



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

Environmental & Land Case 349 of 2010

NANCY WANJIRU GITHUA NJAAGA.....PLAINTIFF

V E R S U S

MARGARET NJERI MUKIRAIDEFENDANT

R U L I N G

This application by way of notice of motion filed under **sections 3 and 3A** of the **Civil Procedure Act** and **Order 50 rule 1** of the **Civil Procedure Rules** was not defended. The Defendant/Respondent was served but did not file a response or attend the hearing. The factual basis of the application as contained in the supporting affidavit by the Plaintiff/Applicant was therefore not controverted.

The Applicant and the Respondent entered into a sale agreement (page 10 of the bundle of documents annexed to the affidavit) on 25th November, 2008 in which the Respondent was selling $\frac{1}{4}$ acres (0.10 Ha) to the Applicant for KShs. 1,250,000/=. The portion was part of the Respondent's land Ref. No. Dagoretti/Riruta/1591. The Applicant paid a deposit of KShs. 300,000/= which was acknowledged in the agreement. The balance of KShs. 950,000/= was to be paid on transfer. The Respondent was to obtain the necessary Land Control Board consent to enable the subdivision of her land and the transfer of $\frac{1}{4}$ acre of it to the Respondent. She was to thereafter execute the transfer document and hand over the same together with the letter of consent and her other documents to enable the registration of the same.

The Respondent successfully applied for consent for the subdivision (page 16) and transfer (page 15) from Dagoretti Land Control Board. She also obtained approval (page 17) for subdivision from the City Council of Nairobi's City Planning Committee under the **Physical Planning Act (Cap. 286)**.

The Applicant's complaint is that the Respondent subsequently refused/and or neglected to execute the transfer documents and to deliver all such documents including the title deed for the purpose of the registration of the transfer.

The Applicant reported the refusal to the area Chief who wrote to the Respondent on 12th June, 2009 (“NW2”) to attend to him on 19th June 2009, but the Respondent failed to show up. The Applicant then filed this suit by way of originating summons for a declaration that the Respondent sold to her the plot and for an order of specific performance. With the suit was filed the present application to restrain the Respondent from selling, offering for sale, transferring, charging, hearing, leasing out and/or in any other way dealing with the plot. Also prayed was an order of mandatory injunction to compel the Respondent to sign and execute all documents necessary for the transfer of the suit premises and to deliver the original title document to the Applicant or the District Land Registrar, and in default thereof, the Deputy Registrar be at liberty to execute the said necessary documents on behalf of the Respondent.

The principles to be considered in granting of a prohibitory injunction have been settled since the decision in **Giella –vs- Cassman Brown & Co. Ltd [1975] EA 358**. The Applicant has to establish a *prima facie* case with a probability of success. He has to show that if the application is not granted he may suffer such injury or loss that damages may not adequately compensate. If the court is in doubt, it will decide the application on balance of convenience.

The basis upon which a mandatory injunction can issue at an interlocutory stage is different and a higher burden is placed upon the Applicant. **(See Kenya Breweries Ltd and Others -Vs- Washington O. Okeyo, Civil Appeal No. 332 of 2000 at Nairobi)**. Such an injunction can only be granted where special circumstances exist, the case is clear and straight forward and the court feels that the act at which the injunction is directed is a simple and summary one, or where the Respondent is trying to steal a march. A mandatory injunction may very well dispose the case at an interlocutory stage and thereby deny the Respondent to be heard by way of calling oral evidence which is subject of cross-examination and scrutiny. This is why, before making the order, the court is required to have a high degree of assurance that the injunction is the right order to be given at this stage of the case.

It is clear that the Respondent agreed to sell ¼ of an acre of her land to the Applicant who paid the deposit and who is willing to proceed to completion. The Respondent obtained the necessary consent and somehow developed cold feet, as it were, when it came to the final stage of transfer. There has been no explanation for the reluctance to complete the transaction. The Applicant fears that if injunction is not granted before the suit is heard and finalized the Respondent may sell or otherwise deal with the plot to her detriment. I find that the Applicant has shown a *prima facie* case against the Respondent and is therefore entitled to an interlocutory injunction in terms of prayer (3) of the motion in order that the property in question is preserved to await the determination of the case. The prayer is hereby granted.

With the property preserved, I find it is inappropriate to grant a mandatory injunction as sought in prayer (4) whose effect would be to determine the case and yet the Respondent has not even been served with the originating summons. Costs of this application will be paid by the Respondent.

DATED AND DELIVERED AT NAIROBI

THIS 4TH DAY OF OCTOBER 2010

1. O. MUCHELULE
JUDGE