



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Civil Suit 46 of 2008**

**ALI MUSA AHMED & 39 OTHERS.....PLAINTIFFS**

**VERSUS**

**THE REGISTERED TRUSTEE OF POSTAL CORPORATION OF KENYA**

**STAFF PENSION SCHEME.....DEFENDANT**

**RULING**

On 5<sup>th</sup> March 2008, the plaintiffs filed this suit against the defendant seeking two main reliefs that the defendant be restrained from selling houses standing on Plot No. LR MSA/IX/136 Tudor Tom Mboya Avenue Mombasa (hereinafter “the suit property”) and a similar order restraining the defendant from dealing with the suit property in any manner that is adverse to the plaintiffs’ interests.

The foundation of the plaintiffs claim is pleaded in paragraphs 8, 9, 10, 11, 12 and 13 of the plaint. In a nutshell the plaintiffs plead that the funds they have contributed and still contribute as employees of Postal Corporation of Kenya and Telkom (K) Limited were and still are used to develop and manage housing schemes which include the development on the suit property. It is also pleaded that as members of Postal Corporation of Kenya Staff Pension Scheme and Teleposta Staff Pension Scheme, they were notified by the defendant of its intention to sell houses on the suit property in May 2005. Pursuant to that notice the defendant vide its letter dated 9<sup>th</sup> February 2008 offered to sell to the plaintiffs some of the said houses and sought for each house a deposit of 10% of the purchase price by the 10<sup>th</sup> March 2008 and the balance within 90 days.

The offers and demands for payment within the time specified has provoked the suit because according to the plaintiffs, the price is inflated; the remuneration of some of the plaintiffs cannot allow them to buy the houses; they were not consulted before the decision to sell the houses was made and that six of the plaintiffs have been retrenched and their dues have not been paid and cannot therefore meet the said dateline. The plaintiffs are therefore apprehensive that the houses will be sold to independent bidders who are not members of the pension scheme.

Simultaneously with the plaint, the plaintiffs filed the application before me and seek the same orders prayed for in the plaint on an interim basis. The applicants have supported their application by an affidavit sworn by the 1<sup>st</sup> plaintiff. The affidavit essentially restates on oath the averments in the plaint.

The application is opposed, and there is a replying affidavit sworn by one Deborah Jepchumba Limo, the defendant’s Pension Scheme Administrator and Secretary to the Board of the defendant. In the affidavit, Ms Limo acknowledges 18 of the plaintiffs to be members of the Postal Corporation of Kenya Staff

Pension Scheme and depones that the other 22 plaintiffs' relationship with the defendant is that of tenant and Landlord. She then gives the history that culminated in the creation of the Telposta Pension Scheme, the Postal Corporation Staff Pension Scheme and the Communications Commission of Kenya Staff Pension Scheme. Assets and liabilities were duly apportioned. Ms. Limo further depones that the defendant does not hold the suit property or any other property in trust for the 18 members of the Postal Corporation Staff Pension Scheme whose total membership is over 3000. She swears that the defendant's primary obligation is to pay to the members such pensions and other benefits as the members may be individually entitled to under their respective retirement benefits agreements.

Ms Limo has also deponed that when the decision to sell the houses in question was made, the plaintiffs were given the first opportunity to buy them at reserved prices which reflect the market value of the units. In seeking to liquidate the houses at the best price, the defendant according to Ms Limo is acting in the best interests of the entire membership of the defendant. She further depones that the plaintiffs are not bound to purchase the houses if they dispute the prices offered to them because in the event of their failure to buy the units the same will be offered for sale through an open tender process in which the plaintiffs are entitled to participate. She also depones that the decision to sell the said house is in accordance with the Retirement Benefits Authority ("RBA") investment regulations and is intended to enhance the growth, preservation and sustainability of the Fund.

When the application came up for hearing inter partes on 29<sup>th</sup> April 2008, counsel representing the parties reiterated the positions taken by their clients in their respective affidavits.

I have considered the application, the affidavits filed, the submissions of counsel and the authorities cited. Having done so, I take the following view of this matter. The principles for the grant of an interim injunction are now well settled. They were succinctly set out in **Giella – v – Cassman Brown & Co. [1973] EA 358**. They are firstly that the applicant must show a prima facie case with a probability of success at the trial. Secondly, an injunction will not normally be granted unless the applicant will suffer an irreparable injury which cannot be compensated by an award of damages and thirdly if the court is in doubt it should determine the application on a balance of convenience.

