

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA Civil Case 197 of 2009

HACIENDA DEVELOPMENT HOLDINGS LTD.....PLAINTIFF

VERSUS

BOKIN HOLDINGS LIMITED

DEFENDANT

RULING

The Plaintiff/Applicants filed this Chamber Summons dated 17th June 2009 seeking a temporary injunction to restrain the Defendant from in any way interfering with the Plaintiffs right to free and unhindered use and access of the parcel of land known as **LR NO. MN/II/10279** and further to restrain the Defendant from interfering in any manner whatsoever with the sale of the housing units thereon. The Defendant/Respondent did file their grounds of opposition dated 24th June 2009.

Briefly the Defendant sold the suit property to the 2nd and 3rd Respondent and was paid a sum of US\$10 million as a deposit. It was agreed vide an Agreement for Sale dated 27th April 2006 that the balance of the purchase price would be paid by way of deferred payments to be made as and when the Plaintiff sold the housing units which they were constructing upon the suit property. The Defendant later wrote to their lawyers on 9th June 2009 asking that they move with speed to recover all the monies owed to the Defendant. The Plaintiff have now come to court seeking this injunction. The conditions for the granting of an injunction were clearly spelt out in the case of **Giella –vs- Cassman Brown**. The Applicant is required to show a prima facie case with overwhelming chances of success. Firstly as Mr. Amollo for the Defendant pointed out the Plaintiff named in this application is Hacienda Development Holdings Ltd (hereinafter referred to as "**Hacienda**"). The said Hacienda were not a party to the sale agreement dated 27th April 2006. That sale agreement for the purchase of the suit land was made between the Defendant and the 2nd & 3rd Plaintiffs. Whilst it is true that the Plaintiffs did seek and obtained leave to join the 2nd and 3rd Defendant to the suit, they made no effort to likewise amend this chamber summons. Therefore as matters stand the 1st Plaintiff not being a party to the sale agreement has no locus standi to bring this present application.

Be that as it may what apprehension does the Plaintiff have to show that the Defendant have ever or intend to interfere with their possession and enjoyment of the suit premises. Ms. Ngugi for the Plaintiff has listed a litany of breaches of contract which she alleges the Defendant have committed. This may prove bad faith on the part of the Defendant but certainly does not prove any intention to interfere either with the Plaintiff quiet enjoyment of the suit land or with the construction of the housing units thereon. Indeed no allegation has been made that the Defendant have at any attempted to so interfere.

The Plaintiff apprehension appears to be based on a letter written by the Defendant to their advocates. In that letter the Defendant merely ask their lawyer to move with speed to recover monies they feel are due to them. There is absolutely nothing wrong with a party asking his lawyer to recover monies due to them. In the same letter the Defendant writes

“The Board of Directors are also instructing you to make sure that the project stops until we are fully paid”.

There is no evidence that by this the Defendant intends to use unorthodox means to stop the project. Since the letter is written to a lawyer I do presume the instruction was that his lawyer use **legal** means to stop the project and recover the monies. This court will not stop the Defendant in pursuing his legal rights to recover his dues. There is no hint that the intention was to move into the premises and interfere with construction. If indeed this was the Defendant intention he need not have written to his advocate. The Plaintiff talks of “**threats**” by the Defendant to interfere with their quiet possession of the suit premises. This letter does not in my view amount to any sort of threat. It is merely a letter by a citizen to his lawyer seeking legal advice on how to recover what he believes is due to him. In my considered opinion this case does not meet the standards laid out in the **Giella** case. The Plaintiffs have not convinced this court that they have a prima facie case. There is no evidence of any illegal or unorthodox act on the part of the Defendant. The Plaintiffs are apprehensive that the Defendant may interfere with the sale of the housing units. How is this apprehension justified. No evidence is shown that the Defendant have taken any step to so interfere. On the whole I find that this present application lacks merit and I hereby dismiss the same in its entirety with costs to the Defendant/Respondent.

Dated and delivered at Mombasa this 7th day of August 2009.

M. ODERO

JUDGE

Read in open court in the presence of:

Ms. Ngugi for Plaintiff/Applicant

Ms. Ngugi holding brief for Mr. Amollo for Defendant/Respondent

M. ODERO

JUDGE

7.8.2009