



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**HC.COMM. 78 OF 2016**

**JEREMIA MUTEKA KIBERA.....PLAINTIFF/APPLICANT**

**VERSUS**

**EMMANUEL DEE.....DEFENDANT/RESPONDENTS**

**R U L I N G**

1. In this matter, the Plaintiff filed the Notice of Motion dated 25th July 2016 seeking both Probitutory and mandatory injunction directed at the Defendant. The Prohibition was sought to restrain the defendant from offering for sale or in any manner adversely dealing with the suit property, LR No. 21/1/37 by virtue of an indenture registered as VOI No. 38 Folio 144/1 File 11890. The mandatory injunction on the other hand is sought to compel the Defendant/Respondent to execute and deliver to the Plaintiff, within a period of 14 days after the order of this Court, all completion documents conveying all the defendant's proprietary interests in the suit property and in default the Deputy Registrars to execute all such documents, on behalf of the defendant.
2. The suit and the application are grounded on an agreement for sale dated 15/11/2015 between the parties by which the defendant agreed to sell and the plaintiff agreed to buy from the Defendant the suit property at a price and consideration of Kshs.35,000,000/-. Pursuant to that agreement, it is deponed in the affidavit of support, that way back in the month of May 2016, the Plaintiff executed his part of the indenture but the defendant has todate failed to execute his part hence the suit.
3. There is an affidavit of service by one JAMES KAZUNGU swearing that the defendant was served with the plaint and Summons to Enter Appearance on the 9th July 2016 but that the defendant accepted service but refused to acknowledge the service.
4. The application for injunction was placed before the Judge under Certificate of Urgency on the 1st August 2016 when interim prohibitory injunction was granted and matter fixed for hearing on the 15th August 2016 with an order that the application be served upon the Respondent/Defendant.
5. There is yet another affidavit of service sworn on 12/8/2016 by the same Process Server, JAMES KAZUNGU, to the effect that the application was served upon the Defendant/Respondent on the 01/08/2016. While preparing this ruling, I have noted that the defendant did enter appearance on the 10/08/2016 a fact that points to me the fact that the defendant was indeed served with the application and summons to enter appearance. However, come the 15/08/2016 there was no appearance for the defendant. There was equally no response to the application hence it was ordered that the matter proceeds under Order 51 Rule 14.

## **Analysis and Consideration**

6. The issues for consideration are whether or not to grant to the plaintiff the orders sought. For a temporary prohibitory injunction the plaintiff has to meet the requirement set out in *GIELLA VS CASMANN BROWN & CO. LTD* [1973] EA 358. He has to establish a prima facie case with a probability of success and demonstrate that unless the injunction is granted he stands to suffer an injury irreparable of remedy by an award of damages. Where the two tests are met, but the court entertains any doubt then the balance of convenience becomes a consideration.

7. In the matter before court there is evidence of an agreement for sale duly executed by the parties with clear and unequivocal terms. There is an averments by the plaintiff/applicant that during the month of May 2016 the defendant failed for no justifiable reason to execute the indenture. It is equally averred that the defendant has become evasive and could be conducting another conveyance with a third party.

8. To this court, parties are bound by the terms of a contract they freely enter into. The court equally take the position that land is a unique commodity and no land is, in the eyes of a purchaser, the same as another for the specific purpose one sets to buy. On the evidence availed, and on prima facie basis, the plaintiff has a case to urge at trial which case should be preserved by ensuring that the subject and substratum is not dissipated and destroyed. I am convinced that a prima facie case has been demonstrated.

9. On the second consideration of irreparable loss or injury and whether or not damages would be an adequate remedy, I reiterate that there are, unless the contract is set aside, vested interests over the land the plaintiff contracted and paid for.

10. The principle of damages being adequate remedy is not a dogma that a party is entitled to forebear legal rights in place of damages. I am convinced that land being what is it, and that plaintiffs claim in the amended plaint being in the nature of specific performance damages would not be an adequate remedy.

11. Having found that the plaintiff has met the two test, I would entail no doubt whether or not to grant the restraining injunction.

12. I would have granted to the applicant a temporary Prohibitory had the plaintiff prayed for a temporary order pending the hearing and determination of the suit. He however, did not advance such a prayer and this court cannot grant to a party a prayer not sought. The plaint was content with an order of injunction restraining pending hearing inter-parties. Now that I have had the application, that prayer stands spent.

