



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELC APPLICATION NO. 301 OF 2017

CHRISTOPHER MURAYA1ST PLAINTIFF/ APPLICANT

FLORENCE NJOKI MUNENE2ND PLAINTIFF/APPLICANT

-V E R S U S-

FRANCIS KIHONGE NGANGA1ST DEFENDANT/RESPONDENT

NYANDARUA DISTRICT LAND REGISTRAR.....2ND DEFENDANT/RESPONDENT

RULING

1. Before me is a Notice of Motion dated 6th December 2016 and filed on the 8th December 2016 pursuant to Article 50(1) and 159 (2) (a) (b) and (d) of the Constitution of Kenya, Order 51, Rule (1) and (4) of the Civil Procedure Rules, Sections 1A,1B, 3A and 95 of the Civil Procedure Act, and all other the enabling provisions of the Law, where the Applicant sought for orders confirming the Caution placed on land Parcel No. Nyandarua /Kahuru/307.
2. The Application further sought for orders of prohibition against the Defendants prohibiting them for removing the said caution and inhibiting them from registration of any dealings with the said suit land pending the hearing and determination of the suit.
3. The applicants also sought for orders of temporal injunction restraining the 1st Defendants by himself his servants, agents, employees and /or anyone acting on his behalf or under his instructions, from alienating, selling or in any manner interfering with the suit land and finally that there be orders of specific performance pursuant to the sale agreement dated the 30th December 2016 between the Plaintiff and the 1st Defendant.
4. The application was based on the grounds on the face of it and on the sworn affidavit of Christopher Muraya Kanyi dated the 5th December 2016.
5. The Applicant obtained interim orders in regard to prayer 5 of the application wherein they were directed to serve the said application for inter parties hearing.
6. There was an application subsequently filed by the Applicant seeking leave to serve the 1st Respondent through substituted service which application was allowed. The 1st Respondent entered appearance and was granted leave to file his response to the application.
7. Counsel for the Plaintiff then sought for direction that the Application be disposed of by way of written submissions wherein parties filed their respective written submissions save for the 2nd Respondents herein who did not file their response.
8. I have considered the said written submissions herein and it is the Plaintiff/ Applicants' submission that vide a sale agreement dated the 30th December 2015, they purchased 6 acres of land from the 1st Respondent herein, to be excised out of his parcel of land being Nyandarua Kahuru/307 for a sum of Ksh. 6 million. That they paid a deposit of a sum of Ksh. 5 Million wherein the 1st Respondent has now refused to perform his part of the obligation under the agreement and instead has resolved in threatening to sell the suit land.
9. Following the 1st Respondent's conduct, the Applicant resolved to place a caution on the suit land but have now received notice from the 2nd Defendant indicating their intention to remove the caution which in turn caused them to come to court to seek injunctive orders so as to preserve the suit land. They submitted that their Application was in conformity with laid down principles of **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358**
10. The 1st Respondent on the other hand opposed the application stating that indeed the Applicants had not discharged the onus placed on

them by the principles in the case of **Giella –vs- Cassman (supra)**. Their argument was that since an injunction was an equitable remedy and anybody seeking the same must come to court with clean hands, the Applicants herein had not come to court with clean hands.

11. The 1st Respondent confirmed that indeed he had entered into a sale agreement with the Applicants herein to sell them 6 acres of land to be excised out of his larger parcel of land being Nyandarua Kahuru/307 measuring 12.9 hectares, for a sum of Ksh. 6 million. That the Applicants paid him part payment of ksh. 5 million and defaulted in paying the balance of the purchase price of Ksh. 1 million as per the sale agreement. That the Applicants were shown the beacons but refused to take possession and instead procured a court order wherein they registered a caution on the whole parcel of land thereby halting the process of sub-dividing and procuring titles to the subdivision of the suit land.

12. It was the 1st Respondent's submission that the Applicants were the authors of their own misfortune. That the 6 acres of land was still available for the Applicants and further that they were willing to perform their part of the agreement.

13. I have considered the Application as well as the submissions and authorities cited for and against this application. The often cited case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358** is the leading authority on the conditions that an applicant needs to satisfy for the grant of an interlocutory injunction. An applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.

14. My first task is to determine whether the Defendant/Applicant has demonstrated a prima facie case. A prima facie case was described as follows in the case of **Mrao v First American Bank (2003) KLR 125**;

a. "...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard that is higher than an arguable case."

15. On the first issue I find that the Application is disguised as seeking an injunction but in real sense it is seeking specific performance of the contract by the 1st Respondent. I have seen the response by the 1st Respondent and find that the Applicants herein are the authors of the current state of affair. By failing to meet their end of the bargain in the sale agreement and subsequently placing a caution on the whole parcel of land, they had curtailed any dealing on the same thus hindering the Respondent from performing his end of bargain. I find that the Applicants herein have come to equity with dirty hands. It is trite law that a party with soiled hands cannot get equitable remedy.

16. The tenor of, the style adopted by the application, and the arguments of the applicants, clearly show that the prayer for an order to protect the subject contract is in the alternative. It is also a saddle on the prayer for a temporary injunction in the hope that it will provide an easy relief. The major issue that should completely determine the application is whether the applicant has satisfied the threshold for the grant of a temporary injunction.

17. On this, I am guided by the wise words of LAW, J.A in the case of **Ibrahim vs Sheikh Bros. Invet. Ltd [1973] E.A 118** that:-

"All that the plaintiff has established, in my view, is a prima facie case of breach of contract against the defendant. He has not established any prospects of irreparable harm being suffered by him if the status quo is not preserved. Any loss he may have suffered, or may suffer in future, is susceptible of pecuniary compensation".

18. I find that the contract/agreement between the Applicants and the 1st Respondent herein is for a definite consideration and any breach is capable of pecuniary compensation. In my view therefore, the Applicants *have not established any prospects of irreparable harm being suffered by them if the orders of temporal injunction are not issued.*

19. I need not consider the other condition for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The court of appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

"The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied".

20. Consequently, I dismiss the application dated 6th December 2016 with costs to the 1st Respondent.

21. Parties to comply with the provisions of order 11 within the next 21 days for the hearing of the main suit herein.

Dated and delivered at Nyahururu this 1st day of November 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE