



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 203 of 2009

THOMAS GATURA GATHU.....PLAINTIFF/APPLICANT

VERSUS

JORETH LIMITED.....1ST DEFENDANT/RESPONDENT

KENNETH MBONGO MARARO...2ND DEFENDANT/RESPONDENT

KAMIRI THUO.....3RD DEFENDANT/RESPONDENT

RULING

The plaintiff moved to this court, by way of a plaint dated 30th day of April 2009, and filed on 4th May 2009. The salient features of the same are that:-

- Him plaintiff entered into a sale agreement of land parcel No. LR. NO. 13336/275 being part of thome No. 5 Estate off Thika road.
- He paid full purchase price of 1.7 million plus other charges and signed a transfer instrument.
- He moved to court because, he had found building material deposited onto the suit land by the 2nd and 3rd defendants and later learned that the 1st defendant was trying to dispose off the said property to the 2nd and 3rd defendants in breach of the afore said sale agreement.
- That he is a bonafide purchaser for value and for this reason he seeks orders that:-
 - (i) *An order of specific performance against the 1st defendant*
 - (ii) *An order compelling the 1st defendant to effect registration of the transfer in favour of the plaintiff.*
 - (iii) *A permanent injunction to restrain the defendants jointly and severally restraining them, their agents and or servants from entering into or trespassing into or wasting, alienating, selling interfering, and or destroying the suit premises LR. NO. 13330/275*
 - (iv) *An order compelling the 2nd and 3rd defendants to remove their building material from the suit premises and restore the same to its original condition.*
 - (v) *That the 2nd and 3rd defendants do meet the costs of restoring the afore said property to its original form.*
 - (vi) *Costs of the suit*
 - (vii) *Interests on (d) at court rates.*

The plaint is accompanied by an interim application brought by way of a notice of motion dated 30th day of April 2009, and filed on 4th May 2009. It is brought under order XXXIX rule 1, 2, section 3A of the CPA cap 21 laws of Kenya. Six prayers are sought namely:-

1. *Spent*
2. *That the Honourable court, be pleased to grant a temporary injunction restraining the 1st Defendant/Respondent by itself, its agents and or servants from alienating, selling, evicting the plaintiff from LR. NO.13336/275 pending the interpartes hearing of this Application.*
3. *That this Honourable court be pleased to grant an injunction restraining the 2nd and 3rd Defendants/Respondents by themselves, their agents and/or servants from commencing construction on or wasting/alienating, selling, interfering and or destroying LR. 13330/275 pending the interpartes hearing of this application.*
4. *That this hounorable court be pleased to grant an order compelling the 2nd and 3rd Defendants/Respondents to remove their building material from the suit premises and restore it to its original condition pending the hearing and determination of this application.*
5. *That this Honourable court, be pleased to grant an order restraining the defendants by themselves, their agents and/or servants from wasting/alienating, selling, destroying and/or otherwise interfering with the plaintiffs quiet enjoyment of LR NO. 13330/275 pending the hearing and determination of the suit herein.*
6. *That the costs of this application be provided for.*

The grounds in support are set out in the body of the application, supporting affidavit, annexures, skeleton arguments and case law. The major ones are a reiteration of the content of the plaint the same of which are as follows:-

-The property was advertised for sale as per TGG7

- In response to the sale, the plaintiff showed interest and entered into a sale agreement and paid full purchase price and signed the transfer as per TGG 1, 2 and 3

- That later on is when the plaintiff found building material on the site, and upon inquiry was told they belong to the 2nd and 3rd defendants who had instructed criminal investigation against the plaintiff in respect of the same suit property but which ended in the applicants favour.

- That despite meeting all the pre-requisites, the 1st defendant instead of effecting the transfer in his favour, wishes to rescind the contract and transfer to the 2nd and 3rd defendant instead.
- -That by reason of what has been stated above, they have demonstrated a prima facie case with a probability of success and should therefore be granted an informative relief.

Vide their supplementary affidavit, in response to the replying affidavit, the following were added.

