



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 186 of 2006

WESTERN PUMPS LIMITED
PLAINTIFF

VERSUS

JOSEPH WAINAINA IRAYA T/A QUEEN CHICK INN.....1ST
DEFENDANT

H.E. DANIEL ARAP MOI.....2ND DEFENDANT

R U L I N G

The Plaintiff has brought this application pursuant to the provisions of Order 39 rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

Through the application the plaintiff seeks an injunction to restrain the defendants from transferring, subdividing, selling or in any other way dealing with L.R. No. ELDORET MUNICIPALITY/BLOCK 15/239, pending the hearing and determination of the suit.

It is common ground that the said property is registered in the name of the 2nd Defendant .

The Plaintiff says that there was an agreement for the sale of that property, as between the 1st and the 2nd defendants, for KShs. 21.4 million. And, it is the plaintiff's contention that the 1st defendant was purchasing the property for himself together with the plaintiff, as a joint venture. Thereafter, the property was supposed to have been sub-divided by the plaintiff and the 1st defendant, for sale to third parties.

It is the plaintiff's case that it contributed its share of the purchase price, being KShs. 2.0 million. Out of that sum, the plaintiff says that it paid KShs. 1.0 million by a banker's cheque; and a further sum of KShs. 1.0 million was paid in cash.

Subsequent to the payments, the plaintiff later learnt that the 1st defendant had presented himself to the 2nd defendant, as the sole purchaser of the property in issue. It is also submitted that the 1st defendant had presented himself as being a limited liability company, which he was not.

Having obtained possession of the suit property, the 1st defendant is said to have taken steps to sub-divide it, with a view to selling-off the plots created during the sub-division. Initially, the actions of the

1st defendant were said to have been unknown to the plaintiff.

Indeed, the plaintiff also says that unbeknown to him, the 2nd defendant had become dissatisfied with the pace of the sale transaction, and had therefore commenced new efforts to sell the suit property to another party, at a higher price.

It is the Plaintiff's case that as soon as it became aware of the two new developments cited above, it became imperative that this suit be filed. And, the plaintiff also says that it felt the need to seek an interim injunction, with a view to safeguarding the suit property pending the hearing and determination of the suit. It was for the reason that the application dated 10th April 2006 was instituted.

The affidavit in support of the application was sworn by Mr. Stephen Karobio, the Managing Director of the plaintiff. In the said affidavit, the deponent explains that on or about 10th March 2006, he was approached, over the phone, by the 1st Defendant, with information that the 2nd defendant was selling the suit property. At that time, Mr. Karobio was in Nairobi, but he then travelled to Eldoret, in response to the request of the 1st defendant.

Once Mr. Karobio (hereinafter cited as the deponent) got to Eldoret, he conducted an official search at the Lands Registry, which confirmed that the suit property belonged to the 2nd defendant.

The deponent also says that he conducted inquiries at the offices of the Municipal Council of Eldoret, which revealed that the suit property had arrears of rates amounting to KShs. 11,020,038/=, as at March 2006. In that regard, the plaintiff has exhibited a Rates Demand Notice dated 5th April 2006, by which the outstanding rates was being demanded.

Armed with the pieces of information obtained from the Lands Office and the Municipal Council of Eldoret, the deponent met the 1st defendant, who informed him that the suit property was being sold, through the organisation and facilitation of one Caleb Kositany. Meanwhile, the deponent also learnt that the 2nd defendant's advocates, for purposes of the sale was the firm of Sunkuli & Company Advocates.

A meeting was then convened at Sirikwa Hotel, whereat the deponent met with the 1st defendant and Mr. J. Sunkuli advocate. The meeting is said to have resolved that KShs. 1.0 million would be paid as "facilitation fees", which was to be shared between Mr.

Sunkuli and Mr. Caleb Kositany.

The deponent was also persuaded that Mr. Sunkuli needed KShs. 100,000/=, for use to travel to the 2nd defendant's home. In order to enable Mr. Sunkuli travel, the deponent says that he withdrew the money from his bank account.

The other terms of the agreement are said to have been as follows:

- (a) Purchase price KShs. 21,400,000/=
- (b) Deposit KShs. 3,500,000/=

Out of the deposit required, the deponent was to raise KShs. 1.0 million, whilst the 1st defendant was to raise KShs. 2.5 million, so says the plaintiff.

The deponent says that he obtained the necessary bankers cheque for Kshs. 1.0 million, whilst the 1st defendant obtained a banker's cheque for Kshs. 2.5 million. However, according to the deponent, he was later persuaded to replace the banker's cheque for Kshs. 1.0 million, with cash amounting to Kshs. 900,000/=. That cash amount was handed over to Mr. Sunkuli and Mr. Kositany,, says the deponent.

Meanwhile, as between the plaintiff and the 1st defendant, there was an agreement that they would incorporate a new company, in the name of Townview Estate Limited. The said incorporation, according to the plaintiff, was to have taken place on 15th March 2006.

