



**REPUBLIC OF KENYA**

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

**ELC CIVIL CASE NO. 1196 OF 2015**

**MANIL LIMITED.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**FRIENDS THAT CARE HOLDING COMPANY...DEFENDANT/RESPONDENT**

**RULING**

1. This is the notice of motion dated 19<sup>th</sup> November 2015 brought under order 40 rules 1, 2, 3 and 4(1) and 2, order 51 rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act and Section 13 (7) of the Environment and Land Act:-

2. It seeks:-

*(1) Spent.*

*(2) Spent.*

*(3) That pending the hearing and determination of this suit, a temporary injunction be issued restraining the defendant whether acting by itself or through its agents, servants and or employees from evicting the plaintiff or in any manner whatsoever dealing with all that property known as Land Reference Number 366/10, Ruaraka situate in Nairobi (hereinafter referred to as “the suit property”).*

*(4) That the defendant be condemned to bear the costs of this application and of the suit.*

3. The grounds are on the face of the application and are set out in paragraphs (a) to (r).

4. The application is supported by the affidavit of Bharat Kumar Velji Shah, a director of the plaintiff/applicant sworn on the 19<sup>th</sup> November 2015.

5. Upon being served with the pleadings and the application the defendant/respondent filed a notice of preliminary objection dated 15<sup>th</sup> December 2015. There is also a replying affidavit sworn by Seintje Veldhuis a director of the defendant/respondent sworn on the 27<sup>th</sup> July 2017.

6. On the 28<sup>th</sup> September 2017, the court directed that the application be disposed by way of written submissions.

7. It is the plaintiff’s/applicant’s submissions that it went out of its way to procure the issuance of the provisional title in favour of the defendant. Further that the defendant is being dishonest by pleading frustration of the contract when in truth it was in breach of the sale transaction.

8. The plaintiff has established a prima facie case with a probability of success at the trial. It will be able to prove that it was ready, able and willing to complete the sale transaction. That the balance of inconvenience favours the granting of injunction. The plaintiff paid a significant consideration of Kshs.28 million. It has relied on the cases of **Lucy Njeri Njoroge vs Kaiyaha Njoroge [2015] eKLR; Mildred Machanja t/a Learn IT vs Kilimani Junior Academy [2005]; Nabro Properties Limited vs Sky Structures Ltd & 2 Others [2002] eKLR** among others. It urges that the application be allowed in order to protect the plaintiff’s right from being defeated by the defendant.

9. It is the defendant’s/respondent’s submissions that the plaintiff/applicant has failed to satisfy the honourable court that it has a right over the suit property which may be infringed by the respondent. The defendant/respondent being in possession of the provisional title has proved that it is the absolute proprietor to the suit property. It is entitled to protection of the said title. That following the rescission of the sale agreement the application lacks any right with regard to the suit property and hence has failed to demonstrate a prima facie case.

10. That damages can be ascertained and paid since upon rescission the plaintiff/applicant was invited to accept refund of all the monies paid as deposit. They have put forward the case of **Nguruman Ltd vs Jan Bonde Nielsen & 2 others Civil Appeal No. 77 of 2012; Wycliffe Mutali Okwaro vs Kenya Women Micro Finance Bank Ltd & Another [2017] eKLR.**

11. The balance of inconvenience tilts in favour of the defendant/respondent. It has relied on the case of **Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR.** It prays that the application be dismissed with costs.

12. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit and the annexures, the written submissions of counsel and the authorities cited. The issues for determination are:-

*(i) Whether or not the plaintiff's/applicant's application meets the threshold for grant of temporary injunction.*

*(ii) Who should bear costs?*

13. At this juncture it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for an injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were set out in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358.** In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

14. In the case **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557** Bosire J (as he then was) held that:-

*“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”*

15. It is the plaintiff's/applicant's case that it went out of its way to procure the issuance of the provisional title in favour of the defendant. This fact was not challenged or rebutted by the defendant/respondent. It has been ready, able and willing to complete the sale transaction. The defendant/respondent on the other hand was in breach of the sale transaction. The plaintiff/applicant has already paid a deposit of Kshs.28 million. This is a significant amount.

16. I find that the plaintiff has established a prima facie case with a probability of success at the trial. I find that the balance of convenience tilts in favour of granting the injunction. There is need to preserve the suit property pending the hearing and determination of the suit.

17. In conclusion, I find merit in this application and grant the orders sought namely:-

*(a) That an order of injunction be and is hereby issued restraining the defendant, whether acting by itself, or through its agents, servants and/or employees from evicting the plaintiff or in any manner whatsoever dealing with the suit property.*

*(b) That the costs of this application do abide the outcome of the main suit.*

It is so ordered.

Dated, signed and delivered in Nairobi on this 18<sup>TH</sup> day of JULY 2019.

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Ms Nzuki for Mwangi for the Plaintiff

No appearance for the Defendant

Kajuju - Court Assistant