



REPUBLIC OF KENYA

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

Civil Suit ELC 242 of 2008

KOYSAM TRADING AND INVESTMENTS COMPANY LIMITED.....PLAINTIFF

VERSUS

INTERSPAN LIMITED.....DEFENDANT

RULING

APPLICATION NOTICE OF MOTION 31 JULY 2008 SEEKING MANDATORY AND TEMPORARY INJUNCTION

1. Background

1. M/s Koysom Trading and Investments Co. Ltd allege that they entered into an agreement of sale dated 22 January 2007 with M/s Interspan Ltd (the defendant herein) to purchase land situate in the Nairobi area being LR 25442.

2. The defendant failed to complete the sale agreement. The plaintiff herein filed suit for specific performance on being apprehensive that the defendants had shown indication of selling the same property to a third party.

3. The plaintiff also filed an application dated 31 July 2008 on 4 August 2008 seeking.

3.1 "A mandatory injunction [to issue] compelling the respondent to forthwith procure and deliver compellation documents to the plaintiff advocates Ms Kiplangat & Co. Associate Advocate.

3.2. A temporary injunction (to) issue restraining the defendant whether by itself, its servants or agents or otherwise howsoever from purporting to transfer the property to any third party other than the plaintiff or interfering with the plaintiff possession and development of the property pending the hearing and determination of the suit"

4. The plaintiff wants the following documents to be released to the stake holder M/s Toplands Engineering Survey or its advocates M/s Kiplangt & Associates Advocates.

i. Original certificate of Title of LR No. 25442 (herein referred to as "the property") together with all documents of title relating to the property.

ii. A duly executed transfer of the property in favour of the plaintiff/applicant.

iii. A commissioner of lands consent to transfer the property.

iv. Rates clearance certificate from the relevant local authority for at least 10 days from the date of delivery to the plaintiff advocate.

iv. Land Rent Clearance Certificate.

v. Duly completed and signed forms for valuation for stamp duty.

vi. Passport size photograph of vendors director.

vii. Pin certificate of the vendor.

5. The application is supported by the affidavit of Bernard Koyyoko Kieross, the plaintiff applicant director duly authorized to depon to the affidavit on 31 July 2008.

6. In brief, the plaintiff applicant purchased LR No.25442 (ha 0.1) situate in Langata Nairobi by way of a sale agreement. The plaintiff was to take possession of the property on payment of the deposit upon which the defendant would deposit the certificate of title together with a duly executed transfer document with M/s Toplands Engineering Surveys.

7. The purchase price for the ha 0.1 piece of land was Ksh.2,000,000/-, Ksh.1,000,000/- was to be paid at the completion of the agreement.

8. The plaintiff applicant not only took possession but commercial development.

9. Further, the terms of the agreement was that the completion date was 30 days from the date of agreement of

22 January, 2007 or seven days of successful registration of the transfer.

10. The defendant requested for further payment which was duly made of Ksh.650,000/- . Only Ksh.350,000 was now left.

11. On 9th May, 2008, the plaintiff was informed that the defendant wishes to refund the deposits money already paid. The plaintiff demanded the complete sale agreement within 3 days. On 14th May, 2008, the defendant once again confirmed their wish to refund the sum to which the plaintiff rejected.

II: Application 31 July 2008

12. The plaintiff served the defendant with the notice of motion 31st July, 2008 together with the supporting affidavit and authorities on the 12th August, 2008 at 12.30 pm.

13. The plaintiff failed to attend court as direction or through his advocate.

14. Arguments put forward by the plaintiffs advocate to the plaintiffs advocate

i. Land Rent Clearance

Certificate

ii) Duly completed and signed

forms for valuation for stamp duty

iii) Passport sizes photo graphs of vendors directors.

v. **Pin certificate of the vendor.**

15. The application is supported by the affidavit of Bernard Koyyoko KibeRass, the plaintiff/applicant.- next director duly authorized by his board to depose the sue and dated 31st July, 2008.

16. He relied on the case law of:-

Shariff Forex Bureau Co. Ltd

V

Dubai Bank Kenya Ltd.

Hccc1150/02, Emukule J.

In which Emukule J stated that an application for an injunction under order XXXIX Civil Procedure Rule on section 63 (c) or (e) Civil Practice Act relate to a grant of prohibitory injunctions. It would not apply to provisions of a mandatory injunction. Nonetheless relying on the ruling of:

Belle Maison

v

Yaya Towers Ltd

Hccc2225/92 Bosire J (as he then was)

“A mandatory interlocutory injunction may issue where circumstances exist which would warrant immediate restriction of an applicant into possession at interlocutory stage”.

17. There is therefore a high standard in issuing of a mandatory injunction.

18. In relying on Halsbury Laws of England (4 ed)

para 948

“ a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances it will not normally be granted”

19. The principles of a mandatory injunction is that it should **NOT** normally be issued except in special circumstances

III: Finding

20. In this application the defendant is not before the court. Service upon the defendant of the notice of motion was duly made but it is unclear whether the plaint and summons to enter application has been served

21. If per it chance it had been serviced it would be safe to conclude that the defendant is not interested in this matter.

22. The plaintiff application has illustrated how after entering into the a sale agreement the defendant wishes to breach the agreement by selling the property to a third party and refund his money.

23. The plaintiff is not inclined to have his money refunded simply because he is already in possession of the property as per the agreement.

24. I would note that the plaintiff sought prayers for an injunction restrain the defendant from selling the property to a third party. I believe that this injunction is merited and I would grant it.

25. As to the mandatory injunction it requires there to be a “high degree of assurance that at the trial it would appear that the injunction had rightly been granted”

Locabail International Finance Limited

v

Agroexport and Others (1986) 1 All ER 901

26. In this present case this application was argued ex parte. The discretion of this court is for the court to reject the mandatory injunction but grant the second prayer for a temporary injunction which prayer I grant till the determination of the main suit.

27. There will be costs to the plaintiff.

DATED THIS 23RD DAY OF SEPTEMBER 2008 AT NAIROBI.

M.A. ANG’AWA

JUDGE

Kiplangat instructed by C. Kiplangat & Co. Advocates for the plaintiff/applicant – present

Interspan Ltd – the defendant not represented –absent