



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO.144 OF 2010**

**LACTON MURIITHI**

**NJOKA.....PLAINTIFF**

**V E R S U S**

**BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND.....DEFENDANT**

**R U L I N G**

The Defendant is the owner of the house on L.R. No. Nairobi/Block 146/40 Hazina Estate in Nairobi (hereinafter known as “the suit property”) which the Plaintiff was buying on tenant purchase arrangement and in which he resides. There does not appear to be any formal agreement signed between the parties indicating the terms and conditions of their engagement, or at all. The Plaintiff alleges there exists one but did not avail a copy. The Defendant says there isn’t, and that is why it relies on section 3(3) of the Law of Contract Act (Cap. 23) to challenge both the suit and the application. However, it is evident the Plaintiff is in the Defendant’s house and was paying for it on monthly basis towards its purchase. The present dispute relates to these payments, as the Defendant threatened to repossess the house on the basis that the Plaintiff was in arrears. This is what forced the Plaintiff to come to court saying he was not in arrears; that he had offered to pay the entire purchase price but that the Defendant had failed to avail the completion documents and to have the suit property transferred.

The Plaintiff sued seeking general damages for intended unlawful repossession, a permanent injunction and a mandatory injunction to compel the Defendant to forthwith release the completion documents on the appropriate undertaking to pay the balance of the purchase price upon the successful registration of the transfer of the suit property. It was the Plaintiff’s case as contained in letter (“LMN1”) dated 15<sup>th</sup> February 2006 that his advocate had given a professional undertaking to pay KShs. 4,362,359/= to the Defendant upon the receipt of the registered transfer and charge in his favour. One does not know what

the “appropriate undertaking to pay the balance of purchase price” contained in paragraph 11 (c) of the plaint is.

The Defendant is saying that the Plaintiff was to pay for the suit property by way of instalments of KShs. 62,982/= per month but has constantly defaulted leading to demand at various times; that on 11<sup>th</sup> July 2003, for instance, he acknowledged to be in default. The Defendant acknowledged that the Plaintiff the Plaintiff’s advocates provided a professional undertaking to pay KShs. 4,348,802/= in receipt of the transfer and charge instruments duly registered in his name and that of the financier on the strength of the completion documents. The Defendant’s advocates provided a transfer duly executed and indicated the other documents were to follow. The Plaintiff complains these documents were not availed. There is letter dated 27<sup>th</sup> July 2009 to the Plaintiff regretting the delay in providing these documents. Of course, registration of the transfer could not be effected without these documents. This is indicated in the Plaintiff’s letter dated 22<sup>nd</sup> May 2009. On 1<sup>st</sup> March 2009 the Defendant had issued a repossession notice if the Plaintiff did not pay KShs. 4,284,951/41 that was outstanding on the account. The notice was for 7 days. This is what prompted the suit.

It is clear that the Plaintiff’s account with the Defendant is in arrears. The Plaintiff wants to pay using a loan from a bank which has agreed to provide the facility on the basis that the registration has to reflect it as a joint owner. The Defendant has to provide various completion documents to enable that registration before the money is released to it. According to the Defendant, the amount continues to accumulate, despite the undertaking. That, as at 30<sup>th</sup> July 2010 the amount in question was KShs. 8,381,617/30. It seeks that a formal agreement be signed between the parties and the amount paid in full before it can release the documents.

The Plaintiff makes reference to the Defendant’s letter dated 10<sup>th</sup> November 2006 which indicated that the account was being frozen at KShs. 4,348,802/=. He denies therefore that amount has continued to accumulate.

The present application seeks a mandatory injunction to compel the Defendant to release all the completion documents to the Plaintiff’s advocates pending the hearing and determination of the suit. The application is under section 3A of the Civil Procedure Act. The application was prosecuted by Mr. Kwengu for the Plaintiff and defended by Mrs. Mbaabu for the Defendant. I am grateful for their written submissions.

The prayer sought is the same as prayer 11 (c) of the plaint. If it is granted the Defendant will release all the documents to the Plaintiff’s advocates who can then go and register the suit property in the joint names of Plaintiff and the bank. That will substantially have determined the Plaintiff’s claim. And yet, the Defendant has not even filed a defence to the claim. It is, however, indicated that the claim will be defended on the basis that there is no formal contract between the parties in terms of section 3(3) of the Law of Contract that can form the basis of what is essentially a specific performance suit. The Defendant is further saying that the Plaintiff has not performed his part of the bargain and cannot at this stage be entitled to a discretionary and equitable remedy of an injunction (**John F. Makanga –Vs- Kenya Power And Lighting Company Limited, HCCC No. 300 of 2003 at Nairobi**).

In the case of **Stephen Kipkebut t/a Riverside Lodge And Rooms –Vs- Naftali Ogola, Civil Application No. 146 of 2008 at Nairobi**, the Court of Appeal reviewed the various decisions on the principles to be borne in mind when dealing with an application for an interlocutory mandatory injunction. It was observed that the grant of such an injunction is drastic in effect. This is because the case has not been tried for the court to have a conclusive view of the matter. The final result of the case is not

yet known, and yet the court is being asked to consider the affidavits and annexures made available by the parties at their interlocutory stage to reach a preliminary conclusion that the Applicant has an unusually strong and clear case that ought to be decided at once. In the instant application, the Plaintiff is asking that he be granted an interlocutory mandatory injunction against the Defendant to enforce a contractual obligation.

My view of the matter is that, the court is not dealing with a straightforward, clear or simple matter. Issues have been raised that require evidence on and consideration and therefore the summary remedy that is being sought is not available at this stage.

In conclusion, I dismiss the application with costs.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MAY 2011**

**A. O. MUCHELULE**

**J U D G E**