



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND OF KENYA

AT NAKURU

CIVIL CASE NO. 589 OF 2013

**KOYUMKEI MULTIPURPOSE COOPERATIVE SOCIETY LIMITED AND
OTHERS.....1st PLAINTIFF/ APPLICANT**

VERSUS

RAEL CHEPNGETICH KOECH....DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion dated **12th November, 2013** was filed by the plaintiffs/applicants herein under **Order 51 Rule 1, Order 40 Rule 1, 2, 4** of the Civil Procedure Rules 2010, **Sections 3A** of the Civil Procedure Act and all other enabling Laws seeking :

That pending the hearing and determination of the suit herein this honourable court be pleased to restrain the respondent, servants, employees, agents and or proxies from trespassing onto, entering, dealing with, alienating, disposing off, selling or in any way interfering with all demarcated 23 plots belonging to the plaintiffs that are contained in 6 acres of land parcel number Njoro/ Ngata Block No. 2/26 (Kirobon) (hereinafter referred to as the suit property) and the usual order on costs.

2. The application is premised on the grounds which are found in the body of the application, a supporting and further affidavit sworn by **James P. Cheruiyot**, chairman of the 1st applicant on behalf of the 2nd to the 18th applicants on 12th November, 2013 and 18th January, 2014. The applicants were represented by **Mr Kipkoeh** who also filed written submissions on 20th January, 2014.

3. The defendant swore a replying affidavit dated 29th November, 2013. She strenuously opposed the application but did not file written submissions despite being given an opportunity to do so.

4. The brief facts of the plaintiff's case are that the plaintiff, the defendant and her husband entered into a sale agreement dated 23rd July, 2012 for the purchase of six (6) acres of the suit property out of 7.338 hectares for Kenya shillings six million six hundred thousand (6,600,000).

5. The relevant terms of the agreement were as follows;

- a) **Kenya shillings one million eight hundred thousand (1,800,000) to be paid upon execution of the agreement. Balance was Kenya shillings four million eight hundred thousand(4,800,000)**

- b) Any money at any day needed by the vendors shall be paid by the purchaser**
- c) The final payment shall be paid to the vendors by the purchaser after land control board when purchaser gets its title deed within four months.**
- d) The purchaser upon payment of one million eight hundred thousand (1,800,000) was to take possession and subdivide the 6 acres among its members**
- e) The vendor undertook to execute all transfer documents and obtain all necessary consents to facilitate a smooth transfer of the land in favour of the purchaser.**

6. In compliance with the terms of the agreement the purchaser paid the agreed initial sum of Kenya shillings one million, eight hundred thousand(1,800,000), took possession and subdivided the property and thereafter paid another Kenya shillings four million, Eight hundred thousand (4,800,000 totaling to Kenya shillings six million five hundred thousand (6,500,000)Unfortunately before any consent could be obtained **Kipyegon Koech** (defendant's husband) passed on.

7. It is the plaintiffs contention that instead of honoring the agreement, the respondent in September 2013 started obstructing the plaintiffs from developing their respective parcels and eventually credited a total of Kenya shillings four million seven hundred thousand (4,700,000) into the plaintiffs account. These actions were not only inequitable, illegal, greedy but also unconscionable because while doing all this the defendant did not have letters of administration of the estate of the deceased.

8. The defendant in a replying affidavit dated 29th November, 2013 opposes the application. She denies that she and her late husband entered into a sale agreement with the plaintiffs for the sale of six acres but admits that they intended to sell the land. She later admits that there was an agreement which they were tricked into signing whose contents they did not read nor were the contents explained to them which was unfair, ambiguous, a sham and contrary to what the parties had agreed verbally. She admits that she and her husband had received a total of Kenya shilling six million five hundred thousand(6,500,000) from the plaintiff but in several stretched installments.

9. She further depones that the suit land being Agricultural land, required that consent be obtained from the land control board within six months of execution of the agreement which was not obtained.

10. Finally, she denied obstructing the 2-18th plaintiffs from developing their respective parcels claiming that she had attempted to resolve the issue amicably with them but negotiations had failed out of frustration from the plaintiffs forcing her to refund the money being a joint signatory to her late husband's account.

11. She urges the court to dismiss the application with costs as the applicants were now in receipt of the money and are also in occupation of the suit property.

