



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC CIVIL SUIT NO. 1554 OF 2014

ONI PROPERTIES LTD..... PLAINTIFF

VERSUS

SIGAL INVESTMENT LTD.....DEFENDANT

RULING

The matter coming up for determination is the Plaintiff/Applicant's Notice of Motion dated **17th December 2014**, brought under **Section 13(7)** of the **Environment & Land Court Act, Section 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act and Order 40 Rules 1 & 2 and Order 51 Rule 1** of the **Civil Procedure Rules 2010**, and all enabling provisions of the law. The applicant has sought for these orders;-

- i. *Spent*
- ii. *Spent*
- iii. *Spent*
- iv. *That the Court do issue an order compelling the Defendant, its servants, agents ,attorneys and/or employees to forthwith give immediate vacant possession of the properties known as LR.No1160/ 654, LR.1160/655 and LR.No.1160/656 situated in Karen within Nairobi to the Plaintiff.*
- v. *Spent*
- vi. *That the Court do issue an order of temporary injunction restraining the Defendant whether by itself, its agents, servants, attorney and/or employees from selling, alienating, disposing, wasting, damaging or in any manner whatsoever interfering with the properties known as LR.No.1160/654,LR.No.1160/655,LR.No.1160/656, situated in Karen within Nairobi pending the hearing and determination of the suit.*
- vii.*That the Court do issue an order of temporary injunction restraining the Defendant, its servants, agents, attorneys and/or employees from re-entering, encroaching and/or trespassing in any manner whatsoever into the properties known as LR.No.1160/654,LR No.1160/655 and LR.No.1160 /656, situated in Karen, within Nairobi pending the interpartes hearing and determination of this suit.*
- viii.*That costs of this application be provided for.*

The application is supported by the grounds stated on the face of the application and on the supporting Affidavit of **Patrick Muchemi Gitonga**, the Director of the Plaintiff/Applicant herein.

These grounds are:-

- i. **By three sale agreements dated 9th June 2009, the Respondent agreed to sell properties known as LR No.1160/654, LR No.1160/655, and LR.No.1160/656.**
- ii. **Further that the said suit properties were to be excised from a property known as LR.No.1160/67 (Original number 1160/8/5) situated in Karen, Nairobi.**
- iii. **The sale agreements provided that, the entire purchase price for LR.1160 /654and LR No.1160/655 was Ksh.12,000,000/=and for LR.1160/656, the purchase price was Kshs.13, 000,000/= to be paid to the Defendant on or before the completion date therefore.**
- iv. **That the sale agreements were executed on 9th June 2009 and by the letter dated 28th May 2009, the Defendant undertook to complete the sale within a period of 180 days from the date of execution of the sale agreements by furnishing the Plaintiff with the relevant completion documents.**
- v. **That the applicant fully paid and the Respondent by a letter dated 8th December 2014 duly acknowledged receipt of the entire purchase price in the sum of Kshs 37,000,000/- in respect of the suit properties.**
- vi. **That the Respondent executed transfers for the suit properties but has deliberately failed to grant vacant possession of the suit properties to the applicant.**
- vii. **That by a letter dated 22nd September 2014, the Respondent declined to deliver up completion documents and vacant possession of the suit properties contrary to the sale agreements and demanded that the applicant pay revised value of Kshs 35,000,000/- per acre for only two of the suit properties and that suit property LR. No. 1160/654 had been disposed off and the suit properties LR. No. 160/655 and 1160/656 were counter offered at Kshs 43,000,000/-.**
- viii. **Therefore the Defendant is in breach of the sale agreements and that Defendant intends to sell the suit properties unless restrained by this court and compelled to complete its obligations under the sale agreements.**

In his Supporting Affidavit, **Patrick Muchemi Gitonga** averred that on **28th November 2014**, he conducted an official search and ascertained that the property known as **LR. No. 1160/654**, was still in the name of the Respondent despite allegations that the same had been sold to offset the cost of construction of the access road. Further that despite the Respondent being served with notice to complete the Respondent has declined to deliver up completion documents and or grant vacant possession of the suit properties to the applicant. He also deposed that unless the orders sought are granted, the applicant will suffer irreparable loss and the suit will be rendered nugatory as the Respondent will have already disposed off the subject matter of the suit properties herein.

