



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Petition 20 of 2012

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS**

UNDER ARTICLES 27(5) AND 40 (1) OF THE KENYAN CONSTITUTION

AND

IN THE MATTER OF ARTICLE 21(3), 22(2) (D) AND 165 OF THE CONSTITUTION

AND

**IN THE MATTER OF ARTICLE 55(B) AND ALL THE ENABLING PROVISIONS OF THE
CONSTITUTION AND THE LAW**

AND

IN THE MATTER OF GENERAL TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

BETWEEN

WANDE YOUTH ASSOCIATION.....PETITIONERS

AND

**1. NATIONAL SOCIAL SECURITY FUND BOARD OF
TRUSTEES**

2. HARISH RAMJI

3. BHARAT RAMJI

4. ASHVIN RAMJI

5. HARP HOUSING LIMITED

6. VISHWAL DEVELOPERS LIMITED

7. MANISH DEVJI DAVASIA

8. ASHVIN RAMJI

9. CODICOTE INVESTMENTS LIMITED

10. KNEBWROTH INVESTMENTS LIMITED

11. KIMPTONS HOLDINGS LIMITED.....RESPONDENTS

RULING

Vide a Petition dated 1st February, 2012 and filed in this court on the same day, the petitioners prayed for-

“1. A declaration that the resultants sale(s) (sic) from L.R Number 11895/24 were unconstitutional by virtue of being discriminatory and contra to constitutional youth agenda on affirmative action for the youth.

2. The transfers emanating from L.R. Number 11895/24 be cancelled

3. The resultant parcels from L.R number 11895/24 be sold to the petitioner at the market rate obtaining at the time of the irregular sale

4. Compensation for missed opportunities

5. That costs be in the cause.

6. All such orders (s) as this honourable court shall deem just”.

The petitioner is a registered youth group comprising of over 1000 members. It had an interest in buying land reference 11895/24 “*the suit premises*”, then registered in the name of the 1st respondent. As negotiations were ongoing, the 1st respondent under suspicious and questionable circumstances disposed the suit premises to 2nd to 11th respondents respectively. Since then these respondents had used criminal justice system to intimidate and harass the petitioner. To the petitioner the said sale was discriminatory as all the purchasers were either persons of Asian origin or Companies whose directors were Asian in origin. The suit premises were being held by a statutory body which existed for the public good and as such, subject to best practices on disposal of fixed assets, the suit premises were sold secretly and in a manner which was inconsistent with the rights of the petitioner. Finally, the petitioner complained that being youth members of the community where the suit premises were located, it ought to have been given the first priority as a social and economic justice measure. Accordingly, its rights had been denied and violated by the respondents and its economic survival threatened, hence the petition.

Contemporaneously with filing of the petition, the petitioner mounted a chamber summons application under articles 22 and 159, section 19 of the sixth schedule and part III of the constitution of Kenya. In the application, the petitioner sought in the main an interlocutory injunction against the 2nd to 11th respondents to restrain them from developing, interfering or otherwise disposing off, alienating, transferring, charging, leasing or otherwise dealing with titles carved out of the suit premises namely L.R 11895/41-48 all inclusive pending the hearing and determination of the petition.

The grounds in support of the application were that:-

§ 1st respondent had violated the rights of the petitioner

§ 2nd to 11th respondents acquired the aforesaid parcels of land in an irregular and controversial manner

§ 2nd to 11th respondents had initiated developments in the said parcels of land in an attempt to solidify themselves

§ The petitioner's rights will be defeated if the 2nd to 11th respondents continue to deal with the parcels of land unabated.

§ The acts of these respondents had evoked negative passions among the host community and it was thus in the best interest of security that any dealings in the subject parcels of land be halted.

The affidavit in support of the application was sworn by one **Festus Ngui Mwaka**, who described himself as the Secretary General of the Petitioner. In that affidavit he deponed that the 2nd to 11th respondents were in possession of the parcels of land though in an irregular and controversial manner. Its rights will be defeated if the said respondents were to continue to deal with the subject parcels of land unabated. He reiterated the fact that the acts of the said respondents had evoked negative passion among the host community resulting to the use of the criminal justice system by the said respondent so as to intimidate the petitioner's members and it was therefore in the best interest of security that any developments in those parcels be halted. Again in those circumstances, it was in the best interest of justice that the petitioner be granted the injunctive orders sought.

