



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 101 OF 2020

ZAHEER JHANDA.....PLAINTIFF

VERSUS

LOSUPUK LIMITED.....DEFENDANT

RULING

Introduction

1. The plaintiff initiated this suit through a plaint dated **1st April 2020**. He sought the following verbatim orders against the defendant:
 - a) *A mandatory injunction to restrain the defendant from selling, transferring, alienating, collecting rental income and in any way dealing with the suit property and title thereto;*
 - b) *An order of specific performance of the agreement for sale dated 21st February 2020; (sic)*
 - c) *A declaration that the action by the defendant to blatantly flaunt and breach the contractual terms of the sale agreement are unlawful;*
 - d) *A mandatory order compelling the defendant herein to complete the sale and purchase transaction within seven (7) days of the court's decision or in the alternative, an order directing the Land Registrar to effect such transfer of the suit property upon the execution of the requisite transfer documentation by the Deputy Registrar of this honourable court, including applications and necessary consents to transfer;*
 - e) *An order for the payment of mesne profits from the property;*
 - f) *An order for the payment of all rental income collected from all the town houses currently erected on the suit property to the plaintiff herein from the defendant together with interest thereon at commercial bank rates from the original completion date of the agreement for sale till payment in full;*
 - g) *Damages for loss of use of the suit property from the date of payment of the final instalment until the date of judgment determining this suit;*
 - h) *Costs of the suit together with interest thereon at commercial rates from the completion date until payment in full.*
2. Together with the plaint, the plaintiff brought a notice of motion dated 1/4/2020 (**the application**). He sought the following verbatim orders against the defendant:
 - 1) *That the matter herein be certified urgent and heard ex parte in the first instance.*
 - 2) *That this honourable court do issue a temporary injunction restraining the defendant/respondent whether by themselves, their agents, servants, employees or whomsoever from wasting, damaging, alienating, sale or disposal, occupation, trespassing into, collecting rental income and/or in any way interfering in any manner with the suit property being Land Reference Numbers 209/384/5 and 209/384/6, pending the hearing and final determination of this application.*
 - 3) *That this honourable court do issue a temporary injunction restraining the defendant/respondent whether by themselves, their*

agents, servants, employees or whomsoever from wasting, damaging, alienating, sale or disposal, occupation, trespassing into, collecting rental income and/or in any way interfering in any manner with the suit property being Land Reference Numbers 209/384/5 and 209/384/6, pending the hearing and final determination of the suit.

4) That this honourable court be pleased to grant a temporary injunction restraining the respondent/defendant by itself, servants, employees or whomsoever from demanding or accepting rental income or managing the buildings erected on the suit property pending the hearing and final determination of this application.

5) That this honourable court be pleased to grant a temporary injunction restraining the respondent/defendant by itself, its agents, servants, employees or whomsoever from demanding or accepting rental income or managing the buildings erected on the suit property pending the hearing and final determination of the suit.

6) That this honourable court be pleased to grant the applicant herein sole access and vacant possession of the suit property including the right to let, demand, collect and or accept whether by himself, agents, servants, employees or whomsoever rental income from the buildings and improvements erected thereon pending the hearing and final determination of this application.

7) That this honourable court be pleased to grant the applicant herein sole access and vacant possession of the suit property including the right to demand, collect and or accept whether by himself, agents, servants, employees or whomsoever rental income from the buildings and improvements erected thereon pending the hearing and final determination of this application.

8) That the costs of this application be on the cause.

3. The said application is the subject of this ruling. The application was supported by the plaintiff's supporting affidavit sworn on 1/4/2020 and supplementary affidavit sworn on 15/7/2020.

