



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ENVIRONMENT AND LAND COURT CASE NUMBER 47 OF 2012**

**GEORGE ANDIVA. .... 1<sup>ST</sup> PLAINTIFF/APPLICANT**

**JOHN OKIOGA. .... 2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**TELPOSTA PENSION SCHEME**

**TRUSTEES REGISTERED.**

**.....DEFENDANT/RESPONDENT**

**RULING**

The application before the court is the Notice of Motion dated 30<sup>th</sup> January, 2012, filed by the Plaintiff. It seeks the grant of an Injunction Order restraining the Defendant from doing anything including, offering for sale, advertising for sale, disposing off, transferring or entering into, arrangement or compromise for disposal, sale, or alienation to any other person other than the applicant, the parcels of land known as Nairobi Block 23/576 and Nairobi Block 23/579 respectively until this suit is fully determined.

The main facts are as follows:-

The suit properties belong to the Defendant, Telposta Pension Scheme Trustees Registered, but they are occupied for the last 8 years as tenant, by the Plaintiff/applicant. The Plaintiff at all material times was a member of the Scheme and is still one, although retired. The company that founded the Defendant, Telkom (K) Ltd, did so for the purpose of providing retirement benefits for its employees, former employees and dependants. It is not denied that one of such benefits to the members is a provision of a house for occupation, initially as a tenant and subsequently or following acquisition thereof, as owners.

In 2003 the suit premises were each valued at Ksh.8 million for the purpose of downloading to members but could not be sold to tenants then because the Defendant did not have title to the specific properties aforesaid including the suit properties. The deliberate practice arising from the nature and purpose of the scheme, was to offer the scheme members and occupiers, who were tenants, the first priority to purchase. Other members whose pieces had title were given such opportunity and went ahead to purchase. It is alleged that the Plaintiff among others were promised to purchase theirs when titles would be available and as a result he alleges that he improved the suit premises, living in the legitimate expectation to purchase the same.

In 2011, the unpurchased properties were revalued at Kshs.24,150,000/- million thereabout. However in January, 2012 the Defendant finally offered to sell the suit property to the Plaintiff at ksh.72,450,000/- on

condition that 10% would be paid within 21 days from 12<sup>th</sup> January, 2012 and that no mortgage arrangements would be involved. That is what aggrieved the Plaintiff/Applicant to file this suit and this application on the basis that the conditions attached to the offer for sale to him, were unreasonable, discriminatory, influenced by external issues and intended to make it impossible for the plaintiff to purchase to his detriment as a scheme member. He hence seeks injunction orders to restrain the Defendant from alienating the suit premises until the suit in court determines the fair and just conditions upon which the plaintiff can purchase the properties, if at all he does so.

The Defendant in response avers that there is no written contract between the parties to the effect that the Defendant must at all sell the suit premises to the Plaintiff or at any given price. That there was no agreement that the defendant cannot freely sell the properties to any other person. That it has not breached any trust with the Defendant nor is it under any legal obligation to sell the same at the market price.

The relevant issue at this stage is whether the Applicant has established the terms upon which temporary injunctions are issued which are: -

- a. Whether the applicant has shown that he has a prima facie case with probability of success.
- b. Whether the damages will adequately compensate the applicant if an order of injunction is not granted.
- c. Whether on the balance of convenience the plaintiff will suffer more if an injunction is not issued.

I have carefully considered the application, taking into account the argument from each side. It is not denied that the purpose of setting up the Defendant Scheme was to benefit members of the scheme who were in occupation of the premises as tenants. That might, on the face of things, be the reason why priority for purchase was to be given to the scheme member who is in occupation. It also appears that other scheme members whose titles were available earlier were at the time given opportunity to purchase the houses they occupied without harsh and discriminatory conditions as well as at unfair prices.

Furthermore Regulation 25(2) (a) of the Retirement Benefits (Individual Retirement Benefits Schemes) Regulations, 2000 deals with the valuation of assets disposable to scheme members. It provides thus: -

***“..... assets of the scheme should be valued at values not exceeding their market or net realizable value and in particular, the value of the land and buildings should not exceed the value determined on the basis of valuation by a registered valuer who is a member of the Institute Surveyors of Kenya once in every three years or at such shorter intervals as the Authority may otherwise permit in writing.”***

Assuming that the above regulations will apply to the Defendant Scheme, it impresses this court to leave the issue of valuation of the suit properties to be decided by the court that will try this suit. Put differently the Plaintiff's suit raises issues that are arguable and which might end in his favour. In short, he has demonstrated a prima facie case with probable chances of success.

On the second condition of the **Giella Vs Cassman Brown case**, the issue is whether failure by this court to grant the injunction sought may lead to incomensurable or inadequate damages. It is not disputed that the Plaintiff is in occupation of the suit premises for over eight years. He is a member of the scheme all along. He may have formed an individual personal compassion or sentimentalism of the suit premises. Would damages compensate him adequately if the Defendant is allowed to sell the property to a third party, which it can easily do, considering the nature of the Defence filed herein? The court forms the view that damages may not give the Plaintiff adequate compensation.

On the final condition of the **Giella case**, this court thinks that the balance of convenience lies in favour of the Plaintiff who is in occupation and offers to purchase at reasonable terms and which are not discriminatory.

It can only be recalled as stated by Ibrahim, J (as he then was) in the case of **Kenya Hotels Limited Vs**

**Kenya Commercial Bank Ltd & Another [2004] iKLR** to the effect that: -

***“An injunction being an equitable remedy, the court man, while remaining guided by these three principles, also look at all circumstances including the conduct of the parties”.***

That is to say, that this court is bound to look at the Defendant Scheme structure, its regulations and the purpose for which the scheme was set up, and whether the conduct of the parties is in conformity or non-compliance thereof would make the court grant or not grant the injunction sought.

Taking all those factors into the court is persuaded that the Plaintiff has demonstrated merit for the injunction orders sought until the hearing and final determination of the suit. The orders are, therefore, granted as sought with costs in the cause.

Dated and delivered at Nairobi this 17<sup>th</sup> day of March, 2014.

**D A ONYANCHA**

**JUDGE**