



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 522 of 2009

DUNCAN WAITHAKA NDEGWA.....1ST PLAINTIFF

JACKLINE NYAGUTHI GITHINJI.....2ND PLAINTIFF

VERSUS

SIGAL INVESTMENTS LIMITED.....DEFENDANT

RULING

1. The application before court is the Notice of Motion dated 13/10/2009 brought under Order XXXIX Rules 1, 2 and 7 of the Civil Procedure Rules Section 63(3) of the Civil Procedure Act and Section 64 of the Registration of Titles Act, Cap 281 Laws of Kenya seeking the following orders:-

(a) *THAT due to the urgency of this motion service of the same be dispensed with, the motion be certified urgent and be heard exparte in the first instance.*

(b) *THAT upon hearing exparte, a temporary order of injunction be issued restraining the defendant its agents and/or servants, or anyone acting or claiming through it from selling, offering for sale, disposing and/or in any other manner interfering with Land Reference Number 1160/114 situate in Karen area of Nairobi until the hearing interparte.*

(c) *THAT upon hearing interpartes an order of injunction be issued restraining the defendant its servants and/or agents, or anyone claiming or acting through it from selling, offering for sale, disposing or parting with possession of L.R. No. 1160/114 situate in Karen area of Nairobi until determination of the suit herein.*

(d) *THAT a mandatory order of injunction be issued directed to the defendant to produce and/or surrender the original title L.R. No. 1160/114 situate in Karen to this court or the Chief Land Registrar for safe custody pending hearing and determination of the main suit.*

(e) *THAT the costs of this motion be borne by the defendant in any event.*

2. The application is premised on the grounds on the face thereof, the gist of which is that upon agreement for sale between the parties, the Plaintiffs/Applicants paid the full purchase price for suit property known as LR No. 1160/114 situate in Karen area of Nairobi. The Plaintiffs also allege that the Defendant has refused and or neglected to facilitate

transfer of the suit property to them and they say they are afraid that unless enjoined the Defendant might dispose of the suit property to third parties at great peril to the Plaintiffs. The application is also premised on the supporting affidavit sworn by Duncan Waithaka Ndegwa dated 13/10/2009. The deponent reiterates the averments contained in the grounds on the face of the application and urges this court to maintain the status quo until this suit is heard and determined. The Applicants have exhibited as "DW 1" a copy of the Agreement for Sale of the suit property, dated 22/07/1998 executed between Duncan Waithaka Ndegwa as purchaser and Sigal Investments Ltd as vendor. The property described therein is Nairobi LR No. 1160/659 (original 1160/640/7) measuring 0.4240 ha. The purchase price was the sum of Four Million Shillings only and the Clause 11 of the Agreement for Sale provided:-

11. Conditions

"11.1 The Purchaser shall pay all registration fees and stamp duty to cover transfer but each party shall meet its legal costs.

11.2 The Purchaser shall provide all the Transfers to be executed by the Vendor.

11.3 The Vendor shall provide the Purchaser with all the original title documents, the relevant consents to transfer and any other documents that may be required to facilitate registration of the Transfers.

3. There is also exhibited with the Supporting Affidavit a copy of an Agreement for Sale dated 8/09/1998 as DW 2 between the 2nd Plaintiff, Jackline Nyaguthi Githinji as purchaser and Sigal Investments Ltd. as seller of property known as Nairobi LR No. 1160/657 (original 1160/640/5) measuring 0.4568 ha at a price of Kenya Shillings Four Million only.

4. The Plaintiffs/Applicants also filed a plaint simultaneously with the application in which they allege that the Defendant had flagrantly breached the terms of the Sale Agreements by refusing to surrender the original title to the registrar for registration of transfer to the Plaintiffs. The Plaintiffs also allege that the Defendant was intending to offer the suit property for sale to 3rd parties. The Plaintiffs pray for judgment against the Defendant for:-

i) *A declaration that the plaintiffs are the bona fide purchasers for value of L.R. No. 1160/114 from the defendant and are entitled to an order of specific performance of the contracts of sale.*

ii) *An order of specific performance to issue directed to the defendant to surrender the original title L.R. No. 1160/114 to the Chief Land Registrar and execute all the necessary papers to facilitate transfer of LR No.1160/114 to the plaintiffs separately as per the contract of sale dated 22nd July 1998 and 8th September 1998 respectively.*

iii) *And or in the alternative an order be issued directed to the Chief Land Registrar to facilitate transfer of Land Reference 1160/114 to the plaintiffs' with or without the defendant's original title by use of a certified copy of the title in possession of the Land Registrar.*

iv) *That in the event of refusal by the defendant to execute the necessary transfer papers the Deputy Registrar of this court, do execute all the necessary transfer papers to give effect to prayer number (ii) herein above.*

v) *That the original title to L.R. No. 1160/114 be and is hereby deemed to have been surrendered to the Chief Land Registrar for purposes of effecting the orders sought herein above.*

vi) *An order of permanent injunction do issue restraining the defendant its servants and/or agents or anybody acting through or claiming through it from selling, offering for sale, parting with possession or in any other manner interfering with LR No. 1160/114.*

vii) *General damages for breach of contract and mesne profits.*

viii) *That the defendant do pay the plaintiffs the costs of this suit and interest.*

5. On the 14/10/2009, the Plaintiffs/Applicants sought and obtained a temporary order of injunction in terms of prayer (b) of the application. The Plaintiffs/Applicants were ordered to serve the application together with the order upon the Defendant for interpartes hearing on 29/10/2009. The application was duly served upon Mr. William K. Kipkoti, a director of the Defendant Company on 21/10/2009 at 3.10 p.m. Despite that service there has never been a response to the application.

6. At the hearing of the application on the 29/10/2009, there was no appearance on behalf of the Defendant. Mr. Paul Njuguna, counsel for the Plaintiffs/Applicants argued the application on behalf of the Plaintiffs/Applicants and reiterated the grounds on the face of the application and the affidavit in support. Mr. Njuguna cited the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358** and submitted that the Plaintiffs had established a prima facie case with a probability of success. He also contended that if the orders sought are not granted, the Plaintiffs stand to suffer irreparable damage that cannot be compensated by way of damages.

7. The court has now considered all the pleadings on record to date. The court has also considered the principles for the granting of injunctions as set out in the **Giella case**. The question that arises is whether the Plaintiffs have complied with the said principles.

8. In the view of the court, the Plaintiffs have satisfied the court that they have a prima facie case with a probability of success. The Plaintiffs have exhibited Agreements for Sale with the Defendant. They have also stated that each of the 2 Plaintiffs has paid the full purchase price for their respective portions of the suit property. The Plaintiff's have also demonstrated that the Defendant has refused and/or failed to surrender the original title to the Commissioner of Lands to facilitate transfers of the suit properties into the Plaintiffs' names. It is clear from the record that the Defendant has no answer to all these allegations and claims by the Plaintiffs. There is no indication from the Defendant whether it would even be in a position to refund the purchase price if the suit property is not preserved.

9. In the circumstances, the Plaintiff's application dated 13/10/2009 has merit. I find and hold that unless the orders sought are granted, the Defendant might sell the suit property to innocent third parties to the utter detriment of the Plaintiffs. The application is allowed in terms of prayers c) and (d) of the application until this suit is heard and determined. As regards prayer (d) the original title shall be surrendered to this court for safe custody pending the hearing and determination of this suit. The Plaintiffs shall also have the costs of this application.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 26th day of November, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Njuguna for the Plaintiffs/Applicants

No appearance For the Defendant/Respondent

Weche- court clerk