



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC CIVIL SUIT NO. 479 OF 2018**

**TITUS SINKEEN TERTA.....PLAINTIFF/RESPONDENT**

**=VERSUS=**

**SUSAN KALUKI NZIOKI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JERITAH NGANYI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JAMES MAINGI MAWEU**

**T/A MAWEU & COMPANY ADVOCATES.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**NATIONAL SOCIAL SECURITY**

**FUND MANAGING TRUSTEES.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**LILIAN NKIROTE MARETE.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This is a Ruling in respect of two applications and a Preliminary Objection. The first application is dated 6<sup>th</sup> November, 2018. It is brought by the Plaintiff and it seeks the following orders:-

**(a) Spent**

**(b) Spent**

**(c) That a temporary injunction do issue restraining the Respondents by themselves, their agents, servants, employees and/or otherwise from interfering wasting or alienating the Applicant's proprietary rights over the suit property pending hearing and determination of the suit herein.**

**(d) That any other relief that may be just to meet the ends of justice in this case.**

**(e) That costs of this application be in the cause.**

2. The second application is dated 28<sup>th</sup> November, 2018. It is brought by the 5<sup>th</sup> Defendant and it seeks the following orders:-

**1. Spent**

**2. That pending hearing and determination of this suit the Plaintiff Titus Sinkeen Terta his agents, relatives and or any person acting on his behalf be hereby restrained from selling, charging, damaging, leasing, subdividing, constructing or dealing in any manner whatsoever with the 5<sup>th</sup> Defendant/Applicant LR No. NAIROBI BLOCK 140/5 UNIT 26.**

**3. Spent**

4. That this Honourable Court pleases to order that the Plaintiff Titus Sinkeen Terta pays rent forthwith to the 5<sup>th</sup> Defendant/Applicant with effect from 30<sup>th</sup> September, 2017 to date at Kshs.40,000/= per month.

5. That the 5<sup>th</sup> Defendant/Applicant be at liberty to levy distress for rent against the Plaintiff.

6. That this Honourable Court pleased to order the Plaintiff to vacate the suit property forthwith.

7. That this Honourable Court pleases to lift any orders issued exparte against the 5<sup>th</sup> Defendant if any.

8. That the Officer commanding Embakasi Police Station be directed to supervise the Court orders for peace and harmony.

9. That costs of the application be provided for.

3. The Preliminary Objection was raised by the 5<sup>th</sup> Defendant on the ground the Plaintiff's application is hopelessly misconceived, frivolous, totally devoid of merit and is mala fides for the reason that the 5<sup>th</sup> Defendant is the registered owner of LR 140/5/26 (suit property). The 5<sup>th</sup> Defendant further contends that the Plaintiff's suit is mischievous, an abuse of the process of law, is vexatious and is calculated to waste the Court's time.

4. The Court had directed parties to file Written Submissions in respect of both applications and the Preliminary Objection. The main contestants that is the Plaintiff and the 5<sup>th</sup> Defendant filed submissions touching on the two applications but it is only the Plaintiff who filed submissions touching on the Preliminary Objection. I will first deal with the Preliminary Objection.

### **Preliminary Objection**

5. The grounds upon which the 5<sup>th</sup> Defendant has raised the Preliminary Objection are that she is the registered owner of the suit property; that there was a meeting held at National Social Security Fund (NSSF) offices among the protagonists whereby it was agreed that the suit property belonged to the 5<sup>th</sup> Defendant and that the Plaintiff was to be reimbursed the amount he had paid to the 1<sup>st</sup> Defendant and that pursuant to this meeting, the Plaintiff and the 3<sup>rd</sup> Defendant entered into an agreement dated 4<sup>th</sup> October, 2017 in which the 3<sup>rd</sup> Defendant agreed to refund the Plaintiff what had been paid to the 1<sup>st</sup> Defendant. Further the 5<sup>th</sup> Defendant contends that she has a Court order dated 19<sup>th</sup> October, 2018 authorising her to levy distress for rent which order the Plaintiff is trying to circumvent through the application which he had filed.

6. The Plaintiff opposed the Preliminary Objection on the ground that the same does not meet the threshold of a Preliminary Objection which should be based on a pure point of law. The Plaintiff further argues that there are facts to be ascertained by the Court and as such what the 5<sup>th</sup> Defendant is trying to raise cannot pass for a Preliminary Objection. The Plaintiff further argues that to allow the grounds raised by the 5<sup>th</sup> Defendant will be tantamount to locking out him from being heard which is against the spirit of Article 159(d) of the Constitution.

