



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**ENVIRONMENT AND LAND COURT**

**E.L.C NO. 370 OF 2013**

**HOPEWELL ENTERPRISES LTD.....PLAINTIFF**

**VERSUS**

**KENYA PORCELAIN FACTORY LTD.....DEFENDANT**

**RULING**

1. Before the Court is a Notice of Motion dated 7<sup>th</sup> April, 2014 filed by the plaintiff under **Order 40 Rule 2, Order 51, Rule 1** of the Civil Procedure Rules, **Sections 1A, 1B and 3A** of the Civil Procedure Act and all enabling provisions of the Law seeking the following substantive order *inter alia*:

**That a temporary injunction be issued restraining the defendant from interfering and dealing howsoever with the suit property known as Naivasha Municipality Block 2/620 (“suit property”) and all plots carved out of the suit property particularly plot number Block 2/639, 640, 646, 655, 667, 668, 669, 670, 671, 703, 704, 720, 721, 722, 723, 724, 725, 726, 727, 728 and 731 pending the hearing and determination of this suit.**

2. The application is premised on the grounds on its face and is supported by the affidavit of **David Mwaniki Kinuthia**, a director of the plaintiff company. It is deposed that **Walkabout (K) Ltd** the third party in this suit from whom the plaintiff bought the suit property, was the chargee of the suit property and that the defendant was the chargor; that the defendant defaulted in payment of the loan facility, whereupon the chargee exercised its power of sale and sold the property to the plaintiff at a consideration of Kshs.6,000,000.

3. As at the time the plaintiff purchased the suit property, the defendant had already subdivided the suit property into 96 smaller plots. The mother title had been surrendered to Lands office but still remained in the defendant’s name. The plaintiff as the new proprietor, began entering into sale agreements with buyers of the smaller plots. It was agreed between them that the defendant would continue to sign transfer forms in favour of the purchasers and indeed the defendant's directors signed several such transfer forms.

4. For some unknown reason, the defendant in **April, 2013** collected lease certificates and other vital documents for some of the plots from the Lands office and retained them, causing inconvenience and frustration to the plaintiff and purchasers of the respective plots. The defendant has now adamantly refused to return the lease certificates and other documents to the lands office Naivasha or explain the reasons for withholding the same.

5. The application is opposed vide the defendant's replying affidavit dated **28<sup>th</sup> April, 2014**, sworn by

**Geoffrey Muhoro Mwangi**, a director of the defendant company who contends that they have never entered into any agreement with the plaintiff and there is no clear nexus between the parties in these proceedings; that there could not be a charge over subdivided properties and that the purported Power of Attorney is fake and inadmissible; that the applicant was being economical with the truth by concealing to the court that there were twelve plots that may have been sold to **East Africa Almadiyya Muslim Mission** that were part of the suit property: that the role played by **Chege Kirundi Advocate** in this whole saga has also not being disclosed and that the applicant has not attached a copy of an official search to demonstrate that the plots exist and their current status in the Government records.

6. The application was argued before me on **13<sup>th</sup> May, 2014** by the learned counsels **Mr Okeke** for the plaintiff/applicant and **Mr P.K Njoroge** for the defendant/ respondent.

7. At the hearing, **Mr Okeke** for the plaintiff reiterated the contents of the affidavit of **David Mwaniki Kinuthia** and highlighted the circumstances that led to the plaintiff becoming the owner of the suit property; that after the suit property had been sold to the plaintiff, a meeting was held between the parties and one of the purchasers where it was agreed on the modalities of the planned transfer. It was his contention the plaintiff had established a prima facie case as the defendant had not denied that there had been a charge, a sale agreement and transfer to the Plaintiff. He relied on the case of **Giella v Cassman Brown**. On the second limb, he submitted that since all the plots had already been sold, damages would not be an adequate remedy if the defendant was permitted to sell the same plots to other buyers and that the balance of convenience lay with the plaintiff.

8. In reply **Mr Njoroge** submitted that there was no resolution by the plaintiff's board of directors to institute this suit, which was already unsustainable because it did not disclose a cause of action, or that if it did, it should be for recovery of money only; that the plaintiff claims that they bought land from a third company whose director gave himself a Power of Attorney, which was improper; there were that other buyers of the property, namely East Africa Almadiyya Muslim Mission and if these orders are granted, the orders would affect innocent buyers.

9. In a brief rejoinder, **Mr Okeke** sought to rely on **Order 3 Rule 15** of the Civil Procedure Rules to submit that the Order confines affidavits to issues of fact and that the certificate of registration and search are matters to be produced at a later stage during the hearing of the suit.

10. I have considered the application, replying affidavit and the submissions filed by the respective parties. The issue before this court is whether the applicant is entitled to an interlocutory injunction in the circumstances of the case on the basis of applicable principles.

11. Injunctions are equitable remedies that are granted at the discretion of the court. The principles of granting such injunctions were laid down in the celebrated case of **Giella vs Cassman Brown and Company Limited (1973) EA 358** where the Court held at page 360 as follows:-

**“First, an applicant must show a *prima facie* case with 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 (E.A. Industries vs Trufoods, 1972) EA 420.”**

12. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the appellant has a *prima facie* case. It must also be noted that the purpose of an injunction is to maintain the status quo pending the hearing and determination of the matter before it.

13. I am alive to the fact that the court is not required to make final findings of contested facts but to weigh the relative strength of the parties cases. The principle was considered and Lord Diplock made the following observation in **American Cyanamid Co. V Ethicon Limited (1975) 1 ALL ER 504; (1975) A.C. 396 HL** at 510.

**“It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.**

14. From the affidavits and submissions by the respective Counsels, it is not in doubt that there are a lot of players in this matter. There is the defendant who entered into some arrangement with his Counsel and friend **Chege Kirundi** to advance him some money, then there is Malik and Co. Advocates who appear to be in the mix with Kirundi and Company and part and parcel of Walkabout K Limited. To get themselves out of the claws of the firm of Kirundi and Company Advocates, Malik and Company Advocates and Walkabout K limited, the defendant gave the firm of Malik and Company Advocates, 12 plots at a consideration of Kshs.1,300,000 to save the other plots. These 12 plots were sold to **East Africa Almaddiya Muslim Mission**. The story does not end there. The plaintiff then came into the picture and sold of the other plots to third parties. To my mind this is too much to untangle at this stage and this should be left for trial. However at this stage, what I deem to be important is to secure the interests of all these players and preserve the suit property until the matter is heard and determined. I agree with Counsel for the plaintiff that if an injunction is not granted and the plots which have already been "sold"are "sold" again, it will be a recipe for disaster and this court would not wish to be blamed for contributing to the chaos that would most likely follow which harm may not be easily compensated by damages.

15. It is my humble view however, that there are many necessary Parties in this matter who have not been brought on board and who will assist the court to unravel this mystery. I therefore direct that Walkabout (K) Ltd, East Africa Almaddiya Muslim Mission and the other purchasers who bought land from the plaintiff be enjoined as parties in the suit and any other person who may have a stake in this matter.

16. Accordingly, I do allow the Notice of Motion dated **7<sup>th</sup> April 2014** and grant prayer 3 contained therein.

Costs to be in the cause.

**Dated, Signed and delivered at Nakuru this 3<sup>rd</sup> day of October 2014.**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

Mr Okeke for the plaintiff/Applicant

MsLagat holding brief for P K Njoroge for Defendant/Respondent

Emmanuel Maelo : Court Assistant

**L N WAITHAKA**

**JUDGE**