



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC. NO. 550 OF 2008

JOSEPH MWANDAGHA

**MWAUDA.....PLAINTIFF/
APPLICANT**

V E R S U S

KENYA PORTS AUTHORITY PENSION SCHEME

**(formerly known as Kenya Cargo Handling Services Limited Staff Pension Scheme).....1ST
DEFENDANT/RESPONDENT**

FAHIMA ALI AHMED

**ZEIN.....2ND
DEFENDANT/RESPONDENT**

R U L I N G

On 6th September, 2007 the Plaintiff entered into a sale agreement (annexture “JMMI”) with the 1st Defendant to buy property known as Maisonette No. 31 standing on plot LR No. 209/127/12736 South C Nairobi. The 1st Defendant was developing several maisonettes collectively known as Bandari Villas. The purchase price for the maisonette in question (hereinafter referred to as “the suit property”) was KShs. 6,800,000/=. It was agreed that on or before the execution of the agreement the Plaintiff would pay KShs. 680,000/= which he did. He was thereafter to pay KShs. 680,000/= on or before 31st July, 2007 and KShs. 5,440,000/= on or before the completion date. It is the Plaintiff’s case that he paid the full purchase price following which the property was transferred into his name, as shown by annexture “JMM4” which is a copy of the title. He states that while waiting to collect the title from the 1st Defendant’s lawyers he was shocked to find that there was a stranger occupying the house. That stranger is the 2nd Defendant.

There is no dispute that on or September 2008 the 1st Defendant offered to sell to the 2nd Defendant the suit property for KShs. 8,000,000/=: payable in two instalments of KShs. 6,000,000/= and KShs. 2,000,000/=. The money was paid and the 2nd Defendant put into occupation on or about 4th October, 2008. Since then, the 2nd Defendant has been in occupation and has carried out improvements to the

property to the tune of KShs. 600,000/=. Obviously, the 1st Defendant has not transferred the suit property to 2nd Defendant.

The 1st Defendant's case is that the Plaintiff was in fundamental breach of the sale agreement by not paying the instalments as agreed. It stated that the Plaintiff paid part of the purchase price by instalments as follows:-

- a) KShs. 680,000/= on 18th June, 2007
- b) KShs. 680,000/= on 1st August, 2007
- c) KShs. 300,000/= on 31st October, 2007
- d) KShs. 500,000/= on 21st April, 2008, and
- e) KShs. 1,000,000/= on 29th April, 2009.

The Defendant fulfilled its part of the agreement by constructing the suit property and registering the transfer in the name of the Plaintiff. The 1st Defendant requested the Plaintiff to pay the balance of the purchase price in order for the title document, share certificate, a copy of the Memorandum of Association for the management company and other documents to be released to him. The Plaintiff issued the 1st Defendant post-dated cheques in the sum of KShs. 3,640,000/= which did not clear due to insufficient funds. Following this, the 1st Defendant, through its advocates, gave the Plaintiff 21 days notice to complete failure to which the transaction was to stand rescinded. The Plaintiff did not comply with the notice which meant, according to the 1st Defendant, the agreement stood rescinded. It is following this that the 1st Defendant sold the suit property to the 2nd Defendant.

Regarding the claim by the Plaintiff that after the transfer of the suit property to him the same was not available for sale to the 2nd Defendant in view of **section 23 (1) of the Registration of Titles Act, Cap. 281**, the 1st Defendant's response is that it lodged the transfer in the name of the Plaintiff upon receipt of the postdated cheques from the Plaintiff and upon his lawyers undertaking that the same would be honoured.

There is no dispute that following the dishonour of the cheques the Plaintiff went to Diamond Trust Bank Kenya Limited who agreed to grant him a financial facility to enable the payment of the balance of the purchase price. The Bank sought that the facility be secured by the title in respect of the suit property and asked for the same from the 1st Defendant. The 1st Defendant declined to avail the title documents. Its argument was that the agreement it had entered into with the Plaintiff was a cash buyer arrangement and not a mortgage arrangement. In any case, by this time the 1st Defendant had resold the suit property to the 2nd Defendant.

The Plaintiff filed this suit for an order for vacant possession of the suit property, an order of eviction against the 2nd Defendant, an order for the Defendants jointly and severally to pay *mesne* profits for the period they have deprived him of the use of the suit property, and, in the alternative and without prejudice to the above, damages for breach of contract and exemplary damages.