- Indeed the property was advertised for sale vide annexure A.
- The second and 3rd defendants cannot claim to be purchasers for value without notice as they have not exhibited a sale agreement or a receipts evidencing payments for the same.
- The documents exhibited do not aid the defendant's case as they do not bear any land reference number on the same.
- Insist the 1st defendant is the registered proprietor of the suit land.
- By their own assertion the 2nd and 3rd defendants claim to have had no commercial relationship with the 1st defendant meaning that they have no interest in the subject matter of the property herein.

The 2nd and 3rd defendants filed an affidavit deponed by one Kenneth Mbogo Mararo on 8th day of June 2009, and filed on

the same date on behalf of both 2nd and 3rd defendants. The salient features of the same are:-

- They purchased the said plot no. 10 for an unspecified amount in the year 1993 and were issued with a share certificate KMM1, 2 where upon ownership passed on to them in 1992 upon payment of the consideration.
- That the 1st defendant has no title in their favour and as such they could not pass any title to the plaintiffs who claim to have purchased the properties from the said 1st defendant.
- By reason of what has been stated above, the plaintiff has no legal basis to disentitle the 2nd and 3rd defendant of the ownership of the said parcel of land.
- That the advertisements by the 1st defendant in respect of the suit land are inconsequential to their claim to the suit land.
- That in the year 2009 the defendant paid Kshs. 348,500.00 as fees for processing the title deed.
- He allowed his daughter to develop the land on his behalf and when she attempted so, she was confronted by a 3rd party who alleged to have been authorized to develop the same through the plaintiff.
- The matter was reported to the police for investigation but notwithstanding the plaintiff proceeded to sell the property to 3rd parties.
- Maintains they have never done any commercial transactions with the 1st defendant over the suit land, they have an indefeasible claim over the suit land and have been in occupation of the same since 1993.
- By reason of what has been stated above, they have reason to believe that the plaintiff has not made out a case to warrant an injunction.

In their skeleton arguments dated 20th July 2009 and filed the same date, the applicant reiterated the content of the plaint, supporting affidavits, and annexures and then stressed the following:-

- They have demonstrated a prima facie case with a probability of success because of the following
 - (i) The 1st defendant has not filed any response to the application.
 - (ii) The 2nd and 3rd defendants affidavit is totally defective and of no consequence.
 - (iii) The claim of the plaintiff flows from the 1st defendant who are the registered owners of the suit land as per TGG7 and not theme (v) who issued a share certificated to the 2nd defendant
 - (iv) The 1st defendant as a legal entity had capacity to enter into the same transaction with the plaintiff as a registered owner of the suit land.
 - (v) The sale agreement between the plaintiff and 1st defendant is valid and legal as the 1st defendant advertised the plots for sale, the plaintiff applied, he was sold and paid consideration for the same and a process put in motion for the transfer of the same.
 - (vi) The 2nd and 3rd defendants have no valid claim because:-
 - (a) They say they had not commercial transaction with the 1st defendant who are the titleholders.
 - (b) Although they claim to be purchasers for value, they have not exhibited an agreement for sale.
 - (c) The alleged documents of ownership namely the share certificate does not aid their case because it does not bear description of any property on it how, and as such annexure KMM 1-2 do not show or have any link with the property subject of these proceedings.
 - (d) There is no proof that the 2nd and 3rd defendants took ownership of the suit property in 1993 evidenced by the fact that when the

matter was reported to Kasarani Police station for investigation, the plaintiff was in possession.

By reason of what has been stated above, they contend they have made out a prima facie case with a probability of success and are therefore deserving of an injunctive relief.

