REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 1933 OF 2000

NJOROGE KIBATIA ……..PLAINTIFF

- V E R S U S –

KARURA FARMERS COMPANY LTD…….DEFENDANT

R U L I N G

In this application, the Plaintiff seeks to restrain the Defendant, its servants, agents, nominees or whomsoever from interfering, taking over and/or obstructing the Plaintiff's contractual duty of completing the conveyance of the sub-division of L.R. 8469/12 and 8469/13 situate at Kasarani, Nairobi (hereinafter referred to as "the suit lands") and obtaining a certificate of the title in favour of the allottee.

The Plaintiff is an Advocate of this court. On 4th May, 2000, the Plaintiff and the Defendant entered into a written agreement by which the Plaintiff's firm was retained as the Defendant's Advocates in respect of the subdivision, allotment, conveyancing and issuance of documents of title for the suit lands. Clause 3 of that agreement provided as follows:-

> *"3. The company undertakes not to employ or consult any other Advocates for or in relation to the subdivision conveyancing and issuance of the title documents in respect of the premises (that is, the suit lands) and subdivisions thereof and/or not to otherwise deal by itself, its members, servants and/or employees without consulting the (Plaintiff) law firm and/or through the law firm and further undertakes to make good any loss the law firm may suffer in case of breach of this term either by itself, servant, agent members and /or employees ."*

Under the agreement, the Plaintiff's law firm was to be paid K.shs. 10,000/= in respect of each title document together with all disbursements which was to be paid before the title documents were released. Clause 7 contained the termination clause and provided as follows:-

> *"7. TERMINATION*
>
> 7.1. This agreement may be terminated by the company (the Defendant) in case the law firm being prevented by any incapacity from carrying out the terms of this agreement for a continuous period of six (6) months.
>
> 7.2. By either party by notice in writing to the other party in event of serious breach by the other party of the terms of this agreement."

The Plaintiff proceeded and obtained all letters of allotment from the Commissioner of Lands. He has also obtained a number of certificates of title. In carrying out his part of the bargain, the Plaintiff has

incurred expenses: In his affidavit, he says that he has "invested in excess of K.shs. 2 million." On 7th October 2000, the Defendant held elections whereby new directors were elected. On 24th October 2000, the new directors wrote to the Plaintiff informing him that the Defendant had withdrawn its instructions to his firm. They asked the Plaintiff's law firm to surrender all company documents to Mrs. Susan Kahoya & Company, Advocates the new Advocates. On 16th November, 2000, the new Advocates wrote to the Plaintiff's law firm asking them to hand over all the documents belonging to the Defendant in their custody. They also requested the Plaintiff's law firm to forward their fee note, undoubtedly, for settlement. The Defendant, in a Replying Affidavit sworn by one of its new Directors, stated inter alia that the contract between it and the Plaintiff was contrary to the company's articles of association and, therefore, **ultra vires.** It was also stated that the agreement was bad in law for the following reasons:

1. It was ultra vires the company's articles of association;

2. it was against public policy;

3. it was in bad faith;

4. it was without the shareholders consent;

5. it was not one that should have been irrevocable;

6. it was wrongly executed;

7. it contained clauses which made it illegal;

8. it had been breached fundamentally by the Plaintiff;

9. it purported to bind third parties;

10. it was vitiated by use of undue influence; and

11. it was draconian against the Defendant.

Mr. Maina for the Defendant argued these matters at length but I do not think that his arguments are helpful to his client's case. To begin with, these matters were never alleged in the defendant's Plaint in their previous suit which was consolidated with the present one. I, therefore, do not think that they can be allowed to urge those matters now. Without deciding the point, the Defendant appears, from the material before me, to have no basis for stating those matters. These are, in my view, wild allegations which have no bearing at all to the real issue before the court.

Mr. Ngatia for the Plaintiff was also not very helpful. He submitted that the issue before the court was whether the previous Board of Director's decision could be reneged upon by the new Board. With all due respect that is not the issue before this court. The case before the court is an application for an interlocutory injunction to prevent the breach of the contract between the parties. The question before the court is whether, in the circumstances of this case, it is appropriate to restrain the Defendant as prayed.

The principles upon which this court will act on an application for an interlocutory injunction are now settled beyond peradventure. In the case of **Giella v. Cassman Brown & co. Ltd** [1973] E.A. 358, SPPY, V. – P. laid down the following principles as governing applications for interlocutory injunctions:

(a) The Applicant must show a **prima facie** case with probability of success;

(b) it must be shown that the applicant stands to suffer irreparable damage if the application is refused; and

(c) when the court is in doubt, it will decide the application on a balance of convenience.

All cases on this point are in agreement that in exercising its jurisdiction by way of interlocutory injunction, the court acts upon the principle of preventing irreparable injury. In all cases, it remains for the Plaintiff to show that he stands to suffer irreparable damage should his application be refused.

The development in the law allows the court to assume jurisdiction to restrain a breach of contract because the remedy at law is not sufficient, and the interest of the party requires that the act should be prevented, instead of merely receiving damages, by way of compensation. However, it is not in every case of breach of contract that the court will interfere by way of injunction. The mere fact that the contract in question is clear and the breach clear is not of itself sufficient to warrant interference by the court unless the contract is itself of such a nature that it can be enforced consistently with the rules and principles upon which the court acts in granting equitable relief. I have already discussed those principles above. Is the remedy sought by the Plaintiff an appropriate one? The contract between the Plaintiff and the Defendant is, in my view, nothing more than a contract to provide services for a price. It is the Advocate's retainer. It is one that is clear in its terms and one that provides for its termination. Even if that is not the case, there is nothing in that agreement that imports special rules than would govern an ordinary contract. There is no doubt that the Plaintiff has threatened to "breach" (if it has not done so by now) its agreement with the Defendant. It is also not contested that the Defendant is ready to pay the price for the services rendered, undoubtedly under that agreement. In these circumstances, I do not think that an injunction would be an appropriate remedy in this case. It has not been shown that the plaintiff will suffer irreparable damage if the Defendant is not restrained as claimed. In any event, the Plaintiff knows the value of his rights and was even able to estimate them in monetary terms. His claim is one that can be compensated by an award for damages. In these circumstances, I do not think that an injunction would be an appropriate remedy.

I, therefore, dismiss this application with costs.

DATED and DELIVERED at NAIROBI this 8th day of May, 2001.

ALNASHIR VISRAM

JUDGE.