



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL CASE 242 OF 2007**

**1. DIMA COLLEGE LTD**

**2. MUNDIA NJERU GETERIA**

**3. GETERIA ASSOCIATES LTD.....PLAINTIFFS**

**VERSUS**

**KENYA COMMERCIAL BANK LTD.....DEFENDANT**

**R U L I N G**

The Defendant is the registered proprietor of immovable property **L.R. No. 209/3541** situated along Tom Mboya Street, Nairobi (hereinafter called the “suit property”). The Defendant was sued by the three plaintiffs by plaint dated 6<sup>th</sup> March, 2007 (amended on 28<sup>th</sup> March, 2007). The Plaintiffs’ case as set out in the amended plaint is that by two letters of offer dated 11<sup>th</sup> December, 2002 and 23<sup>rd</sup> November, 2004 the Defendant offered to lease to the 2<sup>nd</sup> Plaintiff certain separate portions of the premises standing on the suit property for terms of 6 years, the first lease to run from 1<sup>st</sup> February, 2003 and the second lease to run from 1<sup>st</sup> January, 2005, both with options to renew at expiry. The 2<sup>nd</sup> Plaintiff was to conduct in the premises the business of a “training college”. The rent payable on each lease would be KShs. 124,980/00 per month. The 2<sup>nd</sup> Plaintiff duly accepted the offer and took possession of the premises.

It is further pleaded that on 20<sup>th</sup> June, 2005, the 1<sup>st</sup> Plaintiff was incorporated with the object of acquiring the business carried on in the premises by the 2<sup>nd</sup> Plaintiff. In or about July, 2005, the 2<sup>nd</sup> Plaintiff assigned his proprietary interests in the business, including the tenancies, to the 1<sup>st</sup> Plaintiff.

The Plaintiffs’ main complaint is that the Defendant is now selling the suit property to a third party without giving the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs an option to purchase the same, despite certain representations made to them by the Defendant. The Plaintiffs therefore want the court to declare that the Defendant is estopped from selling or otherwise disposing of the suit property to any other person without first giving the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, either jointly or severally, the first option to purchase it. They also want an order to compel the Defendant to sell the property to the 1<sup>st</sup> Plaintiff for a consideration of KShs. 65,000,100/00. Other reliefs have also been sought.

The plaint was filed on 6<sup>th</sup> March, 2002. On the following day the Plaintiffs filed an application by chamber summons dated 6<sup>th</sup> March, 2007 which was then amended a day later. They sought, in effect, a

temporary injunction to restrain the Defendant from selling or otherwise disposing of the suit property to any person pending hearing and determination of the suit, or pending expiry of the “1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs’ tenancy on 31<sup>st</sup> December, 2011”. In the alternative a mandatory injunction was sought to compel the Defendant “to sell, transfer or otherwise dispose of the suit property subject to the leases contained in the letters dated 11<sup>th</sup> December, 2002 and 23<sup>rd</sup> November, 2004”.

That is the application under consideration in this ruling. It is supported by the affidavit of the 2<sup>nd</sup> Plaintiff sworn on 6<sup>th</sup> March, 2007 to which various documents are annexed. The grounds for the application stated on the face thereof include:-

1. That the 1<sup>st</sup> Plaintiff is the sole tenant in the suit premises occupying 51% thereof.
2. That the 1<sup>st</sup> Plaintiff’s tenancy is based on the letters of offer dated 11<sup>th</sup> December, 2002 and 23<sup>rd</sup> November, 2004 addressed to the 2<sup>nd</sup> Plaintiff by the Defendant.
3. That it was verbally represented to the 1<sup>st</sup> Plaintiff by the Defendant that it would have the first option to purchase the suit property.
4. That the Defendant is selling the suit property to a third party in breach of the said representation.
5. That if allowed to proceed, the sale to a third party will “lead to unilateral rescission, termination or compromise of the 1<sup>st</sup> Plaintiff’s tenancy”.