The 2nd and 3rd defendants skeleton arguments on the other hand are dated 17th July 2009 and filed on the 20th July 2009 and the main points stressed in them are as follows:-

- That the 2nd and 3rd defendants are the bonafide purchasers of plot No. 10 from thome (v) limited, which plot is comprised in LR NO. 13330/275 now the suit property and were issued by an allotment letter and share certificate which certificates have not been conceded to date.
- The 2nd and 3rd defendants have been in possession of the suit land from 1993 to date
- Made payments in 2009 to the tune of Kshs. 348,500.00 to an advocate Njeri Kariuki to process title deeds of the suit land as per annexure KMM 3, 4 and 5
- The plaintiff is the author of his own misfortune because he knew that the 2nd and 3rd defendants were the owners of the suit property and yet the plaintiff went a head to purchase the same.
 - Maintain that they have an indefeasible claims on the said suit land.
 - The plaintiff has no locus standi to the suit land and if anything he only has a claim for specific performance against the 1st defendant only
 - No title was conferred to the plaintiff by the 1st defendant as the title was already vested in the 2nd and 3rd defendants
 - The agreement of sale which is the basis of the plaintiffs claim is invalid as the same does not bear a stamp duty stamps on it contrary to section 5 and 9 of the stamp duty Act.

The 1st defendant filed grounds of objection dated 16th September 2009 and filed the same date. There are five of them namely:-

1. *That the said application is totally incompetent bad in law misconceived and an abuse of this Honourable courts' process.*
2. *That the only remedy available to the plaintiff/applicant is damages which remedy has not been prayed for in the plaint and the application.*
3. *That the sale agreement the basis upon which the application and the suit are premised has not been executed under seal of the 1st Respondent in breach of the mandatory provisions of law.*
4. *That the sale agreement the basis upon which the application and the suit are premised has not been stamped in contravention of the mandatory provisions of the stamp duty Act.*
5. *That the application is otherwise misconceived, unfounded, has no merit and an abuse of the due process of this honourable court.*

On case law the court, was referred to the case of **WAITHAKA VERSUS INDUSTRIAL AND COMMERCIAL**

DEVELOPMENT CORPORATION (2001) KLR 374 decided by Ringera J (as he then was) where it was held interalia that:-

(2) The conditions for grant of interlocutory injunctive relief in Kenya are as laid down in the case of **GIELLA VERSUS CASSMAN BROWN** namely, *first the applicant must shaw a prima facie case with a probability of success, secondly an injunction will not normally issue where the injury complained of would be adequately compensated in damages, and 3rdly if the court is in doubt it should decide the matter on a balance of convenience.*

(4) *It is not an inexorable rule that where damages may be an appropriate remedy,, an interlocutory injunction should never issue. If the*

adversary has been shown to be high handed or oppressive in its dealings with the applicant, this may move a court of equity to hold that one cannot violate another citizen's right only at the pain of damages.

The case of **DIAMOND TRUST BANK (K) LIMITED VERSUS JAS WINDER SINGH ENTERPRISES (1999) 2 EA 72**

decided by the court of appeal. The court, was referred to the judgement of Owuor JA (as she then was (now rtd)). At page 79 line 18 from the bottom the learned judge (as she then was) made the following observations:-

*“The learned judge also found that the agreement could not be enforced because they contravened section 31 of the stamp duty Act (chapter 480). In view of my above findings, it suffices to state section 19 (3) 20, 21, and 22 of the same Act (Stamp duty Act) provided relief in a situation where a document or instrument had not been stamped, when it ought to have been stamped. The course open to the trial judge was as in the case of **SUDERJI MANJI LIMITED VERSUS BHALOO (1958) EA 762 at 763** where law J (as he then was) quoted with approval the holding in *Bagahat Ramu Raven Chand (2) (1930) AIRal 854* that:-*

“Before holding a document inadmissible in evidence on the sole ground of it not being properly stamped, the court, ought to give an opportunity to the party providing it to pay the stamp duty and penalty.the applicant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee, on which he sought to rely in his support of his claim against the second Defendant/Respondent and he must be given the opportunity. Although it was the respondent who was relying on the unstamped agreement, there was the offer by the appellant counsel to be given a chance to have the agreements stamped. This in my view was the correct step in terms of section 19 (3) of the stamp duty Act”

