

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. NO. 416 OF 2012

SAMUEL NDUNGU GRACE.....PLAINTIFF

VERSUS

ISAAC GATHUNGU WANJOHI.....1ST DEFENDANT

PRODIGY COMMERCIAL AGENCIES.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 2nd April 2015 in which the Plaintiff/Applicant seeks for an order of mandatory injunction to be issued compelling the 1st Defendant to hand over or surrender the original title and the duly executed discharge of charge in respect of the parcel of land known as L.R. No. 209/9694 I.R. No. 61456 (hereinafter referred to as the “suit property”) to the Plaintiff.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff, Samuel Ndungu Grace, sworn on 2nd April 2015 in which he averred that in his Amended Complaint filed on 15th October 2013, he sought an order of specific performance against the 1st Defendant ordering him to surrender the completion documents in respect of the suit property. He added that he had already paid the 1st Defendant the full purchase price for the suit property but the 1st Defendant had failed, refused and/or ignored to surrender to him the completion documents and specifically the duly executed transfer and title document. He further stated that on 17th September 2014 this court delivered a ruling to the effect that he is the beneficial owner of the suit property by virtue of the purchase of the same and full payment of the purchase price. He further stated that he needs the original title deed for the suit property for purposes of obtaining a loan facility from a financial institution to meet his financial obligations and for working capital of his businesses located on the suit property. He stated that in the circumstances, the court should order the 1st Defendant to immediately hand over the said documents of title as he has been paid the full purchase price.

The Application is contested. The 1st and 2nd Defendants filed the Replying Affidavit of the 1st Defendant, Isaac Gathungu Wanjohi, sworn on 19th August 2015 in which he averred that the orders sought in this Application would in effect determine the entire suit without the same having gone for full hearing and that the court cannot issue final orders at this interlocutory stage. He further averred that there are no special circumstances in this suit to warrant the court to grant a mandatory injunction as prayed in this Application. He added that the orders sought in this Application cannot issue because the sale agreement the subject of this suit was entered into between the Plaintiff and one Haruiti Waruguru on 31st May 2010 and he is not a party to that agreement. He added that the said sale agreement contains extensive provisions on dispute resolution including the arbitration process and this suit is an attempt to circumvent the terms and conditions of that agreement. He further stated that he has neither the power nor the capacity to complete that agreement on behalf of the said Haruiti Waruguru. He finalized by stating that the remarks of the court in its ruling to the effect that the Plaintiff is the beneficial owner of the suit property by virtue of the payment of the purchase price are made *orbiter dicta* for the reason that the issue

of the ownership of the suit property was not one for consideration and determination before the court at the interlocutory stage. He therefore sought for the dismissal of this Application as it lacks merit.

The Plaintiff filed his written submissions. In their oral submissions, counsel for the Plaintiff stated that the issue of the surrender of the title document by the 1st Defendant to the Plaintiff is the only issue remaining and does not need to go for trial. In their oral submissions, counsel for the Defendants stated that the circumstances under which a mandatory injunction can be granted are well settled. He cited the case of **Locabail International Finance Ltd vs. Agroexport and Others (1986) 1 ALLER 901** and stated that such mandatory injunction as the Plaintiff seeks herein ought not to be granted except in clear cases, where the court thought the matter ought to be decided at once or directed at a simple act easily remedied or where the Defendant attempted to steal a match on the Plaintiff. He further stated that the ruling referred to by the Plaintiff was in reference to the Plaintiff's prayer for a temporary injunction restraining the Defendants from illegally attaching the Plaintiff's goods of trade. He submitted that the court had to determine whether the Defendant could attach the Plaintiff for rent due and owing and whether the 1st Defendant was a beneficial owner of the suit property or not. He added that the 1st Defendant was not privy to the sale agreement and they cannot be compelled to do something that is not within their power. He referred to clause 15 of the said sale agreement which is an arbitration clause and that this Application is meant to circumvent that. Further, counsel for the Defendants submitted that the issue of the ownership of the suit property should be subjected to a full hearing as the court cannot determine with finality this issue on the basis of affidavit evidence. He pointed out that in prayer (b) in the Amended Plaintiff, the Plaintiff prays for a declaration that he is the legal proprietor of the suit property and prayer (c) seeks an order of specific performance against the 1st Defendant. He added that the court is being asked at this stage to determine prayers (b) and (c) of the Amended Plaintiff based on contested affidavit evidence. He submitted that this is an issue for determination on oral evidence on the hearing of the suit especially in view of the fact that the 1st Defendant was not a party to that sale agreement. He further submitted that the Plaintiff is enjoying very wide injunctive orders and therefore does not need the mandatory injunction.

The issue arising from this Application is whether or not to grant the mandatory injunction sought after by the Plaintiff. The leading authority on this issue is the case of **Locabail International versus Agro Export (1986) 1 ALLER 901** wherein it was stated at follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thought that the matter ought to be decided at once, or where the injunction was directed at simple and summary act which could easily be remedied or where the Defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

Further, in **Homes Limited versus Shandahu (1971) 1Ch. 34**, the following was stated:

“It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.”

Upon assessing the Amended Plaintiff dated 25th April 2013, it is true that the Plaintiff sought for orders that he be declared the legal proprietor of the suit property and further sought an order for specific performance against the 1st Defendant compelling him to surrender to the Plaintiff the completion documents enumerated in paragraph 5.1 of the sale agreement. These are the same prayers that the Plaintiff seeks this court to grant him in this Application. As noted from the precedents above, this court cannot arrive at a determination of those issues at this interlocutory stage and the Plaintiff has not

demonstrated any special circumstances prevailing in this matter that would warrant being granted a mandatory injunction at this stage. Further, going by the submissions of the Defendants, it emerges that the Defendants are distancing themselves from the sale agreement that the Plaintiff is relying upon by stating that they are not privy to it. At this stage, I can do no better than to agree as the sale agreement exhibited by the Plaintiff is between him and one Haruiti Waruguru who is not a party to this suit. It would appear therefore that the Plaintiff's claim against the Defendants is not strong and clear warranting the grant of an order of mandatory injunction. As far as I can tell, the Plaintiff has failed to meet the threshold for the grant of the mandatory injunction which he seeks.

In light of the foregoing, I hereby dismiss this Application with costs to the Defendants.

DELIVERED AND SIGNED IN NAIROBI THIS 12TH DAY OF FEBRUARY 2016.

MARY M. GITUMBI

JUDGE