The 1st Defendant filed a defence and counterclaim. The Defendant sought a declaration that she was the lawful and or beneficial owner of suit property, an order under section 64 of the Registration of Titles Act cancelling the certificate of title, a declaration that the Plaintiff holds the property in trust for him, an order compelling the Plaintiff to transfer the property to the Defendant, and a permanent injunction restraining the Plaintiff from taking possession of the property, or charging, leasing, transferring or otherwise dealing with it.

Presently, there are two applications. One was filed by the Plaintiff on 19th April, 2010 seeking a temporary injunction to restrain the Defendants and all those acting under them from alienating, selling, transferring, changing records at the Lands registry, taking possession, demolishing and/or in any other manner howsoever interfering with his ownership and/or quiet enjoyment of the suit property until the suit is heard and determined. He sought a mandatory injunction to compel the 2nd Defendant and those acting under her to give him vacant possession of the suit property and to demolish any extra building or development erected on the property, and to compel the 1st Defendant to surrender the original title deed to him or to deposit the same into court. Also sought to be deposited was a sum of KShs. 50,000/= per month being rent for the suit property and such rent was to be from the date of occupation to the time she vacates the property.

The other application was by the 1st Defendant for temporary injunction. It sought to restrain the

Plaintiff and all those acting through him from interfering with the Defendant's and or the occupant's quiet possession and enjoyment of the suit property.

Both applications were brought under **Order 39 rules 1 and 2** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act**.

I received both oral and written submissions from the advocates of the parties. Mrs. Mogusu appeared for the Plaintiff, Mr. Ibrahim for the 1st Defendant and M/s Ajiambo for the 2nd Defendant. I have considered their submissions and the authorities cited. I have also considered the respective affidavits sworn by or on behalf of each party to the applications.

The law applicable in an application for interlocutory injunction has been settled since the decision in **Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358**. The applicant must show a *prima facie* case with a probability of success; that the Applicant will suffer irreparable injury or loss if the application is not granted; and when in doubt, the court will decide the application on the balance of convenience.

The Plaintiff sought a mandatory injunction. It was settled in the case of **Locabail International Finance Ltd -Vs- Agro Export and Others [1986] 1 All ER 901, 902** that:-

“a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction was rightly granted that being a different and higher standard than was required for a prohibitory injunction.”

This decision has been upheld in many decisions in Kenya. They include the Court of Appeal decision in **Kenya Breweries and Another –Vs- Washington O. Okeyo, Civil Appeal No. 332 of 2000, [2002] 1EA 109**. The Applicant's case has to be unusually strong before the court can grant a mandatory injunction. (See **East Africa Fine Spinners Ltd and Others –Vs- Bedi Investments Ltd, Civil Application No. Nairobi 72 of 1994**).

There is no dispute that the Plaintiff is the present registered proprietor of the suit property, although he has never been in occupation of the same. Ordinarily such a registered owner will be deemed to be the *prima facie* owner of the property, and this is captured by **section 23 (1)** of **Registration of Titles Act**. The 1st Defendant is, however, saying that it registered the transfer on the understanding that the post-dated cheques, which constituted the balance of the purchase price, would be honoured. When they were not honoured this was brought to the notice of the Plaintiff who was asked to make good. When that was not done a completion notice was issued. When nothing was forthcoming, the agreement was rescinded and therefore the suit property became available for re-sale. The court is not at this stage supposed to make any conclusive findings regarding these competing positions. It is sufficient, I find, to say that neither party has established a *prima facie* case. The two positions will have to be subjected to scrutiny and all the correspondences examined as against the sale agreement for a definite position to be taken.

As to whether the Plaintiff or the 1st Defendant will suffer such injury or loss that damages may not be able to compensate, it is clear that the suit property was a commodity of sale whose value, therefore, is certain. There is no evidence that any of the parties to the suit and applications is incapable of making good the amount. This includes whatever damages. Such damages can be quantified. It should also be noted that once the Plaintiff seeks damages for breach of the sale agreement as an alternative remedy, he cannot be heard to say that if the application is not granted he will suffer irreparable injury.

Regarding the balance of convenience, it is clear that the Plaintiff has title to the suit property whereas the 2nd Defendant is in occupation. The 2nd Defendant is acting under the cover of the 1st Defendant. Neither party in the case can therefore successfully dispose of the property. The balance of convenience tilts towards maintaining the *status quo*.

Regarding the plea for mandatory injunction, it is clear from the foregoing that the Plaintiff has not demonstrated a *prima facie* unusually strong case, nor has it been shown that there are exceptional circumstances.

The result is that both applications are dismissed each with costs.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2010

A. O. MUCHELULE
JUDGE