



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 379 of 2008**

**FRANCIS MWAURA NJINU.....PLAINTIFF**

**VERSUS**

**HANNAH WANJIKU MBURU ..... 1<sup>ST</sup> DEFENDANT**

**G.M. MUHORO ADVOCATE .....2<sup>ND</sup> DEFENDANT**

**JULIUS MUTUKU MUMINA.....3<sup>RD</sup> DEFENDANT**

**JAMES KANGETHE MUMINA..... 4<sup>TH</sup> DEFENDANT**

**MUTHOKI BROTHERS CO. LTD.....5<sup>TH</sup> DEFENDANT**

**R U L I N G**

This Amended Application is brought under Section 3A, Section 63 (e) of Civil Procedure Code, Order 39 Rule 1 and 9 of Civil Procedure Code and Section 52 of the Transfer of Property Act of India as amended seeking orders to restrain 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants and their agents from accessing, taking possession, selling, transferring, charging or in any other manner whatsoever dealing with plot No. L.R. No.7583/66, Karen or any sub-division thereof pending the hearing and determination of this suit. And that these defendants be ordered to deposit in court all documents of title relating to plot No.7583/66 or sub-divisions pending hearing and determination of this suit.

The application is based on several grounds set out on the application alleging fraud, inducement of breach of contract between plaintiff and 1<sup>st</sup> and 2<sup>nd</sup> defendants, breach by 2<sup>nd</sup> defendant, advocate of the client/advocate relationship, collusion between 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant. The 5<sup>th</sup> defendant is an incorporated body with a share capital of only Kshs.100,000/= with 3<sup>rd</sup> and 4<sup>th</sup> defendants as shareholders. The application is also supported by affidavit of applicant, Francis Mwaura Njiru, sworn on 7<sup>th</sup> July 2008 which contains 107 paragraphs all supporting the plaint.

It is sworn that the suit property was 5 acres and that the plaintiff intended to sub-divide the same. It is also sworn that the property was thereafter sold and registered in the name of the 5<sup>th</sup> defendant at the price of Kshs.28,000,000/=. In the meantime, the sale to the plaintiff was not terminated but was alive. It is also sworn that the property is under sale on behalf of the 5<sup>th</sup> defendant by an agent called Latida Enterprises and it was proposed the price is now Kshs.70 million.

The applicant swears he has spent time in the sale and sub-division of the property with consent of the 1<sup>st</sup> defendant. Sale agreement between plaintiff and 1<sup>st</sup> defendant and dated 16/6/2005 is exhibited. The

3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants have caused an affidavit to be sworn by Irene Kamene Mumina in reply to the plaintiff's application. They emphasize that the plaintiff has no registrable interest in the land and therefore he is not entitled to injunction. Furthermore, damages would be adequate remedy.

The parties have filed skeleton submissions. It is submitted on behalf of the plaintiff that the transfer of suit property to the 5<sup>th</sup> defendant is tainted by fraud and that the 5<sup>th</sup> defendant is not a purchaser for value without notice and for these and other reasons, the sale ought to be cancelled and the property be restored to him.

The counsel has referred to Bullen & Leake & Jacobs for the definition of fraud which includes unlawful interference and inducing breach of contract, deceit and conspiracy. It is also submitted that the "Secretary" of 5<sup>th</sup> defendant was not its secretary and the documents executed by secretary were illegally executed and therefore could not pass title.

On the issue of directors' liability the plaintiff relies on the case of NSSF vs. Akhan Holdings Ltd. – HCC No. 268 of 2004 in which Hon. Justice Ochieng quotes with approval the holding by Lord Hoffman in the case of Standard Chartered Bank vs. Pakistan National Shipping Corporation:-

*"This reasoning cannot in my opinion apply to liability for fraud. No one can escape liability for his fraud by saying:*

*"I wish to make it clear that I am committing this fraud on behalf of someone else, and I am not to be personally liable."*

The defences filed by 3<sup>rd</sup> and 4<sup>th</sup> defendants admits the wrong and avers that they did it for their company. The 3<sup>rd</sup> and 4<sup>th</sup> defendants cannot be allowed to hide behind their company whilst committing fraud and deceit. The plaintiff also relies on the case of Martin Ndungu vs. HFCK & Others – HCC No. 609/2006. It is quite clear that the company, 5<sup>th</sup> defendant was aware of the sale agreement between plaintiff and the 3<sup>rd</sup> and 4<sup>th</sup> defendants had obtained the information from the plaintiff who in good faith showed them the agreement. They then enticed the vendor with higher price and induced her to sell to them and they put forward their company as nominee.

