



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 420 OF 2011

**KAMINDI SELFRIDGES SUPERMARKET
LTD.....PLAINTIFF**

VERSUS

**KIAMBU MURUTANI COMPANY
LTD.....DEFENDANT**

RULING

The Plaintiff avers that it entered into a sale agreement on 24th October 2009 with the Defendant, for the purchase of a building in Kiambu Town known by the name “Murutani House” for the price of Kshs 40,250,000/=. The building is erected upon land title No. Kiambu Township Block 11/87 that is owned by the Defendant, and is hereinafter referred to as the suit property. The Plaintiff further avers that on 15th October 2009 it paid a deposit of Kshs 6,037,500/= to Njuakim Commercial Agencies who they claim is the Defendant’s agent. The Plaintiff has provided a copy of the sale agreement, evidence of appointment of the agent by the Defendant and evidence of payment of the said deposit.

The completion date in the said sale agreement was 15th January 2010. The Plaintiff states with regard to the completion date that the Defendant, in a letter dated 29th January 2010, informed it of new Board of Directors elected on 23rd January 2010. The Plaintiff further submits that the Defendant, by asking it to transact with the new board of directors in the said letter thereby waived the terms as to the completion date. The Plaintiff also states that it informed the Defendants through a letter from their lawyer dated 10th March 2011, that they were willing and ready to complete the transaction.

The Defendant admits that a sale agreement was entered into on 24th October 2009 with the Plaintiff, but that it was illegal, null and void for various reasons. Firstly the Defendant states that the purported sale agreement was executed by people who were not its directors, and had no capacity to enter into the

agreement. Secondly, time was of the essence and since no extension was sought, the transaction ought to have been completed on or before 15th January 2010. Finally the Defendant avers that no consideration flowed from the Plaintiff to the Defendant. The evidence tendered by the Defendant is a ruling made by the Registrar of Companies dated 16th April 2010 directing that a new board of directors be appointed, and the sale agreement dated 24th October 2009.

The Defendant accordingly indicated in a letter to Walker and Kontos Advocates dated 29th July 2011 that it was not willing to complete the sale agreement, and demanded the return of the original title document to the suit property from the Advocates. Walker and Kontos Advocates were initially the advocates for both parties in the sale agreement. The Defendant also demanded that the Plaintiff removes the caution it had placed on the suit property's title at the land registry in Kiambu.

The Plaintiff thereupon on 17th August 2011 filed a plaint and an application in a Notice of Motion, which application is the subject of this ruling.

I have read and carefully considered the pleadings, evidence, written submissions, authorities and oral submissions by the respective parties to this application. I will proceed by addressing the substantive prayers sought by the Plaintiff in the application. The first prayer sought is that pending the hearing and determination of this suit, a temporary injunction be issued restraining the Defendant from occupying, using, leasing, transferring, charging, pledging, alienating, tampering with, altering or otherwise whatsoever dealing with the suit property in any manner prejudicial to the Plaintiff. What the Plaintiff needed to do with regard to this prayer is to bring itself within the ambit of the principles for granting an interlocutory injunction as set out in the case of **Giella v Cassman Brown & Co Ltd (1973) EA 358**. These are:-

(a) *A demonstration that the applicant has a prima facie case with a probability of success.*

(b) *A demonstration that if an injunction is not granted, the applicant will suffer irreparable loss which cannot be compensated for in monetary terms.*

(c) *Where the court, is in doubt about ingredient (a) – (b) it will decide the matter on a balance of convenience to both parties.*

On the first requirement of a *prima facie* case, there is evidence of a sale agreement signed between the Plaintiff and Defendants, and both parties have relied on the terms of this agreement in their pleadings and evidence. There is also evidence of the Plaintiff and Defendant undertaking some acts pursuant to this agreement. The Plaintiff paid a deposit of the purchase price, and this is acknowledged in the sale agreement signed by the Defendant. The Defendant also deposited the original title with the parties' advocates, and gave an indication of their willingness to proceed with the sale transaction after the completion date. These facts in my opinion are sufficient to establish a *prima facie* case for the Plaintiff.

There are disputed facts about the nature of this sale agreement, particularly the issue of the Defendants directors' authority to enter into the sale agreement. This issue cannot be determined at this stage, and will have to be canvassed and finally determined at the hearing of the main suit. The only observation that is relevant for this application is that both the Plaintiff and Defendant could not have had knowledge or notice of the ruling by the Registrar of Companies made on 16th April 2010 at the time they entered into a sale agreement on 24th October 2009.

On the second requirement set by the decision in **Giella vs Cassman Brown**, I do take judicial notice of the fact that land is becoming an increasingly scarce commodity in Kenya, especially in densely populated urban and peri-urban centres. It is therefore increasingly the case that when parties enter into an agreement to buy land, damages are unlikely to be an adequate remedy to a purchaser in the event of non-

performance.

On the final requirement on balance of convenience, I find that in certain respects the balance tilts in favour of the Defendant. This is because of the disputed facts about the nature of the sale agreement between the parties, and also because the Defendant is still the registered owner and in occupation of the suit property. I therefore find in this respect that the Defendant would be prejudiced if the prayer sought is granted in its totality. For the reasons given in the foregoing, I hereby grant an injunction with respect to prayer 5 of the application dated 16th August 2011 only to the extent of restraining the Defendant by itself or through its officers, agents, servants or employees from selling, charging or transferring the property known as Title No. Kiambu Township Block 11/87 pending the hearing and determination of the suit filed by the Plaintiff.

The second prayer sought by the Plaintiff is that the order for temporary injunction if granted, be lodged with the Kiambu Lands Office and registered against Title No. Kiambu Township Block 11/87, pending further orders. It is not only necessary, but also in the interests of justice that the suit property be preserved pending the hearing and determination of the suit herein. I accordingly allow prayer 3 of the Plaintiff's application pending the determination of the suit herein, and order that a copy of the injunction order be served on the Land Registrar at the Kiambu Lands Office, who shall register it in the appropriate register immediately.

The final substantive prayer sought by the Plaintiff is that the original certificate of Lease in respect of Title No. Kiambu Township Block 11/87 be retained by M/s Walker and Kontos Advocates pending further orders. The court notes that Walker and Kontos Advocates ceased to act for both the Plaintiff and Defendant once the dispute arose, and the parties have since engaged independent counsel. In a letter dated 2nd August 2011 addressed to the Defendant's advocate, Walker and Kontos Advocates indicate that they hold the title document as trustee and have no vested interest in the same. They further indicate that they are ready to surrender the document to whichever party is deemed by the High Court to be entitled to it.

Ordinarily it is the duty of the Vendor's advocate to obtain and deliver the original title document upon completion of a sale agreement for land. In the present case the Plaintiff states that it is willing to complete the sale, while the Defendant has indicated its intention to rescind the sale agreement. In the circumstances, it is prudent that the *status quo* as to the original title of the suit property be maintained, to further safeguard and preserve the suit property pending the determination of the dispute between the parties. I accordingly grant prayer 4 of the Plaintiff's application. Walker and Kontos Advocates shall have custody of the original title to the suit property both as a trustee and as an officer of the court, pending further orders from this Court.

Finally, the costs of this application shall be costs in the cause.

Dated, signed and delivered in open court at Nairobi this 1st day of November, 2011.

P. NYAMWEYA

JUDGE