



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Environmental & Land Case 11 of 2011

CONCEPTA NYABOKE ..... PLAINTIFF/ APPLICANT

VERSUS

PETER MUASYA WANGAIKA ..... DEFENDANT/ RESPONDENT

RULING

Before me is a Chamber Summons dated 19<sup>th</sup> January 2011 filed by the Plaintiff./Applicant. It was filed under Section 1A, 1B, and 3 of the Civil Procedure Act (Cap 21) and Order 40 Rule 1 and 2 of the Civil Procedure Rules. The substantive prayer is for injunction. It is prayer 3, which is in the following terms:-

**The respondent be restrained by way of injunction either by himself, his servants, employees and/or agents from disposing of, selling, transferring, charging, leasing, alienating, removing caution entered on the Register as entry number 4 in the property section and/or otherwise interfering with the applicant's possession rights and interests pending the hearing and determination of this suit.**

The applicant also asks for costs of the application. The application has several grounds on the face of the Chamber Summons. It is averred therein that the respondent refused, failed and neglected to complete his part of a sale agreement for the plot, and that he now wanted to sell the same to a 3<sup>rd</sup> party.

The application was filed with an affidavit sworn on 19<sup>th</sup> January 2011 by the applicant. It was deponed in the affidavit that the parties entered into an agreement for sale of the subject land at Athi River for Kshs.600,000/=. That the plaintiff paid Kshs.343,000/= to the respondent. That the respondent did not meet his obligations for completion of the agreement.

The application is opposed. A replying affidavit sworn on 8<sup>th</sup> March 2011 by the respondent was filed. It was deponed in the affidavit that in November 2009 the respondent instructed his brother in law Sammy Muindi Ndunda to identify a buyer for the subject plot. In February, the respondent was surprised to learn that Sammy had identified a buyer and had been paid Kshs.300,000/=. That the respondent went to the office of the advocate who dealt with the matter, who asked him(respondent) to execute a sale agreement. That the respondent declined to execute the agreement because he had not received the Kshs.300,000/=. However, he accepted to receive Kshs.43,000/= from the applicant. He denied executing the sale agreement relied upon. It was deponed that he later entered into a sale agreement with Evah Muthoni Muchemi, and got the consent of the Land Control Board. That he was willing to refund the Kshs.43,000/= which he had received from the applicant.

Parties' counsel filed and served written submissions to the application. Mr Makau for the applicant and Mr Mutia for the respondent, also highlighted the submissions in court.

Having considered the application, documents filed and the submissions, both written and oral, I am of the view that the case and application revolves around an agreement for sale of land. It is a transaction in which money changed hands. In my view, there are various issues to be considered in the matter. Firstly, whether indeed the respondent signed an agreement for sale. Secondly, whether he can now purport to return money which he received. Thirdly, the effect of receiving money and then purporting to sell the same property in question to a 3<sup>rd</sup> party.

In my view, with the above issues in mind, I conclude that the applicant has demonstrated a *prima facie* case with probability of success. This is the first consideration in an application for interlocutory injunction.

The second consideration is whether damages will be adequate compensation, that is if the orders of injunction are not granted. It does not appear to be specifically denied that the applicant was allowed to go into possession and carry out development. In case that is the position then, in my view, it is not easy for a court to determine the quantum of damages. I find therefore, that the applicant will suffer irreparable loss if temporary injunction is not granted.

These two considerations are the main parameters for the grant of temporary injunctions – See **Geilla –vs- Cassman Brown Ltd (1973) EA 358**. I will therefore not go into the third parameter of consideration of the balance of convenience.

Consequently, I allow the application and grant prayer 3. Costs will be in the cause.

Dated and delivered this 6<sup>th</sup> day of **June** 2012.

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**George Dulu**  
**Judge**

**In the presence of:**

Mr Makau holding brief for Mr Mamboleo for the Plaintiff/Applicant

Mr Mutia for the Defendant/Respondent

Nyalo – Court clerk.