The Notice of Motion is opposed. **Wilson Kipkoti**, swore a Replying Affidavit on behalf of the Defendant. He averred that he is a stranger to the sale agreements purportedly signed between the Plaintiff and the Defendant in respect of sale of **LR.No.1160/654,655 and 656**, the subject of this suit. He further averred that the Defendant never instructed the Law Firm of **Ochieng Opiyo & Co. Advocates** to represent it in the alleged sale transaction. Further, that the Defendant admits receiving some deposit of **Kshs.38.6Million** from the Plaintiff but categorically denied that the payments were made through the said Firm of Advocates. He further deposed that if any agreement was entered with the Plaintiff, the same was oral agreement and supported by various correspondence between the Plaintiff and the Defendant. He contended that **Kshs.38.6 Million** acknowledged as received was paid in cash by **Mr Muchemi** and not

by the Plaintiff company. It was his contention that they orally agreed that **Mr Muchemi** would purchase the three plots upon completion of the civil works on road, water, street lights, drainage systems, and other improvements. He also contended that they concluded that upon completion of the said works, the Defendant would carry out evaluation of the properties and then advise the Plaintiff of the actual value and that would have formed the basis of the sale for each of the plot.

The Respondent further contended that after the works, he instructed **Tyson Ltd** to carry out valuation of the suit properties and the same was done as per Valuation Report annexure **WK4**. He also contended that **Mr Muchemi** wrote a letter to the Defendant requesting for the refund of the deposits paid and therefore the Defendant treated the oral agreement as rescinded and cancelled by the letter dated **30th October 2014**. It was further contended that the Defendant did sell **LR.No.1160/655** and **1160/656** for **Kshs.45 Million** and **Kshs.50 Million** respectively as per annexure **WK9**. He deposed that it was only after this, that the Plaintiff's Advocate purported to recant the letter of the Plaintiff dated **27th October 2014**, demanding a refund insisting that **Mr Muchemi** had no Boards authority ' **to accept the refund**'. It was his further contention that the Defendant is only bound to refund the deposit as per the sale agreements with the Plaintiff. He therefore urged the Court to vacate the Interim Orders forthwith so that the defendant can conclude the sale of the suit properties as per the agreements dated **26th November 2014**, and then refund the Plaintiff's deposits as agreed.

The Plaintiff /Applicant filed a further affidavit in reply to the Defendant/Respondent's Replying Affidavit and reiterated the contents of the supporting Affidavit. The deponent further denied all the allegations contained or implied in the Defendant's Replying Affidavit which was allegedly full of materials misrepresentations of facts and malicious falsehoods, vexatious, scandalous, and misconceived in law and a clear case of abuse of the Court's process.

The Defendant also filed a further affidavit through **Wilson Kipkoti** and averred that in entering into agreements for sale of the suit properties with 3rd parties, he kept the plaintiff fully informed through **Mr Muchemi** and in writing and Plaintiff cannot allege that the Defendant was unjustly enriching itself. He further reiterated that he was ready and willing to refund the Plaintiffs deposits of **Kshs.38.6 Million** as agreed previously between the parties thereto.

Mary Nyokabi, also swore a further Affidavit and averred that she is the one who introduced **Patrick Muchemi Gitonga** to **Wilson Kipkoti**, the Defendant's Director. It was her contention that the agreement for sale was **informal** and **oral** and in **September 2014**, **Mr Muchemi** called her and told her that since he had no money for purchase of **LR No.1160/655** and **656**, he wanted the oral agreement rescinded. He also sought for the refund of the deposits already paid to **Mr Kipkoti** to the tune of **Kshs.38.6 Million**. She further contended that she informed **Mr Kipkoti** of the request by **Mr Muchemi** and **Mr Kipkoti** informed her that **Mr Muchemi** had communicated the same to him.

The application was canvassed by way of written submissions. The Court has now considered the Notice of Motion dated **17th December 2014**, the annexures thereto, the pleadings in general, the relevant laws and the written submissions together with the cited authorities and the Court makes the following findings:-

The applicant herein has sought for various injunctive Orders. The application is premised under **Sections 1A,1B, 3A & 63(e) of the Civil Procedure Act**. Section 1A& 1B deals with the overriding objective of the Civil Procedure Act and Section 3A donates power to the Court to issue and make any such Orders that are necessary to ensure that end of justice is met and also prevent abuse of the Court process.