Applicant's Case

4. The plaintiff's case was that he entered into a sale agreement with the defendant, dated 21/2/2019, pursuant to which the defendant sold to him **Land Reference Numbers 209/384/5 and 209/384/5**, together with the developments thereon (**the suit properties**). The agreed purchase price for the properties was Kshs 150,000,000. He duly paid the agreed purchase price and the defendant acknowledged receipt. In breach of the said agreement, the defendant had failed to give him completion documents. The defendant had similarly failed to give him vacant possession of the suit properties, despite receiving purchase price in full. The plaintiff exhibited various documents in support of the application, among them: (i) sale agreement dated 21/2/2019; (ii) written acknowledgment of receipt of Kshs 51,000,000 dated 21/2/2019; (iii) written acknowledgment of receipt of Kshs 25,000,000 dated 26/3/2019; (iv) written acknowledgment of receipt of Kshs 50,000,000 dated 18/4/2019; (v) letter dated 26/4/2019 authorizing Mayfair Bank to transfer Kshs 15,000,000 to Andrew Peter Ngirici. The plaintiff contended that in addition to the above sums, a sum of Kshs 9,000,000 was paid to Mr Ngirici on instructions of the defendants, to make a total of Kshs 150,000,000.

Respondent's Case

5. The defendant responded to the suit through a statement of defence dated 14/7/2020. Further, the defendant opposed the application through a replying affidavit sworn on 14/7/2020 by Margaret Wanjiku Saitoti. The case of the defendant was that, indeed, it entered into the said sale agreement dated 21/2/2019. The plaintiff only made part-payment of the agreed purchase price but the said payments did not settle the entire purchase price for the suit properties. Due to circumstances beyond the control of both the plaintiff and the defendant, which prevented them from completing the sale transaction, both parties entered into a cancellation agreement dated 5/8/2019, pursuant to which the sale contract dated 21/2/2019 was cancelled and the defendant agreed to refund to the plaintiff Kshs 90,000,000 through instalments. The defendants had continued to make payments to the plaintiff in tandem with the cancellation agreement dated 5/8/2019. As at the time of filing the defence, the defendant had refunded to the plaintiff a total of Kshs 55,600,000, leaving a balance of Kshs 34,400,000. The defendant denied liability and opposed the application on the above grounds. The defendant exhibited various documents in support of its case, among them (i) a cancellation agreement dated 5/8/2019; (ii) written acknowledgment dated 18/8/2019 by the plaintiff acknowledging by the plaintiff receipt of Kshs 2,000,000; (iii) written acknowledgment dated 20/12/2019 by the plaintiff acknowledging receipt of Kshs 10,000,000 and confirming that the total amount received by him as at 20/12/2019 was Kshs 31,400,000.

Rejoinder

6. The plaintiff filed a supplementary affidavit as a rejoinder to the defendant's response. He disowned the cancellation agreement exhibited by the defendant, deposing that he was a stranger to it. He added that the cancellation agreement appeared to have been executed by the vendor alone. He further deposed that should the original agreement bear a nexus to him, the same should be treated as a document procured by the defendant through misrepresentation because he had fully discharged his obligations under the agreement and there was nothing else remaining to be done by him towards completion of the contract. Further, he deposed that the acknowledgments of payments exhibited by the defendant related to brokerage fees and debt payments and were not related to the sale agreement dated 21/2/2019.

Applicant's Submissions

7. The application was canvassed through written submissions. Counsel for the plaintiff submitted that because the suit properties were in danger of being wasted, damaged or alienated, the court was obligated to preserve them. Secondly, counsel submitted that the plaintiff was entitled to injunctive reliefs because the defendant had breached the agreement dated 21/2/2019. Thirdly, counsel argued that the suit properties required ardent management.

8. Citing the principle spelt out in **Giella v Cassman Brown (1973) EA 358; American Cynamid Co v Ethicon Limited [1975]**

All ER 504 and Mrao v First American Bank of Kenya Limited (2003) eKLR, counsel argued that the plaintiff had demonstrated a *prima facie* case with a probability of success. It was further argued that, in the absence of an injunctive order, the plaintiff stood to suffer irreparably because the defendant will continue to benefit multiple times from the suit properties.

9. Counsel for the plaintiff argued that the applicant's obligation was to make payment which he duly made whereas the defendant's obligation was to grant vacant possession to the plaintiff and release completion documents to him, which they had failed to do. Counsel added that the cancellation agreement dated 5/8/2019 was inadmissible because it offended the parole evidence rule. Counsel further argued that there was no meeting of the minds in the cancellation agreement and that it mistakenly alluded to inability by both parties to complete the agreement yet the plaintiff had already completed his part of the agreement. Lastly, counsel argued that the cancellation agreement reeked of bad faith, undue influence and fraud.

