



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 466 of 2011

CIBIYA WORLDWIDE LIMITED.....PLAINTIFF

VERSUS

JAMES MWANGI GACHERU.....1ST DEFENDANT

LILIAN ANNE HEALY and ELIZABETH ANN G. HAYES

(Sued as trustees of and on behalf of the Congregation

of the Sisters of Charity of the Incarnate Word Houston, Texas)...2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 27/4/12 brought under Order 40 Rule 1(a), (b) and 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Application seeks the following orders.

1. Spent
2. That this Honourable Court be pleased to grant an injunction against the 1st and 2nd Defendants pending the hearing and determination of this application and suit restraining him by his agents, servants and employees from trespassing, developing, advertising, selling, dealing, disposing or charging or in any manner interfering with parcel of land known as L. R. No. 12296, Karen, Nairobi (hereinafter referred to as the "suit property").
3. That cost of this application be provided for.

The application is premised upon the grounds listed on the face of the application as well as on the supporting affidavit of NEWTON OMONDI OSIEMO wherein he averred that he is a director of the Plaintiff Company and that in February 2009, he entered into an agreement on behalf of the Plaintiff Company to purchase the suit property at an agreed price of Ksh. 62,500,000/-. He averred that he paid Ksh. 53,000,000/- to the 1st Respondent through his advocates M/S Wanjama & Co. Advocates. He further swore that the stated law firm forwarded to his advocates M/S. Odero & Co. Advocates the completion documents and a duly signed transfer in favour the of the Plaintiff Company, pending completion of the balance of the purchase price. He swore that after that in July 2011 he was notified that the suit property had been fenced off and he paid a visit to the suit property and ascertained this to be true. He said he immediately instructed his lawyer to write a demand letter which was done but the same did not elicit any response. He swore that construction is ongoing on the suit property to date. He further

stated that he had been informed by his advocates that the 1st Respondent had sold the suit property to the 2nd Respondent which was unlawful, improper, and fraudulent and no good title can be derived by the 2nd Respondent. He averred further that the 1st and 2nd Respondents continue to unlawfully trespass the suit property thereby prejudicing the Plaintiff/Applicants rights of ownership.

The application is contested. In his Replying Affidavit dated 26th September 2011, the 1st Respondent swore that the Plaintiff paid to him Ksh. 50,800,000/- towards the purchase price for the suit property but he did not know the source of those funds. He further stated that his Advocates delivered all the completion documents to the Plaintiff's advocates and called upon them to pay the balance of the purchase price.

He further stated that his advocates called upon the Plaintiff's advocates to lodge the documents for registration which was not done. He then stated that he instructed his lawyers to take back from the Plaintiff's advocate's the Discharge of charge and his Certificate of Title No I. R. 31227 for the registration of the charge. He stated that this was done. He further stated that thereafter he realized that the Plaintiff was either having difficulties raising the balance of the purchase price or was unwilling to complete the side and he instructed his advocates to terminate the Agreement. He swore that his advocate carried out his instructions and wrote to the Plaintiff's advocates giving the Plaintiff 21 days notice to complete the sale or have the same terminated. He stated that the Plaintiff did not comply with the said termination notice and that pursuant to that, he terminated the agreement for sale with the Plaintiff on 14th July 2009. He further swore that thereafter, he sold the suit property to the 2nd Respondent and that it is the new owner, and not himself who is now developing the suit property. He further swore that the Kenya Anti-Corruption Commission ("KACC") wrote to him their letter dated 1st September 2009 demanding that he deposits the entire amount of money paid to him by the Plaintiff arising from investigations the Kenya Anti-Corruption Commission had made on the Plaintiff's dealings. He further stated that when he resisted depositing the said sum the Kenya Anti-Corruption Commission threatened to have him charged with an offence of obstructing their investigations and a caveat against the suit property was entered. He further stated that the Kenya Anti-Corruption Commission made it clear that it would remove the caveat only after he had deposited in its account the total sum of Ksh. 47,500,000/-. He averred that his advocates transferred the said amount to Kenya Anti-Corruption Commission but thereafter the Kenya Anti-Corruption Commission insisted he must also deposit the balance of Ksh. 3,300,000/- to make a total of Ksh. 50,800,000/- which he had received from the Plaintiff. This was effected. He swore that as a result, the caveat was removed and he transferred the suit property to the 2nd Respondent. He thus stated that the Plaintiff's suit has been overtaken by events and he no longer holds any money belonging to the Plaintiff.

