



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 172 OF 2012

DUBAI BANK KENYA LIMITED ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

- VERSUS -

UKAMBA AGRICULTURAL INSTITUTE ::::::::::::::::::::::::::::::::::::::: DEFENDANT

R U L I N G

1. The application before the court is a **Notice of Motion** dated **17th April 2012**. It is supported by the supporting affidavit of **HASSAN AHMED ABDULHAFEDH ZUBEIDI** sworn on the same date seeking orders namely:

(1) That pending the hearing and/or determination of this application *inter-partes* a temporary injunction do issue restraining the Defendant whether by itself, directors, officials, employees, agents or any other person from purporting to sell, or offer to sell or transfer or otherwise alienate, charge, lease, let, deal or mortgage the suit property L.R. No. 209/10350 – City of Nairobi to any other person or any other third party except to the Plaintiff herein.

(2) That a mandatory injunction do issue compelling the Respondent to forthwith procure and deliver the following completion documents to the Plaintiff’s Advocates M/s Soita & Saende Advocates to facilitate the transfer of the suit property known as L.R. No.209/10350 – City of Nairobi to the Plaintiff forthwith:-

(a) The Original Title document of L.R. No. 209/10350 (hereinafter referred to as “**the Property**”).

(b) A Commissioner of Lands consent to transfer the property.

(c) Valid Rates Clearance Certificate from City Council of Nairobi.

(d) Valid Land Rent Clearance Certificate.

(3) That in the alternative and without prejudice to prayer (1) above, a Vesting Order do issue vesting good and valid title of the suit property LR. No. 209/10350 – City of Nairobi to the Plaintiff or its nominee free from any encumbrances whatsoever.

(4) That a Mandatory Injunction do issue compelling the Defendant whether by itself, directors, officials, employees or agents or any other person to hand over vacant possession of the Property to the Plaintiff forthwith.

(5) That this Honourable Court be pleased to make any other orders it may deem fit and just to grant in order to meet the ends of justice.

(6) That the costs of this application be borne by the Defendant in any event.

The application has been served. The Defendant has not entered appearance and/or filed a Defence despite having been served with summons and the Plaint on 30th March 2012. The application is therefore unopposed.

2. Since the orders sought are mainly mandatory in nature, I will consider the application on the usual principles governing the exercise of the Court's discretion in granting a mandatory injunction. These principles were set out in the Ruling of Gicheru (J.A.) (as he then was) in **EAST AFRICAN FINE SPINNERS LIMITED (IN RECEIVERSHIP) & 3 OTHERS – VS – BEDI INVESTMENTS LIMITED**, and the case of **SHARIFF FOREX BUREAU COMPANY LIMITED - VS – DUBAI BANK KENYA LIMITED** and **KOYSAM TRADING AND INVESTMENTS COMPANY LIMITED – VS – INTERSPAN LIMITED**. They are as follows:-

(a) The case has to be unusually strong and clear before a mandatory injunction is granted,

(b) The court must take into consideration what benefit the order will confer on the Plaintiff and the detriment which it will cause to the Defendant.

(c) The court should consider whether a mandatory order will bring a fair result.

(d) In granting the mandatory injunction, the court must feel a high degree of assurance that at the trial it will appear the injunction was rightly granted.

(e) A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances it will not normally be granted.

3. This court has discretionary jurisdiction to grant the mandatory orders the Plaintiff is seeking in prayer 2 and 4 of the application. It is not in dispute that the Plaintiff and the Defendant entered into an agreement for sale dated 2nd August 2011 whereby the 2nd Defendant agreed to sell and the Plaintiff agreed to purchase that parcel of land known as Land Reference number 209/10350. It is undisputed that the Plaintiff pursuant to the said agreement duly paid the deposit price of Kshs.38,100,000/= to the Defendant and has also paid the balance of the purchase price (Kshs.215,900,000/=) to M/s Soita & Saende Advocates' account to be held on stakeholder basis pending the registration of the transfer in favour of the Plaintiff or its nominee and vacant possession of the property.

4. The Defendant has acknowledged receipt of the deposit. The stakeholder has acknowledged receipt of the balance of the purchase price into its account.