Upon the application being served on the respondents the 1st respondent reacted first. Through one, **Margaret Osolika**, its legal officer, it filed a replying affidavit and where pertinent it deponed that the suit premises were registered in its name. It subdivided the same and sold portions thereof to a number of purchasers who responded to the sale bid advertisements placed in the local dailies. Otherwise the petitioner had no capacity in law to institute this petition in its name and therefore the petition was a nullity. The petitioner had not disclosed the articles in the Bill of Rights that had been and how they were infringed by the 1st respondent. The allegation of public land having been disposed off in a manner that was not transparent can be tried in ordinary courts and was not a constitutional issue. It was contrary to public policy to force 1st respondent to enter into contracts with 3rd parties. There was no evidence of any communication between the management of the 1st respondent and the petitioner. The allegations by the petitioner that the sale/purchase was discriminatory were ludicrous. The purchases were conducted in compliance with and in response to the advertisement. The racial background of the purchasers, notwithstanding, the sale was conducted in accordance with the law. It was also unfortunate that the petitioner founded its petition on bigoted views. Their main contention is that Kenyans of Asian extraction are not entitled to purchase property from public institutions. If these views were to be entertained then Kenyans from diverse backgrounds will be denied their fundamental and constitutional rights to acquire and own property anywhere in this country.

The 5th, 6th, 9th, 10th and 11th respondents too reacted to the application by affidavits sworn by **Christopher Nzioka** and **Jignesh Desai** respectively. As far as they were concerned, the parcels of land were sold and transferred to them legally. Some of them have since subdivided them and transferred parcels of land arising from the further subdivision to Kenbro Industries Shetron Enterprises Ltd, Khetani Chandrakant Chamaklall, Kothari Mitesh Pradikumar, Jatakiya Keval, Jayantkumar, Topen Industries, Harhousing Ltd, Pralia Holdings Ltd, Brookman Ltd and Shreeji Enterprises Ltd. Due to some uncalled for activities by members of the petitioner, these respondents had lodged complaints with the Athi River Police Station and some of those members were arrested and charged. The case was still pending in court.

When the application came before me for *interpartes* hearing on 11th May 2012, all parties agreed to canvass the application by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them.

A careful reading of the written submissions on record discloses that all the parties including the petitioner missed the tenor and purport of the application under consideration. For the respondents, their submissions dwelt on why the petition lacked merit and ought to be dismissed. We are not yet at that stage yet. The application was not for striking out on the petition but for an interlocutory injunction. For the petitioner, its argument was in support of conservatory orders as opposed to interlocutory injunction

that it had sought in the application. Different considerations apply to applications for conservatory orders as opposed to interlocutory injunctions. They are not interchangeable.

Since the application before court was specific, and sought an interlocutory injunction pending the hearing and determination of the petition; I will handle it as such:-

The legal principles for granting interlocutory injunctions are now well settled in Kenya. They are set out in the celebrated case of **Giella vs Cassman Brown in the words of Spry V.P.:**

First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

In his authoritative book on injunctions, Justice Kuloba (now retired) restated these legal principles thus:

[T]he right formulation of [the principles] would be this, that among other considerations a court takes into account in determining whether a temporary injunction should be issued, first, whether there is a significant likelihood that the applicant will prevail on the merits of the case at a full trial. Second, the court will ordinarily consider whether there is a threat of irreparable harm. Finally, there is the traditional consideration of whether harm to the respondent would outweigh the need for temporary relief. But there may be other matters, for example public interest, involved."

Despite my misgivings with the respective submissions on board, I have adverted my mind, in the mode of **Giella vs Cassman Brown** [*supra*], to the fact that-

A party seeking the drastic remedy of an interlocutory injunction bears the burden of demonstrating:

- a. A likelihood of success on the merits in the substantive suit;
- b. The prospect of irreparable injury if the provisional relief is not granted; and
- c. That the balance of equities is in favor of the Applicant.

