REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

CIVIL CASE 64 OF 2011

SIMON NJII MWANGI…….PLAINTIFF/APPLICANT

VERSUS

UTUMISHI INVESTMENT LTD…….DEFENDANT/RESPONDENT

RULING

On 6th April, 2011, **Kihara Kariuki,J** *(as he then was)* directed that the application dated 21st March, 2011 be canvassed by way of written submissions. However, by the time the submissions were on board, **Kihara Kariuki,J** had been deployed from the station and infact promoted to the Court of Appeal. The task of seeing through the application therefore fell on me. On 10th May, 2012, parties agreed that I should take over the application from where **Kihara Kariuki, J** had stopped. This effectively meant that I should read the pleadings, in particular the application, rival submissions on record, craft and deliver the ruling.

By a Notice of Motion dated 21st March, 2011 filed under a certificate of urgency and pursuant to Orders 40 rules, 1,2 & 3, 51 rule 1 of the Civil Procedure Rules, Sections 1A & B of the Civil Procedure Act and all other enabling provisions of the law, the applicant sought against the respondent, in the main a temporary injunction to restrain the respondent from repossessing, selling, advertising for sale, transferring and or dealing with land parcel Numbers KJD/Kaputiei North/Isinya Block 1/540,541, 1/631 and 632 respectively hereinafter *" the suit premises"* pending the hearing and determination of the suit. He also prayed for costs.

The grounds in support of the application are that the applicant was not indebted to the respondent at all, he had entered into a sale agreement with the respondent where by the respondent agreed to sell to him the suit premises. The applicant fully paid the purchase price and even fees for processing the title. However, as at the time of filing the suit and the application the defendant had not processed and availed to him the certificate of title for no justifiable reason or cause despite repeated demands. Surprisingly however, on 5th January, 2011, the respondent wrote to him a letter demanding Kshs. 120,000/= allegedly being administration fees failing which, the respondent threatened to re-possess the suit premises. Much as the applicant wrote back and demanded the withdrawal of the offensive letter, the respondent had not responded and he was therefore apprehensive that the respondent may illegally dispose of the suit premises, as he had been called by neighbours who informed him that they had seen third parties viewing the suit premises. The amount demanded by the respondent was not part of the sale agreement, neither was its component explained to the applicant. In the premises, the applicant stood to suffer irreparable damages should the sale to 3rd parties allowed to proceed.

The affidavit in support of the application was sworn on 21st March, 2011 by the applicant. It is a rehash of the grounds above. Suffice to add that as far as he was concerned, having paid the entire purchase price

to the respondent, the suit premises vested in him legally. There was no law that allows the respondent to issue threats of re-possession in the absence of any outstanding purchase price. The respondent will not suffer any prejudice should the application be allowed since it still stands a chance of recovering any amount that could be adjudged to be lawfully and legally belonging to it.

Augustine Kimantaria, the Chairman of the Board of Directors of the respondent replied to the applicant's accusations through a replying affidavit dated 5th April, 2011. Where appropriate he deponed that the respondent bought in the year 1998 land parcel Kajiado/Kaputiei-North/1870 to sell at reasonable prices to its members. It was subsequently subdivided in 839 individual plots. Initially the plots were only available to members though this requirement was later reviewed to allow non-members to purchase subject of course to resolutions and terms that were set by members of the respondent at Annual General Meetings and by the Board of Directors from time to time. The applicant was one such an outsider. The applicant made an offer to purchase 4 plots, the suit premises which offer was accepted by the respondent. The applicant submitted himself to the terms and conditions of the respondent with regard to the transaction. Down the line members of the respondent authorized it to embark on a feasibility study and put up a collective project for the construction of houses for members and procure the supply of basic utilities from various institutions. Towards this end, the respondent expended the sum of Kshs. 22,654,425/60 as at 22nd August, 2008. This amount was divided among the total numbers of plots to determine the additional amount to be paid by each plot buyer in order to defray the expenses incurred by the respondent and it was determined each plot buyer to pay Kshs. 30,000/=. This decision was communicated on 15th September, 2008 to all plot buyers including the applicant. The respondent's decision aforesaid was further confirmed by members and non-members plot buyer's meeting held on 21st February, 2009 at which meeting the respondent was authorized to repossess all plots allocated to those who would default to pay the amount. Several notices and reminders were sent to the applicant resting with one dated 5th January, 2011. In view of the foregoing, it was the respondent's case that the applicant had not demonstrated a *prima facie case* with a probability of success against the respondent to justify an interlocutory injunction.

I have carefully read and considered the pleadings, the application, the affidavits in support thereof and in opposition to as well as the annextures thereto, rival written submissions and the authorities cited. However, I have found the applicant's written submissions least helpful in this regard. They have not at all addressed considerations for the granting of interlocutory injunction or refusal thereof instead they have addressed the law applicable to the contracts of this nature, that is the Law of Contract Act, the consequences of variation or modification of terms of the agreement, unconscionability of the modified terms of the agreement and failure by the respondent to issue to him the certificate of title. This is all fine. However, the issues are being raised and canvassed at the wrong forum. These are matters to be addressed at the plenary hearing of the main suit but not at this interlocutory stage.

