



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Suit 71 of 2010

ENG. ISABELLA JEROP.....PLAINTIFF

VERSUS

JOSEPH OCHIENG ODONGO.....1ST DEFENDANT
REGISTERED TRUSTEES OF POSTAL
CORPORATION OF KENYA
STAFF PENSION SCHEME.....2ND DEFENDANT

RULING

This is an application under **Order 39 Rules 1, 2, 3 and 9** of the **Civil Procedure Rules** as well as **Section 3A** of the **Civil Procedure Act** for a temporary injunction. It seeks an order that pending the hearing and determination of this suit the defendants by themselves, their servants and/or agents or anyone authorized by either of them be restrained from disposing to a third party by way of sale, transfer or other the property known as **Title No. Nakuru Municipality/Block 21/861/12** (the suit property).

Briefly the facts of the case are that on 1st December 2008 the second defendant as the owner of the suit property agreed to sell it to the first defendant for Kshs.1,000,000/-. By an agreement dated 12th January 2009 (the second agreement), the first defendant in turn agreed to sell his interest in the property to the plaintiff at a consideration of Kshs.150,000/- with the plaintiff paying the consideration in the first agreement directly to the second defendant. As the first defendant had paid Kshs.200,000/- to the second defendant at the time of entering into the second agreement, it was agreed that the plaintiff would pay to the first defendant a total of Kshs.350,000/- and Kshs.800,000/- to the second defendant. Pursuant to the second agreement the plaintiff paid Kshs.200,000/- to the first defendant and Kshs.460,000/- to the second defendant. He claims that despite his willingness and ability to pay the balances the defendants have refused to accept any further payments and instead have purported to rescind the second agreement hence this application.

In his replying affidavit, the first defendant, while admitting entering into the second agreement with the plaintiff, avers that he rescinded that agreement because the plaintiff failed to pay to him Kshs.350,000/- by 28th February 2008 and Kshs.800,000/- to the second defendant by 1st March 2008 as agreed. Instead he paid Kshs.200,000/- to him and Kshs.460,000/- to the second defendant on 14th April 2008.

For the second defendant it is averred in the replying affidavit of its Pension Scheme Administrator and Secretary to the

Board of Trustees that as it is not privy to the second agreement the plaintiff has no cause of action against it and therefore no orders can issue against it. It is further averred that the first defendant having paid to the second defendant a sum of Kshs.730,000/- and given a professional undertaking in respect of the balance the second defendant has executed a transfer of the suit property in favour of the first defendant and handed over the Title Deeds to the 1st defendant's advocate.

I have considered the application. This being an interlocutory application and having not heard evidence, I cannot at this stage make any definitive findings. However, on the material placed before me I find that the plaintiff has paid Kshs.200,000/- to the 1st defendant and Kshs.460,000/- to the second defendant. The latter sum having been made through M/S Kiptui Mbabu & Co. Advocates who act for both the defendants in the first agreement, the second defendant cannot be heard to say that it is a stranger to the second agreement. True it is not privy to the second agreement but it knew about it and has accepted Kshs.460,000/- from the plaintiff under it. On this basis I am satisfied that the plaintiff has made out a prima facie case against both the defendants. Consequently I grant the first limb of prayer 3 of the application which is a prohibitory injunction to restrain the defendants by themselves, their servants or agents from in any way disposing of the suit property to a third party until this suit is heard and determined. The plaintiff having not made the full payments as stated in the second agreement, the second limb of prayer 3 of the application has no basis. At any rate it cannot be granted in an interlocutory application like this. It is therefore hereby dismissed. The costs of the application shall be costs in cause.

DATED and DELIVERED this 29th day of June, 2010.

D. K. MARAGA
JUDGE.