12. From the material before court I find the issues for determination to be as follows;

1. what is the effect of not having obtained the consent from the land control board?

a) on the agreement of sale entered into by the parties

b) on the suit between the parties

2. can the orders sought be granted

3. costs.

Effect of not obtaining Land Control Board consent

13. It is common ground that the land in dispute is a land control area. Indeed the agreement for sale had a clause stating that the vendor shall ensure that he executes all transfer documents and obtains all necessary consents and final payment shall be paid to the vendors by the purchaser after obtaining the consent from the Land Control Board. The defendant relies on that clause to argue that the sale is void for lack of consent from the Land Control Board.

14. **Section 6(1) (a) of the Land Control Act Cap 302** states that any transaction for sale within a Land control area which does not have Land Control Board consent is void for all purposes. There is no doubt that there was no land control consent for the sale transaction herein. This fact is admitted by both parties.

15. Under **Section 8 (1) of Cap 302**, the application to the Land Control Board must be made within 6 months of signing the agreement. The High court may notwithstanding the period of six months, extend the period.

16. There is no indication by either party that there was an application to extend the time once the six months lapsed as contemplated by section 8(1) of Cap 302. Therefore under the Land control Act the agreement for sale herein is thus void for non compliance with the law.

17. Are the provisions of the Land Control Act absolute in view of the land Act, 2012 which was enacted to give effect to **Article 68** of the constitution? **Sections 39, 40, 41 and 42** of the Land Act 2012, spell out clearly the procedure to be followed by a vendor in repossessing his/ her land where there is breach of a contract for sale when the purchaser has taken possession through a contract for sale. It also outlines the reliefs available to the purchaser where there is breach of contract. Obstruction of the applicants' developments and refund of part of the purchase money by a vendor in the manner the respondent chose to do, is not one of the ways available. Such possession must be peaceful or through obtaining a court order for possession of the land.

Is the applicant entitled to the orders sought?

18. The conditions upon which an interlocutory injunction may be granted were well settled in the case of **Giella V Cassman Brown & Co. Ltd (1973) EA 358**. They are:-

- 1. The applicant must demonstrate that he has a prima facie case with a probability of success;**
- 2. An interlocutory injunction will normally not be granted unless the applicant will suffer irreparable loss that cannot adequately be compensated in damages;**
- 3. If the court is in doubt, it will decide the application on a balance of convenience.**

19. At this stage the court is not required to make any final findings on the facts. That will be for the main hearing. The issue is therefore whether the applicant satisfies the above conditions. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the applicant has a prima facie case. However, traditionally, court has always considered all the three principles.

20. So has the plaintiff established a prima facie case? Prima facie is defined in **Mrao Ltd vs. First American Bank Kenya Ltd & 2 Others (2003) KLR 125** as " a case which, on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation rebuttal from the latter"

21. A sale agreement has been exhibited by the applicants and although the respondent tries to deny its existence, she admits signing a document with her husband and receiving a total of Kenya shillings six million five hundred thousand (6,500,000). She also admits that the plaintiffs are in possession of the suit property with their consent therefore beneficial interest has passed to the purchasers. I do not find anything in the plaintiff's actions to show that they have violated the rights of the defendant's calling upon them to rebut the allegation. This been the case, I do believe that the applicant has demonstrated a prima

facie case with a probability of success.

22. Will the applicant stand to suffer irreparable damage if the injunction is not granted? From the material before me, it is clear that the applicants are in occupation of the suit property with the consent of the respondent and have developments therein. The money refunded by the respondent was done so on her own motion. I therefore find that the applicants have proved that they will suffer irreparable damage and will most likely be evicted by the respondent if the orders sought are not granted.

23. Having found that the plaintiff has established a prima facie case, will suffer irreparable damage, I also find that the balance of convenience tilts in their favour.

24. For the above reasons I grant prayer 3 in the notice of motion dated 12th November, 2013 with costs.

Dated signed and delivered this 9th day of May 2014

L N WAITHAKA

JUDGE

PRESENT

Ms Manyal holding brief for Mr Kipkoech for the plaintiff

N/A for Defendants

Emmanuel Maelo: Court Clerk

L N WAITHAKA

JUGE