REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT 263 OF 2004

TIMOTHY KAMAU …… PLAINTIFF

VERSUS

MARIASHONI FOREST HOUSING CO-OPERATIVE

SOCIETY LIMITED ……..……1ST DEFENDANT

PAUL KINYANJUI NGANGA ……..…...2ND DEFENDANT

RULING

The applicant filed an application dated 16th September, 2004 seeking an order of injunction to restrain the defendants, their servants, their servants and/or agents from selling, disposing of or registering that parcel of land known as L.R. No.7171/24 to any person other than the Plaintiff.

The application was made on the grounds that the first Defendant had agreed to sell the suit premises to the Plaintiff at Kshs.1,300,000/- and of that sum, the Plaintiff had spent 500,000/- on the suit premises and was ready and willing to pay the balance of Kshs.800,000/- or deposit the same in court.

In his affidavit in support of the application, the applicant deposed that he occupied the aforesaid premises owned by the first Defendant on the mutual understanding that the same was on sale and that he would be given the first priority to purchase the same. He further deposed that he agreed with the first Defendant that he would renovate and refurbish the building and he spent Kshs.500,000/- on renovations.

The first Defendant later informed the applicant that he wanted to sell the property at Khs.1,300,000/= and the applicant made an offer of Kshs.800,000/= since he had allegedly spent Kshs.500,000/- on it. However, the Plaintiff did not produce any documentary evidence as to how the alleged sum of Kshs.500,000/- had been spent, if at all.

The applicant stated that the first Defendant did not respond to his letter of offer but went ahead to sell the property to the second Defendant.

The first Defendant admitted that it had promised to give the first Defendant priority to purchase the said property and when he was given that option, he offered Kshs.800,000/-. The first Defendant had offered to sell it to the Plaintiff for Kshs.1,300,000/=. The first Defendant denied that the Plaintiff had spent Kshs.500,000/= in renovating the premises. The second Defendant made an offer of Kshs.1,000,000/- which was accepted as he was the highest bidder. Mr. Ayusa for the second Defendant submitted that by the time when the matter was brought to court the sale had already been done and so no order of

injunction could issue to restrain the first Defendant from selling the property in question. The sale agreement annexed to the second Defendant's replying affidavit shows that the sale took place on 14th September, 2004 through Ndeke Gatumu & Co., Advocates and the full purchase price of Kshs.1,000,000/- was paid by banker's cheque.

The Plaintiff stated in his supplementary affidavit that the said sum could not have originated from the second Defendant as he is not financially endowed to raise that money as he is a photographer. That kind of argument is inappropriate and is rather derogatory to the second Defendant since the Plaintiff does not know how the second Defendant conducts his financial affairs. He could have saved that money or even borrowed the same from a financial institution or a friend but in any event, where he got the money from is not important, the fact is that he lawfully purchased the property from the first Defendant.

Has the Plaintiff established a prima facie case with a probability of success? I do not think so. The property in question belonged to the first Defendant and he gave the Plaintiff the option of purchasing the same but the Plaintiff was unable to raise the required amount of money. The Plaintiff had no proprietary interest in the said property. The Plaintiff sought to rely on the doctrine of promissory estoppel premised on the understanding that he had with the first Defendant that they would give him the first priority to purchase the house and he acted on that promise and allegedly spent Kshs.500,000/- in renovating the premises.

Promissory estoppel arises when one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then in that case, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made.

In my view, that doctrine is inapplicable in this case because the first Defendant did not renege on its promise to the Plaintiff but it is the latter who was unable to raise the amount that the landlord wanted. Again, there was no evidence that the Plaintiff had spent Kshs.500,000/- renovating the premises and if he had done so, it was not with the consent of the first Defendant.

It is trite law that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury if the order is refused. In this particular matter, even if the Plaintiff had established a prima facie case with a likelihood of success, which in my view he didn't, any loss which he would have stood to suffer is easily quantifiable and cannot be said to be irreparable injury. It is loss which can be compensated in monetary terms.

Although the Plaintiff's application quoted the suit premises as Plot No.7171/24 Elburgon, the actual plot number is 7172/24. Counsel for the Plaintiff said that this was a typographical error and urged the court to amend the same. If this had been the only shortcoming to the Plaintiff's application I would have over looked the same and dealt with the application as though it cited the correct land reference number.

I have considered the Plaintiff's application and found it to be lacking in merits for the reasons aforesaid and I hereby dismiss it with costs.

DATED, SIGNED and DELIVERED at Nakuru this 25th day of November, 2004.

D. MUSINGA

Ag. JUDGE

25/11/2004