



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 76 of 2011

NURU MOHAMED OMAR ..... 1<sup>ST</sup> PLAINTIFF

ZAINAB TSUMA BONGOJA ..... 2<sup>ND</sup> PLAINTIFF

VERSUS

SUHEEL AHMED NAZIR ..... DEFENDANT

RULING

(1) The Plaintiffs by Notice of Motion dated 30<sup>th</sup> March 2011 seek an injunction order restraining “the Defendant from occupying, developing, alienating or in any other way from dealing with all that plot of land known as Plot No. 309 Kawala “A” Kadzozzo situated in Kilifi pending the hearing and disposal of the suit.

(2) The principal ground of the application is set out in the application as:

***“That the Defendant and Plaintiffs got into an agreement for sale of the suit property. The consent was obtained and the title was transferred to the Defendant. However the Defendant paid cash less Kshs.433,000/= alleging that we did a survey (and found out that it was 1.5-acres contrary to 1.7-acres as alleged). The survey was done without any consent of the Plaintiffs and neither were the Plaintiffs consulted.”***

(3) In urging their respective cases the parties have filed their pleadings, affidavits and written submissions; and the parties agreed to rely on these without supplementary oral argument and ruling was reserved. The court regrets that owing to overload and competing assignments outside court, it has not been possible to deliver the ruling earlier.

(4) The Plaintiffs' case is simply that the Defendant has a duty under the contract for sale to pay the full purchase price before he can enjoy the use of the property and that since **“the Defendant has unreasonably refused to fully pay the purchase price, it is fair and just to maintain the exiting status until the matter is fully heard and determined by this court.”**

(5) The Defendant contends that he has paid the full purchase price for the 1.5 acres established by a survey to be acreage of the suit property being Kshs.3,817,000/=. It is argued for the Defendant that the contract price of Kshs.4,250,000/= was based on an estimated acreage of 1.7 acres at an agreed purchase price of Kshs.2,500,000/= per acre. The Defendant also claims that the property was sold with vacant possession and that therefore the Plaintiffs are required to give vacant possession of the suit property having received the full purchase price way back on 28<sup>th</sup> January 2011.

(6) The dispute between the parties will be determined at trial upon construction of the contract for sale dated 10<sup>th</sup> June 2010 and any collateral agreements as alleged by the Defendant. At this interlocutory stage, I find that the Plaintiffs have a prima facie case under the parole evidence rule as the purchase price is given in the Contract for Sale as Kshs.4,250,000/= and therefore the Plaintiffs would be entitled to the unpaid vendor's lien over the suit property. In **Halsbury's Laws of England 4<sup>th</sup> Ed (1979) Vol. 28 paragraph 555**, the vendor's lien is described as follows:

***“555. Vendor's lien. A vendor of land has a legal lien of the land sold until the execution of the conveyance. He also has a legal lien of the title deeds in his possession. However, in equity the vendor's lien for the unpaid whole or part of the purchase money subsists until actual payment, even where the conveyance has been executed and the purchase money is expressed in the conveyance to have been paid and received, or the proprietorship register, in the case of registered land, records a receipt. For this reason the vendor's equitable lien, which prevails, has supplemented the vendor's legal lien for all practical purposes and the vendor's lien is here regarded as an equitable lien.”***

A vendor's lien has however been held to have been lost “where the vendor on completion of a contract obtained all that he had bargained for.” See **Halsbury's Laws of England ibid at paragraph 580 and Capital Finance Co. Ltd v. Stokes (1969) 1 Ch. 261**.

(7) The question to be determined at the trial therefore is whether the vendor Plaintiffs have lost their vendor's lien having obtained all that they bargained for or whether the claim of Kshs.433,000/= is part of the purchase price under the contract of sale between the parties. In the interim, it appears to me, to be a case of balancing the equitable interests (a) of the vendor in the subject of the Sale Agreement as security for the full purchase money and (b) the purchaser as the owner of the beneficial interest in the land which the vendor is, in regard to his legal ownership and possession, constructively a trustee for the purchaser. See **Halsbury's Laws of England ibid at para 1343 Vol. 16**.

(8) In considering the test for interlocutory injunction, whether under the **Giella v. Casman Brown (1973) EA 585** cited by both parties or the **American Cyanamid Co. v. Ethicon Ltd (1975) 1 ALL ER 504**, the test whether damages are adequate compensation is central. I take the view that as the Plaintiffs' claim in the Plaint, although couched as a declaration, is principally for the payment of the Kshs.433,000/=, it is an injury that is reparable by an award of damages. As prayer No. (a) of the Plaint filed on 31<sup>st</sup> March 29011 shows, the Plaintiffs seek:

***“(a) A declaration that the Defendant has no right to interfere with the Plaintiffs' occupation of Plot No. 309 Kawala “A” Kadzonzo until the Defendant has paid the balance of Kshs.433,000/= to the Plaintiff. Also an appropriate injunction be issued by the Court to the effect that until the Defendant pays the said sum of money to the Plaintiff, the Defendant is restrained from dealing in any manner with the suit property.”***

(9) On the balance of convenience test, I consider that the Defendant who has paid Kshs.3,392,000/= (since 2<sup>nd</sup> February 2011 as conceded in Plaint) of the claimed Kshs.4,250,000/=, which the Defendant disputes, is entitled to the benefit of the suit property pending determination of the dispute as to the balance of Kshs.433,000/=. The vendor's interest in the balance of the purchase price may be secured by an order for the deposit of the said sum of money in a joint account in the names of the parties' advocates or in the court pending the determination of the dispute. This appears to be the justice of the case as required by Article 159 of the Constitution.

(10) Accordingly, for the reasons set out above, I make the following orders on the Notice of Motion dated 30<sup>th</sup> March 2011:

(1) The Plaintiffs' application for interlocutory injunction is dismissed with costs to the Defendant of the suit property to the Defendant within 60 days from the date of the ruling.

(2) The Defendant will within 30 days from the date of the ruling deposit the sum of Kshs.433,000/= in

an interest earning account in the joint names of the counsel for the parties.

(3) In the interest of an expedited hearing and determination of the dispute, the parties are directed to fix the case for hearing within 14 days from the date of this ruling.

**Dated and delivered this 11<sup>th</sup> day of December 2012.**

**EDWARD M. MURIITHI**  
**JUDGE**

In the presence of:

No appearance for the Plaintiffs

Miss Mbulika for the Defendant

Mr. Buoro - Court Clerk