At this stage all that the applicant is required to convince the court in the words of **Spry, JA** in the notorious case of **Giella vs Cassman Brown & Company Limited [1973] E.A. 358:_**

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a <u>prima facie case</u> with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt it will decide an application on a balance of conevenince…"

On this must also be added that the remedy of injunction is discretionary as well as equitable. Accordingly, whoever comes to court to seek it must come to court with clean hands, must disclose all material facts and be candid with the court. Failure to do so would automatically lead to the denial of the relief by the court.

As I have already stated, the applicant in his written submissions has not addressed any of the above issues. However, I will seek solace or refuge in his affidavit in support of the application which in a very small way has addressed slightly two conditions for the grant of injunction, irreparable loss and balance

of convenience. However, these considerations can only be addressed once the first condition has been established. That is to say, the applicant must first establish that he has a *prima facie case* with a probability of success at the trial, before the court can move to consider irreparable loss and balance of convenience. Those considerations are sequential. If the applicant fails on the first condition, then there will be no need for the court to consider the remaining 2 grounds.

Has the applicant made out a *prima facie case* at this interlocutory stage? I do not think so. The applicant's supporting affidavit and submissions do not demonstrate a *prima facie case* with a probability of success. It has been stated many a time by the Court of Appeal that a *prima facie case* is the kind of case in which on the material presented to the court, the court properly directing itself will on the face of it conclude that there exists a right which has been breached by the opposite party as to call for an examination or rebuttal from the later. The case need not necessarily succeed at the trial though. As long as there is such possibility then the test of a *prima facie case* would have been established. See **Mrao Ltd vs First American Bank of Kenya Ltd [2003] KLR 125**. In the present application, the applicant has stated that he entered into a sale agreement with the respondent, paid full purchase price but the respondent has refused to process and avail to him the title deeds in respect of the suit premises. He has alleged that the respondent has unilaterally demanded of Kshs. 120,000/= failing which it would repossess the suit premises. To all these, the respondent had an answer. Those answers were contained in the replying affidavit. It is instructive that the matters raised in the replying affidavit have not been controverted in any way by the applicant.

Dealing with the issue of the sale agreement, it is the position of the respondent that there was no such written agreement entered into between the applicant and respondent for the sale of the suit premises. What there was, was that the sale of parcels of land owned by the respondent through the process of application and balloting and that the entire transaction was governed by the terms and conditions set by resolutions of either the respondent or the buyers from time to time which bound each and every buyer or prospective buyer. From the materials placed before me, I think the position of the respondent is vindicated. If the case was otherwise, I would have expected that the applicant would have annexed a copy of the sale agreement in his affidavit in support of the application. It is trite law that agreements respecting land or its disposal thereof should be in writing. In the absence of such an agreement, one wonders how the applicant may succeed at the trial, much as the respondent has accepted that the applicant was among those who successfully balloted and was allocated the suit premises.

The applicant's beef with the respondent is about Kshs. 120,000/= demanded from him by the respondent as administrative costs. The applicant claims that he was not privy as to the origin of the aforesaid sum and its purpose. This assertion cannot possibly be correct. There is ample communication from the respondent to the applicant on the subject. This has not been countered by the applicant. He cannot be heard therefore to say that the respondent had taken unilateral decision to impose the amount to him. There is evidence of the meeting and resolutions of the respondent, members and buyers and or prospective buyers to that effect. Indeed the applicant attended some of those meetings. Further there is evidence of compliance by other plot buyers. A list of fully compliant members has been exhibited. It would appear that the applicant wishes to be exempted. Whether this is possible or not cannot be determined at this interlocutory stage. Suffice to say that on the material placed before me the applicant is aware as to how the sum of Kshs. 120,000/= demanded from him by the respondent came about.

It is clear therefore that when the applicant claims that the was not a party to the additional sum of Kshs. 120,000/= demanded from him by the respondent and that its purposes or origin has not been explained to him, the applicant is obviously being less than candid with the court and is indeed guilty of material non-disclosure. These are grounds as already pointed out upon which the discretionary and equitable remedy of interlocutory injunction can be denied. In the case of **Tiwi Beach Hotel limited vs Julian Ulrike Stamm[1990] KAR,** it was stated "***it is the clear duty of an applicant seeking relief from the court, particularly on an ex parte application to make full disclosure of all the facts material to the application which are known to him or her…"*** In this case it is obvious that the applicant was in the know as to the origin and purposes of Kshs. 120,000/=. For him to feign ignorance is tantamount to material non-disclosure and indeed lack of candor on his part.

The applicant having failed to fulfill the set conditions for the issuance of titles and in particular payment of Kshs. 120,000/= for the suit premises cannot really press for an interlocutory injunction against the respondent, for he who comes to equity comes with clean hands.

In view of the foregoing, I am satisfied that the applicant has failed to fulfill the first condition for the grant of an interlocutory injunction. I need not therefore delve into the other remaining conditions. The application lacks merit and is accordingly dismissed with costs to the respondent.

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

ASIKE-MAKHANDIA
JUDGE