7. In support of his arguments the Plaintiff relied on the cases of Mukisa Biscuit Manufacturing Company Limited -Vs- West End Distributors Limited [1969] EA 696, Janet Syokau Kaswii -Vs-Kathonzaweni Financial Service Association [2014]eKLR, Sauti Africa Limited -Vs- Cheraik Management Limited & Another[2012]eKLR and Litein Tea Factory Company Limited -Vs- Davis Kiplagat Mutai & 5 Others[2015]eKLR.

8. In the Mukisa Biscuit case (supra) Law J.A stated as follows:-

***“So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the Pleadings and which if argued as a Preliminary Objection may dispose of the suit.”***

9. In the same case of Mukisa Biscuits (supra) Sir Charles Newbold P stated as follows:-

***“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is raised is the exercise of judicial discretion.”***

10. I have considered the grounds raised in support of the Preliminary Objection. It is clear that the facts require to be ascertained and what is being raised does not therefore qualify to be a Preliminary Objection which may dispose of the application or even the main suit. I therefore overrule the Preliminary Objection for not meeting the threshold of what a Preliminary Objection ought to be.

### **Application dated 6<sup>th</sup> November, 2018**

11. In this application, the Plaintiff contends that on 20<sup>th</sup> May 2015, he entered into a sale agreement with the 1<sup>st</sup> Defendant who agreed to sell to him the suit property at a consideration of Kshs.6,000,000/=. The agreement was drawn by the 3<sup>rd</sup> Defendant who is an advocate. He paid the entire purchase price by 30<sup>th</sup> May, 2015. He renovated the suit property which is an apartment at Nyayo Embakasi Estate. He then took possession in June, 2015.

12. As the Plaintiff was waiting for completion documents, he was informed that the suit property had already been sold by the 1<sup>st</sup> Defendant

to the 2<sup>nd</sup> Defendant vide an agreement dated 5<sup>th</sup> October, 2009 and that the 2<sup>nd</sup> Defendant had title to the suit property which she had charged to National Bank of Kenya Limited but which she had been unable to clear.

13. Upon discovery of this new development, an agreement dated 3<sup>rd</sup> August, 2016 was entered into between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the one part and the Plaintiff on the other part. This agreement did not however materialize. The Plaintiff had to enter into an agreement with the 3<sup>rd</sup> Defendant on 4<sup>th</sup> October, 2017 in which it was agreed that the 3<sup>rd</sup> Defendant was to refund the Plaintiff Kshs.7,000,000/= in addition to Kshs.1,000,000/= for renovations which the Plaintiff had carried out on the suit property. The two agreed that the 3<sup>rd</sup> Defendant was to repay the total sum of Kshs.8,000,000/= through monthly instalments of Kshs.300,000/=. The 3<sup>rd</sup> Defendant has however not honoured the agreement.

14. The Plaintiff later learnt that the suit property had been sold to the 5<sup>th</sup> Defendant. The 5<sup>th</sup> Defendant threatened to evict him hence the filing of the suit and the present application in which he seeks to restrain the 1<sup>st</sup> to 5<sup>th</sup> Defendants from interfering with the suit property pending the hearing and determination of the suit.

15. The 4<sup>th</sup> Defendant opposed the application by the Plaintiff based on two replying affidavits sworn by Hellen C. Koech, a Legal Officer of NSSF sworn on 17<sup>th</sup> April, 2019. The deponent gives details on how the suit property initially belonged to an Employee of NSSF Leonard Karimah Walukoha who purchased it on tenant purchase terms and thereafter transferred it to the 1<sup>st</sup> Defendant. She deponed that since then, the property has changed hands to the 2<sup>nd</sup> Defendant and finally to the 5<sup>th</sup> Defendant who is now the current registered owner according to their records and the records held by the Ministry of Lands.

16. The deponent, states that the only slight confusion which has been there was as a result of parties transacting on the suit property at times without informing NSSF. She went on to deny the allegations by the Plaintiff that the Plaintiff had records for purposes of paying service charge changed from the 1<sup>st</sup> Defendant into his name. She stated that according to their records, the person in whose name service charge has been paid is the 1<sup>st</sup> Defendant and now that the suit property is in the name of 5<sup>th</sup> Defendant the records have accordingly changed.

17. The deponent stated that a meeting was convened at the NSSF where the disputing parties including the Plaintiff were in attendance. It was resolved that the suit property now belonged to the 5<sup>th</sup> Defendant who had cleared the mortgage which the 2<sup>nd</sup> Defendant had with National Bank of Kenya Limited. She attributes the predicament in which the Plaintiff finds himself to the 3<sup>rd</sup> Defendant who was at one time a Legal Officer at NSSF and who ought to have advised the Plaintiff that what he was purchasing had already been purchased by the 2<sup>nd</sup> Defendant in 2009.