Further, the Notice of Motion is also premised under **Order 40 Rule 1&2** which states that:-

- i. **Where in any suit it is proved by affidavit or otherwise;-**
 - a. **That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**

- b. *That the Defendant threatens or intends to remove or dispose of his property in reasonable probability that the Plaintiff will or may be obstructed or delayed in execution of any decree that may be passed against the Defendant in the suit, the Court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienating, sale removal or disposition of the property as the Court thinks fit until further Orders.*

Therefore the Orders sought by the applicant falls under the purview of **Order 40 Rules 1&2**. The Court has a duty to further the overriding objective as stipulated in **Section 1A &1B** of the **Civil Procedure Act** and also the court is further empowered by **Section 3A of the Civil Procedure Act** to make orders that would ensure that the end of justice has been met.

Taking into account, the above provisions of law and the pleadings in general, the Court finds that the applicant has sought for equitable reliefs which are granted at the discretion of the Court. However, such discretion must be exercised judicially. Such was the finding in the case of **CMC Motors Group Ltd and another Vs Evans Kageche Boro Civil Appeal No.295 of 2001**, where the Court held that;-

“In granting the injunctory reliefs, the Superior Court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the learned Judge if it is satisfied that the learned Judge did not exercise his discretion judiciously”.

In arriving at a determination on whether to grant or not to grant the orders sought, the court will be guided by the laid down principles for grant of such orders. These principles were laid out in the case of **Giella Vs Cassman Brown and Co. Ltd 1973 EA 358** and later emphasized in various judicial pronouncements. In the case of **Kibutiri Vs Kenya Shell, Nairobi, High Court , Civil Case No. 3398/1980 (1981) LR 390** the Court held that:-

“ The conditions for granting of a temporary injunction in East Africa are well known and these are; First an applicant must show prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”

The applicant herein needed to establish the above stated principles.

Firstly, the applicant needed to establish that he has a prima facie case with a probability of success. In the case of **Mrao Ltd Vs First American Bank of Kenya and 2 Others (2003) KLR 125**, the Court described prima facie case as;-

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

From the above description, it is clear that a prima facie case means more than an arguable case, and in which the evidence must show an infringement of a right or the probability of success of the applicant's case at the trial.

From the available evidence, there is no doubt that the Defendant herein is the owner of the three parcels of land **LR No.1160/654, LR No.1160/655 and LR No.1160/656**, situated in Karen Nairobi. There is no doubt that sometime in the year **2009**, the Defendant and the Plaintiff entered into an agreement(s) for sale of the above suit properties to the Plaintiff by the Defendant. The plaintiff alleged that the agreements were reduced into writing and that the Defendant and plaintiff executed the three sale agreements which were attached to the Affidavit in support of this application. On his part, the Defendant alleged that the said agreement was oral agreement(s) supported by various correspondences. The issue of whether the agreements(s) were in writing or oral is a contested issue which will have to await the calling

of evidence for determination of the same at the full trial.

There is no doubt that the Plaintiff has so far paid **Kshs.38.6 million** towards the purchase of the above stated suit properties. The plaintiff averred that the above payment of **Kshs.38.6 M** was the full payment of the purchase price. However, the Defendant alleged that the said payment was only part payment of the purchase price and referred the same as deposit.

What is not in dispute is that the Defendant did write to the Plaintiff on **22nd September 2014**, and stated that due to the challenges they have experienced, they had been forced to go back to the drawing board and revalue the plots gain. It was further stated in the said letter that **LR No.1160/655** and **656** would be sold for **Kshs.35 Million** per acre. It was however, not indicated by the Defendant what was the initial agreed value per plot, whether in the oral agreement or written agreements. However, in the attached sale agreements by the Plaintiff/Applicant, it was alleged that Plots **No.LR No.1160/654** and **655** were each being sold for **Ksh.12,000,000/=** whereas plot **No.1160/656** was being sold for **13,000,000/=**. The plaintiff further averred that he paid a further deposit of **Ksh.1.6 Million** to the Defendant to facilitate the subdivision and tarmacking of the said plots. Therefore the total amount paid by the Plaintiff to the Defendant was **Kshs.38.6 Million**. That amount has been acknowledged by the Defendant herein. The issues for determination are whether the Plaintiff and Defendant entered into an agreement for sale of the suit properties herein or not.

