



IN THE HIGH COURT OF KENYA AT NAIROBI

ELC CIVIL SUIT NO. 883 OF 2012

VERSUS

RULING

The Plaintiff vide a plaint dated 22nd November 2012 filed in court on 23rd November, 2012 filed the present suit against the Defendant and seeks an order for specific performance against the defendant for the transfer of 2 acres from Land Parcel NO. **LOC.16/KIMANDI/WANYANGA**

/1015 or in the alternative the executive officer of this Honounable Court to sign all necessary documents on behalf of the defendant and a refund of amount paid for the other 1 ¼ acres and a penalty of 30%.

Simultaneously with the plaint the Plaintiff filed a notice of motion application seeking the following orders:-

1. A prohibitory order preventing all dealings from land parcel NO. **LOC.16/Kimandi/Wanyaga/33** which is a original title of land parcel **Loc. 16/Kimandi/Wanyaga/1014 and 1015** pending hearing of this case.
2. A temporary injunction restraining the defendant, servants, agent from interfering with peaceful possession and utilization of 2 acres from land parcel NO. **Loc.16/Kimandi/Wanyaga/1015** until determination of this suit.

The plaintiff/applicant predicates his application on the grounds outlined on the face of the application and the grounds set out in the supporting affidavit sworn by Plaintiff on 22nd November 2012 and a further affidavit sworn on 11th July 2013. The Defendant opposes the application and has sworn a replying affidavit dated 23rd February 2013 in opposition thereto. The parties have filed written submissions articulating their respective positions in the matter.

The brief facts of the plaintiff's case are that on or about 11th December 2009 the Plaintiff entered into an agreement of sale with the Defendant to purchase a portion of 1.5 acres out of land parcel Loc. 16/KIMANDI WANYAGA/801 then registered in the name of the Defendant's mother one Esther Wambui Mbari for Kshs.1,000,000/- and paid to the Defendant a sum of Kshs.900,000/- upon execution of the Agreement with the balance of Kshs.100,000/- being payable upon the transfer of the portion to the Plaintiff. The parties, it appears acknowledged that the Defendant did not possess the authority to sell the portion of land to the plaintiff since the parcel of land **Loc.16/Kimandi/Wanyaga/801** out of which the portion was to be excised was in the name of the Defendant's mother.

The Defendant as at 5th May 2011 had become registered as proprietor of Land parcel **Loc. 16/KIMANDI/WANYAGA/33** measuring 1.98Hectares and the parties on the said 5/11/2011 entered into two agreements one of which was to revoke the previous agreement of 11th December 2009 and the other an agreement whereby the Defendant agreed to sell to the plaintiff a portion of 2 acres at the price of Kshs.1,325,000/-. The Defendant acknowledged receipt of the payment of Kshs.1,000,000/- upon the execution of the agreement with the balance of Kshs.325,000/- being payable as follows, Kshs.25,000/-

on 30/5/2011 and Kshs.300,000/- on 30/11/2011. The defendant was to grant the plaintiff possession of the portion of 2 acres on 30/5/2011.

The agreement for sale under clause 7 provided for payment of liquidated damages of 30% in the event of breach of the agreement by either party. The Defendant on 8/11/2011 acknowledged having been paid by the plaintiff the total sum of Kshs.1,325,000/- for the portion of 2 acres pursuant to the agreement for sale of 5/5/2011.

The plaintiff yet again avers that he entered into a further agreement with the Defendant on 25/11/2011 where the Defendant agreed to sell to the plaintiff another portion of 1.25 acres out of land parcel **Loc.16/KIMANDI/WANYAGA** for Kshs.870,000/- out of which Kshs.170,000/- was paid on execution of the agreement for sale. The agreement did not give the particulars out of which the portion 1.25 acres was to be excised but the Plaintiff in his further affidavit avers that the portion of 2 acres after subdivision of Title **Loc.16/KIMANDI/WANYAGA/33** became **Loc.16/KIMANDI/WANYAGA/1015** which he claims he was given possession of and that the other portion of 1.25 acres became **Loc.16/KIMANDI/WANYAGA/1014**. The copy of the unregistered injunction for in respect of **Loc.16/Kimandi/Wanyaga/33** dated 8/3/2010 shows plot 1014 was to be 0.607 Hectares and plot 1015 was 1.354 hectares.

