



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 388 OF 2004**

DR JOSEPHAT KIPKOECH YEGO1ST PLAINTIFF

EMILY CHEPLETING YEGO2ND PLAINTIFF

VERSUS

ALLAN MUJISU1ST DEFENDANT

GIDEON AGUMBA2ND DEFENDANT

MULLY CHILDREN FAMILY TRUST

REGISTERED TRUSTEE.....3RD DEFENDANT

ALUTA HOLDING LIMITED4TH DEFENDANT

RULING

The Plaintiffs have invoked Order XXXIX Rules 1,2,3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and during submissions counsel invoked Section 52 of the Transfer of Property Act.

The prayer which was subject of argument before me was: -

“Pending the hearing and determination of this suit, an injunction do issue restraining the Defendants or any of them by themselves, their servants, agents howsoever from selling, transferring, disposing of or in any way wasting, alienating or encumbering the property Land Reference No. 1/1232 (original Number 1/246/2).”

During submission an issue was taken up by the 1st and 2nd defendant’s counsel that the aforesaid prayer was directed to the wrong property and not the one stated in the conveyance. Indeed the correct land reference reflected in the conveyance is L.R. No. 1/1239 (Original Number 1/246/9). Although counsel for the 1st and 2nd defendant used this discrepancy to show the plaintiff’s application was frivolous I am of the view that, since the correct land reference number is seen in the documents annexed to the application and particularly the conveyance, I have power to amend on the courts own motion the prayer in the application to reflect the correct land reference number which relates to this litigation.

Accordingly I do hereby amend the aforesaid prayer to reflect L.R. No. 1/1239 (Original Number 1/246/9). The same shall hereinafter be referred as the suit property.

The 1st and 2nd defendants offered for sale the suit property to the plaintiff for the consideration of kshs 5, 200,000/-. The suit property comprises of a single mansionette namely No. 8 and it was necessary

for subdivision to be undertaken to enable the aforesaid transaction to be completed. The parties agreed that the said subdivision would take a period of 6 months and during this period it was agreed that the plaintiffs would have possession of the suit property for the monthly rent of kshs 25, 000/-. By April 2000 the 1st and 2nd defendants had not completed the subdivision and the vendors counsel wrote and confirmed that as at April 2000 the plaintiffs were in possession of the said property as purchasers and no rental was payable by them.

The plaintiffs stated that during the aforesaid occupation of the property they redeveloped the property to the tune of kshs 2, 060, 000/- with the consent and approval of the 1st and 2nd defendants.

The Plaintiffs and the 1st and 2nd defendants executed a sale agreement on 28th July 2000 and the plaintiffs paid the 10% deposit of the purchase price of kshs 520, 000/-. Condition A of the said agreement provided that the completion date was to be within 90 days or 14 days of obtaining the title whichever was later.

According to the plaintiffs this was a transaction, which required letters of administration to be obtained before completion because 1st and 2nd defendants are administrators of the Estate of George Owour (deceased). The plaintiffs said that it later transpired that the property was being sold by Akiba Bank in exercise of their statutory power of sale and their consent was required. Akiba Bank did give that consent on 17th October 2001. By a letter dated 9th November 2001 the vendor's advocate gave the plaintiffs a 21 days notice to complete.

The Plaintiff's counsel argued that that notice could not take effect because the vendors were not ready to complete contrary to clause 4 (7) (b) of the Law Society conditions of sale. The plaintiff's counsel argued that the vendors had not firstly obtained the full letters of administration; secondly had not obtained clearance certificate, land rent certificate and thirdly had not obtained the removal of the prohibitory order registered against the title by the City Council of Nairobi.

I noted that even after the aforesaid completion notice the advocate for the vendor and also the advocates for Akiba Bank corresponded with the purchaser's counsel severally and the tone of those letters was as though the completion notice had not been served on the plaintiffs.

The clearance certificate was obtained by the vendors advocate on 10th April 2002 and by a letter dated 25th July 2002 the purchasers advocates were informed of the prohibitory order registered on the title of the suit property.