At page 80 line 5 from the bottom, on the issue of the granting of a mandatory injunction, the learned judge (as she then was) made the following observations:-

“At the end of the action the court, will of course grant such injunction as justice of the case require, but at the interlocutory stage when the final result of the case cannot be known and the court, has to do the best it can, I think the case has to be unusually, strong and clear before a mandatory injunction will be granted even if sought to enforce a contracted obligation”

On the basis of the above reasoning and others the court held inter alia that:-

1. *It was wrong not to admit the hire purchase agreement in evidence because it was not stamped as the court, should first have allowed the parties an opportunity, to pay the stamp duty and the penalty.*
2. *The granting of a mandatory injunction, ended the case and left the appellant unprotected. The court should bear in mind that to grant the injunction would mean giving them judgement without giving the other party a right of trial.....*

In this court's, assessment of the rival arguments herein, it is clear that the arguments presented have presented the issue for determination on 3 fronts representing the interests of the plaintiff on the one hand, the 1st defendant on the other hand and the 2nd and 3rd defendant on the other hand.

It is to be noted that at this point in time, only one party has placed a pleading in the file namely the plaintiff. The first defendant only has put in grounds of objection filed long after the other parties had filed their skeleton arguments and affidavits hence the inability of the other participating counsels to comment on the same. The first defendant did not also file skeleton arguments. That notwithstanding, since the grounds of opposition having been placed on the record before the drafting of the ruling, there is no way they can be ignored. The court, has to consider them in the assessment of the facts for and against the interlocutory application irrespective of their not being commented upon by the other participating counsels before they were filed belatedly.

It is common ground that the relief being sought is an interlocutory injunctive relief as demonstrated by the written skeleton

arguments and case law cited. The yard stick for determining whether a litigant seeking to avail himself/herself of this relief has to satisfy are now well settled in the Kenyan jurisprudence on this aspect. This yardstick has been set by the court of appeal decision in the famous case of

GIELLA VERSUS CASSMAN BROWN AND CO LIMITED (1973) EA 318. These are:-

1. *The applicant has to establish or demonstrate the existence of a prima facie case with a probability of success.*
2. *To demonstrate that if an injunction is not granted, the applicant will suffer irreparable harm which cannot be compensated for by way of damages.*
3. *If the court, is in doubt it will decide the matter on a balance of convenience of both parties.*

The possible reason behind the court, of appeal reasoning in the setting up of the said yardstick has been put forward by Ringera J as he then was in the Waithaka case (supra). At page 380 line 18-21 the learned judge as he then was made the following observation:-

“I discern the doubt” in the 3rd condition as referring to the existence or otherwise of a prima facie case”. where as at page 381 line 9-27 the learned judge as he then was went on:-

“As regard damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule the law, would unduly lean in favour of those with enough to pay damages, for all manner of that would not only be unjust. I think that is why the East African court of Appeal couched the second condition in very careful terms by stating that namely an “injunction would not issue if damages would be an adequate remedy. By using the word “normally,” the court, was recognizing that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not injured. I think some of the considerations to be borne in mind is the strength or otherwise of the applicants case for a violation or threatened violation of its legal rights and the conduct of the parties. If the adversary has been shown to be high handed or oppressive in its dealings with the applicant, this may move a court of equity to say money is not everything at all times and in all circumstances and don’t you think you can violate another citizens rights only at the pain of damages.

The argument of the Plaintiff/Applicant is that he has brought himself within the ingredients of granting the relief sought because he has demonstrated the following:-

1. That Joreth Limited the first defendant, is the registered owner of the title a matter demonstrated by the exhibition of the title in the bundle of documents forming TGG7 in the first instance. In the second instance the first defendant has not disputed ownership in the grounds of opposition filed. In the 3rd instance, although the 2nd and 3rd defendants have stated that the 1st defendant is not the registered owner of the suit land and that the same belongs to Thome (v) limited, they have not exhibited a title in the name of the said thome (v) limited.