Respondent's Submissions

10. Counsel for the defendant filed written submissions dated 20/8/2020. He listed the following as the three issues falling for determination in the application (i) *whether or not the applicant comes to this honourable court with unclean hands for failure to disclose material facts relating to this matter*; (ii) *whether or not the cancellation agreement dated 5th August, 2019 is valid and binding upon the parties*; (iii) *whether or not the applicant has satisfied the required legal standard to merit the granting of an injunction as established in the case of **Giella v Cassman Brown (1973) EA 358***.

11. On the first issue, counsel submitted that the plaintiff had, while approaching the court for equitable relief, deliberately failed to disclose to the court the existence of the cancellation agreement dated 5/8/2019. Counsel added that the plaintiff did not deny signing the cancellation agreement but merely contended that he mistakenly signed it. Counsel added that the acknowledgments exhibited by the defendant were clear that the plaintiff was receiving refunds in furtherance of the cancellation agreement dated 5/8/2019.

12. On the second issue, counsel submitted that through the cancellation agreement dated 5/8/2019, parties to the agreement moved away from the agreement dated 21/2/2019 and bound themselves to the terms of the cancellation agreement. Counsel added that the cancellation agreement was a fresh agreement between the parties, pursuant to which they mutually agreed to cancel the sale agreement dated 21/2/2019. It was further submitted that the cancellation agreement was valid because it met all the necessary elements of a contract.

13. On the third issue, counsel submitted that the plaintiff had not satisfied the criteria for grant of restraining orders because the agreement dated 21/2/2019 was cancelled; upon cancellation, the parties entered into a fresh agreement; and the parties ceased being bound by the agreement dated 21/2/2019. Secondly, counsel submitted that the plaintiff had failed to demonstrate that he stood to suffer irreparable loss for which he would not be adequately indemnified through an award of damages. Counsel argued that the value of the suit properties, together with any rental income made from them, were quantifiable and the plaintiff would be compensated through an award of damages should his claim succeed. Lastly, on this issue, counsel submitted that the balance of convenience tilted heavily in the defendant's favour.

14. On the last issue, counsel submitted that prayers 4, 5, 6 and 7 were not capable of being granted at this interlocutory stage because they were final orders that would only be granted upon full hearing and determination of the suit.

Analysis & Determination of the Application

15. I have considered the application together with the supporting affidavits; the response thereto; the parties' respective submissions; the relevant legal framework; and the prevailing jurisprudence on the key issue falling for determination in the application. Prayers 1, 2, 4, 6 and 7 are spent because the application is under determination now. What remains to be determined are prayers 3, 5 and 8. Consequently, the single key issue falling for determination in this application is whether the plaintiff has satisfied the criteria upon which jurisdiction to grant an interlocutory injunctive relief is granted.

16. The criteria upon which our courts exercise jurisdiction to grant an ordinary interlocutory injunctive relief is well settled [see **Giella v Cassman Brown (1973) EA 358**]. Firstly, the applicant is required to demonstrate a *prima facie* case with a probability of success. Secondly, the applicant is required to demonstrate that he stands to suffer irreparable damage that may not be adequately indemnified through an award of damages. Thirdly, should there be doubt on both or either of the above two requirements, the court should determine the application for injunction on a balance of convenience.

17. At this interlocutory stage, the court does not make conclusive or definitive findings on the substantive issues in the suit. Its focus is on whether or not the above criteria has been satisfied. Definitive and conclusive findings are for a different forum.

18. There is common ground that parties to this suit entered into a sale agreement dated 21/2/2019 pursuant to which the defendant sold to the plaintiff the suit properties. What is in contest is whether the entire purchase price was paid. What is also in contest is whether the said sale agreement dated 21/2/2019 was mutually cancelled through a binding and enforceable cancellation agreement dated 5/8/2019.