The 2nd Respondent also opposed the application though their Replying Affidavit sworn by ROSE NYAMBURA GITHUKA sworn on 28/2/12 in which she stated that the Plaintiff's application has been overtaken by events and cannot be granted by the court as prayed. She further stated that the plaintiff was relying on an undated and unstamped transfer as evidence of ownership of the suit property to sustain its application. She swore that the same should not be relied on and that there was no evidence of a valid transfer of the suit property to the Plaintiff upon which this court can rely or act upon to grant the injunction order. She further stated that the suit property was lawfully registered on 22/10/10 in the name of the 2nd Respondent thereby making the 2nd Respondent the absolute and indefeasible owner of the suit property and that there is no allegation in the Plaintiff's application that the 2nd Plaintiff acquired the suit property by fraud or misrepresentation to which the 2nd Respondent was party.

The Plaintiff filed a Supplementary Affidavit sworn by NEW OMONDI OSIEMO on 17/7/12 in which he stated that he was not under any obligation to disclose the source of funds being used to purchase the suit property. He also swore that the 1st Respondent accepted further payments from him i.e. Ksh. 5 million on 11/7/07 and Ksh. 3.3 million on 18/7/07 thereby waiving his termination notice and that no fresh notice was ever issued to the Plaintiff Company thereafter. He stated that the 1st Respondent was consequently stopped in law from selling the suit property to a third party without giving a fresh valid notice to the Plaintiff. He further swore that in any event the said termination notice stated that the 1st

Respondent would refund the total sum of part payments received by him less 10% but he has to date not refunded the monies received by him. He further stated that the 1st Respondent delayed in delivering to it the required completion documents and cannot be allowed to rely on the completion date of 30/4/09 as a basis for issuing the said termination notice. He further stated that the 1st respondent having signed the transfer of title in favour of the Plaintiff Company did not have a good title to pass to the 2nd Respondent.

Written submissions were submitted by the Plaintiff, 1st and 2nd Respondents all of which I have read and given consideration to.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set in the case of *Giella v Cassman Brown [1973] EA 358* in which the conditions for the grant of an interlocutory injunction were settled as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”

Has the Plaintiff made out a *prima facie* case with a probability of success? In the case of *Mrao v First American Bank of Kenya Ltd & 2 others [2003] KLR 125*, a *prima facie* case was described as

“a *prima facie* case in a Civil application includes but is not confined to “a genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

Looking closely at this case, the applicant must show that he has a genuine and arguable case against the two Respondents. Is this the case? Looking at the facts adduced and information supplied, it is clear that the transaction for the sale of the suit property between the Applicant and the 1st Respondent took off on a positive note. The applicant paid up Ksh. 50,800,000/- to the 1st Respondent who in turn released all the completion documents to the Applicants’ advocates. It is at this juncture that many questions arise regarding the Applicant. For some undisclosed reason, no action was taken by the Applicants’ advocates to proceed to lodge the completion documents for registration of the suit property in the name of the Applicant. So long was the inaction that the 1st Respondent instructed his lawyers to retrieve the title document and discharge of charge to enable him lodge the same for registration. It is at this juncture that the 1st Respondent became suspicious that the Applicant would not be able to raise the full purchase price. This court has noted that the 1st Respondent gave the Applicant a chance to redeem the transaction by serving it a 21 day Termination Notice. If the Applicant was still interested in purchasing the suit property, this was its opportunity to demonstrate that. However, as has been reported, the Applicant did not seize this opportunity. To my mind, by this time, the Applicant had lost two great opportunities to seal the deal and become the new owner of the suit property. It therefore comes as a surprise that two years down the road, the Applicant arose out of its sleepy slumber to stake its claim over the suit property which was by now sold to the 2nd Respondent. It is clear that the only document being relied upon by the Applicant to stake its claim to the suit property is an undated and unstamped Transfer signed in its favour by the 1st Respondent. It also emerged quite clearly that the 1st Respondent no longer holds the purchase price paid by the Applicant as the same was released to Kenya Anti-Corruption Commission. Overall, to the mind of this court, the Applicant has failed to show or demonstrate a genuine and arguable case against the two Respondents. The sale agreement it relies on was duly terminated and undated, unstamped Transfer is not only inadmissible in evidence, it is also of no legal effect. That being the case this court finds that the Applicant has failed to show that it has a *prima facie* case with probability of success.

Having found that the first ground in the *Giella* Case has not been met, this court sees no need to

find whether the other two tenets in the said case have been fulfilled.

In the light of the foregoing, the Applicant's application is hereby dismissed with costs to the Respondents.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI ON THE 3RD DAY OF MAY 2013

MARY M. GITUMBI

JUDGE