



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 60 of 2008

LICINUS INVESTMENTS LTD.....PLAINTIFF

VERSUS

MAURIZIO DALPIAZ.....DEFENDANT

RULING

In its plaint dated 18th March 2008, the plaintiff prays for the following orders:

- (a) A declaration that the Agreements dated 24th November 2004 and 28th September 2006 are null and void.
- (b) A declaration that the defendant acquired possession of part of the suit premises unlawfully and is therefore trespassing into the suit premises.
- (c) A declaration that the continued possession of the suit premises by the defendant without the prior written consent of the plaintiff and of the Commissioner of Lands is illegal and unlawful.
- (d) Vacant possession of the suit premises in good order and condition and in the condition in which the suit premises were when the defendant acquired possession thereof.
- (e) An order of injunction restraining the defendant by himself, his employees, servants and/or agents from digging any well or continuing to dig any well and from altering the structure of the house, or any of the developments standing on the suit property or altering any fence and from building any additional structures thereon or leasing or pledging or trespassing or remaining upon any part of the suit property.
- (f) Mesne profits.
- (g) General damages.
- (h) Costs.

Simultaneously with the filing of the plaint, the plaintiff lodged the application which is now before me. The application has been brought under the provisions of Section 3A of the Civil Procedure Act and Order XXXIX Rules 1, 2, 2A (1) and 3 (1) of the Civil Procedure Rules. The application seeks one primary order expressed as follows: That

“The defendant by himself, his employees, servants and/or agents be restrained from digging any well or continuing to dig any well and from altering the structures of the house or any of the developments standing on LR No. 5054/275 or altering any fence and from building any additional structures thereon or leasing or pledging or trespassing or remaining upon any part of LR No. 5054/275 Kilifi pending the hearing and determination of this suit.

The application is based on some 16 grounds the main ones of which are as follows:-

- 1) That the plaintiff is the registered proprietor of the suit property.
- 2) That under the conditions of the Grant the property cannot be subdivided, sold, changed, transferred, leased or otherwise dealt with without the consent in writing of the Commissioner of Lands which was not obtained.
- 3) That the property cannot be subdivided without deed plans duly approved by the Director of Surveys.
- 4) That the director of the plaintiff entered into 2 agreements to sell portion “A” of the suit premises to the defendant. That at the time portion “A” did not exist.
- 5) That the plaintiff did not execute any agreement of sale of any portion of the suit premises and the said agreements are null and void.
- 6) That the plaintiff did not receive any purchase price from the defendant.
- 7) That the defendant is digging a well on the suit premises and altering the structure of the house on the premises thereby interfering with the beauty and general appeal of the suit premises.
- 8) That the defendant has damaged the garden and is continuing to do so.
- 9) That the plaintiff’s director went into the suit premises to inspect the same and was arrested and charged with trespass.
- 10) That the defendant’s activities on the suit premises may lead to the forfeiture of the Grant thereby causing the plaintiff to suffer loss that cannot be remedied by any award of damages.

The application is supported by an affidavit sworn by one Pietro Canobbio a director of the plaintiff. In the affidavit at paragraph 3 it is deponed that the said director sold portion “A” of the suit premises to the defendant before a subdivision had been carried out and before consent of the Commissioner of Lands had been obtained.

It is further deponed by the said director that the plaintiff did not execute the agreements of sale and on advise of his advocate he depones that the agreements are therefore null and void. The said director admits that Kshs. 5,352,273.00 has been paid to their mutual advocates M/S Sachdeva & Company and the plaintiff and himself have no objection to the said sum being released to the defendant subject to compensation for damages to the suit premises. The said director in the rest of his affidavit recites the grounds in the Chamber Summons.

The application is opposed and there is a replying affidavit sworn by the defendant. Its advocates have also filed Grounds of Opposition. In the replying affidavit the defendant has deponed that the two agreements referred to by the plaintiff were entered into between the plaintiff and one Gilberto Agosta and the plaintiff and the defendant respectively. It is also deponed that portion “A” in question is clearly identifiable and is surrounded by a wall as its boundary. The defendant has also deponed that he lived on the said portion since 2006 and Mr. Canobbio the plaintiff’s director is his neighbour. The defendant further swears that he had paid the entire purchase price for the said portion and it is the duty of the plaintiff to ensure that the said portion is transferred to him. In his view, the agreements are valid and lawful and as a bona fide purchaser he has lawfully acquired possession and is entitled to carry out

renovations, construction and sink a well and is further entitled to choose his visitors. In the premises, the defendant contends that the plaintiff has not shown a prima facie case and that in any event damages would adequately compensate it.

