



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

Civil Case 911 of 2009

EDWARD NJUNGA KANGETHE PLAINTIFF

VERSUS

**JOEL KIEMA MUTINDA1ST DEFENDANT/RESPONDENT
VIOLET NDANU 2ND DEFENDANT/RESPONDENT
BOARD OF TRUSTEES
NATIONAL SOCIAL SECURITY FUND3RD DEFENDANT/RESPONDENT**

RULING

1. The plaintiff entered into a sale agreement with the 1st and the 2nd defendant who are husband and wife. There were two sets of agreements dated the 29th July 2009 and 25th September 2009. The defendants were supposed to sell to the plaintiff LR NO.12948/266, IR NO. 63124 house Number 81 within Mountain View Estate, Nairobi at an agreed price of Ksh.16 million. The plaintiff duly the 10% deposit which was acknowledged by the defendants. The suit premises is registered in the name of the 3rd defendant under a **tenant purchaser agreement**. The transaction was consented to by the 3rd defendant and the sum owing to the 3rd defendant was to be paid directly to the 3rd defendant. Sometimes on 2nd December 2009 the 3rd defendant wrote to the plaintiff's advocate requesting that he should pay a sum of Ksh.8,307,416/- being the amount owing to the 3rd defendant by the 1st and 2nd defendant so as to facilitate the transfer.
2. The plaintiff paid the sum to the 3rd defendant. To date a sum of Ksh.9,910,516/= has been paid on account of the 1st and the 2nd defendant. However they declined proceed with the sale transaction. The 1st and the 2nd defendant instructed the 3rd defendant to cancel the sale by a letter dated 18th December 2009. The 1st and the 2nd defendants also continue to occupy the suit premises in total disregard of the terms and conditions of sale agreement and to the plaintiff's prejudice. The plaintiff maintains that he is ready and willing to deposit the balance of the purchase price or to pay to the defendants directly as long as they can provide the completion documents.
3. Mr. Machira learned counsel for the plaintiff submitted that his clients have established a prima facie case with a probability of success. Damages would not be adequate remedy because in the plaint they are seeking for a specific performance. The defendants did not deliver the documents of title. It is the 1st and the 2nd defendant who caused the crises by failing to deliver the documents of title as set out under the Law Society Conditions of Sale and by purporting to cancel the sale. Regarding the prayer for injunction, Mr. Machira admitted that the prayer should have ended with the words "pending the determination of the suit" as clearly stated under ground number 13 of the

grounds in support of the application. He regretted the typing error which did not cause any prejudice to the respondents as counsel argued the whole application on merit.

4. On the part of the 1st and the 2nd defendants this application was opposed on the grounds that there is no prayer capable of being granted since prayer Number 2 was granted on the interim basis and it is now spent. On the merit of the application, the sale agreement stipulated that a sum of Ksh.7.3 million was supposed to be paid to the 3rd defendant. However the plaintiff paid a whole 8.3 million to the 3rd defendant. The discrepancy of 1 (one) million is what brought the problem. The 1st and the 2nd defendant were in total darkness how a sum of 1 million was ignored. This prompted them to write the letter dated 18th December 2009 seeking to stop the sale. What that letter did, was merely to stop the sale. There is no evidence of alienation of the property to any person. The 1st and the 2nd defendants have also indicated that they will pay the plaintiff in terms of the contract. It is the plaintiff who breached the agreement by sidestepping the 1st and the 2nd defendants and by dealing with the 3rd defendant.

5. The plaintiff therefore cannot be granted an injunction to benefit from its own wrong doing. It was also denied that the sum of Ksh.8.3 million was paid to the 3rd defendant. The fact that, there are two sets of agreements, require this matter to proceed for full trial by way of viva voce evidence. The plaintiff is also not in possession of the suit premises, thus his monetary loss can be compensated for by damages. The plaintiff was also faulted for filing this suit prematurely. According to the agreements, the documents were supposed to be delivered on 25th December 2009. This suit was filed on 17th December 2009.

6. The above are the salient issues raised in the rival submissions and the pleadings. The principle element for determination is whether the applicant has established a prima facie case with a probability of success to warrant the granting of an order of injunction. Secondly, irreparable harm which cannot be compensated for in damages would arise and if in doubt the court would determine the matter on balance of convenience. (See the often cited case of **Giella vs Cassman Brown & Company Limited [1973] EA 358**. The Court of appeal has explained what constitutes a prima facie case in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** the court of appeal held that:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

7. Mr. Machira learned counsel for the plaintiff has explained there was a typographical error regarding the prayer Number 2 which did not end with the wording “until the hearing and determination of the suit”. Is this a fatal error which should render the whole application incompetent? In the interest of justice am prepared to exercise my discretion and allow this amendment while considering it has not caused the defendants any prejudice. The replying affidavit by the 2nd defendant clearly shows they were aware of the matters they were responding to and their advocate argued the whole matter on merit.

8. The plaintiff has annexed the copies of the agreements. He also annexed copies of their payments made to the 3rd defendant and also to the 1st and 2nd defendants account. The contention by the 1st and the 2nd defendants that the payment was never made to the 3rd defendant is a mere denial. Indeed they are merely acrobating and reprobating on one breath they say the plaintiff paid the 3rd defendant 8.3 million instead of 7.3 million and at the same time they are calling for proof of payment. The plaintiff has annexed a copy of the payment to the 3rd defendant, the 3rd defendant has not denied that receipt. The 1st and the 2nd defendants have not indicated their willingness to complete the sale transaction by sending the completion documents as per the agreements. Indeed they wrote a letter to the 3rd defendant saying they

had cancelled the sale.

9. The plaintiff has established a prima facie case with a probability of success. I have also looked at his claim in the suit, he is seeking for specific performance. Moreover the 1st and 2nd defendants are in possession of the suit premises. It is in the interest of justice that the 1st and the 2nd defendants be and are hereby restrained from dealing with the suit premises until the suit is heard and determined. The plaintiff is granted prayer number 2 of the Chamber Summons dated 8th March 2010 until the hearing and determination of the suit on condition that the plaintiff shall deposit the balance of the purchase price to be held in an interest earning account in the joint names of the plaintiff's advocates and the advocates of the 1st and the 2nd defendants within 30 days of this order. Costs of this application will be in the cause.

RULING READ AND SIGNED ON 30TH JULY 2010 AT NAIROBI.

M.K. KOOME

JUDGE