



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 43 of 2008

MARGARET WANGECHI NDERI PLAINTIFF

VERSUS

JUSTUS KARUIGI CHUANI DEFENDANT

RULING

By a Plaint dated 5th May 2008 and filed in court on the same day, **Margaret Wangechi Nderi**, hereinafter referred to as “*the applicant*” claimed from **Justus Karuigi Chuani**, hereinafter referred to as “*the respondent*”, an order for specific performance and in the alternative an order for refund of Kshs.580,000/= with interest at 20% and compensation for the developments made by her in respect of **Nyeri Municipality/Block1/1133** hereinafter referred to as “*the suit premises*”. She also sought for costs of the suit. The suit was anchored on a written agreement dated 22nd February 2001 between the applicant and respondent wherein the respondent agreed to sell the suit premises to the applicant at a consideration of Kshs.700,000/=. Upon execution of the agreement the applicant paid the respondent Kshs.580,000/= in part payment. The applicant thereafter took possession of the suit premises but in breach of the agreement aforesaid the respondent had refused to complete the transaction and be paid the balance. If anything, the respondent has resiled from the agreement and now wished to refund the part purchase price paid by the applicant, hence the suit.

On 10th June 2008, the applicant took out a chamber summons application in which she sought an injunction to restrain the respondent from selling, alienating, disposing or charging the suit premises until the hearing and determination of the suit. The application was informed by the fact that though the respondent had sold the suit premises to the applicant, and the applicant had taken possession, the respondent had nonetheless refused to complete the agreement and was bent on selling the suit premises to third parties.

The application was further supported by the affidavit of the applicant in which she reiterated her case as set out in the plaint and grounds in support of the application. The only addition being that the applicant strongly believed that the respondent after failing to honour his part of the bargain wants to sell the suit premises to a 3rd person at a higher price. That one of the terms of the agreement was that the certificate of title be left under the custody of **Messrs Kebuka Wachira & Co. Advocates** from whom the respondent was demanding its release. The applicant has further deponed that she is ready and willing to perform her part of the contract and having taken possession, she believes she has established a prima facie case and the respondent should be restrained from disposing the suit premises till the suit is heard and determined.

In support of the application, **Mr. Kiminda** orally reiterated and expounded on the averments in the plaint as well as the supporting affidavit.

The application was of course opposed. A replying affidavit by the Respondent was to the effect:-

“3. That it is true that I had entered into a written

sale agreement with the applicant for my plot L.R. Nyeri/Municipality/Block1/1133 at Ksh.700,000/ out of which I was paid Kshs.580,000/=.

4. That the said agreement had a completion date of 90 days from the 22nd day of February 2001.

5. That the said agreement has not been completed

8 years later and I am not agreeable to the claim for specific performance by the applicant.

6. That prior to the filing of this suit I had demanded

from the applicant the balance of Kshs.120,000/= and the accrued interest after which I would transfer the said plot to her.

7. That upon failure by the applicant to pay the said

balance I purchased a banker’s cheque number 005273 for Kshs.460,000/= in favour of the applicant but our common lawyer refused to receive the said cheque in exchange for my certificate of title.

8. That it was as a result of that stalemate that I filed the originating summons in HCCC number 47 of 2008 at Nyeri against F.K.M. Wachira Advocate.

9. That I did not at any time authorize the Plaintiff to

go into occupation of L.R. Nyeri/Municipality/Block 1/1133 and any construction thereon is unauthorized and done without any approved plan.

10. That the applicant’s occupation of the suit land amounts to trespass upon private land and for which I have counter claimed for eviction.”

Mr. Muchira, learned counsel for the respondent in opposing the application orally submitted that the sale agreement had been in abeyance for 7 years. That the applicant had not satisfied the 2nd condition set out in the case of **Giella v/s Cassman Brown & Co. Ltd (1973) E.A. 358**. Granting the injunction sought in the circumstances will be adding unnecessary cloak to the respondent’s title.

I have now carefully considered the application, the supporting as well as the replying affidavits and the annexures thereto, respective oral submissions and the law. The law on temporary injunction could not have been settled any better than in the case of **Giella (supra)**. The principles enunciated in that case have withstood the test of time. They are as true today as they were when pronounced in 1973, thirty five years ago.

They are that in granting an injunction, the court is exercising discretion which discretion must be exercised judicially. An applicant must show a prima facie case with a probability of success. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and finally when the court is in doubt, it will decide the application on the balance of convenience. It must be appreciated that these conditions are disjunctive and not conjunctive. So that an applicant only needs to bring himself within the perimeters of one of them and he will have his injunction.

In the circumstances of this case, it is common ground that the parties entered into a written sale agreement with regard to the suit premises. The purchase price was agreed at Kshs.700,000/= out of which the applicant paid to the respondent Kshs.580,000/= leaving a balance of Kshs.120,000/= I believe payable on completion. Since then and according to the applicant though she has always been ready and willing to pay the balance and fulfil the terms of the agreement, the respondent on the other hand has been unwilling to see through the transaction. Indeed the applicant's contention is that the respondent after failing to honour his part of the agreement wants to sell the property to a 3rd person at a higher price. To the applicant, it is the respondent who is in breach of the sale agreement. On the other hand the respondent takes the view that it is the applicant who is actually in breach of the agreement. That prior to the filing of this suit he had demanded from the applicant the balance of Kshs.120,000/= and accrued interest after which he would transfer the suit premises to the applicant but the applicant refused to comply. That the applicant's occupation of the suit premises was illegal and amounted to trespass.

From the foregoing, it is quite apparent that the applicant's suit is not frivolous. The court will be called upon to determine who between the applicant and respondent actually is in breach of the sale agreement. Such breach if proved will of course attract sanctions. If it is the respondent, then the applicant will be entitled to either an order for specific performance that she has prayed for or in the alternative a refund of Kshs.580,000/= with interest at 20% and compensation for the developments she has undertaken on the suit premises as prayed in the plaint. On the other hand, if it is held that it is the applicant who was in breach, then he will be entitled to orders in terms of his counterclaim. For now however and on the basis of the material placed before me, I am satisfied that the applicant has made out a prima facie case with high chances of success. She should not thus be denied the injunction sought.

It is also common ground that upon execution of the sale agreement, the applicant with the consent of the respondent entered and took possession of the suit premises and in preparation for construction of her residential house, fenced, installed water, constructed a semi permanent house, toilet and bathroom thereof. I think that it is only fair that pending the hearing and final determination of the suit, the status quo currently obtaining on the suit premises be maintained. In my view therefore, the balance of convenience tilts in favour of the applicant. I do not see any prejudice or inconvenience that may be caused to the respondent if the injunction is granted. After all he has not been in possession of the suit premises and or utilised them for the last 7 or so years since he allowed the applicant to take possession. Yes, his title to the suit premises may be cloaked by the granting of the injunction. However the injunction would not have been granted on spurious grounds. There is every possibility that the court may at the end of the day order him to specifically perform the contract. It is also possible that the court may hold that the applicant is in occupation of the suit premises as a trespasser and order for her eviction.

I think I have said enough to show that the application is merited. Accordingly I allow it with costs. An injunction shall forthwith issue in terms of prayer 1 of the application to last until the hearing and final determination of the suit.

Dated and delivered at Nyeri this 20th day of November 2008

M. S. A. MAKHANDIA

JUDGE