

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 250 OF 2010

LEE MWATHI KIMANIPLAINTIFF

V E R S U S

**NATIONAL SOCIAL SECURITY FUND1ST
DEFENDANT**

ALIO IBRAHIM HASSAN2ND DEFENDANT

R U L I N G

There is no dispute that the 1st Defendant was the owner of the suit property, that is L.R. No. Tassia-11-97/0770/140, also known as L.R. No. 140/0770/140, and L.R. No. Tassia –11- 97/0768/142, also known as LR. 140/0768/148. The Plaintiff claims that in 2007 he bought them from the 1st Defendant under tenant – purchase scheme and took possession but that on 18th May 2010 he found the 2nd Defendant having taken possession and was developing the same on basis that he had bought the same from the 1st Defendant. He claims that the subsequent sale to the 2nd Defendant was illegal and fraudulent. The suit was brought for a permanent injunction and costs. With the suit was filed an application under Order 39 rules 1, 2 and 9 of the Civil Procedure Rules for a temporary injunction to restrain the Defendants either by themselves, their agents, employees, from transferring, alienating, constructing upon the suit properties until the suit is heard and determined.

The 1st Defendant’s case is that the Plaintiff expressed interest in buying the two properties by signing an application form which has been annexed. He paid a deposit of KShs. 50,000/= for each property following which he went quiet. No formal agreement had been signed. The 1st Defendant wrote to the Plaintiff twice using the address he had provided to pay the balance failing which the properties would be sold. When there was no response, the 1st Defendant sold the properties to the 2nd Defendant with whom it entered into a formal agreement. The 2nd Defendant paid the full purchase price and is waiting for the title. That was also the evidence of the 2nd Defendant. It is this formal agreement that led to the 2nd Defendant taking possession of the suit properties.

The Plaintiff admits in the supporting affidavit that he has only partly paid for the suit properties. The receipts he annexed to the affidavit show a total payment of KShs. 101,000/=. He does not say what the agreed purchase price was, or how much was outstanding. He does not say at what intervals payments were supposed to be done and whether he honoured the agreement.

Both Mrs. Mbaabu for the 1st Defendant and Mr. Lakicha for the 2nd Defendant submitted that the transaction between the Plaintiff and the 1st Defendant cannot be the basis of a suit to claim the property as there is no evidence that an agreement in writing signed by both parties and witnessed exists as required by the provisions of section 3(3) of the Law of Contract Act (Cap. 23). Under the circumstances, therefore, a *prima facie* case with a probability of success in terms of **Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358** cannot be said to have been demonstrated (**Kirkdale Limited –Vs- Mount Agencies Limited And Others, Civil Appeals No. 42 & 45 of 2008 (Consolidated) at Nairobi**). I agree with counsel.

It is also clear that whatever monies the Plaintiff paid for the suit properties can be recovered as damages. The issue of irreparable loss or injury should not arise.

The 2nd Defendant has paid full purchase price of KShs. 812,000/= and is in possession. The balance of convenience should tilt in his favour as against the Plaintiff who has no signed contract, did not pay the full purchase price and did not honour the periodic payments. It should always be remembered that an injunction is a discretionary and equitable remedy.

In conclusion, the application by the Plaintiff is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI
THIS 14TH DAY OF MARCH 2011**

**A. O. MUCHELULE
J U D G E**