5. It is also not in dispute that upon payment of the deposit price the Defendant was required by Clause 3 (b) of the Agreement to deliver the completion documents set out in Clause 10 of the Agreement to the Plaintiff and in exchange of the delivery of the completion documents, the Plaintiff was required to issue a bank guarantee from a reputable bank in favour of the Defendant for the balance of the purchase price in the sum of Kshs.215,900,000/= to guarantee payment of the said sum to the Advocate's account within 3 days of successful registration of the Transfer of the Property in favour of the Plaintiff or its nominee.

6. The Defendant in partial performance of the Agreements has delivered to the Plaintiff's Advocates the completion documents specified in Clause 10 (ii), (iii), (iv), (v) and (vii) of the Agreement but it has in breach of the Agreement failed to complete the sale by delivering the original title documents in respect

of the property, valid Rates Clearance Certificate, Valid Rent Clearance Certificate and Consent to Transfer which documents are specified in Clause 10 (i), (vi) and (viii) of the Agreement. The Defendant has further breached the Agreement by failing to deliver vacant possession of the property on the completion date to the Plaintiff.

7. M/s Soita & Saende Advocates issued a professional undertaking dated 6th September 2011 to the Defendant undertaking to pay the balance of the purchase price upon the registration of the transfer and on vacant possession of the property. The Plaintiff is ready to complete the contract and served a completion notice to the Defendant on 6th December 2011 but the Defendant has refused to comply with the notice.

8. The other special circumstances which this court may consider in determining this application are that the Defendant has no defence to the claim. It has also retained and continues to retain the deposit price of Kshs.38,100,000/=. The Defendant has also not bothered to defend the application despite having been served with the application and the Order on 20th April 2012.

9. I believe that the grant of the mandatory injunctions we sought herein are grantable and are justified, in order to bring this transaction to completion. There is no evidence that the mandatory injunctions if granted will cause any detriment to the Defendant. It is not settled law that a mandatory injunction can be issued so as to enforce a contractual obligation.

10. The principles governing the exercise of the court's discretion in granting an interlocutory injunction are well settled. Those principles were set out in the case of **GIELLA - VS – CASSMAN BROWN & COMPANY LIMITED** and are as follows:-

(a) the Plaintiff must establish a *prima facie* case with a probability of success,

(b) the Plaintiff must prove that it will suffer irreparable injury which cannot be compensated by an award of damages if the injunction is not granted and

(c) if the court is in doubt it will determine the application on a balance of convenience.

11. I believe that the Plaintiff has satisfied all the 3 conditions. On the issue of *prima facie* case it is not in dispute that the Plaintiff entered into an agreement dated 2nd August 2011 with the Defendant where the latter agreed to sell to the former its parcel of land known as Land Reference Number 209/10350. The Plaintiff paid Kshs.38,100,000/= to the Defendant as deposit. The Plaintiff further paid the balance of the purchase price in the sum of Kshs.215,900,000/= to M/s Soita Saende Advocates to be held on stakeholder basis pending the registration of the Transfer in favour of the Plaintiff or its nominee. The Defendant in partial fulfillment of the Agreement forwarded to the Plaintiff's Advocates the completion documents set out in Clause 10 of the Agreement but has in breach of the Agreement refused to deliver the documents specified in Clause 10 (i), (vi) and (viii). The Plaintiff is willing to complete the transaction.

12. On the issue of irreparable harm, it is submitted, rightly so by the Applicant, that if the injunction is not granted the Plaintiff will suffer irreparable harm which cannot be compensated by an award of damages because there is no evidence whatsoever that the Defendant is in a good financial position to pay any damages to the Plaintiff if at the end of the trial the Plaintiff succeeds. The Defendant's position is worsened by the fact that it has not even refunded the deposit the Plaintiff paid to it for the purchase of the suit property.

13. I also believe that the balance of convenience tilts in favour of the Plaintiff rather than the Defendant. The harm the Plaintiff would suffer if an injunction is refused and if it thereafter succeeds in the main suit is likely to be greater and graver than that which the Defendant would suffer from the grant of the injunction should it be successful.

14. In conclusion, the court allows the application as prayed.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 29TH DAY OF JUNE 2012

E. K. O. OGOLA

JUDGE

PRESENT:

Kipng'eno for the Plaintiff

N/A for the Defendant

Teresia – Court Clerk