



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

Civil Case 17 of 2011

PENINAH NDEGEAPPLICANT

VERSUS

1. JOSEPH NYANGAU BOGONKO.....RESPONDENT

2. PENWEL NYAMWEYA.....RESPONDENT

RULING

The applicant filed this suit on 27th January, 2011 seeking special and general damages, a declaration that the sale transaction between herself and the 1st defendant was *null and void* and surrender of the original title to her by the defendant. According to the plaint, the applicant was at all material times the registered proprietor of land parcel Kajiado/Kitengela/16917, hereinafter “*the suit premises.*” In or about 4th September, 2010, the applicant offered to sell to the 1st respondent who accepted to purchase ½ an acre out of the suit premises at a consideration of Kshs. 600,000/= . On that very day, the 1st respondent introduced to the applicant, the 2nd respondent as a qualified lawyer who would handle the conveyance on their behalf. The duo persuaded the applicant to append her signature on the last page of the agreement of sale on the understanding that the remaining pages of the agreement were to be made available later. At this juncture the 1st respondent paid the applicant Kshs. 300,000/= as part purchase price. In return the applicant parted with the original title deed to the 1st respondent for purposes of taking copies. However, the 1st respondent disappeared with the same. Since then the respondents had been reluctant to conclude the transaction nor have they given back to the applicant, the title deed. By virtue of these acts and omissions the agreement had been breached and frustrated, and the applicant wants out; hence the suit.

Simultaneously, with the filing of the suit, the applicant took out under a certificate of urgency, a chamber summons application praying for an order of *inhibition* to inhibit any dealing with suit premises or any subdivision thereof until the determination of the suit. In support thereof, the applicant reiterated what I have already set out hereinabove. Suffice to add however that she later came to learn that the 2nd respondent was not actually an advocate, but a Registrar of Lands, Kajiado District where the suit premises are situate. Orally they had intended for the conveyance to be concluded within 90 days. By virtue of the position of the 2nd respondent she was apprehensive that the suit premises could be transferred without her consent and without following due process. If that was to happen, she would suffer irreparable loss. Otherwise she was willing to refund the part purchase price less 20% as per the oral agreement.

In response, the 1st respondent deposed on his own behalf and that of the 2nd respondent that the application was fatally defective, incompetent, misconceived, bad in law as it had been filed under wrong legal provisions, no *prima facie* case had been established with probability of success, there was non-

disclosure of material facts, applicant was guilty of indolence, laches and had not come to court with clean hands. The applicant had neither the *locus standi* to institute the suit against the respondents nor juridical basis to sustain the claim. As far as the 1st respondent was concerned, he first transacted with the applicant's husband who had created the impression that he was the registered proprietor of the suit premises. As negotiations progressed he realized that the suit premises actually belonged to the applicant. That is when she came into the picture. Once an agreement was struck as to the purchase price, mode of payment which was to be immediate and the applicant to handover vacant possession the suit premises, 1st applicant called the 2nd respondent, a Land Registrar, Kajiado and informed him of the agreement. The 2nd respondent advised him to enter into a written agreement and offered as a friend to draw it. On 4th October, 2010, the agreement for sale was executed and the applicant received Kshs. 300,000/= as part purchase price. The balance thereof was to be paid within 30 days upon the applicant availing the completion documents, viz Land Control Board consent, mutation and deed plans, and duly filled transfer form. Pursuant to the terms of the agreement, the applicant left with the 1st respondent the original title for purposes easing subdivision and transfer which was to be embarked on immediately. He denied having disappeared with the original title or that he gave her last page only of the agreement to sign. Thereafter he did not receive any further communication from the applicant until when he was summoned to Ongata Rongai Police Station to answer to a complaint by the applicant that he had stolen her title deed. After presenting his side of the story, the police were convinced that the applicant had made a false report and abandoned further investigations in respect of the complaint. As far as he was concerned therefore, it was the applicant who was in breach of the agreement having failed to procure and handover completion documents. He was otherwise desirous of concluding the transaction and had ready, the balance of the purchase price. On the whole, however, the 1st respondent deposed that the applicant had not met the criterion of granting the injunction.

