



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 708 of 2009

EDWARD GICHUNJI WAMBIRI
PLAINTIFF

VERSUS

HANNAH NJERI THUBI DEFENDANT

RULING

1. The plaintiff filed this suit against the defendant seeking for a permanent injunction restraining the defendant either by herself or her agents from charging, selling or dealing with the property known as **LR NO. DAGORETTI/RIRUTA/5311** until the hearing and determination of this suit. The plaintiff also seeks for an order that the defendant do transfer part of the land to the plaintiff. Simultaneously with the filing of the plaint, the defendant filed a chamber summons under order **XXXIX rules 1, 2 and 3 of the Civil Procedure Rules**.
2. In that application the plaintiff is seeking for an interim order of injunction to restrain the defendant from dealing with the suit premises until the hearing and determination of the matter. The application is supported by the grounds stated on the body thereto and the matters deposed to in his affidavit sworn 25th September 2009 and 2nd November 2009. According to the plaintiff, the defendant failed to pay the balance of the purchase price as per the agreement entered into between the plaintiff and the defendant on 1st July 2005.
3. It was agreed that the plaintiff would sell **LR NO. DAGORETTI/RIRUTA/5311** to the defendant for a sum of Ksh.2 million out of which the defendant paid Ksh.200,000/- and the balance was to be paid within 90 days. The defendant transferred the part of the land to the

plaintiff but the plaintiff failed to pay the balance of the purchase price and failed to transfer the agreed portion measuring 0.020 hectares of the suit premises. The defendant has failed to pay the balance of the purchase price and the plaintiff is apprehensive that she may sell the suit premises to the 3rd party.

4. The defendant opposed this application; she relied on her replying affidavit sworn 1st October 2009. A further affidavit sworn on 28th October 2009 and 19th November 2009. According to the defendant, the plaintiff had sold to her another parcel of land **DAGORETTI/RIRUTA/5312** for which she fully paid for. They entered into another agreement for the sale of the subject suit premises for which she applied for a loan from East Africa Building Society. She was given a letter of offer but it expired because the plaintiff did not obtain the necessary consents to facilitate the subdivision and transfer. Meanwhile the defendant claims that she has paid the plaintiff a further sum of Ksh.190,000/- in addition to the deposit, and the balance outstanding is for Ksh.1.610,000/-.

5. The defendant claims that it is the plaintiff who delayed the process of seeking the subdivision. Up to now there is no access road to her plot. However the defendant contends that she issued cheques for the balance on 24th February 2009, but the plaintiff refused to collect them and instead filed the present suit. The defendant also makes allegations against the plaintiff for frustrating the completion by failing to obtain the necessary documents for completion. The plaintiff also continues to collect rent from tenants and has been threatening the defendant by reporting her to the C.I.D. on false allegations that she had stolen his title.

6. The above is the summary of the salient issues raised in the pleadings and the submissions by the parties. The principle issue for determination is whether the applicant has established a prima facie case with a probability of success to warrant the granting of an order of injunction. The court of appeal has explained what constitutes a prima facie case in their Lordships decision in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KRL 125**

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly

directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

7. This case involves a contract of sale of land between the plaintiff and the defendant. It is alleged by the plaintiff that he transferred his part of land pursuant to the agreement dated 1st July 2005 and another agreement dated 14th December 2006. However the defendant failed to pay the balance of the purchase price and on 31st December 2008 the defendant was given seven (7) days informing her that the plaintiff will cancel the sale agreement, refund the deposit and she was supposed to re-transfer the property. However the defendant claims that it is the plaintiff who delayed the completion. On 24th February 2009 she was ready with the entire balance of the purchase price but the plaintiff refused to receive the money. The banker’s drafts prepared by the defendant were annexed to the application.
8. The principles that guide the court on the elements to take into consideration on whether or not to grant an order for injunction are well settled in the oft’ cited case of **Giella vs. Cassman Brown and Company Limited 1973**. The applicant must demonstrate a prima facie case with a probability of success. Secondly, irreparable harm which will not be compensated for in damages will arise, and if in doubt, the court will determine the matter on a matter on a balance of convenience. This case obviously involves a claim for breach of contract of a sale agreement of a piece of land.
9. There are allegations by the plaintiff that the defendant failed to complete the sale transaction within the terms and conditions set out in the agreement. There is an agreement dated 1st July 2005 and a further mutual agreement dated 14th December 2006. It is not clear under what circumstances the plaintiff transferred the suit premises to the defendant before the purchase price was fully paid and the rationale of transferring the suit premises to the defendant and then requiring her to re-transfer 0.02 hectares back to the defendant. The agreements talk about the subdivision; it is not clear in my mind whether these subdivisions were done.
10. The defendant on the other hand claims that she had been ready with the purchase price which was even forwarded to the plaintiff but he declined to receive it because he had given the defendant a

notice rescinding the contract. This is a claim involving allegations of a breach of contract, the plaintiff claims to have rescinded the contract, and the defendant claims to have tendered the balance of the purchase price, is an order of injunction the appropriate remedy? The plaintiff 's claim obviously passes the first test, he establishes a prima facie case, that there was a contract, however for reasons that the balance of the purchase price was tendered, I find the plaintiff's case can adequately be compensated for by payment of damages.

11. The plaintiff can reclaim the balance of the purchase price which in any event is available. The defendant can retransfer the 0.02 hectares as per the agreement and the plaintiff can be paid damages as a result of the delay and inconvenience once proved. Accordingly, the application for an interim order of injunction is disallowed. However, the parties may be at liberty to take an early hearing date for the hearing and determination of the main suit so the court can assess the damages payable to the plaintiff. Costs of this application shall be in the cause.

RULING READ AND SIGNED ON 12TH OF FEBRUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE