparable loss, if the orders sought are not granted. That is the second requirement for grant of injunction set down in the case of GIELLA – vs- CASSMAN BROWN LTD (supra). He has not for example shown that the Defendant will sell the plot to a third party. In any case, the transaction he is disputing or challenging is a money transaction of sale and purchase, in which he admits a substantial amount of the purchase price was paid. He has the amount of the purchase price in his possession, and has had the same since 2005. He cannot have his cake and eat it at the same time. The purchase price, whichever amount it is, will be adequate compensation.

In my view, the application is misconceived, mischievous and not merited. I will dismiss the same.

Consequently, the application is dismissed with costs to the Defendant.

Dated this 12<sup>th</sup> day of **March** 2012.

**George Dulu**

**JUDGE**

**In the presence of:**

N/A for Plaintiff/Applicant

Mr A.K Mutua h/b for Mr Muli for Defendant/Respondent

Nyalo – Court clerk.