



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL CASE 59 OF 2009**

**MURIUNGI M'TWARUCHIU ..... 1<sup>ST</sup> PLAINTIFF**

**BAITURU BARON INVESTMENT LTD ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**EQUITY BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ZAIN KENYA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**ROBERT KINYUA GACHAU ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

In the plaint hereof, the plaintiffs have prayed for a permanent injunction to restraining the 1<sup>st</sup> defendant from selling parcel Nos. CHUKA/TOWNSHIP/269, KARINGANI/NDAGANI/1621 and KARINGANI/NDAGANI/2113, and further prayed for general damages. Before the hearing of this suit, the plaintiffs by a chamber summons dated 16<sup>th</sup> May 2009 sought for interlocutory injunction. The application was certified as urgent on 20<sup>th</sup> May 2009 and the plaintiff was ordered to serve the defendants/respondents with the application for *interpartes* hearing on 25<sup>th</sup> May 2009. On 25<sup>th</sup> May 2009, although the defendants/respondents had been served, they failed to attend court for *interpartes* hearing. The application therefore proceeded *ex parte*. The chamber summons seeks interlocutory injunction to restrain the 1<sup>st</sup> defendant, its servants, agents and assign from selling or advertising for sale parcels Nos. CHUKA/TOWNSHIP/269, KARINGANI/NDAGANI/1621 and KARINGANI/NDAGANI/2113, herein after called the suit properties, pending the hearing and determination of this suit. The 1<sup>st</sup> plaintiff in his supporting affidavit sets out in details the background of this matter and the grounds upon which the injunction is sought. That the 2<sup>nd</sup> plaintiff, a limited liability company did the business of selling and distributing various products of the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant, in order to so carry out that business, required the 2<sup>nd</sup> plaintiff to provide suitable bank guarantee in favour of the said 2<sup>nd</sup> defendant. Initially, the 2<sup>nd</sup> plaintiff obtained banking facility from the Kenya Commercial Bank Ltd. Subsequently, the 2<sup>nd</sup> plaintiff approached the 1<sup>st</sup> defendant and the 1<sup>st</sup> defendant agreed to take over the obligations and liabilities owed by the 2<sup>nd</sup> plaintiff to Kenya Commercial Bank Ltd. As security, the 1<sup>st</sup> plaintiff charged the suit properties in favour of the 1<sup>st</sup> defendant. That although the plaintiffs made payments to the 1<sup>st</sup> defendant in respect of those bank facilities, the defendants made it impractical for those repayments to

continue due to unlawful, malicious and unauthorized actions. Those actions were stated to involved third parties who used the 2<sup>nd</sup> plaintiff's name to carry out transactions which had not been authorized by the plaintiffs herein. Those third parties have been charged before the criminal courts. In the meanwhile, the 1<sup>st</sup> defendant converted the bank guarantee into a loan which is now demanded from the 2<sup>nd</sup> plaintiff. It was deponed that the sale of goods released to third parties deprived the plaintiffs bonuses which the plaintiffs would have otherwise had earned. That the fraud committed against the plaintiff was as a result of collusion of the defendants. In the meanwhile, that the 1<sup>st</sup> defendant has issued notices to sell the suit properties in exercise of its statutory power of sale. The principles of granting an injunction were set out in the celebrated case Cr. **GIELLA –V – CASSMAN BROWN CO. LTD.** (1973) E.A. 358. They are:-

**“.....an applicant must show a prima facie case with a probability of success, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; (and) when the court is in doubt, it will decide the application on the balance of convenience.”**

On the first principle, I find on the evidence produced in this case, by the plaintiffs, that a *prima facie* case with probability of success has been proved. The plaintiff has stated, and it was uncontroverted, that the 1<sup>st</sup> defendant unilaterally converted the bank guarantee into a normal loan. That loan is now demanded from the plaintiffs. Further, it is deponed by the 1<sup>st</sup> plaintiff that third parties were unlawfully allowed to carry out transactions in the name of the 2<sup>nd</sup> plaintiff without authority. Those depositions suffice, in my view, to show a *prima facie* case with probability of success. Since I have no doubt in respect of the first principle, I will not consider where the convenience lies. I am also of the view that if an injunction was not granted, the plaintiffs would suffer loss which cannot be compensated with damages. Immoveable property in the position in which it is held in our country can be said that its loss cannot be compensated in damages. After all, damages cannot replace the exact property wrongly sold. In the end, I grant the following orders:-

- (i) That a temporary interlocutory injunction be and is hereby issued restraining the 1<sup>st</sup> defendant, its agents, servants or assigns or any one acting under it from advertising or selling the parcel Nos. CHUKA/TOWNSHIP/269 and KARINGANI/NDAGANI/1621 and 2113 pending the hearing and determination of this suit.**
- (ii) That the extracted order in terms of (i) above be served upon Antique Auction Limited.**
- (iii) The plaintiffs are awarded costs of the chamber summon dated 16<sup>th</sup> May 2009.**

**MARY KASANGO**

**JUDGE**

Dated and delivered at Meru this 22<sup>nd</sup> ....day of May... 2009.

**M.J.A. EMUKULE**

**JUDGE**