



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 252 of 2009

FRANCIS WACHIRA NDERITUPLAINTIFF

VERSUS

JOHN WAWERU KINYANJUIDEFENDANT

RULING

1. By his Chamber Summons application dated 20/01/2010 and filed in court on the same day, the Defendant prays first for an order of injunction to restrain the Plaintiff from disposing off or in any other way from alienating to third parties the suit properties known as **Nairobi/Block 105/6003** and **Nairobi/Block 105/6004** pending the hearing and determination of this suit. The Defendant also prays for a second order of injunction to restrain the Plaintiff from developing, interfering with or carrying on any activity on the suit properties above named until this suit is heard and determined.
2. The application is premised on grounds that appear on the face thereof and in particular that the Plaintiff offered to sell and the Defendant accepted to purchase the suit properties at a cost of Kshs.2,000,000/= as consideration. The Defendant further says that the sale was sealed by the parties executing a sale agreement on the basis of which the Defendant released his motor vehicle Honda CVR Registration Number KAU 003F valued at Kshs.600,000/= to the Plaintiff and also paid Kshs.200,000/= in cash and subsequently forwarded a further Kshs.200,000/= to the Plaintiff making a total of Kshs.1,000,000/= in line with the Agreement for Sale. The Defendant avers that after receiving the Kshs.1,000,000/= the Plaintiff purported to rescind the Sale Agreement while keeping the motor vehicle. The Defendant says that while waiting for a hearing date for the suit, the Plaintiff is threatening to sell the suit properties to third parties and that if such an eventuality were to occur, the Defendant would suffer irreparable loss and that the whole suit would be rendered nugatory.
3. The application is also supported by the Defendant's affidavit dated 20/01/2010 in which he reiterates the grounds expressed on the face of the application. Annexed to the Defendant's affidavit are a number of documents, among them a copy of the Agreement for Sale of the suit properties dated 17/02/2009 duly executed between the Plaintiff and the Defendant. Under the Agreement, the Vendor would be deemed to have fulfilled his obligations under the Agreement once he made available the following documents:-

I. *Original Certificate of Lease*

II. *Consent to Transfer by Commissioner of Lands*

- III. *Rates Clearance Certificate*
- IV. *Rent Clearance Certificate*
- V. *The duly executed Transfer in favour of the Purchaser*
- VI. *Photocopy of the Vendor's P.I.N. Certificate*
- VII. *Photocopy of the Vendor's National Identity Card*
- VIII. *Three copies passport size photographs of the Vendor*

4. Under the Agreement, the Plaintiff acknowledged the various payments made to him by the Defendant.
5. The parties herein have already been heard on the Plaintiff's application dated 28/05/2009 by which the Plaintiff sought injunctive orders against the Defendant, namely to restrain the Defendant from interfering entering alienating and/or remaining or carrying on any activity on the suit properties. On the 29/05/2009, Nambuye J gave an interim restraining order pending the hearing of the application interpartes. The application was heard interpartes by Msagha J who found that the Plaintiff had established a prima facie case with a probability of success. The grounds upon which Msagha J found for the Plaintiff were that the Sale Agreement had fallen through and that the Defendant's remedy lay in damages. The Plaintiff had also told the court that he had been duped into signing the agreement and further that he had now offered to refund the monies paid by the Defendant and to return the Defendants' motor vehicle which had been given by the Defendant to the Plaintiff in part payment of the purchase price. The court noted that the Defendant had accepted a refund of Kshs.200,000/= paid by himself to the Defendant as part payment of the purchase price. Msagha J was of the view that the agreement between the Plaintiff and the Defendant was incapable of enforcement.
6. The Plaintiff had also sought a restraining order in the plaint dated 28/05/2008 and filed in court on the same day. The Plaintiff sought to restrain the Defendant, his servants and or agents from interfering, entering, alienating and/or remaining or carrying on any activity on the suit properties pending the hearing and determination of the suit. The Defendant now says that the Plaintiff is exploiting the orders granted by Msagha J on 9/12/2009 to develop the suit properties while the matter is still pending in court. By the said ruling Msagha J also ordered that the Defendant's motor vehicle should be returned to the Defendant through an appropriate party if the Defendant was himself unwilling to take possession of the motor vehicle.
7. The Defendant's application is opposed. The Replying Affidavit by the Plaintiff is dated 28/01/2010. The Plaintiff says that the Defendant has not made out a prima facie case with a probability of success.
8. Counsel appearing also highlighted their respective positions when they appeared before me for interpartes hearing of this application on 11/02/2010. Counsel for the Defendant informed the court that pursuant to Msagha J's ruling of 9/12/2010, the Defendant had now taken possession of the motor vehicle. Counsel for the Plaintiff submitted that the Defendant's application is not only misconceived but that the agreement on which the application is hinged is incapable of being enforced. Counsel for the Plaintiff contended that it is not in dispute that the Plaintiff is the registered owner of the suit premises and that in the circumstances, the Plaintiff cannot be enjoined from dealing or entering what belongs to him. Plaintiff's Counsel argued further that since Kshs.200,000/= and the motor vehicle have now been returned to the Defendant, the Defendant's only remedy now lies in damages. The Plaintiff's counsel referred the court to a number of authorities all of which have been considered by the court.
9. The issue that now arises for determination is whether the Defendant has satisfied the conditions for the granting of injunctions as set out in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**. Those principles which have been applied over and over again by the Kenyan courts require a party seeking orders of injunction to show that he has a prima facie case with a probability of success and further, he must demonstrate that he will suffer irreparable

loss unless the order of injunction is granted. When the court is in doubt, it can decide the case on a balance of convenience.

10. In the instant case, the Defendant has not shown that he has a prima facie case with a probability of success. There is no dispute that the suit properties belong to the Plaintiff. It is also not in dispute that the Defendant has taken back part of the consideration being cash of Kshs.200,000/= plus the motor vehicle valued at Kshs.6,000,000/=. There were part payments of the purchase price in respect of the suit properties. It therefore appears to me that the Defendant has, by taking back the amounts paid by himself to the Plaintiff, compromised his interest in the suit properties under the Sale Agreement.
11. Secondly, it seems clear to me that by bringing this application, the Defendant was trying to set aside the orders by Msagha J dated 9/12/2009. Was this the right approach by the Defendant? I think not. What the Defendant should have done, if he felt aggrieved by Msagha J's ruling was to either appeal against the ruling or apply for review. Consequently and as rightly submitted by counsel for the Plaintiff, the Defendant's application is res judicata. The issue on which he wants this court to make a decision has already been determined and the Defendant has neither appealed against it nor applied for review. See **Mburu Kinyua –vs- Gachini Tuti [1978] KLR 69**.
12. Thirdly, the court finds that the Defendant has not shown what damage he is likely to suffer if the order of injunction is not granted. He has already received back the consideration he gave towards purchase of the suit properties. If there is any further damage and/or loss that the Defendant is likely to suffer, I think that his remedy lies in damages. Even if the court were to consider this case on a balance of convenience, the scales would surely tilt in favour of the Plaintiff who is the registered owner of the suit properties.
13. In summary, I find that the Defendant's application dated 20/01/2010 lacks merit. The same is dismissed in its entirety with costs to the Plaintiff.

Orders accordingly.

Dated and delivered at Nairobi this 4th day of March, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

No appearance for the Plaintiff/Respondent

Mr. Kiarie (present) for the Defendant/Applicant

Weche – court clerk