



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO.392 OF 2008**

**EVANS KAGECHE BORO.....PLAINTIFF/APPLICANT**

**VERSUS**

**ERSKINE ENTERPRISES LTD.....DEFENDANT/RESPONDENT**

**RULING**

By a chamber summons filed on 31<sup>st</sup> December 2008, the applicant, Evans Kageche Boro wants this court to restrain the respondent, Erskine Enterprises Limited from interfering with his property known as L.R. No.398/12 NAIVASHA measuring 48 hectares. It is the applicant's contention that he is the bonafide purchaser of the suit property after entering into an agreement of sale with the respondent. After executing the agreement, the parties obtained the necessary land control board consent and subsequently the applicant occupied the suit land. The applicant realized the respondent was not keen to transfer the suit property to him and appeared to have changed their mind. The respondent has recently begun to interfere with the applicant's quiet occupation of the suit property by attempting to sell it to third parties prompting the applicant to institute HCCC 425 of 1990, which he later withdrew.

The respondent has filed grounds of opposition, a replying affidavit and a further affidavit, the collective effect of which is that out of the agreed purchase price of Kshs.600,000/=, the applicant paid only 400,000/=; that the agreement was not executed; that no land control board consent was obtained; that the suit property has been sold to a 3<sup>rd</sup> party; that the suit is statute barred; that other than grazing his animals on the suit land, the applicant has never been in actual occupation of the suit land.

I have considered the averments, submissions by counsel and the authorities cited. Being an application for temporary injunction, the applicant must satisfy the strictures enunciated in the famous **Giella Vs. Cassman Brown & Company Limited** (1973) 1 EA 358, in order to be entitled to the relief of injunction. Those conditions are that the applicant has a *prima facie* case with a probability of success; that an interlocutory injunction will not normally be granted unless the applicant may suffer loss not capable of being compensated by an award of damages; however, should the court be in doubt it must decide the matter on a balance of convenience. In considering the first condition, the court must not make any definite findings either of law or fact as to do so is to usurp the jurisdiction of the trial court.

The applicant's claim in the main suit is that the respondent holds the title to the suit property in trust for him. That trust is based on the sale agreement coupled with possession by the applicant of the suit property. The applicant has expressly averred in his affidavits that there was a written agreement that gave him the ownership of the suit property. In both the affidavit in support of his application and the supplementary affidavit, no agreement has been annexed. The respondent has however explained that no agreement was executed after the applicant refused and/or failed to sign one. An unexecuted draft agreement is annexed to the respondent's replying affidavit confirming this fact.

Secondly, the applicant is seeking in this application that the respondent be restrained from interfering with the former's occupation and use of the suit property, yet there is an uncontroverted averment that the applicant is no longer in occupation of the suit land having been evicted. The reliefs sought cannot be granted in vacuum. The third issue is with regard to the purchase price. It is common ground that the parties agreed on Kshs.600,000/= as the purchase price. But the evidence presented so far show that only Kshs.400,000/= was paid. Then there is the fourth matter of the land control board consent. The applicant has annexed to his application copies of an application to the Naivasha Land Control Board for consent

and a letter of consent issued after the board's meeting of 19<sup>th</sup> March, 1985.

The respondent has maintained that it was not represented in the board and hence no land board took place. According to it, the letter of consent annexed to the application must be a forgery. In support of that contention, a copy of a letter from the chairman of the Board confirming that no meeting was held on 19<sup>th</sup> March, 1985 and further that no consent in respect of the suit property was ever given on the material day was annexed. Its contents have not been challenged.

From the foregoing, without evidence that the transaction was in writing and witnessed as required by **section 3(3) of the Law of Contract Act**; without evidence that the applicant is in occupation of the suit property and with the consent whose credibility has been seriously challenged, the applicant has failed to discharge the burden to show the existence of a *prima facie* case with a probability of success at the hearing. No doubt the question of the existence of a trust is a matter of evidence that can only be determined with finality at the trial. At this stage, it is sufficient to state that what the applicant has presented does not meet the threshold of a *prima facie* case.

In the result, this application fails and is dismissed with costs.

**Dated, Delivered and Signed at Nakuru this 29<sup>th</sup> day of March, 2011.**

**W. OUKO  
JUDGE**