REPUBLIC OF KENYA

High Court at Machakos

Civil Suit 22 of 2012

STEPHEN GITAU NJOROGE ……...……..PLAINTIFF

VERSUS

GEORGE NGURE KARIUKI……DEFENDANT

RULING

The plaintiff filed the instant suit on 6th February, 2012 praying for among others, an injunctive order against the defendant in respect of land parcel, LR No. 12715/2707 herein after *"the suit premises"*, and an order of specific performance directing the defendant to forthwith transfer the suit premises to him. Simultaneously with the filing of the suit, the plaintiff took out a Notice for Motion under certificate of urgency seeking interim relief in the nature of an interlocutory injunction.

As per the plaint, the facts constituting the suit and indeed the application are that the defendant is the registered proprietor of the suit premises, situate in the Syokimau area of Mavoko in Machakos County. By two sale agreements dated 18th November, 2002 between the plaintiff and defendant, the defendant sold plot numbers 1,2, & 3 among others to the plaintiff at an agreed consideration of Kshs. 200,000/=. The said plots are now the suit premises. The consideration was to be paid partly by cash and partly by set off of monies owed by the defendant to the plaintiff for services rendered. On 27th January, 2010 the plaintiff made a cash payment of Kshs. 100,000/=. The amount for services rendered totalled Kshs. 185,640/=. In effect, the plaintiff overpaid the defendant by Kshs. 85,640/= yet the defendant had failed and or refused to transfer the suit premises to the plaintiff and persists in such failure and refusal.

The grounds and indeed the affidavit in support of the application merely reiterate the foregoing. Suffice to add that the plaintiff has annexed supporting documents to his claim in his supporting affidavit.

In response to the application, the defendant in a replying affidavit dated 16th May, 2013 essentially, admitted that he entered into the sale agreements with the plaintiff and the consideration thereof. However, the consideration was for the allocation and transfer of shares in the company known as Clause Motors Limited that the plaintiff was to incorporate. The said consideration was to be the value of the said shares. The plaintiff failed to satisfy the consideration and accordingly the transaction fell through. Further, the plaintiff despite repeated demands failed to make payments for his share of rent, rates and stamp duty. In the result, the defendant was compelled to do so solely to move the transaction forward.

With the leave of court, the plaintiff filed a further affidavit. Though he concedes that the consideration contemplated and agreed upon never passed, he however hastens to add that the contract was subsequently varied by the defendant's agents and he thereafter made a deposit of Kshs.

100,000/=. The plaintiff further depones that there was an overpayment to the defendant which he believes ought to have been applied to cater for the rent, rates and stamp duty. With regard to Clauste Motors Ltd, he deponed that it was never incorporated into a limited liability company and therefore the issue of shareholding was cancelled and settled vide his letter to the defendant dated 6th January, 2010.

When the application came before me on 3rd July, 2012 for *interpartes* hearing, **Mr. Kasamani** and **Mr. Musyoka** for **Mr. Ithondeka**, learned counsel agreed to canvass the same by way of written submissions. Those written submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

The principles on the grant or refusal of an interlocutory injunction were set out in the celebrated case of **Giella vs Cassman Brown & Co. Limited [1972[E.A. 358.** Essentially an injunction is both equitable and discretionary remedy. However in seeking it, the applicant must show a *prima facie* case with probability of success. It will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and finally, if the court is in doubt, it will decide the application on the balance of convenience.

It has been held that once a court is satisfied that a *prima facie* case with probability of success has been made out by the applicant, there is no need to consider the other conditions.

What then is a *prima facie case*? The Court of Appeal attempted to define such a case in **Mrao Limited vs First American Bank of Kenya Ltd [2003] KLR 125**. It stated thus;-

"A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself may conclude that that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter…"

From the outset and on the material before me, I am satisfied that they show an infringement of the plaintiff's right which the defendant should be called upon to rebut at the appropriate time. The dispute revolves around contracts for the purchase of the suit premises entered into between the plaintiff and defendant. That fact is conceded to by both parties. It is also not in dispute that the plaintiff did not perform some of the terms of the contract. However, he alleges that the contract was subsequently varied. Pursuant to that variation, he paid to the defendant Kshs. 100,000/= on 27th January 2012. The plaintiff too has demonstrated this far, that he has indeed overpaid the consideration by Kshs. 88,640/=. All these assertions have not been seriously challenged by the defendant. The defendant has claimed that the plaintiff breached the agreement by not paying his share of the stamp duty, rent, rates and registration fees. The plaintiff's retort is that the overpayment aforesaid ought to have been applied to offset such expenses. Part of the consideration was initially sale of shares in the yet to be incorporated company known as Clauste Motors Limited. It is common ground and it is admitted by both parties that the said company was never incorporated. The plaintiff's business having not been incorporated, there were no shares to be allocated to the defendant. That is according to the plaintiff. Despite this, the defendant went ahead and received money for the purchase of the suit premises and the balance was paid and overpaid by way of set-off for services rendered to the defendant by the plaintiff.

All these contested issues are best left for plenary hearing of the main suit. Pending such an eventually, it is best that an interlocutory injunction do issue. In other words, it is not in doubt that the plaintiff has made out a *prima facie case* with probability of success and if the order sought is not granted, the defendant may dispose off the suit premises and the plaintiff will thereby stand to suffer irreparable loss and damage.

In the premises an interlocutory injunction shall forthwith issue in terms of prayer 3 of the Notice of Motion dated 4th February, 2012. Costs of the application shall be in the cause. However, the interlocutory injunction is issued on condition that within the next seven (7) days from the date of this ruling, the plaintiff shall execute an undertaking as to damages in the sum of Kshs. 500,000/=.

DATED SIGNED, and **DELIVERED** at **MACHAKOS** this **31ST**day of **OCTOBER 2012.**

ASIKE-MAKHANDIA
JUDGE