



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC SUIT NO. 230 OF 2018**

**ELISHA KURIA KARIGUH.....1<sup>ST</sup> PLAINTIFF/ APPLICANT**

**PAUL KAHORO KARIGUH.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**JOSHUA GATHERU KARIGUH.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**JOHN KIMANI MWANGI AKA**

**JOHN KIMANI MACHARIA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**PINE CRIB APARTMENTS LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the Application dated **29<sup>th</sup> August 2018**, brought by the Plaintiff/ Applicant seeking for the following orders;

- 1. THAT an interlocutory injunction do issue to restrain the Defendants/Respondents herein either by himself, his servants and or agents from transferring, charging, subdividing, selling, alienating, entering into, constructing upon, and/ or in any other way dealing with and/ or interfering in any manner whatsoever/howsoever with the Plaintiffs/ Applicants quiet use and possession of the suit property known as L.R NO. 4871/211(I.R NO. 137649) original number 4871/23/2)-Mavoko Road, Kikuyu pending the hearing and final determination of this case.***
- 2. THAT an order of inhibition do issue prohibiting all dealings in Title number L.R NO.4871/211(I.R NO. 137649) original NUMBER 4871/23/2)-Mavoko Road, Kikuyu till the hearing and determination of this case.***
- 3. THAT the costs of this Application be provided for.***

The Application is based on the grounds that the suit title is registered in the Respondent's name and the Applicant claim is for ownership of the same as it is subject of the sale between the parties. However the Respondent intends to use the same exclusively in disregard of the Applicants claim and interest in the same and they therefore are apprehensive that he may deal with the title to alienate it, jeopardizing their interests.

In his supporting Affidavit, the 1<sup>st</sup> Plaintiff/ Applicant averred that on **20<sup>th</sup> February 2015**, the vendor induced their sister one **Bilha Wairigia** to execute a letter of offer and place a deposit to purchase an apartment erected on **L.R No. 4871/126 (Original Number 4871/23/2)** under the Company, **Pine Crib Apartments Limited**. However a copy of the title attached to the letter of offer concealed the adverse encumbrance registered against the title and the Advocate acting for their sister raised the issue with the Defendants. He alleged that following the discussions, the Advocates engaged in negotiated terms of an Agreement for sale dated **26<sup>th</sup> October 2015**, prepared on the understanding that the Defendants/Respondents would settle the amount owing to the bank and transfer the property free from any encumbrance. They then paid the entire purchase price of **Kshs. 8,000,000/=** and the vendor did not disclose that the property had been sold and transferred to a third party. To avoid a civil case, he proposed to avail to them the suit property priced at **Kshs. 25,000,000/=** and to sell this plot to purchasers under **Novation and variation** agreement on sale of **Bo. C1 Apartment on L.R No. 4871/123(Original 4871/23/2)Mavoko Road Kikuyu** and the said agreement is underway between the parties.

He further alleged that they have already deposited and added **Kshs. 1,000,000/=** over and above the **kshs. 8,000,000/=** as part of the agreed instalment to be released to the vendors as part of the Novation and Variation Sale agreement, but the vendors have failed to meet their obligations raising concerns and they do not wish to trust him due to his previous misconduct. It was his contention that the suit property is

the only one under his name and the title to the same is being held by **Gatheru Gathemia & Co Advocates**, and the 1<sup>st</sup> Defendant/Respondent has continued to behave as if the suit property is still available for him to sell and having sold all his property save for his homestead has no capacity to refund their moneys and he intends to proceed with his unlawful acts unless restrained.

The Application is opposed and the 1<sup>st</sup> Defendant/Respondent filed a Replying Affidavit dated **5<sup>th</sup> October 2018**, and averred that he was not a party to the alleged sale agreement since it is between the Applicants and the 2<sup>nd</sup> Defendant/Respondent and that the Plaintiffs/Applicants are mixing two separate independent transactions in order to mislead the court. It was his contention that he has not entered into any sale agreement with the Plaintiffs/Applicants for the sale of the suit property and they having attached the alleged draft unsigned **Novation** and **Variation** agreement, to the Plaintiffs/Applicants and therefore it has not been introduced into evidence. He further averred that the Plaintiffs/Applicants cannot enforce unsigned agreement and there can never be specific performance on it. He alleged that the Plaintiffs/Applicants are forcing the agreement on him yet it is fundamentally flawed and he is yet to receive any of the alleged deposits as they are with their Advocate who also are in possession of the original title. He further averred that he is being coerced to sell the suit land to them. He further averred that the Application is based on unfounded fear as there is no evidence that his properties have been sold and no evidence of incapacity to refund the amount alleged. Further that the Applicants do not have a prima facie case since no agreement was signed and the injunction will not serve any purpose.

The Application was canvassed by way of written submissions to which the court has now carefully read and considered.

The Plaintiffs/Applicants have sought for injunctive orders. There have been further allegations on whether or not the Plaintiffs/Applicants Application is based on an unsigned agreement. Since the Applicant is seeking for injunctive orders, this Court cannot conclusively deal with the disputed issues as the Court is only called upon to determine whether they are deserving of the injunctive orders. The principles for grant of temporary injunction have been long settled in the case of **Giella ...Vs... cassman Brown Co Ltd ( 1973)EA 358** , and later repeated in various judicial pronouncements. See the case of **Kibutiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, the Court held that:-

***“The conditions for granting a temporary injunction is East Africa are well known and these are: First, the 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 might 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. See also E.A Industries ..Vs...Trufoods (1972) EA 420.”***

For the Plaintiffs/Applicants Application to be allowed they must be able to establish that they have satisfied all the three grounds that have been enumerated above.