On the issue of adequacy of damages, the plaintiff submits that he sub-divided the land and entered into agreements with 2 parties to sell 2 portions as shown by exhibit "FMN-14." If no sale is achieved, the plaintiff will suffer penalties. Furthermore, the plaintiff will be unable to get another piece of land in Karen because of escalating prices. The land size and location are ideal. Damages are not adequate remedy.

The case of Joseph Siro Musiona vs. HFCK – HCC No.265 of 2007, Mr. Justice Warsame stated:-

*"On my part let me state that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss, which is occasioned by a clear breach of law. In any case the financial strength of a party is not always a factor to refuse injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an injunction."*

While the defendants think that in assessing damages the plaintiff would only get refund of deposit paid, the true position would be entitled to the difference between purchase price and the market value (Kshs.70 million) which the 5<sup>th</sup> defendant will not be able to afford being a small company with Kshs.100,000/= capital.

On the issue of balance of convenience, the balance tilts in maintaining status quo pending determination of this suit. On the side of 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, it is submitted that the suit against 3<sup>rd</sup> and 4<sup>th</sup> defendants is unsustainable because they were acting as directors of 5<sup>th</sup> defendant, a limited

liability company. And that anyway the suit against the 5<sup>th</sup> defendant cannot succeed. The Amended Chamber Summons cannot succeed as there is no prayer in the main suit for mandatory injunction.

They rely on the case of Southern Credit Banking Corporation vs. Charles Wachira Ngundo in which decision was that relief for injunction must be in accordance with final orders. In this case, interim orders are to protect suit property from being disposed of before the determination of the suit where the prayer is the cancellation of the title. It is also submitted that the plaintiff can be compensated in damages and a refund of money be expended in the deal.

Finally, the defendants submit that the balance of convenience tilts in favour of the 5<sup>th</sup> defendant who is in possession. Parties have submitted authorities to support their positions. I have considered submissions made and the evidence available. There is no dispute that the suit property has been sold and transferred to the 5<sup>th</sup> defendant who is in reality a child of 3<sup>rd</sup> and 4<sup>th</sup> defendants. There is no dispute that the plaintiff had a valid agreement for the purchase of the property before the 5<sup>th</sup> defendant purchased the same.

The 3<sup>rd</sup> and 4<sup>th</sup> defendants came to know of the plaintiff's deal by questioning the plaintiff. There is evidence that they colluded to defeat the plaintiff's rights over his contract by being secretive, by deceiving the plaintiff and by offering the 1<sup>st</sup> defendant a very high price than that offered by the plaintiff. It is my view that the acts of the defendants were unlawful. The court should not allow parties to trample on other parties rights already acquired. A sale agreement gives a right to enforce it and it is not correct to say that the plaintiff had no interest in the suit property.

In the case of Waithaka vs. 1 CDC [2001] KLR, it was held that:-

*“It is not an inexorable where damages may be an appropriate remedy, an interlocutory injunction should never issue. If the adversary has been shown to be high handed or oppressive in its dealings with the applicant ..... One cannot violate another citizen's rights at the pain of damages.”*

In this case the conduct of the defendants towards applicant “cannot for less be told.”

It is clear the plaintiff has demonstrated a *prima facie* case the trial of which may lead to the cancellation of the title now held by the 5<sup>th</sup> defendant. It is also not a case that the plaintiff should be forced to accept damages. I therefore find that the plaintiff is entitled to interlocutory injunction pending hearing and determination of this suit.

The application is allowed and orders granted in terms of prayer (3) only namely; that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants are hereby restrained from doing the things complained of.

The cost of this application shall be by 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants jointly and severally.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 16<sup>th</sup> day of October 2009.

**JOYCE N. KHAMINWA**

**JUDGE**