

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Environmental & Land Case 168 of 2009

FRANKLIN KAMATHI KAMAUPLAINTIFF

V E R S U S

TERCY INVESTMENTS LIMITEDDEFENDANT

R U L I N G

ABRAHAM MWANGI NJIHIA has a 99 lease over L.R. NAIROI/BLOCK 63/748 which was registered on 9th October, 2001 (“FKK1”). On 6th July, 2002 he registered a power of attorney (“FKK2”) in favour of the Plaintiff in which he donated all interest in regard to the plot. On 16th April, 2009 the Plaintiff filed this suit against the Defendant stating that the later was claiming ownership of the plot saying it had bought the same from ABRAHAM. He denied the claim. The suit was brought for a permanent injunction.

The Defendant’s case is that it entered into agreement (“MMK1”) on 23rd July, 2004 with ABRAHAM in which it was buying the plot from him for KShs. 900,000/= out of which it has so far paid KShs. 496,775/=. The Defendant contents it has since entered into the plot and developed it to the extent of KShs. 380,225/=. It states that there was no power of attorney in respect of the land then and that the said power of attorney which was executed was subject to the agreement above. It alleges fraud and trespass against the Plaintiff. It counterclaimed for damages for the trespass and prayed for permanent injunction.

The present application is by the Defendant who seeks both a temporary and permanent injunction pending the resolution of the counterclaim. A permanent injunction must await the hearing and determination of the dispute between the parties.

The principles to be applied in an application for interlocutory injunction have been settled since **GIELLA –VS- CASSMAN BROWN AND COMPANY LTD [1973] EA 358**. The applicant has to demonstrate a *prima facie* case with a probability of success, and also that if the application is not granted he may suffer irreparable injury or loss which cannot be compensated by damages. If the court is in doubt it should decide the application on balance of convenience.

The premises are registered in the name of ABRAHAM who has donated power of attorney to the Plaintiff. The Defendant has only possession. He has no title to the plot. At this stage, the Plaintiff has a better claim. When the sale agreement is considered, it is material that the same was supposed to be completed in 90 days and to date the Defendant has not performed, at least to the extent that it has not fully paid the purchase price. An equitable remedy is being sought and the Defendant must therefore meet the approval of the court of equity. (See **KENYA PROJECTS AND INVESTMENTS LTD. -Vs- KENYA POSTOFFICE SAVINGS BANK LTD, HCCC NO. 2811 of 1995 at Nairobi**).

In short the Defendant has not demonstrated a probable case. What it paid towards the purchase of the plot and the expenses so far incurred to develop it are quantifiable and therefore capable of compensation in damages. The balance of convenience usually tilts in favour of the registered owner of land. The application is not merited and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2010

A. O. MUCHELULE
J U D G E