The Defendant for his part acknowledges there was an agreement to sell to the plaintiff a portion of 1 ½ acres out of parcel NO. **LOC.16/KIMANDI/WANYAGA/33** but denies he had agreed to sell 2 acres. The Defendant further denies he was a party to the agreement he is alleged to have signed on 25th November 2011 and alleges that the signature said to be his in the sale agreement must have been forged. The Defendant further states that the sale of the portion of 1.5 acres that he had agreed to was blocked by the Land Control Board and that his children consequently objected to the sale of the land as per the letter annexed to the Defendant's replying affidavit marked 'JKH5'. The Defendant states that since it became impossible to effect the transfer to the plaintiff he suggested to the plaintiff that he (the plaintiff) continues using the portion land including picking the tea until he repays himself fully the amount paid towards the purchase price.

The foregoing is the factual background to the instant suit and the issue that falls to be determined is whether in the circumstances of this case the plaintiff has established a prima facie case with any probability of success to enable the court to grant the plaintiff the equitable relief of an injunction that he seeks.

The court has considered and evaluated the material and evidence placed before the court at this stage and the court is not satisfied that the plaintiff has established that he has a prima facie case with a probability of success at the trial. Firstly it is clear that the transaction was a controlled transaction within the meaning of the Land Control Act Cap 302 Laws of Kenya and it has not been demonstrated that sections 6 and 7 of the Land Control Act have been complied with. The Act requires that in regard to any transaction of sale/transfer the consent of the land control board of the relevant area has to be sought and obtained within six (6) months from the date of the sale agreement otherwise the agreement becomes null and void for all purposes and the same cannot be enforced. The Plaintiff seeks to rely on the agreements alleged to have been entered into on 5th May 2011 and 25th November 2011 respectively. Unless in respect of these agreements the consent of the Land Control Board was sought and obtained within 6 months of their being entered into the same became void abinitio and are unenforceable. The court cannot enforce contracts that have become void through operation of the Law and in the circumstances the Plaintiff's prayer for specific performance may be difficult to obtain at the conclusion of the trial.

The Land Control Act indeed provides that any sums paid pursuant to a void transaction are recoverable as a civil debt and in the circumstances of this case it is the view of the court that the plaintiff would be adequately compensated by an award in damages. The parties in this agreement for sale anticipated the possibility of breach and provided for payment of liquidated damages for any breach at the agreed rate of 30% of the purchase price. Infact the plaintiff in his demand to the Defendant through his advocates on 11th July 2012 "**FGT7**" had that in mind when he inter alia wrote as follows:-

“We have now instructions to demand which we hereby do that you transfer the said 2 acres to him or refund to him the sum of Kshs.1,325,000/- and Kshs.397,500/- being 30% of the purchase of the 2 acres as per the agreement dated May, 2011.....”

I am in the premises satisfied that damages are quantifiable and would be an adequate remedy in the event the plaintiff is successful at the trial.

The court in the circumstances of this suit is satisfied the plaintiff has not brought himself within the threshold under which a court of equity will grant an interlocutory injunction. The conditions for the grant of an injunction as set out in the case of **GIELLA – VS- CASSMAN BROWN & CO. LTD (1973) EA 358** are well settled and it has to be shown that the plaintiff has established and/or demonstrated a prima facie case with a probability of success and secondly that damages would not be an adequate remedy should the plaintiff be not granted an injunction at the interlocutory stage and he is successful at the trial. The plaintiff in this case has not satisfied these two conditions. To the extent that there is no doubt as regards the aforesaid two primary conditions considering the third condition as to whether the balance of convenience would favour the plaintiff would be superfluous. There is no basis upon which the plaintiff would be granted the order of injunction sought.

In the premises I find the Plaintiff’s application to be devoid of any merit and the same is dismissed with costs to the Defendant.

Ruling dated and delivered at Nairobi this.....5th.....day of February.....2014

J.M. MUTUNGI

JUDGE

In presence of:

..... Plaintiff

..... Defendant