(2) That him plaintiff/applicant was attracted to the purchase of the said property through an advertisement put by the 1st defendant, he expressed his interest and willingness to purchase the land, which expression was accepted by the 1st defendant and an agreement to that effect was reached and executed between the two of them and he fully paid for the full purchase price. The first defendant does not dispute the agreement of sale TGG1 and also in TGG7, and the payment of the full purchase price shown by the presence of the payments receipts TGG2, but says that it is not enforceable because it does not have the seal of the 1st defendant in the first instance, and secondly that it does not have stamp duty paid for it. The 1st defendant was supported by the 2nd and 3rd defendant on the issue of the invalidity of the sale agreement by reason of failure to pay stamp duty.

Due consideration has been made of these arguments and the court, makes a finding that the 1st defendant did not put in a replying affidavit annexing the memorandum and articles of Association to demonstrate that signatures of Directors or chief officers on documents alone does not bind the company in the absence of affixing of a seal. In the absence of such demonstration, ground 3 of the grounds of opposition has been ousted as it is not a point of law as presented but a matter of evidence which required to be demonstrated by evidence

irrespective of the requirement of the law that transaction of company be under seal. It was necessary to demonstrate that the 1st defendant indeed put in place measures to ensure that its transactions can only be recognized if done, under seal endorse by exhibition of the memorandum and Articles of Association.

As for the requirements of the payment of stamp duty, case law on the subject emanating from the court, of appeal cited herein namely, **Diamond Trust Bank (K) Limited (supra)** is to the effect that where a party is in default of compliance with this requirement, room exists for the court, to give such a party an opportunity to comply and pay a penalty and it is only after failure to comply is when the agreement can be rendered invalid.

There is also the issue of the move by the 1st defendant to rescind the agreement as per the content of TGG6, but this does not unseat the plaintiffs claim because the 1st defendant has not tendered the full purchase price paid to them by the plaintiff either to the plaintiff or tendered it to court. This being the case, it means that the first defendants' assertion have not ousted the applicants claim to an interim relief as the grounds relied on by the first defendant to block the interlocutory relief have been ousted by reason of the reason given above.

Turning to the 2nd and 3rd defendants their argument is that the plaintiff has not earned his interim relief because

1. There is no demonstration of advertisement of the plots for sale.
2. The 1st defendant is not the owner of the suit land.
3. They purchased the suit property in 1993 and took possession of the same since then.
4. The Plaintiff/Applicant purchased the same well knowing that the 2nd and 3rd defendant had already purchased the said property and were in possession.
5. They rely on the documentation of the share certificate and payments receipts.

The plaintiff response to these assertion is that:-

- (a) Advertisements have been exhibited to the supplementary supporting affidavit.
- (b) The agreement of sale for 2nd and 3rd defendants has not been exhibited
- (c) Him plaintiff has demonstrated that the 1st defendant is the owner of the land and not thome (v) limited.
- (d) The receipts exhibited do not specify the parcel of land for which the same were paid.

Due consideration has been made by this court, of this rival arguments between the plaintiff and 2nd and 3rd defendants' and the court, moves to make the following findings in respect to the same:-

- (i) Advertisement of the plots for sale has been proved by exhibition of the adverts placed in the Daily Nation of Friday April 7, 2006 annexure A to the further supporting affidavit and another one for Saturday of 30th July 2005. The entity advertising the property for sale is Joreth limited and not thome (v) limited.
- (ii) The agreement of sale of the said land between the 2nd and 3rd defendant on the one hand, and thome (v) limited executed in 1993 has not been exhibited. Neither is there a deponement that the same was executed under seal and stamp duty paid. It follows that in the absence of demonstration by the 2nd and 3rd defendant that their agreement complied with legal procedural requirements as regards to company sealing and payment of stamp duty, their agreement if any exists, qualifies to be invalid and one invalid agreement cannot oust another invalid agreement.