19. The plaintiff contends that he paid the entire purchase price. He has exhibited acknowledgments signed by Margaret Wanjiku Saitoti indicating that the defendant received a total of Kshs 126,000,000. He has also exhibited bank transfer instructions relating to Kshs 15,000,000. He contends that he paid Kshs 9,000,000 to Mr Andrew Ngirici on instructions from the defendant, together making a total of Kshs 150,000,000. The defendant initially contended that the plaintiff only paid Kshs 90,000,000. Their subsequent amended defence indicates that they received Kshs 101,000,000 [It is not clear at this point whether the said amended defence is properly on record].

20. Secondly, the defendant contends that the agreement dated 21/2/2019 was mutually cancelled through a cancellation agreement dated 5/8/2019. The plaintiff has disowned and contested the cancellation agreement dated 5/8/2019 on various grounds. I have at this interlocutory stage looked at the cancellation agreement exhibited by the defendant. It is dated 5/8/2019. It has two recital clauses namely

“A” and “B”. It has four substantive clauses, namely “1” to “4”. It was exhibited as **Exhibit “MWS1”** and it forms pages 6 and 7 of the defendant’s replying affidavit. Missing from the said exhibit is the execution part relating to the plaintiff. It only contains the execution part relating to the defendant. Whether or not this was a clerical omission on part of the defendant or that is indeed the full cancellation agreement is not clear at this stage. Counsel for the defendant focused on this particular exhibit a lot. Strangely, he did not notice that the execution part relating to the plaintiff was missing. Suffice it to say at this point that Exhibit “MWS1” is not a sufficient piece of evidence of a compliant, binding, and enforceable cancellation agreement because it does not contain the execution part relating to the plaintiff. It only bears the part executed by the defendant.

21. There is, however, some evidence that on diverse dates subsequent to the sale agreement dated 21/2/2019, the plaintiff acknowledged receipt of monies from the defendant, together totaling Kshs 31,400,000, in pursuance of a cancellation agreement dated 5/8/2019. What is not clear is whether the cancellation agreement alluded to in the said acknowledgments related to the contract relating to the suit properties.

22. What emerges from the foregoing is that, it is not clear whether or not the sale contract was mutually cancelled through a compliant, binding and enforceable cancellation agreement. What also emerges from the evidential materials placed before the court is that the defendant received money from the plaintiff and still holds a substantial chunk of that money. This is therefore an application which qualifies for determination on a balance on convenience.

23. Secondly, the contract giving rise to this suit relates to two developed parcels of land. If the said properties are not preserved, there is a probability that the suit properties may be wasted or alienated while this dispute is pending adjudication. There is therefore a proper basis for preserving the suit properties in a manner that does not prejudice either of the parties within the framework of Order 40 rule 1(a).

Disposal Orders

24. In light of the foregoing, the court makes the following disposal orders in relation to the plaintiff’s notice of motion dated 1/4/2020:

a) Pending the hearing and determination of this suit, the defendant shall not dispose or charge the suit properties, namely, Land Reference Number 209/384/5 and Land Reference Number 209/384/6 situated in Nairobi

b) Pending the hearing and determination of this suit, all rental incomes (net of management fees) from the two suit properties shall be preserved in a bank account to be jointly opened and operated by the two law firms representing the parties to this suit, namely M/s MS Advocates LLP and M/s Waweru Gatonye & Company Advocates.

c) Parties to this suit shall, with immediate effect, through their respective advocates, appoint a reputable estate management firm to manage the two suit properties pending the hearing and final determination of this suit.

d) Each party shall within 30 days file and serve a single bound, paginated, and indexed bundle of pleadings, witness statements, and documentary evidence

e) This matter shall be mentioned in the month of December 2020 to confirm compliance and fix an early hearing date for the main suit.

f) Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF OCTOBER 2020.

B M EBOSO

JUDGE

In the presence of: -

Court Clerk - June Nafula

Note

This Ruling was supposed to be delivered on 15/10/2020. This was not possible because I was assigned duties outside the Station.

B M EBOSO

JUDGE