



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

Civil Case 693 of 2000

JODAD INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

PAUL IMISONDEFENDANT

RULING

1. It is undisputed fact that this suit was determined by a judgment of Ibrahim, J dated 25/4/2006. In that suit, the plaintiff's claim was for orders: (a) An injunction to restrain the Defendant or his agents and or servants from entering or interfering with all that property known as land Reference Number 1160/575 until the disputes arising under the Agreement for sale dated the 28th July 1998 are heard and determined by an Arbitrator.

(i) a declaration that the Defendant is in material breach of or has repudiated the Agreement for sale dated 8th July 1998.

(ii) An order that the plaintiff is fully discharged from further or any further performance of the agreement for sale dated 28th July 1998 together with all the duties and obligations set out therein.

(b) The Defendant to produce an account of monies paid under the Agreement for sale dated the 28th July 1998.

(b) Such further or other relief or relief's which this Honorable Court deems fit.

(c) Costs of this action with interest therein.

The defendant had also counterclaimed for;

(a) An order for specific performance compelling the plaintiff its servants or agents to hand over to the Defendant the transfer of the suit property duly executed, stamped and registered in the Defendant's name and to further hand over any and all copies of consents and all documents of title relating to the property which are in the plaintiff's possession and in default thereof that the Deputy Registrar of this court do execute the transfer documents in favor of the Defendant.

(b) General Damages for breach of contract with interest at court rates from the date of judgment until payment in full.

(c) An inquiry as to damages occasioned by the grant of the injunction to the Plaintiff.

(c) Interest on the amount of purchase price paid to date at the rate of 30% as per the agreement.

(d) The costs of this suit together with interest at court from the date of filling suit until payment in full.

(e) Any other or further relief that this Honorable court may deem fit to grant.

2. According to the decree of the court, it was ordered that:

THAT the Plaintiff is not entitled to the prayer for injunction in 21(a) and declarations in 21(a) (I) (ii).

1. THAT the plaintiff is not entitled to an order of account of the monies paid under the Agreement for sale as there are not in dispute and have been determined in this judgment.

2. THAT the plaintiff's suit against the defendant be and is hereby dismissed with costs.

3. THAT the orders of injunction granted on 14th June 2000 are hereby discharged.

4. THAT judgment be and is hereby entered in favor of the Defendant as against the plaintiff in terms of prayer (a) and b(i) of the Amended Defence and counter-claim (Amended on 9th December 2002).

5. THAT the inquiry as to damages occasioned by the grant of the injunction to the plaintiff may be carried out by any judge stationed at the commercial Division of the High Court of Kenya at Nairobi.

3. In the face of this decision, the plaintiff filed two applications, a notice of motion dated 21st April 2009 which is brought under Order 39 Rule 2A of the Civil Procedure Rules seeking for orders that Paul Imision and his wife Lucy Imision be committed to civil jail for disobeying the orders made by this court on 22nd April 2008. The second Notice of Motion is dated 24th April 2009. It is brought under Section 3A and 63E of the Civil Procedure Act and Order 39 of the Civil Procedure Rules. The plaintiff is seeking for interlocutory order of injunction to restrain the Defendant his wife, servants of employees from disposing of demolishing the building known as "White House" on Land Reference No. 1160/575 and 1160/576 in terms of special condition number 7 of the agreement for sale between the plaintiff and the Defendant dated 28th July 1999.

4. The Plaintiff also sought for a mandatory order of injunction to compel the Defendant to sign all the necessary documents relating to the alterations of the boundaries of the suit land and an order that the Deputy Registrar of the High Court can sign the requisite transfer documents. The respondent in addition to filing the replying affidavit to these applications also filed a notice of preliminary objection on points of law.

5. Both counsel for the plaintiff and defendant filed extensive written submissions in support of their respective positions. They also highlighted the salient matters during the hearing. I have reviewed those submissions, the pleadings and the authorities cited; undoubtedly this matter was fully determined by a court of coordinate jurisdiction. In this regard therefore it will be prudent to determine the preliminary objection on points of law on (i) whether this matter is *resjudicata* and offends the provisions of Section 7 of the Civil Procedure Act, (ii) whether the application is based on matters that were resolved and (iii) finally whether the applications are an abuse of the court process.

6. In the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696*. Law, J.A. At page 700 letters D-E delivered himself as follows:-

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which is argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

7. I have no doubt in my mind that the objection in this application is on a pure point of law which if determined in the respondent's favor would conclude this litigation. The first application seeks for committal of the respondent to civil jail for contempt of the court order entered into by consent of the advocates for the plaintiff and defendant on 22nd April 2008. The consent order restrains the Defendant, his wife, employees or agents from transferring LR 1160/575 until the hearing of the application *inter partes* on 13th May 2008. This order was made in the midst of the decree of the court cited above in which the Plaintiff's prayer for injunction was dismissed.

8. The question that arises is whether after the plaintiff's suit was dismissed regarding that same subject matter, the plaintiff can file an application seeking for an interlocutory relief when there is no suit pending. In the case of *Theuri vs. Law Society of Kenya [1988] KLR 334*, the court of Appeal had the following to say:

"1. The grant of interlocutory relief is an interim remedy and is normally sought during the pendency of a substantive suit commenced in accordance with the Civil Procedure Rules.

2. As the appellant did not file a plaint as envisaged under order XXXIX of the Civil Procedure Rules, there was no competent action on which he could base his claim for the grant of interim relief. Section 3A of the Civil Procedure Act did not give the court power to act without jurisdiction."

9. The dispute over the suit premises was determined by the judgment of Ibrahim J; the plaintiff did not file a fresh suit. The interlocutory orders of injunction were prayed for without any basis. There were matters of facts such that the advocates who represented the defendant had ceased to act and were not authorized to enter into consent. The fact that the property was transferred and subsequently the house called "White House" was demolished by the Nairobi City Council's enforcement orders long before the consent was entered into. I will however not delve into those matters of fact since I am only dealing with points of law suffice it to say that this application had no substratum and I have no difficulty in dismissing the same.

10. On the second application which seeks for interlocutory and mandatory orders of injunction, this will suffer the same fate in that the subject matter was determined by this court, a judgment delivered and the plaintiff's recourse is the Court of Appeal. Accordingly the plaintiff's applications are dismissed with costs to the Defendant.

RULING READ AND SIGNED ON 16TH APRIL 2010 AT NAIROBI.

M. K. Koome
Judge