



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**

**Civil Case 10 of 2005**

**MARY NGONDU ..... PLAINTIFF**

**VERSUS**

**OBED MBITHI MTIWA ..... DEFENDANT**

**RULING**

The application dated 24.1.2005 is brought by way of chamber summons by the plaintiff who seeks an order of injunction to restrain the respondents by themselves, their agents or servants from leasing, letting developing or in any way interfering with plot No. Matungulu/Kyaume 1886 pending hearing determination of this suit.

Severally the applicant seeks an order of mandatory injunction directing the respondent to transfer title of plot No. Matungulu/Kyaume/1886 which is now held by Kenya Commercial Bank Tala Branch to the applicant or in the alternative the court do effect the transfer of the plot to the applicant.

Lastly the applicant asks for costs. The application is expressed to be brought under Order 39 Rules 1, 2, 3 Civil Procedure Rules, sections 3 and 3a Civil Procedure Act and all other enabling provisions of law. The grounds upon which the application is based are in the body of the application and supported by an affidavit sworn by the applicant Mary Ng'onde on 24.1.2005 and to the affidavit were several annexures. The application was opposed and a replying affidavit was sworn by the respondent Obed Mbithi dated 18.2.2005.

The core of the dispute before court is the sale of the Matungulu/Kyuume/1886. The respondent agreed to sell and the applicant agreed to buy the said land vide an agreement dated 28.1.2000. Changes and additions were made to the agreement through two further agreements dated 4.5.2001 and 29.6.2001 (MMI). Counsel for the applicant is Mr. Mackenzie. The respondent had obtained a loan and used the title of this suit land as security. Mr. Mackenzie submitted that the parties agreed at a sale price of 1.5 million which the applicant was to pay to the Bank – Kenya Commercial Bank. The 1<sup>st</sup> agreement was amended to include developments on the land which were valued at 2.15 million bringing the total price to Kshs. 3.650 million. That Kenya Commercial Bank Tala were made aware of this transactions and gave a loan facility to the applicant to offset the balance (MM2). That the applicant has paid the respondent the full price but he has failed to sign the transfer papers despite having acknowledged that he sold the land (MM2) and he signed for all payments as per annexure MM3 in which payments were made and it was witnessed, It is further submitted that the respondent has refused to give vacant possession and instead he has rented it to a technical school. The applicant annexed photographs showing the academy which has leased the premises.

Mr. Muenda appearing for the defendant/respondent argued that the applicant failed to meet her

obligations of the agreement failing to pay the full purchase price by the completion date as agreed and the date was supposed to be 29.2.2000. That the 1<sup>st</sup> agreement did not include the movable properties as agreed at clause 7 and that to date that has not been agreed. A further agreement of 4.5.2001 was entered into which extended the validity of the 1<sup>st</sup> agreement. In the 3<sup>rd</sup> agreement of 29.6.2001 clause 1 (d) it was noted that only a portion of the respondent's land had been sold to the plaintiff/applicant whereas the defendant retained a portion and that is what the parties were agreeing on. The parties did not agree on the amount to be paid at paragraph 3 and the date for taking possession was also left blank. Mr. Muendo argued that possession would only be given after payment of the full purchase price was made and that to date the full purchase price is not made and the list annexed by the plaintiff as evidence of payment contains figures that are incorrect. It was admitted that the applicant should have annexed corresponding receipts from the Advocate who received the monies from on behalf of the respondent. The counsel further submitted that Kenya Commercial Bank who have an interest in the suit land should have been notified of the agreement and participated in transactions. It is the contention of counsel that prayers can not be granted at this stage as there will be nothing to try after the application.

Although the 1<sup>st</sup> sale agreement dated 29.1.2001 seemed to be in respect of whole plot No. Matungulu/Kyaume/1886, the 3<sup>rd</sup> agreement dated 29.6.2001 at paragraph 1 (d) did clarify what the plaintiff owned and what the respondent owned. It is on that date that the 1<sup>st</sup> agreement was amended so that the plaintiff was to pay a further 2,150,000/- for the rest of the respondent's interest in the land and improvements thereon. The total cost of the plot including improvements but excluding trees and ..... came to a total of Kshs. 3,650,000/-. It has been submitted that the plaintiff took over the payment of the respondent's loan at the bank. Indeed there is a letter from the bank dated 19.7.2001 asking the respondent to confirm the sale of his plot to the plaintiff which he did confirm and that the loan would be paid by the plaintiff. There is no further communication as to whether the bank occupied that understanding and whether the loan was paid by the plaintiff. The bank's interest having had an interest in the matter I do agree that there should be evidence from the bank confirming its acceptance and the payment of the loan thereof.