A re-drafted conveyance was forwarded by the purchasers advocate to the advocates of Akiba Bank.

The plaintiff's counsel said that the foregoing had taken place when on 24th April 2003 that the vendor's counsel sent a letter to terminate the agreement of sale.

The 1st and 2nd defendant sold the suit property to the 3rd defendant who before the said purchase was the plaintiff's tenant.

The plaintiffs argue that the said sale to the 3rd defendant was fraudulent, illegal, void and the plaintiffs' stands to suffer irreparable loss.

Plaintiff's counsel said that the suit property was under the G.L.A. and accordingly Section 52 of T.P.A. was applicable and therefore sought the court to invoke the doctrine lis pendens in favour of the plaintiffs.

Counsel for the 1st and 2nd defendant argued that the Plaintiffs were disentitled to obtaining the order they sought because they had dirty hands in that they fundamentally breached the same agreement they seek to enforce. He pointed out clause 6 (2) (f), which provides that a purchaser who occupies a property before completion date was not entitled to part with possession thereof without the vendors consent.

Counsel further argued that the plaintiff was guilty of laches, which defeated the equitable relief sought since they were aware of the sale of the suit property yet they waited for over a year before bringing this present action.

Counsel finally said that the plaintiff had failed to meet the requirements of injunction.

The 3rd defendant's arguments were that it had leased the suit property from the plaintiffs who it believed were the owners of the same. It subsequently entered into a sale agreement dated 29th April 2003 and the conveyance thereof was registered on 4th June 2003. The 3rd defendant stated that it purchased the suit property in good faith as a purchaser for value without notice. It denied the allegation of fraud. Its counsel finally said that it would be wrong to injunct the 3rd defendant and thereby prevent it from exercising a right over the property it purchased.

As I begin to consider this ruling I must say that there was a lot more argument by counsel, which I have not found necessary to reproduce hereof. The case is of enormous importance to the opposing parties where one side says the sale of the suit property was in breach of the agreement and was tainted with fraud and on the other side the party says it purchased the property without notice for value. As much as I have been bombarded with a lot of facts I believe I ought to keep in perspective the holding of the case of **MBUTHIA V JIMBA CREDIT FINANCE CORPORATION & ANOTHER (1988) K. L. R. I**, which is in the following terms: -

“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each side's proposition. The lower court judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits.”

I have weighed the evidence presented before me in regard to the completion notice and the argument that the vendors had by implication extended the agreement and I have in that regard taken into account the provisions of clause 4 (7) (9) of the law societies conditions of sale.

I have also considered the plaintiff's authorities and I do wish to specifically refer to the case of **MAWJI – V – U.S. INTERNATIONAL UNIVERSITY AND ANOTHER (1976) KLR** page 199.

“Until the court is able to determine the issue both justice and the equities in the case demand that the status quo be preserved so that if the plaintiff succeeds, he will not be left with an empty victory, the just fruits of which he cannot realize; and justice would be defeated.”

The application in the said case was brought under Section 52 T.P.A.

Indeed the court can appreciate the argument by the plaintiff that in making the present application the plaintiff seeks the preservation of status quo to ensure if they succeed in this action they will not be left with an empty victory.

The book of Mulla '*The Transfer of Property Act 1882*' Page 368 states: -

“.....the principle of Section 52 applies even where the Transfer of Property Act does not apply, because the section is based on justice, equity and good conscience.”

Considering the evidence produced by the plaintiffs I am of the view that they have shown a *prima facie* case with probability of success and I am of the view that this is a fit and proper case where an order to stop the transfer of the suit property ought to be granted.

Accordingly the orders of this court are: -

(a) That pending the hearing and determination of this suit, an injunction do hereby issue restraining the defendants or any of them by themselves, their servants, agents howsoever

from selling, transferring, disposing of or in any other way wasting, alienating or encumbering the property Land Reference Number 1/1239 (original Number 1/246/9).

(b) That the costs of the application dated 16th July 2004 be in the cause.

Dated and delivered this 29th November 2004.

MARY KASANGO

AG JUDGE