IN THE COURT OF APPEAL
AT NAIROBI

CIVIL APPEAL NO. 38 OF 1995

PATRICK CAMPBELL MANYUIRA……..……..APPELLANT

AND

ANN MUTHONI PERTET…….RESPONDENT

(Appeal from an order of the High Court of Kenya at Nairobi (Mr. Justice Moijo Ole Keiwua dated 20th day of December, 1994

in

H.C.C.C. NO. 3521 OF 1994)

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JUDGMENT OF THE COURT

The appellant Patrick Campbell Munyuira has appealed against the ruling and Orders made by the superior court (Ole Keiwua J.) on 20th December, 1994. The learned judge had ordered that the appellant be restrained from alienating the suit premises (one maisonnette constructed upon L.R. N0. 209/8878/5 as described in the agreement for sale made between the parties on 2nd August, 1994) either by himself or his servants and/or agents until the final disposal of the suit in the superior court.

The respondent had sworn an affidavit in the superior court, the first four paragraphs whereof, were admitted by the appellant. In paragraphs 3 and 4 of her said affidavit the respondent states that the appellant agreed to sell to her the suit property at a price of K.Shs.3,500,000/= 10% of which sum was to be paid as deposit in two stages; Shs.100,000/= upon the execution of the agreement of sale and Shs.250,000/= upon completion of the requiredsub-division by the appellant.

Mr. Njuguna for the appellant confirmed that at the time the appellant repudiated the contract the sub-division had not been completed.

The completion date of the agreement of sale itself, (which is subject to the Law Society Conditions of Sale) is to be within 90 days from the date new certificates are ready for transfer purposes. The word ‘certificates’ obviously refers to certificates of title. The occasion for completion had not yet arisen. This is common ground.

It transpires therefore that the respondent was not in any breach of her obligations under the agreement of sale at the time the appellant, by his advocates’ letter of 31st August, 1994 repudiated the contract. The appellant stated quite plainly that unless he was offered a sum of K.Shs.5,200,000/= (instead of

Shs.3,500,000/=) the respondent should treat the transaction as cancelled.

Finding no alternative the respondent sought the injunction in terms as granted.

Mr. Njuguna's main argument simply is that when damages are an adequate remedy and that when mode of calculating such damages is agreed, the court ought to consider that damages are an adequate remedy. That argument is not correct. Firstly, there has to be 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. Thirdly, balance of convenience comes in if the court is in doubt.

In this case the learned judge was in no doubt that the respondent had made out a prima facie case with a probability of success. It also is clear the respondent is not yet in any breach of her obligations under the contract. Whilst the learned judge did not specifically go into the issue of irreparable harm, it is clear to us that the respondent will not now get another property at the agreed price. On appellant's own showing the price had jumped up to Shs.5,200,000/= within the very month of the agreement of sale. If the respondent were to buy another similar property now at say K.Shs.6,000,000/= she would suffer irreparable harm in that she would most likely not obtain a similar property at a price of less than Shs.6,000,000/=.

The requirements of first two limbs of the Giella v. Camman Brown (1973) E.A, 358 principles were satisfied and in our view the learned judge exercised his discretion to grant the injunction in question quite properly.

Mr. Njuguna took exception to there being no undertaking as to damages given by the respondent should she not succeed eventually. This is one of the requirements a judge may consider when granting an interlocutory injunction as pointed out in Order 39 rule 2(2) of Civil Procedure Rules. Failure to take into account this requirement is not fatal more so in this case as the learned judge had no doubt about there being a prima facie case with a probability of success. However, using our own powers under section 3(1) of the Appellate Jurisdiction Act we can and do hereby record the respondent's undertaking to pay damages should she eventually not succeed in the case.

This injunction was in our view properly issued and this appeal is dismissed with costs.

Dated and delivered at Nairobi this 12th day of March, 1996.

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL.