



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 165 OF 2019**

**STELLA ACHIENG ODEMBO.....PLAINTIFF**

**VERSUS**

**LUCY WANJIRU MWENJE GACHERU.....1 ST DEFENDANT**

**CHIEF LAND REGISTRAR.....2 ND DEFENDANT**

**REGISTRAR OF TITLES.....3 RD DEFENDANT**

**RULING**

1. The plaintiff brought this suit on 20/5/2019 through a plaint dated 17/5/2019. Among other prayers, she sought orders of specific performance and permanent injunction against the defendants. Her case was that on 13/5/2014, she entered into a sale agreement with the 1st defendant pursuant to which the 1st defendant sold to her Land Reference Number 8392/44 at Kshs 23,000,000. She added that subsequently, the parties to the sale contract executed a supplementary agreement dated 17/7/2015. It was a term of the contract that the 1st defendant would avail completion documents upon receipt of an undertaking from the purchaser's financiers.

2. The plaintiff contended that she had in total paid the 1st defendant a sum of Kshs 8,310,000 but the 1st defendant had failed to provide the completion documents despite demand. She further contended that she was constrained to lodge a caveat against the title to protect her interest. She added that the 1st defendant was intent on causing the caveat to be removed.

3. Simultaneous with the plaint, the plaintiff filed a notice of motion under certificate of urgency, dated 17/5/2019, seeking interlocutory injunctive orders against the defendants, pending *interpartes* hearing of the application and, pending the hearing and determination of the suit. The application was supported by the plaintiff's undated affidavit filed on 20/5/2019 in which she contended that she stood to lose immensely if the caveat was lifted by the 2nd respondent.

4. The court considered the application ex-parte on 21/5/2019 and granted an interim injunctive order in terms of prayer 2 on condition that the plaintiff was to deposit in court balance of the purchase price within 7 days.

5. On 28/5/2019, the plaintiff brought a second application dated 27/5/2019 seeking among other prayers, a review of the order of 21/5/2019 to enlarge the time for complying with the requirement for deposit of balance of the purchase price in court to 90 days from the date of the extension order. The two applications are the subject of this ruling.

6. The 1st defendant filed a statement of defence dated 2/10/2019. She opposed the two applications through her replying affidavit sworn on 3/6/2019 and replying affidavit sworn on 9/7/2019. Her case is that she indeed entered into the sale contract with the plaintiff. The title to the suit property was not in her name at the time of entering into the contract. As soon as the title was processed and issued in her name, she notified the 1st defendant and they subsequently executed a supplementary agreement dated 17/7/2015. The plaintiff thereafter failed to complete the purchase thereby constraining the 1st defendant to issue a notice to the plaintiff to complete the purchase. The plaintiff did not complete the purchase. The 1st defendant subsequently issued a notice of rescission of the contract. The contract was accordingly rescinded.

7. The 1st defendant further contends that it was an express term of the contract that the purchaser's financier's advocates were to provide her with a professional understanding before the release of the completion documents. According to the 1st defendant, the undertaking was never given. The 1st defendant adds that the plaintiff lodged the caveat after she had received both the notice to complete and the rescission notice and therefore the caveat was completely unmerited. She further contends that she made an application for removal of the caveat whereupon the Registrar issued 45 days' notice to the plaintiff. Subsequently, the Registrar removed the caveat after expiry of the 45 days.

8. The 1st defendant adds that she is ready and willing to refund the plaintiff's money less liquidated damages. Further, she states that there

are no developments made on the suit property by the plaintiff and that she (the 1st defendant) is the one in possession of the suit property.

9. The applications two were canvassed by way of written submissions. The plaintiff filed written submissions dated 9/8/2019 through the firm of Owaga & Associates. Counsel framed the following as the three issues falling for determination: (i) whether or not the court should grant an interlocutory injunction against the defendants pending hearing and determination of the suit; (ii) whether or not to review the orders given on 22/5/2019; and (iii) whether or not to enlarge the time to allow the applicant to deposit the balance of the purchase price in court.

