



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Suit 338 of 2008

PETER NJIIRI MURACIA PLAINTIFF

VERSUS

MICHAEL MWAKIDILO THOYA DEFENDANT

RULING

Before me is an application for an interlocutory injunction under Order XXXIX Rules 1, 2, 2A (1) (2) and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application is by the plaintiff against the defendant. The grounds for the application are that the defendant, in an attempt to breach the contract of sale entered into between the plaintiff and the defendant, is in the process of selling the subject piece of land known as Kilifi/Madeteni/510 (hereinafter “the suit piece of land”) to other parties; that the defendant has refused to complete the contract of sale and that he has also refused to accept Kshs.355,000/= being balance of purchase price.

The application is supported by an affidavit sworn by the plaintiff in which it is deponed, *inter alia*, that by an agreement dated 23rd January 2007, the defendant sold the suit piece of land to the plaintiff for Kshs.1,800,000/= and save for Kshs.355,000/=, the said purchase price has been paid and the said balance has been tendered to the defendant who has, in breach of the said agreement, refused to accept the same. It is further deponed that the consent of the relevant Land Control Board has been obtained but the defendant has now refused to execute a transfer in favour of the plaintiff and instead intends to sell the suit piece of land to a third party. Hence this application. Annexed to the affidavit, are various exhibits which include a copy of the agreement of sale, an application for the Land Control Board’s consent, the letter of consent and a letter inviting the defendant to collect balance of purchase price.

The application is opposed and there is a replying affidavit sworn by the defendant. In the affidavit, the defendant admits the agreement of sale but avers that the suit property is owned by him and his father, Thoya Maitha who has objected to the transfer of the land to the plaintiff. In the premises, so the defendant contends, he is unable to effect the said transfer and is ready and willing to refund all the monies paid to him plus agreed interest.

When the application came up before me for hearing on 17.6.2009 counsel agreed to file written submissions which was done by 2.7.2009. Counsel for the plaintiff contends that, the plaintiff is entitled to specific performance but pending that order he should have an interlocutory injunction. The defendant’s counsel on the other hand contends that the agreement of sale provides for refund of purchase price plus a 10% penalty and that is the option available to the defendant and which option the defendant has legitimately exercised.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. The principles for the grant of an interlocutory injunction are now

settled. They were crystallized in the precedent, setting case of **Giella – v – Cassman Brown & Company Limited and Another [1973] EA 358**. They are as follows: -

Firstly, the applicant must show a prima facie case with a probability of success at the trial but if the court is in doubt it should decide the application on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot be compensated in damages. It must be appreciated that an interlocutory injunction is a discretionary equitable remedy and accordingly, the same will not be granted where it is shown that the applicant's conduct with respect to the matters pertinent to the suit does not meet the approval of a court of equity.

In the application at hand, the defendant does not dispute that he entered into the contract to sell the suit piece of land to the plaintiff and that he has received part purchase price. His reason to back out of the contract is the allegation that the suit piece of land is owned by him and his father who has objected to the sale. He however, admits that his father is not registered as a co-proprietor of the suit piece of land. I have perused the contract of sale and note that the defendant's father is not mentioned anywhere in the agreement nor is the agreement made subject to rights of unregistered interests. In the premises, the defendant's answer to the plaintiff's claim, prima facie appears, far fetched.

The plaintiff on the other hand has demonstrated that he complied with the terms of the contract of sale and is ready and willing to complete the same. The plaintiff has exhibited a copy of the application to the relevant Land Control Board and a letter of consent obtained from the said Land Control Board. If the transfer is executed, and presented for registration I see no impediment to the same being duly registered. In the premises the plaintiff has demonstrated, prima facie, that an order of specific performance will probably be issued in his favour at the trial. I therefore do find that the applicant has shown a prima facie case with a probability of success at the trial. That being my view of the matter, I need not consider the balance of convenience.

As regards the second condition for the grant of an interlocutory injunction, I note that an interlocutory injunction may issue even where compensation in damages is possible. The use of the phrase "**will not normally be granted**" in the **Giella – v – Cassman Brown** case, leaves the court with the discretion to determine whether the condition should be satisfied the main concern of the court being, of course, to do justice to the parties. It is therefore possible for an applicant to demonstrate that even though damages would furnish adequate compensation yet his circumstances are such that the injunction should be granted. The applicant herein having complied with the terms of the contract of sale and obtained the requisite consent to the transfer can still urge his claim for specific performance notwithstanding that damages would be an adequate remedy. In the premises, I am inclined to exercise my discretion in favour of the plaintiff. If I were to consider this application on the balance of convenience, I would hold that the same tilts in favour of granting the interim injunction. The same will not prejudice the defendant whose reason for backing out of the transaction is the alleged objection which has been raised by his father. The injunction will preserve the suit piece of land until the trial of the action.

The conduct of the defendant does not, at least prima facie, meet the approval of equity. He entered into the contract of sale alone, received most of the purchase price, obtained the relevant consent and now seeks to wriggle out of the contract on the basis that his father has an interest in the suit piece of land. He did not disclose the father's interest when he executed the contract and obtained the consent of the Land Control Board.

The upshot of my consideration of the plaintiff's application dated 1.12.2008 is that, I accede to the same and grant orders in terms of prayers (2) and (4) thereof. The orders are conditional on the applicant filing in court an undertaking as to damages within the next 7 days from the date hereof.

Costs shall be in the cause. Orders accordingly.

DATED AND DELIVERED ATMOMABSA THIS 28TH DAY OF AUGUST 2009.

F. AZANGALALA

JUDGE

Read in the presence of: -

Ogola holding brief for Kenga for the defendant.

F. AZANGALALA

JUDGE

28.8.2009