As regards the ownership of the land, the 2nd and 3rd defendant have not exhibited title to land to show that it is thome (v) limited which is the owner and not the 1st defendant. Neither is there any deponement from the said thome (v) limited to confirm the sale as well as the ownership of the suit land.

As for the receipts relied upon by the 2nd and 3rd defendants, it is correct as submitted by the plaintiff that they do not have the parcel number and as such there is nothing to link them to the plot in question.

Likewise annexure TGG 6 does not assist them as it does not name the allottee who was being mentioned and as such there is nothing to show that they 2nd and 3rd defendants are the intended beneficiaries of annexure TGG6.

Turning to the mandatory requirements that the 2nd and 3rd defendants be ordered to remove their building materials from the site, the court, wishes to be guided by the decision in the **Diamond Trust Bank (k) limited** case (supra) that this is a remedy which is preferably grantable at the end of the trial. That it should only be granted at an interlocutory stage if the case is strong, clear and is not going to leave the opposite party remediless, that is determine the opponents case without a trial. Applying that reasoning to prayer 4 hereof, it means that if this relief is granted at this interlocutory stage, it means that the case between the plaintiff and the 2nd and 3rd defendant would have been determined at an interlocutory stage without trial.

For the reasons given in the assessment the court, proceeds to make the following final orders in respect to the interim application by way of notice of motion dated 30th day of April and filed on the 4th day of May 2009:-

1. Prayer 4 is refused because granting the same will amount to determining the case against the 2nd and 3rd defendant before trial.
2. Prayer 5 is granted for the following reasons:-
 - (i) A prima facie case with a probability of success has been demonstrated by the plaintiff/applicant because
 - (a) There is proof of advertisement of the property for sale by the first defendant.
 - (b) The plaintiff applied to purchase and a sale agreement was concluded between the plaintiff and the first defendant which though not executed under seal of the 1st defendant remains valid until the first defendant exhibits proof that its memorandum and Articles of Association required it to be so sealed on the first part. In the second part, lack of compliance with the stamp duty Act is not fatal as room exists for the applicant to seek leave to comply and pay the penalty.
 - (c) The plaintiff paid full purchase price which has not been tendered to him or in court.
 - (d) The first defendant is the registered owner of the said parcel of land and the proper entity to transfer the same.
 - (e) The 2nd and the 3rd defendants claim to title stems from transactions allegedly entered into between them and thome (v) limited, which thome (v) limited has not filed any deponement to confirm ownership of the said title and sale of the suit land to the 2nd and 3rd defendants.
 - (f) The documentation relied upon by the 2nd and 3rd defendants do not specify the parcel of land they relate to and as such there is nothing to link them to the suit land in question.
 - (g) Annexure TGG 6 which is a purported rescinding of the sale contract does not help the 2nd and 3rd defendants as they have not been named as the beneficiaries.
3. Although the value of the land is quantifiable and can be paid for in terms of damages the conduct of the 1st defendant in moving to rescind the contract, without a valid reason and failing to tender the purchase price either to the plaintiff or the court, coupled with the 2nd and 3rd defendants moving to the site to start developments in the absence of a sale agreement or documents to purchase which relates to the subject matter in question in these proceedings and yet they moved to block the plaintiff from possession of the suit land can be justifiably be stated to have been an act of high

handedness and oppressiveness to the plaintiff which calls for an injunctive relief as opposed to an award of damages at this interlocutory stage.

4. The balance of convenience also tilts in favour of the applicant in that he made a sale agreement with the title owner, paid full purchase price which has not been refunded. As such he has a beneficial interest in the subject matter of the suit which needs to be protected.
5. In view of the fact that the validity of the sale agreement between the plaintiff and the first defendant needs to be established at the trial, with regard to the payment of stamp duty and affixing of the 1st defendants seal, it is only proper that status quo be maintained whereby no further developments are to be carried out on the suit land namely plot no. LR NO. 13330/275 until the hearing and determination of the suit.
6. The plaintiff will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 5TH DAY OF FEBRUARY 2010

R.N. NAMBUYE

JUDGE