



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 738 of 2003**

**ARTHUR K. APUNGU ..... PLAINTIFF**

**VERSUS**

**M/S JUSTNICE LIMITED**

**JUSTRY PATRICK L. NYABERI**

**ROSE M. LUMUMBA ..... DEFENDANTS**

**R U L I N G**

This Chamber Summons herein, dated 18/11/03, under Order 39 rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of Cap.21, Laws of Kenya, seeks orders that: 1. - already spent. 2. Injunction restraining the Defendants from threatening the Plaintiff/applicant with eviction from the suit premises; selling or conveying or transferring Title Number Soy/Soy Block 10 (Navillus) 1 until the final determination of the suit herein.

3. Prohibition of all further registration or change of registration of the above land until further orders of this court. 4. Declaration that the purported transfer of the land herein by the Defendants to any third party is null and void, until the determination of this suit. 5. - already spent. 6. - already spent. 7. The injunctive order be served on the O.C.S. Soy Police Station to assist and supervise enforcement of the said orders. 8. Costs of this application.

The application is supported by the affidavit of Arthur K. Apungu of even date and on the grounds, inter alia, that: the transaction which is the subject matter of the suit is tainted with fraud, illegality, misrepresentation and breach of statutory provisions; the Defendants intend to evict the Plaintiff and sell the property to third parties, which actions would cause the Plaintiff irremediable loss and injury; that the intended actions are in breach of the agreement of sale; the threats are intended to put pressure on the Plaintiff to pay more sums than agreed in the contract of sale; the object of the suit herein would be defeated if this application is not granted. There is also a further affidavit by the applicant, dated 19/12/03, which among other things attaches documents in support of the matters deponed in the earlier affidavit. There was a supplementary affidavit, by the applicant, of 19/12/03.

In opposition, the Defendants, through an Affidavit by J.P. Lumumba Nyaberi, 2nd Defendant and Director of the 1st Defendant and husband to the 3rd Defendant, dated 8/12/03 aver, inter alia, that the transactions complained of in the suit were conducted by the 1st Defendant; that the 1st Defendant did not sign and seal the agreement because the agreement did not reflect the terms discussed by the parties; that even if the agreement were valid, the Plaintiff never paid the balance of the purchase price; that the Defendant returned the deposit by the Plaintiff on 8/4/03 by a cheque, though registered mail, which has not been returned to the Defendant; that the agreement was formally rescinded and the land subsequently

sold and transferred to a third party, and hence the application is mischievous as the purported cancellation of the transfer could only be done by the court not the Land Registrar.

Upon careful perusal of the pleadings in this application, and consideration of the submissions by counsel for both parties, I have reached the following findings and conclusions. I begin by clearing a legal misconception which is that whereas Defendants Nos.2 and 3 might have even negotiated the sale transaction or even signed the correspondence between the Plaintiff and the 1st Defendant or the 1st Defendant and the third party, the transactions are those of the 1st Defendant, limited liability body with its separate legal existence from those of its directors and or officers. Accordingly, the suit, and by extension this application is against the 1st Defendant.

Secondly, the documentary evidence in the pleadings, and annexures, thereto, show that there was a legally binding Sale Agreement between the Plaintiff and the 1st Defendant for the purchase of the suit property. The purported attempts to rescind that agreement by the Defendant, and the effort to sell the same piece of land to the third party did not follow both the law and violated the terms of the Sale Agreement between the Plaintiff and the 1st Defendant. This is on the basis that the Notice to Rescind was issued to the Plaintiff when the Defendant had already entered into the purported Sale Agreement with the 3rd party, in breach of the earlier Sale Agreement with the Plaintiff.

The other key point is that the purported sale and transfer by the Defendant to the third party of the suit property was, on the face of the documentary evidence before me, fraudulent and unlawful. This is apparently the basis for the cancellation of the transfer by the Land Registrar. Whether that cancellation of the transfer by the Land Registrar was legal or not, is a matter to canvassed at the full trial of the suit herein. But the legal position is that where fraud is alleged, and proved, any transaction tainted by such fraud is null and void, even where the transfer, and even the registration has taken place. It is on record, for example, that the purported transfer to the third party by the Defendant is undated. The requisite Land Control Board, a pre-requisite to a legal transfer in this type of land had not been properly obtained.

I have noted that the Defendant claims to have refunded the Plaintiff's deposit. But, without deciding the point at this stage, the Plaintiff is not duty bound to accept such refund of the deposit if he believed that the Sale Agreement has been illegally or fraudulently rescinded. On the basis of the above reasons, it is in the interest of justice that some of the key issues in this application be canvassed and dealt with at the full trial by way of oral evidence. Accordingly, for that to be meaningful, the orders prayed for herein, which in my view have the effective of preserving the status quo until the full hearing and determination of the suit should be granted, and I hereby grant the same.

All in all, therefore, this application succeeds and I grant the following orders:- 1. Order Nos.2; 3; 4; 2. Order No.7 in the application is not necessary; and compliance with the above granted orders will be enforced by the law on contempt of the court's orders in the normal manner, unless the need for police force becomes necessary. 3. Costs of this application to be by the Defendant/Respondent. 4. Hearing of the main suit to be fixed with registry on priority given the sensitivity of land matters in this country.

DATED and delivered in Nairobi, this 20th day of May 2005.

**O.K. MUTUNGI**

**JUDGE**