



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

Civil Suit 22 of 2010

**ACRES AND HOMES LTD.....PLAINTIFF
VERSUS
INSURANCE COMPANY OF E.AFRICA LTD.....DEFENDANT**

R U L I N G

1. By a notice of motion dated 22nd January, 2010, Acres and Homes Ltd who is the plaintiff in this suit, seeks an order of interlocutory injunction restraining the defendant, by its agents, or servants from advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning or otherwise dealing with Property known as L.R. No.7788/7 I.R. No.12137 Rosslyn Green Estate, Nairobi (hereinafter referred to as the suit property), pending the hearing of this suit.

2. The plaintiff also seeks an order of mandatory injunction directing the defendant to specifically perform the agreement dated 31st October, 2008, subject to the plaintiff's undertaking to pay the balance of the purchase price within 14 days of the registration of the transfer of the suit property.

3. The plaintiff's application is anchored on an affidavit sworn by a Director of the plaintiff Esther Njeri Gitau and grounds stated on the motion. In a nutshell the plaintiff entered into an agreement with the defendant for purchase of the suit property for an agreed price of Kshs.175 million. The defendant paid the 10% deposit on 15th October, 2008 although the written agreement was dated 31st October, 2008. By mutual agreement the original agreement was varied and completion date adjusted. By a notice dated 20th November, 2009, the defendant gave notice of its intention to rescind the sale agreement due to the plaintiff's failure to honour the agreement and proposed variations.

4. The plaintiff maintains that it is the defendant who is in breach of the agreement as the defendant has refused to confirm and perform its obligations under the agreement as varied. The plaintiff therefore contends that it stands to lose the deposit paid together with use of the property. The plaintiff argues that it would be unjust to allow the defendant to retain the benefit of the deposit it has received, and at the same time fail to transfer the suit property to the plaintiff.

5. The defendant objects to the application through a replying affidavit sworn by its Company Secretary, Naomi Munyi. The defendant maintains that the plaintiff was in breach of the agreement entered into, as it failed to complete the transaction within the completion dates. The defendant further maintains that although a supplementary agreement and a deed of variation were proposed, the plaintiff neither executed the deed of variation nor complied with its terms. The defendant contends that the proposed supplementary agreement and deed of variation were null and void as the same were never executed by the plaintiff.

6. The defendant further contends that due to the plaintiff's failure to pay the balance of the purchase price, the defendant has lost the monthly rent of Kshs.200,000/= since February, 2009. The defendant has also lost Kshs.8,557,500/= being interest at 12% per annum from the completion date. The defendant therefore contends that the plaintiff has not come to this court with clean hands as he has failed to disclose material information.

7. I have carefully considered the application, the written submissions made by counsel and the authorities cited. The application before the court being one for injunction, the applicant must satisfy the conditions for granting such an injunction. As stated in the case of *Giella vs Cassman Brown & Company Ltd [1973] EA 358* the conditions are as follows:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

8. The applicant is also seeking an order of mandatory injunction. The law in that regard is that an interlocutory order of mandatory injunction can only be granted in very clear and exceptional circumstances. In the case of *Kenya Breweries Ltd vs Okeyo (2002) 1 EA 109*, the Court of Appeal approved the following test provided in *Vol. 24 Halsbury's Laws of England 4th Edition par.948*: -

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special

circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff mandatory injunction will be granted on an interlocutory application.”

9. With the above in mind, the first issue for determination is whether the plaintiff has established a *prima facie* case such as to justify the granting of an interlocutory injunction. From the facts placed before this court by both parties, it is evident that there was a contractual relationship between the parties as per the agreement dated 31st October, 2008 signed by the parties. While the original agreement is not disputed, there is an issue as to whether there has been mutual variation of the original agreement, and whether there has been any breach or threatened breach of the agreement.

10. It is further clear that pursuant to the original agreement, the plaintiff paid an initial deposit of 10% of the purchase price which was Kshs.17,500,000/= and that to date, no further payments have been made by the plaintiff although both the original agreement and the purported variation provided for payments to be made within specified period. Therefore, whether the plaintiff's claim is anchored on the original agreement or the alleged variation, the plaintiff can only obtain equitable relief if it demonstrates that it has acted equitably by performing its part of the bargain. This, the plaintiff has failed to demonstrate. Moreover, on the material presented before this court, it cannot be concluded that there exists a right of the plaintiff which has apparently been infringed or which is likely to be infringed by the defendant.

11. Further, the plaintiff is seeking a mandatory injunction which can only be granted in exceptional circumstances, and where the plaintiff's case is clear. In this case, the plaintiff has not demonstrated any special circumstances. Moreover, the plaintiff's case cannot be said to be straightforward. This is because of the disputed issue as to whether the original agreement was varied, or the terms of such variation. An order of mandatory injunction at this stage would not be appropriate. Moreover, such an order would be prejudicial to the defendant as it would have the effect of prematurely determining a substantive issue in the suit, without the defence being effectively addressed.

12. On the issue of irreparable injury, although the plaintiff claims that it is likely to suffer loss unless the orders sought are granted, there is nothing to show that the loss likely to be suffered by the plaintiff cannot be adequately compensated by an award of damages. The plaintiff has not demonstrated any factor that makes the suit premises unique. Finally, in my view, the balance of convenience would not be in favour of granting an order of injunction in favour of a party who has failed to perform his part of the bargain. For the above reasons, I find that the plaintiff's application must fail. It is accordingly dismissed.

Dated and delivered this 13th day of October, 2010

H. M. OKWENGU
JUDGE

In the presence of: -
Havi for the plaintiff
McCourt for the defendant
Kosgei - Court clerk