



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Civil Case 39 of 2009**

**ASHFORD GITONGA MUGAMBI ..... PLAINTIFF**

**VERSUS**

**M'ANAMPIU M'ANGAINE ..... 1<sup>ST</sup> DEFENDANT**

**HENRY MUTEMBI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

It is not denied that the plaintiff and the 1<sup>st</sup> defendant entered into an agreement dated 3<sup>rd</sup> March 2001 whereby the plaintiff agreed to buy and the 1<sup>st</sup> defendant agreed to sell 50 by 110 ft of parcel No. ABOGETA/LOWER KITHANGARI/720 for Kshs. 100,000/= . Some money was paid to the first defendant while other monies were paid to the second defendant. There however was no consent from the Land Control Board for the transfer to the plaintiff. The plaintiff in this action has sued for specific performance and/or compensation at market rate value of that land.

In the interim before the hearing of the suit, the plaintiff filed a chamber summons application dated 24<sup>th</sup> March 2009. That application is brought under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules. The plaintiff by that application seeks an injunction to restrain the defendants from evicting him from the plot measuring 70 by 110 ft within the suit property. The plaintiff deponed that he took possession of that plot on signing the agreement, that is, since 2001. Since taking possession, he stated that he had developed the plot by planting indigenous trees and fruit trees.

He however received a letter from the 2<sup>nd</sup> defendant which he annexed to his application demanding vacant possession. He prayed that the court would grant his prayers.

The application was opposed and in opposition the defendants stated that the 2<sup>nd</sup> defendant was in possession of the suit land. They denied that the plaintiff had effected any improvement on the suit land. To buttress their arguments, they referred to the valuation report annexed to the plaintiff's application which stated, "*The whole plot was under subsistence crops during inspection.*"

The defendant stated that the plaintiff is seeking to occupy the suit land by force. The principles of granting an injunction were enunciated in the case of **Giella V. Cassman Brown & Co. Ltd** (1973) EA as follows:-

**(i) an applicant must show a prima facie case with a probability of success;**

**(ii) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;**

**(iii) when the court is in doubt, it will decide the application on the balance of convenience.**

The plaintiff has acknowledged that the suit property is subject to the provisions of the Land Control Act Cap 302. The plaintiff transaction did not get the Land Control Board consent. That Act provides that a transaction without such consent is void and no damages are available to a claimant who did not obtain a consent. That indeed was the finding in the case of **Kariuki V. Kariuki** (1983) KLR 225 at P. 227 in which Law J.A. stated:-

***“No general or special damages are recoverable in respect of a transaction which is void for all purposes for want to consent. The only remedy open to a party to a transaction, which has become void under the Act, is that he can recover any money or consideration paid in the course of the transaction under section 7 of the Act. See also the decision of this court in Cheboo V. Gimunyigei (Kisumu Civil Appeal No. 40 of 1978) in which a majority of this court disagreed with the view expressed by Madam JA that compensation for improvements was recoverable in addition to the money or other consideration paid in the course of a transaction which has become void under the Act. Had the Act so intended, it would have so provided. See also Karuri V. Gituru and others (Nairobi Civil appeal No. 25 of 1980) which is to the same effect.”***

Bearing in mind that the plaintiff at this interlocutory stage has not shown that consent was obtained from the Land Control Board; the plaintiff on a *prima facie* basis has not shown a case with probability of success.

The plaintiff in my view, if the injunction is not granted, will not suffer irreparable injury which cannot be compensated. He has, after all, prayed in his plaint for refund of the purchase price.

There being no doubt in respect of the above two principles as set out in the case of **Giella V. Cassman Brown & Co. Ltd** (supra), I will not proceed to consider the third principle, that is, where the balance of convenience lies.

The application is not merited and the order of this court is that the chamber summons dated 24<sup>th</sup> March 2009 be and is hereby dismissed with costs to both defendants.

Dated and delivered at Meru this 23<sup>rd</sup> day of July 2009.

**MARY KASANGO**

**JUDGE**