The Defendant has opposed the application as set out in the replying affidavit filed on 16<sup>th</sup> March, 2007. It is sworn by one GEORGE KENGA, the head of facilities and property management of the Defendant. Grounds of opposition emerging therefrom include:-

1. That the letter of offer dated 11<sup>th</sup> December, 2002 was accepted on behalf of Dima College while letter of offer dated 23<sup>rd</sup> November, 2004 was accepted on behalf of Dynamic Institute of Management and Accountancy Limited (Dima Ltd.).
2. That though the Defendant indicated it did not mind the lease being drawn in the name of Dima College Ltd. (1<sup>st</sup> Plaintiff) as lessee, this was to be upon certain conditions, which conditions the 1<sup>st</sup> Plaintiff ultimately did not accept. No lease therefore resulted between the 1<sup>st</sup> Plaintiff and the Defendant.
3. That the Defendant has never allowed the 1<sup>st</sup> Plaintiff to occupy the suit premises, and the tenant in the premises has been Dima Limited.
4. That all rents have been paid by Dima Limited and not by the 1<sup>st</sup> Plaintiff.
5. That the 1<sup>st</sup> Plaintiff is not entitled to enforce the terms of the letters of offer because it was not a party to those letters.
6. That there is no tenancy relationship between the 1<sup>st</sup> Plaintiff and the Defendant; the 1<sup>st</sup> Plaintiff therefore has no *locus standi* to sue the Defendant.
7. That the 2<sup>nd</sup> Plaintiff was never promised by the Defendant that he would be given the first priority to purchase the suit property.
8. That the Defendant is not under any legal obligation to sell the suit property to the Plaintiffs or any

other person.

9. That in view of section 109 of the Transfer of Property Act, 1882, of India, even if the 1<sup>st</sup> Plaintiff was truly a tenant of the Defendant in the premises, its rights would not be prejudiced merely by change of ownership of the property.

The Defendant filed a statement of defence on 21<sup>st</sup> March, 2007; the same defences as set out in the replying affidavit are raised. The Plaintiffs filed a further affidavit on 20<sup>th</sup> April, 2007 pursuant to order of court.

I have considered the submissions of the learned counsels appearing. No authorities were cited. This being an application for temporary injunction pending disposal of the suit, the Plaintiffs must satisfy the following principles:-

1. They must demonstrate a prima facie case with a probability of success.
2. They then must demonstrate that they stand to suffer irreparable loss unless the order sought is granted.
3. If the court is unable to decide the application upon those two principles, it will decide it on a balance of convenience.

It is necessary to consider the case of each Plaintiff separately. I will start with the 3<sup>rd</sup> Plaintiff, GETERIA ASSOCIATES LIMITED. The 3<sup>rd</sup> Plaintiff has not pleaded any relationship between it and the Defendant. Nor has it pleaded that it is in possession or occupation of any portion of the suit property or conducting business thereon. It has not pleaded that it was the highest bidder for purchase of the suit property when the Defendant offered it for sale. The 3<sup>rd</sup> Plaintiff has not pleaded any interest whatsoever in the suit property. It is difficult to understand why it sued the Defendant. The amended plaint, as far as it concerns the 3<sup>rd</sup> Plaintiff, does not disclose any cause of action at all against the Defendant. Its application therefore must fail.

What about the 2<sup>nd</sup> Plaintiff, MUNDIA NJERU GETERIA? The two offers of tenancy by the Defendant were made to the 2<sup>nd</sup> Plaintiff. He accepted the offers and indeed took possession of and occupied the demised portions of the premises and conducted business therein. Although the letters of offer provide for six (6) year leases, no leases were executed and registered as required by section 40 of the Registration of Titles Act, Cap. 281. Therefore, no six-year leases resulted. The issue as to what kind of tenancies resulted in the circumstances will have to await trial of the action. It will suffice for the purposes of the present application that the two letters of offer, which were accepted by the 2<sup>nd</sup> Plaintiff, did not create any six-year tenancies or leases for the simple legal reason that no leases were executed and registered as required by law.

It will also be noted that the two letters of offer did not contain any option for the 2<sup>nd</sup> Plaintiff to purchase the suit property. The 2<sup>nd</sup> Plaintiff has sought to rely upon an alleged verbal representation to that effect. But there is no evidence of such representation before the court at this stage. It is in any case doubtful that a verbal representation would create a legal obligation on the part of the Defendant to first offer the suit property to the 2<sup>nd</sup> Plaintiff to purchase.

There is another issue. By his own pleadings, the 2<sup>nd</sup> Plaintiff assigned his two tenancies to the 1<sup>st</sup> Plaintiff. So, what rights does he still retain that he could enforce against the Defendant in this suit? He is no longer in occupation or possession of the premises, having surrendered them to the 1<sup>st</sup> Plaintiff. He no longer conducts business in the premises, having transferred the business to the 1<sup>st</sup> Plaintiff. It matters not that he is a director of the 1<sup>st</sup> Plaintiff. It would even not matter if he were a shareholder of the 1<sup>st</sup> Plaintiff. The 1<sup>st</sup> Plaintiff is a limited liability company duly incorporated; it has its own legal existence

and personality, separate from the 2<sup>nd</sup> Plaintiff.

