

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1389 OF 2005

JOHN NICHOLAS ONDEKO.....PLAINTIFF

VERSUS

JASWANT SINGH DHINGRA & 3 OTHERS.....DEFENDANT

RULING

The application before me is the Chamber Summons dated 17.11.05 and filed in court on the same date. It is expressed to be brought pursuant to Section 3A, 63(e) of the Civil Procedure Act, Order 39 Rules 1, 2, 3, and 9 Civil Procedure Rules. The plaintiffs seeks orders 3, 5 and 7 of the Chamber Summons which are as follows:

3. The defendants their agents, servants and/or employees be restrained from receiving, collecting, expending and keeping any rental income to the suit property until the hearing and determination of this suit and/or until further orders of this court.

5. That the 4th defendant be directed to deposit all the rental income due and payable to the defendants pursuant to the lease agreement dated 30.9.05 or any other lease arrangement over the suit property into an interest earning account of the parties and / or plaintiff's and defendants advocates until the hearing and determination of this suit or further orders of this court.

7. The defendants, their agents, servants and or employees be restrained from alienating, wasting, damaging, parting with possession, selling, mortgaging, disposing of or transferring the suit property until the hearing and determination of this suit or further orders of this court.

The grounds upon which the application is founded are on the face of the application and the application is also supported by the affidavit of John Nicholas Odeko the plaintiff/Applicant herein. The applicant is represented by Mr. Kilukumi of Kilukumi and Company Advocates.

The application was opposed and the 1st Defendant Respondent, Jaswant Singh Dhingra swore an affidavit in reply. The Defendant/Respondent is represented by Mr. Ndege of S. Ndege and Company Advocates.

The dispute herein arises from a sale agreement dated 7.9.00 and a supplementary sale agreement of 14.9.04 in respect of the Land parcel No. LR 209/378/20 (Plot F). The purchaser was the plaintiff where as the vendors were the defendants. The suit premises initially belonged to one Pathan Begum who died testate on 5.6.84 bequeathing her estate to her husband, Noor Alam Khan. Noor Alam Khan died intestate on 12.11.00 and in succession cause no. 81/94 the administrators of the deceaseds estate were Manis Alam Khan, Mushir A. Khan, Khurshed A. Khan Maud Khan and Tanvir Khan.

The suit property was entrusted to Maud Alam Khan (3rd Defendant) who resides in United Kingdom, who donated a power of attorney to his wife Pamela Alam Khan, 2nd defendant who was authorized to sell the property. The 1st defendant is a donee of a special power of attorney donated by 3rd defendants who is the equitable proprietor of the suit property.

The plaintiff and 2nd defendant executed sale agreements dated 7.8.00 where 2nd defendant acted as

agent of 3rd defendant and was paid Ksh 1,525,000/= as refundable deposit and a further Kshs 270,000/=. The plaintiff deponed that it was a term of the contract that in the event the sale was not completed due to the default of the vendor, the purchaser would be entitled to a refund of the money paid as deposit plus interest at Standard Chartered Bank rates. A supplementary sale agreement was executed on 14.1.04 whose purport was to cause the purchaser to cause subdivision of the plot F. The plot was not excised because the defendants failed to produce the original title documents as requested by Nairobi City Council and Commissioner for Lands. Despite issuance of notice of completion on 28.1.05, the defendants did not complete the transaction and that prompted this suit where the plaintiff claims a refund of the sum paid. It is the plaintiff's contention that the suit premises were leased out on 30.9.05 and 4th defendant receives rent there from. The property has also been offered for sale and that is why the plaintiff wants his financial interest safe-guarded to ensure that his money is refunded and hence the prayers sought.

The defendants do not deny the ownership of the property and how it is managed. The defendants also acknowledge the two sale agreements, save that it is contended that it is the plaintiff who caused the sale agreement to be terminated when he failed to carry out sub division of the plot within 30 days from 14.9.04 when the supplementary agreement was made. A copy of the title deeds was supplied to the plaintiff to facilitate the excise of the plot but he did not do so and he is therefore not entitled to a refund of the 10% deposit.

As regards the sum of kshs 270,000/= the defendants argue that the plaintiff is not entitled because the plaintiff had indicated that he wanted to rent the suit premises while awaiting the completion of the sale, but later declined to take up the premises and that the sum of ksh 270,000/= was for rent for the period the plaintiff failed to occupy the suit premises. Counsel suggests that if the plaintiff wants a conservatory order they can lodge a caution as there is no danger of the property being sold since it has now been leased out. The defence counsel urged that the plaintiff has failed to demonstrate that he has a prima facie case with a high chance of success or that he will suffer irreparable damage not capable of being compensated for in damages or that the balance of convenience tilts in his favour.

After considering the application, affidavits, documents annexed and the rival arguments of the counsels, I find as a fact that the equitable owners of the suit property are out of the jurisdiction of this court. Having intended to sell the property there is no evidence that they intend to come back to this country.

There is no doubt that the plaintiff did pay Kshs 1,525,000/= towards the purchase of the suit property and a further Kshs 270,000/= It is not clear what the 2nd sum of Ksh 270,000/= was for. The issues to be determined later at the hearing is whether the plaintiff is entitled to a refund of the Ksh 1.5 million and the Kshs 270,000/= and whether it was the plaintiff who is in breach of the sale agreement, or is it the defendant. These issues can not be dealt with at this interlocutory stage.

The Plaintiff paid this money way back on 7.9.00, over 5 years ago. Now that there is a dispute as to the refund, it is likely to take a long time before the plaintiff will know whether or not he is entitled to this money. The fact that the plaintiffs are holding the Kshs 1.5 million paid by the plaintiff to them in furtherance of a sale agreement does in itself demonstrate that the plaintiff has a prima facie case with high chances of success. As earlier noted, it is only at the full hearing that the court will determine whether or not the plaintiff defaulted in performance of his part of contract, that he is not entitled to a refund.

The owners of the suit property are outside the jurisdiction of this court. Rent is being received by the 1st defendant who uses it for his own upkeep. In the event that the property is sold or 1st defendant parts with possession, the plaintiff will not be compensated in the event of a judgment being entered in his favour at the conclusion of this case. The plaintiff would suffer irreparably as he may not get access to the owners of this property.

The defendants do acknowledge that the plaintiff can have a conservatory order save that they suggest that it should be in the form of a caution or caveat. Though this may have been a way of

preserving the estate, yet I find that at the end of it, if the rents are left to be consumed by the defendants, the plaintiff may be left without a remedy as it may be put out of reach or have difficulty to realize it. The 1st defendant argues that they depend on the rent for up keep meaning that they are impecunious and not able to pay if called upon to. I do agree with the applicant that a conservatory order should be issued to protect the interest of the plaintiff and I hereby grant prayers 3, 5 and 7 save that in respect of prayer 5, I will vary it so that only some of the rents i.e Ksh 75,000/= be deposited in an interest earning account of both counsels for the plaintiff and defendants every month pending the hearing and determination of this suit. Because of the nature of this suit, the court is of the view that the parties should consider fixing it for hearing on a priority basis.

Costs be in the cause.

Delivered and Dated this 10th day of February 2006

R. WENDOH

JUDGE