



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LAND AND ENVIRONMENTAL LAW DIVISION

CIVIL SUIT (ELC) NO.476 OF 2010

**DAVID KARAU KARANJA.....PLAINTIFF/
APPLICANT**

VERSUS

**JAMES MACHARIA MBERA.....1ST
DEFENDANT/RESPONDENT**

**VIOLET WAIRIMU MBERA.....2ND
DEFENDANT/RESPONDENT**

RULING

1. There were two applications which were pending for hearing. The 1st application is an amended chamber summons dated 8th October, 2010 which was filed by David Karau Karanja (hereinafter referred to as the applicant). The 2nd application was a chamber summons dated 1st November, 2010. It was filed by the 2nd defendant Violet Wairimu Mbera (hereinafter referred to as the 2nd respondent).

2. Although directions were given on 21st March, 2011, that the two applications be heard on 17th May, 2011, only the 1st application i.e. the amended chamber summons, was heard. In that application, the applicant, seek orders of injunction as follows:

(i) An order of injunction do issue restraining the 1st and 2nd defendants, their agents, servants and /or employees from dealing, selling or otherwise from disposing of the interest in the property known as L.R.27/302 containing by measurement Nought Decimal Two One Five Six (0.2156) situated in Nairobi pending the hearing and determination of this suit.

(ii) An order of injunction do issue restraining the 1st and 2nd defendants, their agents, servants and/or employees from trespassing on the land known as L.R No.27/302 containing by measurement Nought Decimal Two One Five Six (0.2156) situated in Nairobi pending the hearing and determination of this suit.

3. The applicant claims to have entered into an agreement with James Macharia Mbera (the 1st respondent), for purchase of LR No.27/302 (hereinafter referred to as the suit property), at a consideration of Kshs.10.5 million. The applicant paid a sum of Kshs.3 million towards the purchase price and was given possession of the suit property.

4. The applicant contends that the 1st respondent and the 2nd respondent who is his wife, have now colluded to frustrate the completion of the contract. The 2nd respondent has registered a caveat against the title to the suit property. The 1st and 2nd respondents have been visiting the suit property with prospective buyers. The applicant is apprehensive that should the suit property be sold, he is likely to lose the money he has already paid, and his interest in the suit property. He therefore urges the court to grant the interim orders sought.

5. In response to the application, the 1st respondent has raised a preliminary objection maintaining that the applicant's suit and all subsequent pleadings are misconceived, bad in law, vexatious and frivolous. Further that the plaint does not comply with the mandatory provisions of the law. The 1st respondent has also sworn a replying affidavit in which he admits having entered into an agreement for sale of the suit property to the applicant and having received the sum of Kshs.3 million from the applicant. The 1st respondent maintains that the applicant is in breach of the agreement of sale because he took possession of the suit property before paying the amount of Kshs.4 million as provided in the agreement.

6. The 1st respondent further contends that the applicant reneged on a condition of the agreement requiring him to pay the apportioned rate, and the fees for the sub-division certificate. The 1st respondent explains that the caveat entered against the suit property was placed by the 2nd respondent without any collusion with the 1st respondent. The 1st respondent maintains that because of the hostility from the 2nd respondent, his children and other relatives, who do not want him to proceed with the sale agreement, he is willing to refund the applicant the deposit paid so that the agreement is terminated.

7. The 2nd respondent also filed a replying affidavit in which she maintained that the suit property is matrimonial property which the 1st respondent agreed to sell without her knowledge. She decided to place the caveat to protect her interest after having warned the applicant about the circumstances of the transaction. Despite the 2nd respondent warning the applicant, he proceeded with the agreement and continued to pay for the suit property. The 2nd respondent maintained that she will be highly prejudiced if the orders sought are granted as she is the joint owner of the suit property. She maintained that the applicant has not come to court with clean hands as he has concealed material facts relating to the transaction.

8. I have carefully considered the application which is before me. Since the applicant is seeking orders of interlocutory injunction, it is imperative that he establishes a *prima facie* case with a probability of success. In this regard, the applicant has demonstrated that he entered into an agreement with the 1st

respondent for sale of the suit property. The applicant has further demonstrated that pursuant to that agreement he had paid a sum of Kshs.3 million out of the agreed consideration of Kshs.10.5 million. It is further evident that the applicant is in possession of the suit property.

9. These facts have not been denied by the 1st respondent or the 2nd respondent. Although the 2nd respondent has claimed that the suit property is matrimonial property, the 2nd respondent has not offered anything to demonstrate or substantiate that allegation. The suit property is registered in the name of the 1st respondent. There is nothing that has been exhibited to show that any other person has an interest in the property. *Prima facie*, the applicant has shown that he entered into an agreement with the registered proprietor who is the 1st respondent. The applicant has also demonstrated that there has been partial payment of the consideration and that he is already in possession of the suit property.

10. Under these circumstances, it is only fair and just that the applicant's interest in the suit property be protected. An order of injunction restraining the respondents, their servants or agents from selling, or otherwise dealing in, or disposing off the interest in the suit property would achieve this purpose.

11. The applicant has also sought an order of injunction restraining the respondents from trespassing into the suit property. Nevertheless, although the applicant has taken possession of the suit property, the sale transaction has not been finalized. The respondents' presence in the suit property cannot really be said to be trespass. Thus it would not be fair nor just, to completely restrain the respondents from accessing the suit property.

12. As regards the Arbitration Clause which is contained in the sale agreement, no party has moved this court under Section 6 of the Arbitration Act for stay of proceedings and reference of the dispute to Arbitration. Both respondents have in fact already entered appearance to the applicant's suit thereby waiving their right of referring the matter to Arbitration.

13. For the above reasons, I allow the amended chamber summons dated 8th October, 2010 and issue an order of temporary injunction restraining the 1st and 2nd respondents, their agents, servants or employees from dealing, selling or otherwise disposing of their interest in the suit property, pending the hearing and determination of the applicant's suit. Costs of the application shall be in the cause.

Dated and delivered this 14th day of June, 2011

H. M. OKWENGU
JUDGE

In the presence of: -

Onyango for the plaintiff/applicant

Nyamai H/B for Omenta for the 1st defendant/respondent

Advocate for the 2nd defendant absent

B. Kosgei - Court clerk