I have considered the application, the affidavits filed, the Grounds of Opposition and the submissions of counsel. Having done so, I take the following view of this matter. The gist of the plaintiff's case is that it did not enter into any agreement with the defendant with respect to the suit property. That argument is premised on the fact that the plaintiff as a corporate body did not execute the agreements of sale with the defendant. The plaintiff's further argument is that the portion "A" sold to the defendant is part of land comprised in a Grant from the Government and subdivision and sell may only be effected within the conditions of the Grant. In that regard, the consent of the Commissioner was a prerequisite before subdivision which consent has not been obtained and further that subdivision could only be possible with the approval of deed plans by the Director of Surveys which approval has not been obtained. For those reasons the sale agreements in question are null and void and the plaintiff and its director who executed the agreements have no objection to the release of the purchase price held by their mutual advocates to the defendant. In the premises the defendant should be restrained as sought in the application.

The defendant's position on the other hand is that he lawfully purchased the suit property from the plaintiff and paid the entire purchase price and is entitled to the rights of a bona fide purchaser for value. In his view it is the duty of the plaintiff to ensure that the transfer of the suit premises to him is perfected. In the premises, the defendant contends that the orders sought are not available to the plaintiff which has come to court with unclean hands. The prerequisites for the grant of a prohibitory interim injunction were laid down in the precedent setting cases of **Giella – v – Cassman Brown & Co. Ltd [1973] EA. 358.** These are that:-

- 1) An applicant must show a prima facie case with a probability of success at the trial.
- 2) An interlocutory injunction will not normally be granted unless an applicant can show that he would suffer irreparable loss if the interlocutory injunction is not granted.
- 3) If the court is in doubt it should decide the application on a balance of convenience.

It is now trite that normally an injunction which is an equitable remedy will not be granted where the applicant's conduct in pertinent matters has been inequitable.

I have anxiously considered the plaintiff's main arguments. Although the agreements of sale impugned state that the sale is between the plaintiff and the defendant, no seal of the plaintiff appears to have been affixed. But is the want of a seal on the agreements per se sufficient to invalidate the agreements? At this interlocutory stage I find prima facie, that the want of a seal on the agreements alone cannot invalidate the same. The agreements clearly give the plaintiff as the vendor and are signed by an authorized director of the plaintiff. In any event the plaintiff did not exhibit its Memorandum and Articles of Association to illustrate how the documents on behalf of the plaintiff should be executed. It is illustrative that the director who executed the agreements for and on behalf of the plaintiff is the same one who verified the contents of the plaint herein. It is noteworthy that even in the verifying affidavit he does not say that he has the authority of the plaintiff to swear the affidavit. He also does not depone in the supporting affidavit that he has the plaintiff's authority to swear the same. Yet the plaintiff will not be heard to say that this suit and application are invalid.

On a prima facie basis, I find and hold that the plaintiff indeed entered into the sale agreement it has exhibited to its supporting affidavit.

With regard to the argument that the relevant consents and approvals were not obtained, I have found as follows: The plaintiff is the Grantee under the title in question. It is the party to seek the requisite consents and approvals. It does not explain why those consents and approvals have not been sought and or obtained. The defendant has paid the agreed purchase price in the terms agreed. He is in possession pursuant to the agreement which awaits completion on registration of the transfer to him. No affidavit

evidence has been adduced to show that the relevant authorities have declined to grant the requisite consents or approvals or that the time within which the consents and approvals should be obtained has lapsed.

I have also found that the conduct of the plaintiff does not meet the approval of a Court of Equity. It received the purchase price from the defendant through its authorized director and the same director swears that the plaintiff did not execute the agreements and is therefore not bound by the agreements of sale. It is the Grantee to the title in question and under the Grant it alone can seek the requisite consents and approvals and uses the failure to obtain the same as a basis to seek relief from a court of equity.

In the end on the material availed to the court, I am not satisfied that the plaintiff has shown a prima facie case with a probability of success at the trial. Having so found strictly speaking I need not consider the other conditions for the grant of an interim injunction. However, even if I were to consider whether the plaintiff's injury could adequately be compensated in damages if an injunction were not granted at this stage, I am of the view that damages would be an adequate compensation. The acts complained of by the plaintiff are not in any event acts of wastage nor is the defendant threatening breach of agreement or committing acts otherwise injurious to the suit property. So even if the plaintiff had shown a prima facie case with a probability of success he would not pass the second test set by **Giella – v – Cassman Brown & Co. Ltd. (supra)**

On the balance of convenience, I am of the view that the same tilts in favour of declining the injunction. I have found on a prima facie basis that the defendant has performed his part of the bargain and prima facie therefore is entitled to the rights of a bona fide purchase for value without notice.

The upshot of this matter is that the plaintiff's application dated 18th March 2008 is declined with costs to the defendant.

Order accordingly.

DATED AND DELIVERED AT MOMBASA THIS 5TH DAY OF MAY 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Kinyua for the Plaintiff and Omondi for the Defendant.

F. AZANGALALA

JUDGE

5TH MAY 2008

Kinyua:

I pray for a copy of the ruling.

Court:

A typed copy of the ruling to be supplied to counsel upon payment of the requisite fees.

F. AZANGALALA

JUDGE

5TH MAY 2008