



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Election Petition 433 of 2010

SOLOMON KIRANGU THANDE.....APPLICANT

VERSUS

DAVID MUHIKA MUTAHI .....1<sup>ST</sup> RESPONDENT

TIMOTHY WAMBUGU KAHIHIA .....2<sup>ND</sup> RESPONDENT

RULING

The Plaintiff entered into Agreement (“SKT1”) with the 1<sup>st</sup> Defendant on 13/10/2009 in which he was buying, and the 1<sup>st</sup> Defendant was selling, land parcels NGONG/NGONG/34238, 34239, 34240 and 34241 for Kshs 5,800,000/=. Each plot was to cost KShs. 1,450,000/=. It was agreed that the Plaintiff pays Kshs 580,000/= on or before the execution of the Agreement. The amount was paid. The balance of Kshs 5,220,000/= was to be paid on or before the completion date. The completion date was 15/11/2009. The Plaintiff complained in the Complaint that he had paid a total of Kshs 5,073,330/=. leaving a balance of Kshs 786,670/=. but that the 1<sup>st</sup> Defendant had illegally and fraudulently transferred parcel LR No. NGONG/NGONG/34239 to the 2<sup>nd</sup> Defendant. The suit was brought for a permanent injunction to restrain the Defendants, their agents and or servants from alienating, disposing, charging, selling and or in any manner whatsoever dealing with the property. He also sought the cancellation of the title issued to the 2<sup>nd</sup> Defendant and the retransfer of the parcel to himself.

With the suit was filed a notice of motion under **Sections 1A, 1B, 3, 3A and 63(e)** of the **Civil Procedure Act** and **Order 39 Rules 1, 2, and 3** of the **Civil Procedure Rules** for temporary and mandatory injunctions. The mandatory injunction was intended to have the 2<sup>nd</sup> Defendant compelled to execute the transfer of the paid to the Plaintiff and the temporary injunction was to restrain the Defendants from alienating, disposing, charging, selling or in any other manner dealing with the property until the suit is heard and determined.

The 1<sup>st</sup> Defendant filed a replying affidavit to say that the Plaintiff failed to pay the balance of the price as agreed. This led to the Plaintiff writing to the Defendant on 14/11/2009 (“DMM3”) seeking extension of completion date to 5/12/09. On 18/11/2009 the 1<sup>st</sup> Defendant wrote to the Plaintiff about the breach. “DMM3” refers. Notice was given that if the balance of the purchase price was not paid by 7/12/2009 he would be held to be in breach with the threat of a claim for damages and the forfeiture of the amount paid. The 1<sup>st</sup> Defendant had accepted to extend time to 5/12/2009. However, consent of the Land Control Board had not been got by the Plaintiff who was saying the Board was scheduled to meet on 20/1/2010 (“DMM4”). The 1<sup>st</sup> Defendant obtained the consent on 1/12/2009 and obtained all the completion documents. The Plaintiff was not paying. On 12/1/2010 (“DMM5”) the Plaintiff wrote seeking extension of time to 12/4/2010. The 1<sup>st</sup> Defendant wrote to accept the change but up to 10/4/2010 only, failing which he would rescind the contract (“DMM6”). The Plaintiff did not honour. The Plaintiff had so far paid Kshs 5,073,330/=. The 1<sup>st</sup> Defendant decided to surrender to him documents for 3 plots and to retain documents for the plot in question. The balance he was being owed was Kshs 800,000/=. He resold the plot to the 2<sup>nd</sup> Defendant.

The 2<sup>nd</sup> Defendant stated that he was a purchaser for value in good faith and without notice of the arrangement between the Plaintiff and the 1<sup>st</sup> Defendant.

The principles to be considered in an application for interlocutory injunction are those laid down in **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358**. The Applicant must demonstrate a *prima facie* case with probability of success, he has to show that he will otherwise suffer irreparable injury or loss which would not be adequately compensated by damages, and, if the court is in doubt, the application will be decided on the balance of convenience. As injunction is an equitable remedy the applicant has to show that his conduct is acceptable to a court of equity.

Regarding mandatory injunction, the standard is higher. Such an injunction can only be granted at an interlocutory stage in exceptional circumstances where the Applicant's case is unusually strong (**EAST AFRICAN FINE SPINNERS LTD AND OTHERS VS BEDI INVESTMENT LTD, Civil Application No. 72 of 1994 at Nairobi**). A mandatory injunction has the effect of resolving all the matters in dispute at an interlocutory stage and that is why courts are reluctant to grant it at this stage.

The evidence available at this stage would show that the Plaintiff was guilty of breach in regard to the payment of the purchase price at agreed time. Secondly, the parcel in dispute is presently registered in the name of the 2<sup>nd</sup> Defendant. The Plaintiff alleges the registration was fraudulent, but in paragraph 6 of the plaint the particulars of fraud are only attributed to the 1<sup>st</sup> Defendant. Whatever the case, the 2<sup>nd</sup> Defendant has title which under **Sections 27 and 28 of the Registered Land Act (Cap 300)** makes his claim to the land absolute and indefeasible. It would be unusual to injunct such an owner. In other words, the Plaintiff has not shown he has a *prima facie* case.

The suit property was an item for sale with known value. It has not been suggested or shown that if the injunction is not granted the Plaintiff will suffer irreparable harm. The balance of convenience should tilt in favour of the registered owner of the parcel.

If there has been no proof of the principles governing the grant of interlocutory injunction, a mandatory injunction cannot issue. It should also be pointed out that for this relief a motion was mandatory.

In conclusion, the application lacks merits and is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI  
THIS 8<sup>TH</sup> DAY OF OCTOBER, 2010.**

**A. O. MUCHELULE  
JUDGE**