The plaintiffs object to the sale of the houses in question on four grounds:

- (a) That the pricing of the units has been inflated deliberately to bar them from buying them;
- (b) That some of the plaintiffs are employees of the Postal Corporation of Kenya and their remuneration cannot allow them to purchase the houses as offered;
- (c) That being stakeholders, they were not consulted on the decision to sell the houses and
- (d) That six of the plaintiffs have been retrenched and have not been paid any dues and pension yet the deadline grows nearer.

The defendant has in its replying affidavit aforesaid responded to each of the complaints made by the plaintiffs. On the pricing of the houses the defendant has sworn that the same was arrived at after due diligence and after valuations had been conducted to determine the purchase price of each unit. According to the defendant it is incumbent upon it to obtain the best price on the market in the interest of the entire 3000 plus membership of the scheme. Besides, according to the defendant, in the event the plaintiffs do not accept the offer extended to them on the basis that the prices of the units are inflated, they are not bound to take the offer made by the defendant. They have the option to get the best that the market can offer. The plaintiffs can even bid at the open tender when the units are opened to the public. I do not see how the stance taken by the defendant can successfully be challenged. I am not therefore persuaded that the plaintiffs will at the trial succeed to show that the defendant's pricing of the units in question was deliberately designed to keep the plaintiffs out of the sale.

On the argument that some of the plaintiffs are employees of the Postal Corporation of Kenya and their remuneration cannot allow them to purchase the houses as offered, I am unable to appreciate the same as I

do not see how the defendant can come to the plaintiffs' aid. Indeed even if the plaintiffs succeed to establish that their remuneration impedes their ability to purchase the units in question their success on that score will no doubt operate against granting them the reliefs they seek.

On the issue of consultation, I agree with the defendant that as the registered proprietor of the suit property it enjoys all the rights of such a proprietor. It has no obligation to consult the plaintiffs or indeed any of the members of the scheme before deciding to sell the units and determining the terms thereof. The plaintiffs have not referred to any rule or regulation that provides for such consultation. They have not filed any further affidavit challenging the position take by the defendant in the replying affidavit that there was no such requirement for consultation.

On the issue that some of the plaintiffs have been retrenched and have not been paid their dues and pension in order to beat the deadline, I am afraid that is not and cannot be the defendant's headache. The letters of retrenchment have been written by Telkom Kenya a body with a separate legal existence from the defendant. In the event, the consequences of the retrenchment of the six cannot advance the plaintiffs' cause.

The defendant has argued quite persuasively in my view that its primary obligation is to pay to the members of the Postal Corporation of Kenya Pension Scheme such pensions and other benefits as they may be individually entitled to under their respective retirement benefits agreements and the members' interest including the plaintiffs is restricted to receiving their retirement benefits as and when they fall due.

There is no allegation that in selling the houses in question and giving priority to the plaintiffs the defendant is acting outside or contrary to its mandate. I would infact state without conclusively determining the issue that to accede to the plaintiffs' request would be contrary to that mandate and against the interest of the larger membership of the scheme.

In the premises, I find that the applicants have not established a prima facie case with a probability of success at the trial. Strictly speaking therefore, I need not consider the other conditions for the grant of a temporary injunction. However, even if I were to consider whether the plaintiffs' probable injury is capable of being adequately compensated in damages, I would have no hesitation in finding that it is. The houses in question have been valued by both the plaintiffs and the defendant and if their application for injunction is not granted, what the plaintiffs will lose are the houses quite obviously capable of being converted into money. The plaintiffs' loss is therefore compensable by an award of damages.

The plaintiffs do not allege that the defendant is not capable of paying such compensation should the plaintiffs eventually succeed at the trial. The plaintiffs have therefore not satisfied the second condition for the grant of an interlocutory injunction set in the **Giella – v – Cassman Brown case (supra)**.

On the balance of convenience, I am persuaded that the same would tilt in favour of declining the injunction sought. The entire membership of the scheme is over 3000. The plaintiffs constitute a small percentage of the entire membership and as they do not allege breach of any duty by the defendant and further as I do not find, prima facie, any violation of the plaintiffs' rights, there would be no basis for acceding to the plaintiffs' prayers. So whereas the plaintiffs may succeed in drawing sympathy, that is not enough to tilt the balance of convenience in their favour.

The plaintiffs have therefore failed to show any of the conditions for the grant of an interlocutory injunction set in **Giella – v – Cassman Brown and Co. (supra)**.

The upshot of this matter is that the plaintiffs' application dated 4<sup>th</sup> March 2008 is without merit and is dismissed with costs to the defendant.

**DATED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF MAY 2008.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:

Adhoc for the plaintiffs.

**F. AZANGALALA**

**JUDGE**

**22<sup>ND</sup> MAY 2008**