10. On the first issue, counsel submitted that the plaintiff had met the conditions for grant of an injunction as set out in the case of **Giella v Cassman Brown (1973) EA 358**. It was further submitted that the plaintiff had made full disclosure of the relevant facts and had also shown that she had a legal right that required protection through an injunction. Reliance was placed on **Kenleb Cons Ltd v New Gatitu Service Station Ltd & another [1990] eKLR**. Counsel submitted that the plaintiff was likely to suffer irreparable harm because she had spent a lot of money in developing and buying the suit property and no amount of money would adequately compensate her. Counsel further submitted that the balance of convenience tilted in favour of the plaintiff because she was willing to complete the transaction. Counsel added that no harm would be suffered by the defendants if the injunction was granted. Reliance was placed on the decision in **Robert Mugo Wa Kranja v Ecobank (Kenya) Limited & another [2019] eKLR**.

11. On the second issue, counsel submitted that the court should review the orders issued on 21/5/2019 owing to the fact that the plaintiff was not aware that the caveat had been lifted. On the third issue, counsel submitted that the plaintiff was willing to deposit the balance of the purchase price in court in 90 days.

12. The 1st defendant filed written submissions dated 26/9/2019 through the firm of Mwaure & Mwaure Waihiga Advocates. Counsel for the 1st defendant submitted that the plaintiff had not met the conditions set out in **Giella v Cassman Brown (1973) EA 358**. It was argued that the plaintiff was in breach of the sale agreement and therefore, cannot come to court to seek an injunctive order. Reliance was placed on the decision in **Caliph Properties Ltd v Barebel Sharma & another [2015] eKLR**. It was also argued that the plaintiff was guilty of concealing material facts because she did not disclose to the court that she had received completion and rescission notices from the defendant. It was contended that the plaintiff was unable to pay the purchase price of the suit property and therefore, she was not entitled to an injunction. Reliance was placed on **Jackson Mokaya v James Onchangwa Macharia [2014] eKLR**.

13. Counsel for the 1st defendant submitted that the plaintiff's case had zero chances of success because there was no agreement between them after the initial agreement was rescinded. It was further submitted that the balance of convenience tilted in favour of the 1st defendant. Lastly, it was argued that the plaintiff had not met the threshold for review under Order 45 rule 1.

14. I have considered the two applications. I will make brief pronouncements on the two application in the order in which they were filed.

#### **Application dated 17/5/2019**

15. The plaintiff seeks the following verbatim injunctive orders in the application dated 17/5/2019.

**1. Spent.**

**2. That the 1st, 2nd and 3rd defendants/respondents herein either by themselves, their servants ,agents, assigns or any other person claiming through them be restrained by an order of the court from removal of the caveat registered by the applicant under IR 1641195/2 on LR No 8392/44, pending the inter parties hearing of this application.**

**3. That the 1st, 2nd and 3rd defendants/ respondents herein either by themselves, their servants, agents, assigns or any other person claiming through them be restrained by an order of the court from removal of the caveat registered by the applicant under IR 1641195/2 on LR No 8392/44, pending the hearing and determination of this suit.**

**4. That the 1st defendant/respondent herein either by herself, her servants, agents, assigns or any other person claiming through her be restrained by an order of the court from sub-dividing, interfering, alienating, selling off and/or transferring all that land LR No 8392/44 and from evicting and/or in any way interfering with the applicant's quiet possession of the said property pending the inter parties hearing of this application.**

**5. That the 1st defendant/respondent herein either by herself, her servants, agents, assigns or any other person claiming through her be restrained by an order of the court from sub-dividing, interfering, alienating, selling off and/or transferring all that land LR No 8392/44 and from evicting and/or in any way interfering with the applicant's quiet possession of the said property pending the hearing and determination of this suit.**

**6. That the honourable courts do grant any other order/relief it may deem fit to grant.**

**7. That the respondents be liable for and pay the costs of this application.**

16. I have considered the evidential materials and submissions presented by the parties in relation to the notice motion dated 17/5/2019. The key question to be determined in this application is whether the applicant has satisfied the criteria upon which the courts exercise the discretionary and equitable jurisdiction to grant an interlocutory injunctive order pending the hearing and determination of a suit. The criteria was spelt out in **Giella v Cassman Brown (1973) EA 358**. First, the applicant is required to demonstrate a *prima facie* case with a probability of success. Secondly, the applicant is required to demonstrate that he/she stands to suffer irreparable damage which cannot be indemnified through an award of damages if the injunctive order is not granted. Thirdly, should the court have any doubt on either of the above two requirements, the application is to be determined on a balance of convenience.

17. Secondly, when exercising this jurisdiction, the court does not make definitive or conclusive findings on any of the issues. The court only seeks to establish if the elements of *prima facie* case and irreparable damage have been disclosed.

18. From the materials presented to the court at this stage, there is no dispute that there was a sale contract between the plaintiff and the 1st defendant. The original sale agreement dated 13/5/2014 was amended through the supplementary agreement for sale dated 17/7/2015. At the time the supplementary agreement was executed, the title had been processed in the 1st defendant's name. The supplementary agreement was drawn by the plaintiff's advocates, M/s Owaga & Associates. Clause 3.1 of the supplementary agreement for sale required the plaintiff to cause her financiers to issue a professional undertaking, through their advocates, to the 1st defendant's advocates, and upon receipt of the professional undertaking, the 1st defendant's advocates were to forward the completion documents to the plaintiff's advocates. At this point of these proceedings, there is no evidence of any professional undertaking issued by the plaintiff's financiers to the defendant's advocates. What is before court are various correspondence from the plaintiff indicating that she was unable to raise the agreed purchase price.

19. Secondly, there is *prima facie* evidence that notice to complete the contract was served by the 1st defendant to the plaintiff. There is also *prima facie* evidence that rescission notice was served by the 1st defendant to the plaintiff. Thirdly, there is *prima facie* evidence that the caveat which the plaintiff seeks to preserve was vacated way back in October 2018 (the application for removal was presented on 27/8/2018).

20. In the circumstances, I do not think the plaintiff can be said to have demonstrated to the court a *prima facie* case with a probability of success on the relevant limbs of the claim she has brought before court.

21. On the second limb of **Giella v Cassman Brown (1973) EA 358**, what emerges from the evidence before the court is that, what the plaintiff stands to lose is the sum of Kshs 8,310,000 which she claims to have paid to the defendant. In the court's view, that is loss against which the plaintiff can be indemnified through an award of appropriate damages.

22. There being no doubt on the first two limbs of **Giella v Cassman Brown (1973) EA 358**, I will not rest my decision on a balance of convenience. My finding on the notice of motion dated 17/5/2019 is that the plaintiff/applicant has failed to satisfy the criteria for grant of injunctive orders in this suit. The motion accordingly fails. The plaintiff shall bear costs of the application dated 17/5/2019.

#### **Application dated 27/5/2019**

23. The plaintiff sought the following orders in the application dated 27/5/2019:

**1. Spent.**

**2. That the orders given by this honourable court on the 22nd day of May 2019 be reviewed and or varied and fresh orders be issued in terms of prayer 4 of the applicant's notice of motion dated 17th May 2019 pending the inter parties hearing of the application dated 17th May 2019 or further orders of the court.**

**3. That the IR Number of the property in the subsequent order be changed from IR No 1641195/2 to I R No 164195/1.**

**4. That a fresh time line for the deposit of Kenya Shillings Fourteen Million Six Hundred and Ninety Thousand (Kshs 14,690,000) be issued and enlarged to a maximum of 90 days from the date hereof.**

**5. That the honourable court do grant any other order/relief it may deem fit to grant.**

**6. That the costs be in the cause.**

24. Prayers 2 and 4 seek a review of the terms of the interim order granted on 21/5/2019. This was an interim order which was to remain in force pending the *inter partes* hearing of the application dated 17/5/2019. Firstly, the application dated 17/5/2019 was heard and has been determined. It has been found to lack merit. Secondly, the plaintiff did not comply with the terms of the interim order made on 21/5/2019. The order consequently stood vacated on expiry of the stipulated seven days. Consequently, prayers 2 and 4 of the notice of motion dated 27/5/2019 cannot be granted in the circumstances.

25. Prayer 3 is a plea for leave to amend the plaintiff's pleadings to correct the Title Number of the suit property. There was no objection to that plea. I will therefore grant prayer 3 of the application dated 27/5/2019.

#### **Disposal Orders**

26. In light of the foregoing, the plaintiff's two motions dated 17/5/2019 and 27/5/2019 respectively are disposed as follows:

**a) The notice of motion dated 17/5/2019 is rejected for lack of merit. The plaintiff is to bear costs of the application.**

**b) Prayer 3 of the plaintiff's application dated 27/5/2019 is granted. The rest of the prayers in the application dated 27/5/2019 are declined. Costs of the application dated 27/5/2019 shall be in the cause.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF MAY 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr David Waihiga for the 1st defendant/respondent

Court Clerk - June Nafula