REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 848 OF 2009

PATRICK OLASA WABIDONGE ***(suing as a duly Constituted Legal Attorney of)***
PAMELA OLASA NABWIRE …….....…….. 1ST PLAINTIFF
EUPHEMIA NABWIRE …….....……. 2ND PLAINTIFF

VERSUS

OILCOM (K) LIMITED
…….....…….. 1ST DEFENDANT
BANK OF INDIA …….....……. 2ND DEFENDANT

R U L I N G

This application is brought by a Chamber Summons dated 9th November, 2009 and taken out under **Order XXXIX Rules 1, 2,** and **3** of the **Civil Procedure Rules; and Sections 3, 3A,** and **63 (e)** of the **Civil Procedure Act**. The only two substantive orders which the Applicants seek are –

1. ***That a temporary injunction be issued against the 1st and 2nd Defendants by themselves, their agents, representatives and/or servants restraining them from alienating, damaging, transferring, removing, selling, wasting, subdividing and/or disposing of all that parcel of land known as L.R. No.21059 Nairobi pending the hearing and final determination of this suit.***

2. ***That a temporary injunction be issued against the 1st and 2nd Defendants by themselves, their agents, representatives and servants compelling them to adhere to the terms and conditions stipulated in the duly executed Sale Agreement dated 27th January, 2009 for the sale of all that parcel of land known as L.R. No.21059 Nairobi until the suit is heard and finally determined.***

The application is supported by the attached affidavit of Patrick Olasa

Wabidonge and is based on the grounds that –

(a) The 1st and 2nd Plaintiffs/Applicants are the legally registered joint owners to all that parcel of land known as L.R.21059 Nairobi, and Bukhayo/Bugengi/6904 vested with absolute rights, interests

and title over the same.

(b) On 29th January, 2009 the Applicants herein and the 1st and 2nd Defendants duly entered into a Sale Agreement for the sale of the said land to the 1st Defendant under the terms and conditions stipulated therein.

(c) By the said agreement the 1st Defendant agreed to offset and/or redeem the outstanding loan between the 1st and 2nd Plaintiffs and the 2nd Defendant for a sum of Kshs.4.8 million and the balance to be paid to the Plaintiffs herein.

(d) Indeed on 29th January, 2009 the 1st Defendant issued the 2nd Defendant with a bankers cheque Number 00456 for a sum of Kenya Shilling Four Million Eight Hundred Thousand (Kshs.4.8 million) and immediately thereafter the 2nd Defendant executed a Discharge of Charge and also released together with the original registration documents pertaining to the said parcels of land to the 1st Defendant.

(e) Despite all these and acting in good faith the Plaintiffs executed the transfer form but have never been paid the outstanding balance accruing therefrom being a sum of Kenya Shillings Five Million Two Hundred (Kshs.5,200,000.00) and hence suffer a great risk if the suit property is disposed off, registered and/or wasted by the 1st and 2nd Defendants herein.

(f) The Applicants have a prima facie case with a great chance of success where the balance of convenience is in favour of granting the orders as prayed as they stand a high risk of losing out their property and money most probably through the sale by either public treaty or public auctions.

(g) The 1st and 2nd Defendants/Respondents will not suffer any irreparable damage nor prejudice by the orders being granted as currently they are in possession of both the original registration documents and the money.

(h) It is in the interest of natural justice, equity and conscience that these orders are granted accordingly.

Opposing the application, the 1st Defendant filed a replying affidavit sworn by Faisal Mahsen, one of its Directors. The thrust of Mr. Mahsen's affidavit is that L.R. No. 21059, Uthiru, Nairobi, is part of a road reserve and therefore cannot be transferred to the 1st Respondent. This information was not within the 1st Respondent's knowledge at the time of the Agreement for Sale, and therefore the 1st Respondent opted to rescind that Agreement. The 2nd Respondent also filed its replying affidavit sworn by Raja Kishore Lenka, the Chief Manager of the Bank of India, in which the deponent avers that it had discharged its obligations under the Sale Agreement and consequently it was not liable for the alleged breaches of the Agreement by the 1st Respondent.

At the hearing of the application, Mr. Naikuni appeared for the Applicants but the 1st and 2nd Respondents were not represented. After considering Mr. Naikuni's submissions, I note from the pleadings that the 2nd Defendant advanced to the Plaintiffs a certain sum of money against the security of the suit properties which belong to the Plaintiffs. By an Agreement entered between the Plaintiffs and the Defendants on 27th January, 2009, the Plaintiffs agreed to sell one of the properties to the 1st Defendant for Kshs.10 million. The arrangement between the parties was that the 1st Defendant would pay to the 2nd Defendant a sum of Kshs.4,800,000.00 being part of the purchase price in order to redeem a property which had been charged in favour of the 2nd Defendant. The balance of Kshs.5,200,000.00 was payable directly to the Plaintiffs. The 1st Defendant duly paid to the 2nd Defendant the sum of Kshs.4,800,000.00 in order to obtain a discharge of the charged property but did not pay the balance of Kshs.5,200,000.00 to the Plaintiffs as agreed, thereby precipitating this suit.

By the suit the Plaintiffs pray for judgment against both the 1st and 2nd Defendants for –

(a) A permanent injunction restraining the 1st and 2nd Defendants, by themselves, agents and/or representatives from alienating, transferring, selling, subdividing or wasting all the parcels of land known as L.R. No. Bukhayo/Bugengi/6904 and L.R. 21059 Nairobi, respectively.

(b) A permanent injunction compelling the Defendants herein by themselves, agents and servants to adhere to the terms and conditions stipulated in the Sale Agreement duly executed on 27th January, 2009, specific performance (sic)

(c) General and exemplary damages.

(d) Payment of a sum of Kshs.5,200,000.00 owed to the Plaintiffs.

(e) Costs of this suit.

(f) Interest on (b), (c), (d) and (e) above at Court rates from the date of filing suit until payment in full.

These are the prayers forming the basis upon which the orders in this application are sought. As indicated earlier, at the hearing of the application Mr. Naikuni appeared for the Applicants but the Defendants did not appear. As the hearing date had been given in open Court in the presence of Counsel for all the parties, and there was no explanation as to why the other Counsel did not appear, the Court decided to proceed *ex parte.* After hearing Mr. Naikuni and considering all the pleadings, the Court found that the only substantive issue for determination was whether the Applicants deserve the temporary injunctive orders sought.

The principles governing the grant of interlocutory injunctions were clearly settled in **GIELLA v. CASSMAN BROWN & CO. LTD. [1973] EA 358** in which Spry, V.P. of then Court of Appeal for East Africa said at page 360 –

"… 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."

Regarding the first condition, in paragraph 3 of its Statement of Defence, the 1st Defendant states that the Plaintiff did not have a clear Title to pass to the Defendant as alleged in the plaint and adds that at the material time the suit property was and still is a road reserve. If at the time of contracting the Plaintiffs knew that the property was within a road reserve, their bona fides in the transaction would be questionable as they would have been attempting to sell a property in which they had no good title for being on a road reserve. Title to such property would therefore be suspect. Even if they didn't know, if it factually established that the property lies on a road reserve, the Plaintiffs would not be able to pass a good title since road reserves are public property which is not available for sale by private individuals.

By a letter dated 26th May, 2010, the Chief Engineer (Roads), one Eng. P.M. Mwinzi, apparently wrote a letter to Muteithia Kibira, Advocate, regarding L.R. No.21059 Uthiru, Nairobi, stating, *inter alia* –

"RE: L.R. NO. 21059 UTHIRU NAIROBI

Reference is made to your letter reference No. 8/IND/32 dated 26th May, 2009 regarding the above parcel of land and its relationship with Kangemi Kabete (A104 dual carriage way)

Land parcel L.R. 21059 as shown on FR/No.280/20 was created out of land which was a road reserve. This land was acquired through Gazette Notices Nos. 976 and 977 of 30th March, 1973.

Since the land in question was legally acquired by the Government for the purpose of road expansion, the same cannot be allocated and therefore L.R. No.21059 is still part of the road reserve."

Without countermanding the said letter, the same Officer allegedly wrote another letter dated 26th June, 2009, to Patrick Olasa Wabidonge regarding authority to construct temporary access to/from Nairobi – Nakuru road (A104) for plot No. L.R. 21059. The above two letters hold the key to the issue of whether the suit property is or is not on a road reserve. To start with, the contents of the two letters are contradictory and their probative value and veracity thereof will have to be tested by oral evidence. Until that oral evidence is adduced and evaluated, and the issue of title resolved, one cannot say with certainty whether the property is on a road reserve or not. In the circumstances, I am not able to say, at this stage, that the Plaintiffs have made out a *prima facie* case with a probability of success. For that reason, I find that the Plaintiffs have not satisfied the 1st condition for the grant of an interlocutory injunction.

As regards the second condition, the Plaintiffs have on their own account in the pleadings, put a definite monetary value on the suit property. If I am wrong in holding that the first condition set out in **GIELLA'S CASE**has not been satisfied, and if the worse come to the worst and the property is sold, the Applicants would not suffer irreparable loss as the property had a definite value by which they can be compensated in monetary terms. To buttress that argument, no allegation has been put forward either in the pleadings or otherwise that the Defendants, jointly or severally, cannot be trusted to raise the sum of Kshs.10 million which is the Plaintiff's estimate of the value of the said property. For these reasons, I find that Plaintiffs have also not met the second condition for the grant of either the prohibitory or mandatory interlocutory injunction.

The third condition empowers the Court to decide an application on the balance of convenience where it is in doubt. If this Court were in doubt and since the suit property has been given a definite value by the Applicants themselves, I would still find that the balance of convenience tilts against the grant of the interlocutory injunctive orders since the Plaintiffs can always be compensated in monetary terms.

In conclusion, I therefore decline to grant the orders sought and hereby dismiss this application with costs to the Defendants.

It is so ordered.

Dated and **delivered** at **Nairobi** this 7th day of October, 2010.

L. NJAGI
JUDGE