The plaintiff seemed to be relying on a loan supportably granted to her by Kenya Commercial Bank on the basis of other agreement with the respondent. The said loan agreement was annexed as MN2. It is not dated. It is not signed by all the parties. It can not be ascertained whether the loan was granted at all.

The plaintiff annexed as MN 3 a payment schedule. Most of the money was paid to the Advocates of the parties. The respondent is said to have signed that all monies had been paid which is the best evidence that the plaintiff should avail to this court its receipts or acknowledgement by the respondent of the sums paid. The respondent denies that all the sums have been paid and it was upto the plaintiff to establish that she has complied with the terms of the contract and paid all the sums.

I have looked at the last contract dated 29.6.2001, it superseded the 1<sup>st</sup> contract dated 28.1.2000 which had provided for a completion date of 29.2.2000. The last contract of 29.1.2001 does not have a completion date. At paragraph B 2 the purchaser was supposed to pay the balance of the purchase price to the vendor within 3 months after the loan was processed. The court has no idea when the loan was processed or whether the said money was ever paid within that time. The purported payment schedule shows that money was disbursed to the respondent in little bits for a period of over 2 years on 9.8.2002 to 1.3.2004. Clause B 3 provided that the purchaser would be put into possession after a certain amount was paid to Kenya Commercial Bank. The amount was not indicated. So far the court has not been told whether it was paid or not.

In Clause B 4 the vendor was supposed to give vacant possession of the premises by a date which was not agreed sometimes in 2001. In that year hardly any of the purchase price had been paid. It follows that the parties never adhered to these contracts. They have named them.

The plaintiff can not therefore claim that the respondent was required to give vacant possession when it fell due because there is no evidence as to when it did. Maybe the parties should have agreed afresh. From what has been laid before the court by the plaintiff in support of her case, there is no evidence of

when vacant possession was to be given or whether the terms of the contract were fulfilled by the plaintiff.

The plaintiff in her plaint sought only one prayer of a declaration that the court do declare the suit land as belonging to the plaintiff and defendant be compelled by the court to effect transfer. In her application she seeks prayers of interlocutory and mandatory injunction. The mandatory injunction seeks an order that the court direct the respondent to effect the transfer of the title to the applicant or the court do transfer it. From the court's observations above it is not clear whether the plaintiff has fulfilled her part of the contract for the respondent to be compelled. Besides this is an interlocutory application if the court were to grant prayer (d) compelling the respondent to transfer the suit land then there will be nothing for the court to hear after this application. The court will normally grant mandatory injunctions in the clearest of cases which the present is not and the order of mandatory injunction can not therefore issue at this stage.

The applicant has brought this application under Order 39 Rules 1, 2 and 3 seeking an order of temporary injunction as prayed in prayer (c). It seems the applicant was not sure of what he wanted. He filed this application along with the plaint. It would be expected that he would seek a permanent injunction in the main suit but she did not. Even if the prayer is granted at this stage, there is nothing to confirm at the time of the main suit. Under Rule 2, an application for injunction may be filed after commencement of the suit. Rule 2 should not have been invoked at all. It seems the applicant was not since under what provisions of law to move the court. Having filed this application with the Civil there should have been a prayer in the plaint for mention. Consequently the order for temporary injunction can not since.

Apart from the above observation, for the court to grant an order of injunction the applicant had to satisfy the principles required to be met before an order of injunction can be granted which are

1. That the applicant has a prima facie case which has high chances of success.
2. That if the order is no made the applicant to suffer irreparable loss and if the court is in doubt to decide the case on a balance probability.

This assessment of the evidence presented before this court the applicant has not established a prima facie case with high chances of success nor has she shown that she can not be compensated by way of damages. Infact in one of the laws of the contract they had a good that if the contract was frustrated the purchase price be returned to the plaintiff/applicant.

The upshot is that this application is dismissed with costs being in the cause.

Dated at Machakos this 11<sup>th</sup> day of May 2005.

Read and delivered in the presence of

**R. V. WENDOH**

**JUDGE**