From the admissions by both the Plaintiff/Applicant and the Defendant, there is no doubt that indeed there existed some agreement(s) for sale of the three suit properties to the Plaintiff by the Defendant. The plaintiff went ahead and paid **Kshs.38.6 Million** towards the purchase of the suit properties. However what is in dispute is whether the agreement (s) entered therein was in writing or oral. As I stated earlier, that an issue that will have to await determination after a full trial. I have taken consideration that at this stage I am not required to determine the very issues which will be canvassed at the trial with finality. I will not therefore determine whether the agreement(s) entered herein was oral or in writing as the Court is not required to make any conclusive or definitive findings of fact or law based on the contradictory affidavit evidence presented to it at this interlocutory stage. See the case of **Narendra Chaganlal Solanki Vs Neepu Auto Spaces Ltd , Kisumu High Court Civil Case No. 90 of 2003.**, where the Court held that:-

“In an interlocutory application for injunction, the Court must warn itself of the gravity of danger of making conclusive findings that may prejudice the interest of the parties at the hearing of the suit and should as far as possible exercise some cautionary steps”.

The Court will only now find and hold that indeed the parties herein did enter some kind of agreement(s) for sale and purchase of the suit properties. Due to the said agreement(s) the plaintiff did pay **Kshs.38.6 Million** to the Defendant. It is also evident that now the Defendant has entered into other sale agreements for the sale of the suit properties, with other third parties. There is a sale agreement dated **23rd August 2012** for sale of **LR No.1160/654** to **Rodham Properties Ltd** for **Kshs.25,500,000/=**. Further there are two other sale agreements for **LR No. 1160/655 and 656** for sale of the above suit properties to **Dakota Developers Ltd** for **Kshs.50,000,000/=** and **45,000,000/=** respectively . The said sale agreements are dated **26th November 2014**. The above agreements were entered while the Defendant was still holding **Kshs.38.6 Million** as deposits for purchase of the suit properties.

The Defendant had averred that it rescinded the sale agreements through various correspondences with one **Patrick Muchemi Gitonga**, one of the Directors of the Plaintiff Company. However, the said correspondences were not to the Plaintiff and if indeed the said **Patrick Muchemi Gitonga**, agreed to receive back the full purchase price that was not a decision of the Plaintiff's company. As was submitted by the Plaintiff, a Company is in law separate from its members. See the case of **Salomon Vs Salomon (1897)AC 78 and Victor Mabachi & another Vs Nuntuin Bats Ltd Nairobi C A Civil Appeal No.247 of 2005.** where the Court held that:-

“A company as a body corporate is a personal jurisdica, with a separate independent identity in law, distinct from its shareholders , directors and agents, unless there are factors warranting lifting of

the veil”.

If the Defendant did communicate with the said **Muchemi Gitonga**, on the issue of refund of the purchase price, then the said **Patrick Muchemi Gitonga**, was not the Company and as was submitted by the applicant, the Company letterhead was not used. The issue of whether the Company mandated the said **Patrick Muchemi Gitonga**, to request for refund of the purchase price will have to be determined at the full trial.

The Defendant also denied ever entering into sale agreement(s) with the plaintiff and stated that it was a stranger to the sale agreements produced in Court. The Defendant attached letters from **Ochieng Opiyo & Co. Advocates** indicating that the Defendant did not appear before them for signing of the sale agreements. However, the amount stated in the sale agreements is what has been paid to the Defendant by the Plaintiff. There is therefore some elements of truth as to the issue of the purchase price. The Court therefore finds that the issue of whether the sale agreements were drawn by the Law Firm of **Ochieng Opiyo & Co. Advocates** or not will only be determined at the full trial when the said advocates would either be called to testify on what actually transpired and led to the drawing of the three sale agreements. At this juncture, the Court finds that the plaintiff did pay **Kshs.38.6 Million** for purchase of the suit properties. The Defendant has shown intention of selling these suit properties to other third parties. If the said sale is allowed to go through, the suit properties will pass hands before the issues herein have been fully resolved. There is evidence that the suit properties which are in dispute are in danger of being alienated by the Defendant to third parties. It is also evident that the Defendant intends to dispose of these properties to third parties and the plaintiff may be obstructed or unable to execute any decree that may be passed against the Defendant in relation to these properties in case the Plaintiff succeeds in the main suit. Since the purpose of an injunction in most cases is to keep things in **Status Quo**, pending the trial, Court finds that in the instant case, the applicant has demonstrated that it has a **prima facie** case with probability of success and it is deserving of the injunctive Orders sought.