It matters not whether the application is anchored on a Constitutional Petition or on an ordinary civil suit. These conditions apply to all cases, all and sundry. In the specific circumstances of this petition, I am satisfied that the Petitioner cannot meet the *Giella* standard. The Petitioner concedes that the respondents are in occupation of the parcels of land in contention albeit in controversial circumstances according to them. They have also conceded that those parcels were from a subdivision of the suit premises. On the other hand, the 1st respondent has given a detailed history as to the circumstances leading to the subdivision and subsequent disposal of the units resulting from the subdivision. The suit premises were subdivided and sold in different portions or lots to a number of purchasers who responded to a sale advertisement placed in the local Dailies by the 1st respondent. The petitioner just like 2nd to 11th respondent had an opportunity to respond to the advert but chose not to. I cannot see then how its accusation that public land had been disposed off in a manner that is not transparent can hold. But again that is a matter of evidence at the plenary hearing of the petition.

It is instructive though that the petitioner does not discount the chronology of events leading to the subdivision of the suit premises as narrated by the 1st respondent. Equally, the petitioner does not counter the depositions by the respondents as to how they ended up in possession of their various parcels of land. As the Court of Appeal remarked in the case of **George Orango Orago v George Liewa Jagalo and Others, Civil Appeal No. 62 of 2009 at Kisumu (unreported)**, if it is proved that a person before the Court is in possession, and has title to the land, there is no proper basis for dispossessing him of that land. A litigant who, *prima facie*, demonstrates that he holds the *bona fide* title to a parcel of land, and nothing on the record suggests that the title is validly impugned, is deserving of the presumption that a grant of injunction against him would result in irreparable harm. This is the case here.

In this application, the respondents, save the 1st respondent have incontrovertibly demonstrated their ownership of the parcels of land. It follows that they will suffer irreparable injury if the injunction was to issue against them. Going by the sale agreement exhibited in the respondents' replying affidavits, the amounts involved in the transactions were colossal. Those parcels of land must have been purchased by the respondents for a purpose. To injunct them from developing them will cause more injustice to them as opposed to any benefits that may accrue to the Petitioner. In any event if the petitioner was eventually to succeed on its petition, the properties will still be available for them to take. Alternatively, they can be valued and their loss if any, paid by 1st respondent at the market value as pleaded in the petition.

How about balance of convenience? The parcels of land having been registered in the names of the respondents, I do not see what prejudice the petitioner will suffer if the injunction is denied. The case for the parcels of land to remain in possession of their registered owners is even made stronger by the fact that some of those parcels have since been subdivided further and transferred to 3rd parties who have not been enjoined in this suit. The petitioner had only expressed a desire to purchase the suit premises. No monies had been exchanged between the petitioner and the 1st respondent pursuant to the intent. I cannot see how an intention which has not been actualized or crystallized can impact negatively on the petitioner. The story would perhaps have been different had the petitioner pursuant to that intention parted with money to the 1st respondent who in turn short changed it in favour of the 2nd to 11th respondents. Accordingly, the balance of convenience tilts in favour of the 2nd to 11th respondents.

The Petitioner anchored its application on grounds of breach or threatened breach of fundamental rights. My short answer to that ground for purposes of this application is that, the petitioner has not disclosed what provisions of the Bill of Rights have been infringed and how they were infringed in the application. In the body of the application, the petitioner has cited articles 22 and 159 of the Constitution. Article 22 deals with enforcement of bill of Rights and who can approach the court. That is a non-issue here. As for article 159, it deals with judicial authority which again is a non –issue here.

The application too has been advanced on the grounds of public policy. Essentially, the petitioner is urging that the 1st respondent should be compelled to sell the land to it since its members are youths and vulnerable. I would at once say that it is doubtful whether the new constitution has ushered in an era of forcing public bodies to offload their assets to people who are only considered vulnerable. Nor has the constitution outlawed willing seller and buyer as a basis of commercial transactions.

Then there is the Asian dimension. To me this is very unfortunate. It is unfortunate that the petition and indeed the application is founded on such bigoted views that the sale was discriminatory because it involved either persons of Asian origin or Companies whose directors are of Asian origin. This court cannot sanction these outright bigoted views by granting them an injunction. If these views were to be entertained and sanctioned by this court, the court shall be anointing discrimination in reverse.

The application lacks merit and is accordingly dismissed. This being a constitutional litigation, I am hesitant to make an order for costs.

RULING DATED, SIGNED and DELIVERED at MACHAKOS this 6TH day of JULY, 2012.

**ASIKE-MAKHANDIA
JUDGE**