When the application came before **Ngugi, J** for *inter partes* hearing on 8th December, 2011 parties agreed to argue the application by way of written submissions. However, it was not until 16th March, 2012 that the respective submissions were on board. By which time, **Ngugi, J** had left the station on redeployment. The matter then came before me on 8th June, 2012 when parties agreed that I should carry over from where **Ngugi, J** had left.

I have carefully read the pleadings so far filed and the rival written submissions on record. I do not think that any of those submissions are really helpful, in determining the fate of the application. Those of the applicant are full of evidence from the bar, and not captured by the plaint, the application and the supporting affidavit. To agree to canvass a matter by way of written submissions is not a licence for a party to introduce evidence that has not been ventilated. Further, from those submissions, the applicant has reached definite conclusions on the dispute. Such findings cannot come at an interlocutory stage. If I was to adopt some of those findings in this application, I will definitely have determined the fate of the suit in interlocutory proceedings which is wrong.

As for the respondents' submissions, they have submitted as though the application is one of interlocutory injunction. They have addressed principles which govern the grant or refusal of interlocutory injunction. However, that is not application before court. The instant application is for *inhibition* to prevent any dealings in the suit premises. No wonder, the respondents have asserted that the application as filed is fatally defective and incompetent on account of being filed under the wrong legal provisions. I suspect that the respondent expected the applicant to cite Order 40 that deals with injunction.

This being an application for *inhibition*, it is properly before this court on account of Order 37 rule 8 of the Civil Procedure rules and section 128 of the Registered Land Act. In an application of this nature different considerations, and not the principles of granting or refusing interlocutory injunctions apply. Section 128(1) gives this court wide and unfettered jurisdiction as well as discretion to issue an order of *inhibition*. There are no limitations whatsoever as to what court should consider when granting or refusing an order of *inhibition*. But I suppose the court will have to consider the circumstances that have impelled such request, the conduct of the parties leading to the request, prejudice that may be occasioned to the parties if *inhibition* is ordered or denied and perhaps balance of convenience.

In the circumstances of this case, it is common ground that the applicant entered into a sale agreement with the 1st respondent to sell a portion of her suit premises. Pursuant to the sale agreement she received Kshs. 300,000/= and parted with the original title deed to the respondent. It appears along the way, the transaction fell through. Whereas the 1st respondent is keen to see through the conveyance and has the title to boot, the applicant no longer wishes to carry through the agreement and she is prepared to refund the part purchase paid less 20% penalty. From the looks of things, the 1st respondent has an advantage over the applicant. He has the original title to the suit premises. He has a friend in the 2nd defendant who is the Land Registrar, Kajiado, where the suit premises are situate.

The applicant is apprehensive and any reasonable person will feel that way, that the respondents in contest could deal with the suit premises in a manner inimical to the applicant's title. The only protection available to her pending the hearing and determination of this suit is an *inhibition*.

It is also not lost on me that looking at the material placed before me, both parties have not been candid with the court as to what precisely transpired during the transaction as to have led to the breakdown in their relationship. I do not think that both parties have acted above board. Despite my misgiving aforesaid, nonetheless, I feel that the applicant is more exposed to the mischief that may come with the respondents having her title to the suit premises than the respondents. After all they still retain ½ of the purchase price.

Finally, no prejudice will come the way of the respondents if the inhibition is granted. They retain the title to the suit premises. The applicant cannot therefore deal with the suit premises at their risk and or expense. As it were, their interest is secured. The same cannot be said of the applicant.

For all the foregoing reasons, I am satisfied that the application is merited. I allow it in terms of prayer 2. There shall be n order as to costs.

RULING DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day JULY, 2012.

ASIKE-MAKHANDIA
JUDGE