There is no evidence that the 2<sup>nd</sup> Plaintiff was the highest bidder for the suit property when the Defendant offered it for sale; indeed it is not his case that he was. So, on what legal or factual basis can he assert that the Defendant was obliged to sell the property to him? On what legal or factual basis can he assert that the Defendant is obliged to sell the suit property to him at a price that he has determined (KShs. 65,000,100/00) when the Defendant received an offer of KShs. 100,000,000/=?

After considering the pleadings and all matters placed before the court at this interlocutory stage, I am not satisfied that the 2<sup>nd</sup> Plaintiff has demonstrated a *prima facie* case with a probability of success.

I will now consider the case of the 1<sup>st</sup> Plaintiff, DIMA COLLEGE LTD. The issue whether or not assignment of the tenancies to the 1<sup>st</sup> Plaintiff by the 2<sup>nd</sup> Plaintiff amounted to illegal subletting of the same must await trial of the action. But for the purposes of the present application the issue is probably moot. The Defendant has conceded that it had no objection to the 1<sup>st</sup> Plaintiff being its tenant in place of the 2<sup>nd</sup> Plaintiff. They entered into correspondence regarding terms and conditions of the intended lease(s). Ultimately, the terms and conditions proposed by the Defendant were not accepted by the 1<sup>st</sup> Plaintiff. It is the Defendant's case that due to this no tenancy relationship between the Defendant and the 1<sup>st</sup> Plaintiff resulted. On the other hand, it is the 1<sup>st</sup> Plaintiff's case that the Defendant accepted the assignment of the 2<sup>nd</sup> Plaintiff's tenancies to the 1<sup>st</sup> Plaintiff, and that therefore the 1<sup>st</sup> Plaintiff is the Defendant's tenant in the premises. But it will be noted that in the same pleadings (the amended plaint) the 2<sup>nd</sup> Plaintiff has asserted that he is the Defendant's tenant in the premises.

Determination of the issue whether or not the 1<sup>st</sup> Plaintiff is the Defendant's tenant in the suit premises must await trial of the action. At this interlocutory stage the material placed before the court indicates that the 1<sup>st</sup> Plaintiff is now the one in possession and occupation of the demised premises and conducting business therein. There is also evidence that the Defendant did not mind having the 1<sup>st</sup> Plaintiff as its tenant in place of the 2<sup>nd</sup> Plaintiff. It may well turn out, after trial, that the 1<sup>st</sup> Plaintiff is now the lawful tenant of the Defendant.

It is of course another matter whether the 1<sup>st</sup> Plaintiff's tenancy can defeat any of the Defendant's proprietary rights in the suit property, which include the right to sell the property to any person on a willing seller-willing buyer basis. As already seen, the letters of offer that created the tenancies in favour of the 2<sup>nd</sup> Plaintiff did not contain any clause offering the 2<sup>nd</sup> Plaintiff the first option to purchase the property. I have also already found that there is no evidence of the alleged verbal option given to the 2<sup>nd</sup> Plaintiff, and even if there was, it is doubtful that it could create a legal obligation for the Defendant to give to the 2<sup>nd</sup> Plaintiff the first option to purchase the property.

Again, just as in the case of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs, there is no evidence that the 1<sup>st</sup> Plaintiff was the highest bidder for purchase of the property. So, it must be asked of the 1<sup>st</sup> Plaintiff also, on what legal or factual basis can it assert that the Defendant is obliged to sell the suit property to it or the 2<sup>nd</sup> Plaintiff, or first offer it to them to purchase?

Finally, it has been submitted for the 1<sup>st</sup> Plaintiff that transfer of the property by the Defendant to a third party will adversely affect its tenancy. This does not appear to be so in light of the provisions of section 109 of the **Transfer of Property Act, 1882 of India**. Any sale of immoveable property, in any case, is made subject to any encumbrances on the land, and existing tenancies are such encumbrances.

Upon consideration of the matters now before the court, I am not satisfied that the 1<sup>st</sup> Plaintiff has demonstrated a *prima facie* case with a probability of success.

None of the Plaintiffs has satisfied the first principle for the grant of temporary injunction. I therefore

need not consider the second principle (substantial loss). In the event the application for temporary injunction must fail. By the same reasoning the alternative prayer for mandatory injunction must also fail. The amended chamber summons dated 7<sup>th</sup> March, 2007 is hereby dismissed with costs to the Defendant. If there were any interim orders, the same are hereby discharged. Those shall be the orders of the court.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2007**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2007**