



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 18 OF 2018

NELSON RUNJI NJIRA.....PLAINTIFF

VERSUS

GAKUYO REAL ESTATE LIMITED.....DEFENDANT

RULING

1. By a notice of motion dated 11th June 2018 brought under the provisions of **Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules and sections 1A, 1B, 3A and 63 (c) & (e) of the Civil Procedure Act, (Cap 21 Laws of Kenya)** and **sections 68 and 69 of the Land Registration Act 2012** and **all enabling provisions of the law**, the Plaintiff sought the following orders;

a. That this application be certified as urgent and be heard ex-parte in the first instance.

b. That pending the hearing and determination of this application and/or further orders, an order of inhibition directed to the Land Registrar, Siakago Lands Registry, do issue against all the piece of land situate in Mbeere District within the Republic of Kenya known as land reference No. Mbeere/Kirima/2968 containing by measurement fifty four decimal four one nought (54.410) hectares or thereabouts and or any sub-divisions emanating therefrom.

c. That pending the hearing and determination of this application and or further orders, this honourable court be pleased to issue an order of temporary injunction restraining the Defendant either by itself and/or its authorized agents, servants, employees or otherwise whomsoever from interfering, selling, alienating, subdividing, leasing, charging, transferring and or in any other manner whatsoever intermeddling with all that piece of land situate in Mbeere District within the Republic of Kenya known as Land Reference Number Mbeere/Kirima/2968 containing by measurement fifty four decimal four one nought (54.410) hectares of thereabouts and or any sub-divisions emanating therefrom.

d. That pending the hearing and determination of this suit and/or further orders, this honourable court be pleased to issue an order of mandatory injunction compelling the Defendant forthwith to release to the Plaintiff and or its Advocates on record the original title deed in respect of parcel Land Reference Number Mbeere/Kirima/2968 and in default, the same be dispensed with and a new one do issue.

e. That costs of this application be provided for.

2. The said application was based upon the grounds set out on the face of the motion. It was contended that the Defendant had failed to pay the balance of the purchase price for the Plaintiff's parcel of land known as Title No. Mbeere/Kirima/2968 (hereinafter the *suit property*) despite issuance of a completion notice under the relevant sale agreement between the parties. It was further contended that in spite of such default, the Defendant had purported to sub-divide the suit property with a view to selling the sub-divisions to unsuspecting members of the public.

3. The application was supported by the supporting affidavit sworn by the Plaintiff on the day of filing together with the annexures thereto. The Plaintiff expounded upon the grounds set out in the motion and stated that the Defendant was out to defraud him of the suit property.

4. The Defendant filed a replying affidavit sworn by Moses Kariuki Mwangi on 5th July 2018 in opposition to the said application. It was contended that the balance of the purchase price was to be financed from the sale of the suit property upon sub-division. The Defendant further contended that the suit and application were premature because the agreement between the parties had an arbitration clause which required the parties to refer any ensuing disputes to arbitration.

5. The Plaintiff filed a further affidavit sworn on 18th July 2018 in response to the Defendant's said replying affidavit. It was denied that the

Defendant or any other persons were in possession of the suit property. It was denied that the balance of the purchase price was to be financed through a sale of the suit property upon sub-division. It was contended that no term to that effect was incorporated into the sale agreement. The Plaintiff further contended that the reason for the Defendant's default was the freezing of its bank accounts by the Sacco Societies Regulatory Authority.

6. When the application was listed for hearing on 24th July 2018 Ms Rose Njeru prosecuted it on behalf of the Plaintiff whereas Ms Muriuki opposed it on behalf of the Defendant. The Defendant's counsel asked the court to dismiss the said application and refer the dispute to arbitration.

7. The court has considered the Plaintiff's said application, the Defendant's replying affidavit in opposition thereto and the Plaintiff's further affidavit. The court has also considered the oral submissions made by the advocates for the parties.

8. The court is of the opinion that the main issues which arise for determination are the following;

- a. Whether the court should decline to entertain the application and refer the dispute to arbitration.
- b. Whether the Plaintiff has made out a case for the grant of the interim orders sought.

9. Upon perusal of the copy of the sale agreement between the parties, the court finds that clause 13 thereof provides for referral of disputes arising therefrom to a single arbitrator whose decision shall be final and binding upon the parties. So, should the court decline jurisdiction at this juncture and refer the dispute to arbitration? **Section 6 of the Arbitration Act No. 4 of 1995** states as follows;

“(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds;

(a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

10. The court has also considered the provisions of **section 7 of the said Act** which provide that;

“(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before, or during the arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of ruling as conclusive for the purposes of the application.”

11. In view of the provisions of **section 6 and 7 of the said Act**, the court is not inclined to decline jurisdiction or to decline consideration of the application for interim orders. The Defendant has not filed an application under section 6 for stay of the instant proceedings and for referral of the dispute to arbitration. Instead, the Defendant has actively participated in the proceedings by opposing the application. It is also evident from the provisions of **section 7 of the Act** that an application for interim orders can be entertained by the superior court either before or during the arbitral proceedings. The 1st issue is, therefore, answered in the negative.

12. The 2nd issue relates to the merits of the application for interim orders. The court is satisfied on the basis of the material on record that the Plaintiff has made out a case for the grant of interim orders. The Defendant is clearly in default in payment of the purchase price and it has admitted its inability to meet its obligations due to the freezing of its bank account by the regulator of the industry.

13. The court is thus satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success as set out in the case of **Giella Vs Cassman Brown & Co Ltd [1973] E.A 358**. The court is further satisfied that the Plaintiff might otherwise suffer irreparable loss. There is no guarantee that the bank accounts of the Defendant would be regularized within a reasonable time or that it would have sufficient funds to service its obligations under the sale agreement. In fact, the replying affidavit indicates that the Defendant is depending upon the sale of the suit property upon sub-division in order to settle the balance of the purchase price.

14. The court is also satisfied that an order of inhibition should be granted to preserve the suit property pending resolution of the dispute. The court is satisfied that unless the suit property is preserved, there might be a barren result should the Plaintiff ultimately succeed in the suit.

15. In the case of **Shivabhai Patel Vs Manibhai Patel [1959] EA 907** it was held, *inter alia*, that;

“...In my opinion it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so. If the Plaintiff succeeds in this suit (and part of his claim is based on this cheque) there

might be a barren result, and that it is the duty of the court to avoid...”

16. The court is, however, not inclined to grant the mandatory injunction sought in order No. 4 at the interlocutory stage. The Plaintiff should await the hearing of the suit or conclusive resolution of the dispute through other means. The prayer for release of the original title to the Plaintiff appears to be in the nature of a final order.

17. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated 11th June 2018 and the same is hereby granted in terms of order Nos. 2 and 3 thereof pending the conclusion of the suit or conclusive resolution of the dispute. The prayer for a mandatory injunction for the release of the original title deed for the suit property is hereby declined. Costs of the application shall be in the cause.

18. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **14TH** day of **FEBRUARY, 2019**.

In the presence of Mr. Siro holding brief for Mr. E.K. Njagi for the Plaintiff and in the absence of the Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

14.02.19