However, when the Plaintiff met the 1st defendant for purposes of incorporating the new company, the 1st defendant became unwilling to proceed with the incorporation.

It is then that the plaintiff learnt that the 1st defendant had incorporated his own company, whose name was inserted in the Agreement of Sale, for the suit property.

Meanwhile, the 1st Defendant is said to have sub-divided the suit property into 90 or more plots, which would fetch, Kshs. 700,000/= each. In effect, the sale of all the plots would realise a sum in excess of Kshs. 100,000,000/=

The plaintiff has exhibited an Agreement for sale between the 1st Defendant and “**Lengo Self Help Group – 2003**”, which shows that the purchase price for one plot was Kshs. 700,000/=

Notwithstanding the steps being undertaken by the 1st Defendant, in selling the plots created from the sub-division of the suit property, the 2nd defendant is also said to be making efforts to sell the same suit property to Rai Ply-Woods (K) Limited.

Meanwhile, the 2nd defendant is said to have presented the plaintiff’s banker’s cheque, to his bankers Messrs Transnational Bank, Nairobi. The said presentment was said to have been made on 17th March 2006, following which the banker’s cheque was duly paid.

From the foregoing facts, as set out by the plaintiff, it is convinced that it has made out a prima facie case with a probability of success. The plaintiff says that that is so. The plaintiff also submits that if the orders sought were not granted, it would suffer irreparable loss which could not be compensated in damages. Therefore, the court was asked to grant the injunctive reliefs sought, so as to safeguard the suit property until the suit was heard and determined.

However, the 1st defendant holds the view that the application was totally lacking in merit. The first reason for that submission was that the application was founded on a defective suit, which could not succeed.

The 1st defendant pointed out that the plaintiff was trying to enforce a contract for land, yet the alleged contract was un-written.

That state of affairs was said to be contrary to the provisions of the Law of Contract Act, which requires any contract for the disposition of an interest in land, to be in writing.

In this case, the plaintiff did exhibit an Agreement for Sale dated 15th March 2006. That agreement was clearly in relation to the suit property, L.R. No. ELDORET MUNICIPALITY/BLOCK 15/239.

The parties to the Agreement were **H.E. DANIEL ARAP MOI and QUEECHIC INN LTD.**

However, the Agreement was not witnessed, nor was it registered. Also, the purchaser, Queenchic Inn Ltd, has not affixed its common seal to it. In my considered view, those shortcomings give rise to some doubts about the efficacy of the Agreement.

The 1st defendant also submits that as the payments allegedly made to the 2nd defendant’s advocates were not incorporated into the Agreement, the payments were unproven.

I note that at clause 3, the purchase price of KShs. 21,450,000/= is cited. Then, there is an

acknowledgement of the sum of KShs. 3,500,000/= which was paid by a banker's cheque, and a further sum of KShs. 500,000/= which was paid by cash. It is therefore true that the further payments which were allegedly remitted by Mr. Karobio to Mr. Sunkuli Advocate, are not reflected in the Agreement.

What do I make of that omission? Does it constitute a failure to provide proof of payment, as contended by the 1st defendant?

To my mind, I think that the mere omission from the Agreement, of information about some payments, would not necessarily imply that the said payments were unproven. I say so because the person who has sworn the affidavit, stating that he made the payments did not assert that the said payments were reflected in the Agreement for sale. Had he so stated, then the omission would have been significant.

In this case Mr. Karobio has deponed that he did make payments. As that statement was made under oath, this court would like to believe that it is true, until and unless there is other evidence which either proves that it is not, or otherwise casts serious doubts about its efficacy.

However, the person who is said to have been given the money has not sworn any affidavit to deny receipt thereof. Therefore, even though the 1st defendant may wish to craft submissions to try and disprove the contents of Mr. Karobio's affidavit, the said submissions cannot, by themselves, dislodge the statements which were made under oath.

At this interlocutory stage, the applicant may be deemed to have provided sufficient evidence, by way of his affidavit, to the extent that the contents of such an affidavit are not controverted.

Reverting to the Agreement for sale, it is clear that the plaintiff is not party to it. Therefore, I do accept the 1st defendant's contention to the effect that, at best, the plaintiff appears to be asking this court to enforce a Memorandum of Understanding between it and the 1st defendant.

And, on his part, the 2nd Defendant submitted that the application failed to meet the conditions for the grant of an interim injunction, as laid down in the celebrated decision of **GIELA V CASSMAN BROWN & CO. LTD [1973] EA 358**.

First, the 2nd defendant emphasized the fact that the plaintiff was not Mr. Stephen Karobio. Of course, that is the correct position, as the plaintiff is Western Pumps Limited. That point is very significant because the plaintiff appears to have treated itself as being synonymous with Mr. Stephen Karobio. I say so because in the affidavit in support of this application, Mr. Karobio repeatedly stated that it is he who talked to the 1st Defendant; travelled from Nairobi to

Eldoret; held meetings with Mr. Sunkuli and the 1st defendant; and issued payments to the 2nd defendant, through Mr. Sunkuli.

However, a perusal of the plaint reveals that those actions which were allegedly carried out by Mr. Karoboi, were attributed to the plaintiff. That implies that the plaintiff equated itself to Mr. Karoboi, and vice versa. But, it must always be remembered that even though Mr. Stephen Karoboi was the Managing Director of the plaintiff, the two "**persons**" were distinct legal entities.

Insofar as the plaintiff was not party to the Agreement for Sale dated 15th March 2006, the 2nd defendant would be justified to classify the said company as a meddler or a stranger to that agreement. The Agreement does not therefore support the plaintiff's case as pleaded.

Similarly, even though the 2nd defendant did confirm receipt of Kshs. 4,000,000/=, I do not think that that alone would provide a contractual relationship between the plaintiff and the 2nd Defendant. First, the acknowledgement is contained in the Agreement for Sale itself. But therein, the money is deemed to

have been received from the purchaser, Queenchic Inn Limited.

In any event, the plaintiff has not yet exhibited any evidence to show that it is the one which paid KShs. 3,500,000/= to the 2nd Defendant.

After the defendants' submissions, the plaintiff's advocate submitted that Mr. Sunkuli, Advocate, should not have addressed this court, as counsel. It was said that all officers of the court have a duty to conduct themselves in a manner that was beyond reproach.

There is absolutely no doubt in my mind that advocates, in their capacity as officers of the court, need to always conduct themselves in such manner as would be beyond reproach.

In that regard, if an advocate is likely to be a witness in any matter, he should take all necessary steps to avoid a situation which could result in his playing the role of an advocate in the said matter.

Bearing in mind that policy, it is to be noted that from the outset, Mr. Stephen Karoboi deponed that he made payments directly to Mr. Sunkuli. In the circumstances, if the defendants are to deny receipt of the money or any part thereof; or if they were to deny that the said payments were made in relation to the Agreement for Sale of the suit property, Mr. Sunkuli is a probable witness. Therefore, it would be best that Mr. Sunkuli should not participate in these proceedings as an advocate for any of the parties.

But, it is to be noted that the issue of Mr. Sunkuli's involvement in the case, as an advocate for the 2nd Defendant, was only raised after he had concluded his submissions on the application. By raising the matter so late in the day, the plaintiff made it difficult for the court to preclude Mr. Sunkuli from the proceedings, for if I were to shut out the submissions already on record, that would be extremely prejudicial to the 2nd defendant. I therefore decline to expunge Mr. Sunkuli's submissions from record. However, it is directed that Mr. Sunkuli must not continue to appear as counsel for any of the parties to these proceedings.

In the meantime, it is to be noted that Section 3 (3) of The Law of Contract Act provides as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless –

(a) the contract upon which the suit is founded –

(i) is in writing;

(ii) is signed by all the parties thereto;

and

(iii) incorporates all the terms which the parties have expressly agreed in one document; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

Pursuant to those statutory provisions, it is my considered view that the plaintiff has failed to prove that it has a prima facie case with a probability of success. It does not have any contract in writing as between itself on the one hand, and the defendants on the other hand. It would appear wholly inadequate for the plaintiff to seek to obtain an order for specific performance of a contract between the 2nd defendant and Queenchic Inn Limited. In any event, even that agreement was not attested by any witnesses.

Secondly, the plaintiff has not demonstrated that it would suffer irreparable loss or damage, if no injunction is granted, as prayed. He has paid a specific amount of money. If the 2nd defendant was held

to have been wrong in receiving the money, without giving to the plaintiff consideration for the same, I do not see any difficulty in the

plaintiff receiving reimbursement together with interest thereon. There has been no suggestion that the 2nd Defendant, who the plaintiff believes should earn about KShs. 100 million, from a sale of the plots curved out of the suit property, would be unable to compensate the plaintiff.

Finally, I hold the view that the balance of convenience tilts in favour of the defendants. The reason for that is that plaintiff has at no time had possession of the suit property. Meanwhile, the said property has been sub-divided and is being sold to third parties. I see no good reason to curtail the sale of the plots; yet such sales would raise sufficient funds to compensate the plaintiff, if it were to finally succeed in this case. In saying this, I have taken into account the plaintiff's own concession that the intention of buying the suit property was to sub-divide it for purposes of sale to third parties. In effect, the property was to have been converted into money, immediately after, sale by the 2nd defendant. The process of converting the plots into money is ongoing. There is no need to curtail it.

For all those reasons, I find no merit in the application. It is therefore dismissed, with costs to the defendants.

Dated and Delivered at Nairobi this 20th day of June 2006.

FRED A. OCHIENG

JUDGE

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