The applicant alleged that it carried a search and noted that the suit properties are still in the name of the Defendant and the same have not been transferred to the 3rd parties . As was held in the case of **Jane Kemunto Mayaka Vs Municipal Council of Nakuru & Others High Court Civil case No.124 of 2005**, that:-

“Injunctions are issued to prevent the occurrence of an event that has not occurred or that is threatened to occur that would likely injure an applicant and are not issued where such an event has taken place”

If the suit properties would be sold and transferred to third parties, there is likelihood that the applicant would be prejudiced in the event that the suit is decided in its favour therefore this suit would be rendered nugatory.

Having found that the applicant has a prima facie with probability of success and that it has shown that its rights might be infringed in case the suit properties are sold to 3rd parties and the matter is later resolved in its favour after the trial, the Court finds no reason to delve on the other two principles for grant of injunctions as the orders are sequential. Consequently, the Court finds the applicant is deserving of prayer No.6 of the Notice of Motion dated **17th December, 2014**.

On **prayer No.7**, it is still doubtful whether the sale agreement(s) produced in Court were the ones entered by the parties herein. The Court cannot hold and finds that the applicant was granted vacant possession and that the Defendant has re-entered, encroached, or trespassed on the suit properties. Those are issues that will have to await determination at the full trial. The Court therefore declines to grant **prayer No.7**.

On prayer **No. 4** , the same is a mandatory injunction which is supposed to compel the Defendant to give **immediate vacant possession** of the suit properties . The main issue herein for determination is whether the Plaintiff purchased the three suit properties fully and whether it deserves the order of specific performance as prayed in the main suit. If the Court would grant prayer No.4, then in essence it will have determined the main suit at the interlocutory stage. However, that does not mean that the said prayer

cannot be granted. Nonetheless, Interlocutory mandatory injunction are granted sparingly and only in exceptional circumstances such as where the applicants case is very strong and straightforward and the standard of proof required in mandatory injunction is higher. See the case **Kenya Hotels Ltd Vs Kenya Commercial Bank Ltd & Another , Nairobi High Court Civil case No.8 of 2004 .**

It is therefore trite law that mandatory injunction can only be granted in exceptional circumstances. In the case of **Kenya Breweries Ltd and Another vs. Washington O. Okeyo Civil Appeal No. 332 of 2000 IEA 109**, the court held that;-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one in which the court thinks it ought to be decided at once or if the act done is simple and summary one which can be easily remedied or if the defendant attempted to steal a march on the Plaintiff a mandatory injunction will be granted on an interlocutory application”..... See volume 24 Halsbury Laws of England 4th Edition paragraph 945.

In the instant case, there are several issues to be determined by the Court. Firstly, the Court has to determine whether the three sale agreements are binding on the parties herein and whether they are enforceable. The Court is also to determine whether there was oral agreement or not and whether the existing agreements have been rescinded. Therefore the instant case is not a clear and straight forward one which ought to be decided at once. The matter herein needs to go for full trial, evidence called and tested in cross-examination and issues be determined on merit. The Court therefore finds that the application herein does not meet the standard for grant of mandatory injunction. Consequently, the Court finds that the applicant is not deserving of **prayer No.4** herein.

Having now carefully considered the instant Notice of Motion and written submissions , the relevant provisions of law and the cited authorities, the Court finds that the applicant is only deserving of **prayer No,6** of the said application.

However, the Court finds that **prayers No4 and 7** are **not merited**, and the same are disallowed and thus dismissed. The Court however **allows prayer No.6 plus** costs of the application.

It is so ordered.

Dated, Signed Delivered this 17th day of July, 2015

L. GACHERU

JUDGE

In the presence of

Mr Litolo for the Plaintiff/Applicant

Mr Onyango holding brief for Mr.Imanyara for Defendant/Respondent

Hilda: Court Clerk

Court:

Ruling Read in open Court in the presence of the above Advocates.

L. GACHERU

JUDGE