#### **1. Whether the Applicants have established a prima facie case**

The court in the case of **Eldo City Limited v Corn Products Kenya Ltd & another [2013] eKLR** defined a prima facie case as

***“Prima facie case has been defined in Black’s Law Dictionary 2<sup>nd</sup> Edition as:-***

***“At first sight; on the first appearance; on the face of it.....A prima facie case is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced on the other side”***

Further in the case **Mrao –vs- First American Bank Ltd & 2 others (2003) KLR 125**, the Court of Appeal defined prima face case as ;

***“a case where on the material presented to the court, a tribunal properly directing itself will conclude that there was a right that had been breached by the other party as to call for a rebuttal.”***

Further in the case **Director of Public Prosecutions ...Vs... Justus Mwendwa Kathenge & 2 others [2016] eKLR** where the court held **that**;

***“Traditionally the basis of application of the equitable remedy of injunction has been section 63 of the Civil Procedure Act and Order 40 (previously 39) of the Civil Procedure Rules. Today Article 23 of the Constitution specifically identifies an order of injunction as one of the reliefs that a court can grant if it is satisfied that a person’s right or fundamental freedom under the bill of rights has been denied, violated or infringed or is threatened. Needless to emphasize, the remedy of temporary injunction is a vital tool intended to preserve the property in a dispute until legal rights and conflicting claims are established, so as to prevent the ends of justice from being defeated. Order 40 recognizes that a temporary injunction will be sought where a property in dispute is in danger of being wasted, damaged, or alienated, or wrongfully sold in execution of a decree, or where a party threatens or intends to remove or dispose of the property in order to defeat any execution that may ultimately be passed. An injunction may also be applied for to restrain a party from committing a breach of contract or other injury. It is equally settled that a temporary injunction cannot be claimed as a matter of right, neither can it be denied arbitrarily by the court.”***

In line with the said decisions the Court will therefore sought to look at whether the Plaintiffs/ Applicants have demonstrated that there is a right that has been breached by the Defendants/Respondents.

The Plaintiffs/Applicants have averred that they entered into an agreement with the 1<sup>st</sup> Defendant/Respondent with regard to the suit property and the 1<sup>st</sup> Defendant is not trustworthy as he has shown that in previous situations. The Plaintiffs have also acknowledged that the Novation

agreement is yet to be signed and the Defendants still holds the title to the suit property. It is also not in doubt that the Plaintiff's/ Applicants Advocates holds the title deed to the suit property. It is therefore this Court's opinion that the basis upon which the Plaintiffs/ Applicants are seeking to be granted an injunction are based on mere speculations and that the Plaintiffs/ Applicants have not demonstrated that their rights have been breached in any way as they have not demonstrated any interest that they currently have. Further they have also not demonstrated any way that the Defendants/Respondents intends to waste or alienate the land and the onus of proving the same lies with the Plaintiffs/ Applicants.

For the above reasons the Court finds that the Plaintiffs/Applicants have not established that they have a *prima-facie* case with probability of success.

On the second limb of whether they will suffer irreparable loss which cannot be adequately compensated by an award of damages, the Court finds that the Plaintiffs /Applicants have in no way demonstrated that they have ever been in possession of the suit property. The assertions that they intend to use the same as their family home again remain mere allegations and the fact that they have never been in possession of the suit land there would be certainly no injury or damages that would be occasioned to them if injunctive orders are not granted. Therefore the Court finds that damages herein would be adequate compensation in the event the Plaintiffs/Applicants turns out to be the successful litigants after the main trial. See the case of **Wairimu Mureithi..Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322**, where the Court held that:-

***“However strong the Plaintiff's case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.***

*Though this Court recognises that Courts have severally held that there are times that damages would not be the most convenient, it is important to note that the Plaintiffs/Applicants have not demonstrated any interest that they have in the suit property as they are currently not in possession nor do they have any documents of title to the same. This Court also finds that once a **prima facie** case has not been established then automatically the other two limbs must fail. See the case of **Kenya Commercial Finance & Co. Ltd... Vs... Afraha Education Society (2001) 1EA 86**, where the Court held that:-*

***“The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima-facie case with probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella..vs..Cassman Brown & Co. Ltd 1973 EA pg 360 Letter E. The conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.(emphasis mine)***

*The Plaintiffs/Applicants have also sought for an order of inhibition. To my mind an inhibition order would serve the same purpose as a temporary injunction. In finding that there are no proper grounds within which the Plaintiffs/Applicants have sought for an order of temporary injunction, this Court also finds that there would be no basis upon which an order of inhibition would be granted. See the case of Dorcas **Muthoni & 2 others ...Vs... Michael Ireri Ngari [2016] eKLR** where the court stated that;*

***‘An order of inhibition issued under Section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off. The Court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.’***

*In this regard the Court finds that the balance of convenience tilts in favour of the Defendants/Respondents and subsequently the Court declines to grant the temporary injunction and inhibition order sought herein*

For the above reasons the Court find that the Plaintiffs/Applicants herein have not established the threshold for grant of temporary injunction nor the inhibition order as sought in their **Notice of Motion** application dated **29<sup>th</sup> August 2018**.

Consequently, the Court finds the said Notice of Motion application dated **29<sup>th</sup> August 2018**, is not merited and proceeds to dismiss the same entirely with costs to the Defendants/Respondents

It is so ordered

**Dated, Signed and Delivered at Thika this 14<sup>th</sup> day of June 2019**

**L. GACHERU**

**JUDGE**

**14/6/2019**

**In the Presence of**

.....For the Plaintiffs/Applicants

.....For the Defendants/Respondents

.....Court Assistant