13. The foregoing findings leave me with the prayer for a mandatory injunction and the one for the reconstruction of the register.

To this court, prayer for reconstruction of the Register may only be necessary, as worded, if the court grants the mandatory injunction to compel the execution of the indenture by the defendant. I will therefore only deal with that prayer if it becomes necessary and consequent to grant of the mandatory injunction as a facilitative order.

### **Is the Plaintiff entitled to an Interlocutory mandatory injunction?**

14. There being no defence filed as yet, it may as well appear that the plaintiff case being based on an agreement of the sale in which payment of the consideration is acknowledged, is a clear case meriting grant of a mandatory injunction at an Interlocutory stage. However, the Principles for grant of an interlocutory injunction as set in *Abdi Hassan vs Nadhi Juma Andasun (2006) eKLR* and followed in *Alex Wainaina t/a John Commercial Agencies vs Janson Murigi Wanjihia (2015) eKLR* must always be born in mind. The principles are that; a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only where the court either felt that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the

plaintiff. Before granting a mandatory injunction, the court had to feel that high sense of assurance that at the trial it would appear that the injunction had rightly been granted.

15. In the matter before court, I have looked at the plaint and the application and I am sorry to observe that there is no single special circumstances revealed. The contract sued on is an ordinary and simple contract for sale of land and no more. I have equally taken notice that other than in prayer for mandatory injunction and reconstruction of the register in the plaint, the plaint was amended on the 30/08/2016 after the application had been argued to introduce a prayer for general damages for reason of being illegally denied the right to assume possession and develop the suit property. However, it is clear to this court, without going to the merits, that if prayers c & d are granted, at this stage, then the suit shall substantially stand determined. I say substantially determined because the property may have been adjudged to lawfully belong to the plaintiff and shall, having been so adjudged, to be registered in his favour. The prayer d, as worded, would therefore be merely consequent to that adjudication. To this court that would not be the right thing to be done as there is nothing to show that the amended plaint has been served.

16. I would have stopped at this juncture having made my determination known but I think the court of appeal words in *Alex Wainaina t/a Joh Commercial Agencies vs Janson Mwangi Wanjihia*(supra) are a landmark to courts in considering when to grant an interlocutory mandatory injution. The Court said:

***“the consistent reiteration of those principles by the court is an affirmation that the remedy of a mandatory injunction is a drastic one which ought not to be granted mechanically but considered with caution”***

17. The court has administered to itself a caution and is hesitant at this juncture to grant the mandatory injunction for it appreciates that there are no special circumstances disclosed. The avernment by the plaintiff that the defendant is attempting a subsequent sale to a third party would have been a compelling reason but the manner in which that piece of evidence was presented to this court is quite wanting. Wanting because the identity of the mutual friend is not disclosed and to that extent paragraph 4 of the plaintiff affidavit in support would, to this court fall short of the requirement of order 19 Rule 3 that where a fact is grounded on affirmative, the source of information ought to be disclosed.

18. Having said so, and coming as the court has, that the application for mandatory injunction is not merited, the court has agonised and appreciated what is the likely effect of dismissal of the application in its entirety and the prospects that the suit property may, unless preserved, not be available by the time this matter is heard on its merits. While appreciating the doctrine of *les pendens*, this court invokes its inherent powers under section 3A Civil Procedure Act and direct as follows:-

**(a) The plaintiff shall forthwith and with the use of a process server stationed at this court, effect service of the amended plaint upon the firm of Phillip Mutinda & Co. Advocates who have entered appearance for the Defendant.**

**(b) This matter be mentioned in court on the 19/9/2016 to confirm compliance and further directions.**

**(c)To preserve the subject matter, it is directed that the suit property , being LR No. 21/1/37 by virtue indenture registered as Vol N38 Folio 144/1 File 11890 shall not be alienated or any dealings undertaken on its register pending the outcome of this suit.**

**(d)This order be served on the concerned Land Registrar for compliance.**

**(e) The suit shall be fast tracked.**

**(f) Costs in the cause.**

Dated, signed and delivered this 5<sup>th</sup> day of September 2016

**HON. P.J.O. OTIENO**

**JUDGE**

In the presence of:

Mr. Maosa for the Plaintiff

N/A for the Defendant