



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 174 OF 2008

COAST TUNES HOLDINGS LIMITED..... PLAINTIFF/APPLICANT

-VERSUS-

ALI MUHAJ..... DEFENDANT/RESPONDENT

RULING

Along with plaint dated **10th July, 2008** the applicant filed Chamber Summons under Order XXXIX (Rules 1,2,3) and ss. 3A and 63(e) of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The main prayer outstanding is set out as follows:

“THAT this Honourable Court be pleased to issue an order of injunction restraining the defendant by himself, his employees or agents from selling, disposing or carrying out constructions on all that property known as UNS CAMP Site – Kiwayu Island and more particularly described in the letter of 17th June, 1999 (Ref. 77856/111) pending the hearing of this suit”.

This application rests on the grounds that –

- (i) the defendant had sold the suit property to the plaintiff;**
- (ii) the defendant has, in breach of the agreement for sale, refused to hand over to the plaintiff vacant possession of the suit property;**
- (iii) the defendant has embarked on construction works on the suit property, without the plaintiff’s approval or authority.**

The Managing Director of the applicant, **Josef Brunlehner**, swore an affidavit on **10th July, 2008** deponing that, by an agreement of **5th December, 2001** the applicant undertook to purchase the property known as UNS CAMP Site – Kiwayu Island, more particularly described in the letter of allotment dated **17th June, 1999** under refence No. 77856/111 measuring 1.9 hectares or thereabouts. The deponent avers that the suit property was sold for a total sum of Kshs. 550,000/=, and the respondent was fully paid for the property and duly acknowledged receipt of the payment. He depones that the respondent, in disregard of the sale agreement, has entered upon the suit property and initiated construction works, with the full knowledge that he has sold the property to the plaintiff. The deponent avers that the respondent has “on

numerous occasions moved [into] the property and acted as though he were still the owner”; and that the respondent has continuously committed acts of trespass which if allowed to continue, will cause the applicant “irreparable loss as the respondent might completely deprive it of the enjoyment of property lawfully acquired”.

The deponent avers that the applicant will suffer irreparable loss unless the respondent is restrained by Court order from entering, trespassing upon, or interfering with the suit property in a manner inconsistent with the rights of the applicant as a **bona fide** purchaser.

In a supplementary affidavit, dated **16th July, 2008** the same deponent deposes that the plaintiff has already carried out a survey of the suit property, and paid allotment fees to facilitate the issuance of a title deed.

The defendant, on **31st July, 2008** filed a preliminary objection on points of law, invoking, firstly, the Limitation of Actions Act (Cap.22, Laws of Kenya), secondly the Civil Procedure Act (Cap. 21, Laws of Kenya), and thirdly (and in general terms), “company law”.

That, however, is as far as the defendant went, as he had no submissions made before the Court. The plaintiff, on the other hand, had their case placed before the Court through their Advocates, M/s. Joseph Munyithya & Co., Advocates – and the highlights of this case are set out below.

Learned counsel urged that, as the applicant did indeed purchase the suit property from the defendant, who duly acknowledged receipt of payment, but is now proceeding as if he had not sold the property, there was a **prima facie** case on the applicant’s side with a high probability of success; the applicant is the **bona fide** owner of the suit property, having lawfully acquired it; the respondent, having relinquished his property rights in the suit property, is not entitled to interfere with the plaintiff’s quiet, peaceful and lawful possession thereof; the respondent cannot purport to enrich himself unjustly by acquiring what he has already disposed of, for valuable consideration received.

Counsel submitted that the preliminary objection on points of law raised by the respondent does not specify the provisions of law relied on: and so the objection has no effect to dispose of the plaintiff’s suit. The requirement of a definitive design to a genuine preliminary objection, it was submitted, is stated in the Court of Appeal decision, **Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd** [1969] EA. 696 [**Law, JA** at p.700]:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

Counsel submitted that the preliminary objection herein was not capable of disposing of the entire suit, and so was “fatally defective” and should be struck out.

Counsel submitted that the plaintiff had satisfied the basic tests for grant of an interlocutory injunction, as set out in the Court of Appeal decision in **Giella v. Cassman Brown & Co. Ltd** [1973] E.A. 358 (at p.360, **per Spry, V. - P.**):

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case 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 the balance of convenience”.

Even though the respondent did not come out to canvas a focused case, the outlines of the law and the evidence distinctly stand in favour of the plaintiff who clearly has contractual rights, as well as legitimate expectations founded on the contract. The situation at this moment, **ex facie**, portrays the defendant as a man in quest of unjust enrichment; and at the interlocutory stage, and in equity, such a position is not to

be sustained.

Therefore, an order of injunction is hereby issued restraining the defendant by himself, his employees or agents from selling, disposing of, or carrying out constructions on all that property known as UNS CAMP Site – Kiwayu Island and more particularly described in the letter of **17th June, 1999** (Ref. 77856/111) pending the hearing and determination of the suit.

The defendant shall bear the plaintiff's costs for the instant application.

DATED and **DELIVERED** at **MOMBASA** this 8th day of April, 2011,

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J. B. OJWANG
JUDGE