18. On her part, the 5<sup>th</sup> Defendant opposed the Plaintiff's application based on her replying affidavit sworn on 3<sup>rd</sup> December, 2018. She contends that she purchased the suit property from the 2<sup>nd</sup> Defendant vide an agreement dated 26<sup>th</sup> June, 2017 after conducting due diligence which showed that the 2<sup>nd</sup> Defendant was the registered owner of the suit property whose title had been charged to National Bank of Kenya Limited. Upon payment of the amount which the 2<sup>nd</sup> Defendant owed National Bank, the title was discharged and the same has now been registered in her name on 6<sup>th</sup> September, 2017.

19. The 5<sup>th</sup> Defendant further depones that upon paying all dues to NSSF and the City County of Nairobi, there was a meeting held at NSSF in which it was agreed that the suit property belonged to her. In attendance was the Plaintiff who was advised to seek refund. Following this meeting, the Plaintiff and the 3<sup>rd</sup> Defendant who was acting for 1<sup>st</sup> Defendant during the sale agreement agreed to refund the Plaintiff Kshs.8,000,000/= vide agreement dated 4<sup>th</sup> October, 2017. The 5<sup>th</sup> Defendant therefore argued that there is no basis upon which the Plaintiff can claim ownership to the suit property.

20. I have considered the Plaintiff's application as well as the opposition to the same by the 5<sup>th</sup> Defendant. I have also considered the submissions by the Plaintiff, the 4<sup>th</sup> Defendant and those of the 5<sup>th</sup> Defendant. The only issue for determination is whether the Plaintiff has met the threshold for grant of injunction. The principles of grant of a temporary injunction are now well settled. As per ***Giella Vs Cassman Brown Co Ltd [1973] EA 358*** an Applicant is expected to demonstrate that he has a *prima facie* case that he will suffer loss which may not be compensatable in damages and if the Court is in doubt, it will decide the application on a balance of convenience.

21. In the instant case the materials placed before me show that as at the time the 1<sup>st</sup> Defendant purported to sell the suit property to the Plaintiff, the suit property had already been sold to the 2<sup>nd</sup> Defendant who had title which title had been charged to National Bank. Had the Plaintiff bothered to carry out a search, he would have discovered that the property did not belong to the 1<sup>st</sup> Defendant.

22. When it dawned upon the Plaintiff that the suit property was not in the 1<sup>st</sup> Defendant's name and that it was in the 2<sup>nd</sup> Defendant's name who had already sold it to the 5<sup>th</sup> Defendant, a meeting was held at NSSF where it was agreed that the suit property was lawfully the 5<sup>th</sup> Defendant's property. Following this meeting, the Plaintiff and the 3<sup>rd</sup> Defendant entered into an agreement where the 3<sup>rd</sup> Defendant was to refund the Plaintiff a total of Kshs.8,000,000/-. Though the Plaintiff denies that there was such a meeting, the convenor of the meeting at NSSF has stated that there was a meeting but that the 3<sup>rd</sup> Defendant was not there. This is the meeting which must have prompted the Plaintiff to enter into the agreement with the 3<sup>rd</sup> Defendant. In the circumstances I do not see what *prima facie* case the Plaintiff has.

23. Even if I were to consider the second principle in the *Giella Case (Supra)*, the Plaintiff has already expressed his willingness to get a refund of what he had paid out. Where an Applicant can be adequately compensated in damages, an injunction cannot issue. Even on a balance of convenience, the convenience tilts in favour of the 5<sup>th</sup> Defendant who has obtained title to the suit property which title has been traced to the 2<sup>nd</sup> Defendant who sold the property to the 5<sup>th</sup> Defendant who *prima facie* was an innocent purchaser for value without notice of any adverse claims by third parties.

24. The Plaintiff appears to have resigned to the fact that the 1<sup>st</sup> and 3<sup>rd</sup> Defendant may have pulled tricks against him to obtain money from him without disclosing that the same property had been sold to the 2<sup>nd</sup> Defendant before. The Plaintiff was made aware of this after the transfer of the property to the 5<sup>th</sup> Defendant. It is a sign of bad faith on him to try to disown a meeting which was held at NSSF. I find that the Plaintiff's application is without merit. The same is dismissed with costs to the 4<sup>th</sup> and 5<sup>th</sup> Defendants.

It is so ordered.

#### **Application dated 28<sup>th</sup> November, 2018**

25. In this application, the 5<sup>th</sup> Defendant contends that she purchased the suit property from the 2<sup>nd</sup> Defendant who had charged its title to National Bank. The 5<sup>th</sup> Defendant has since paid all the required fees including stamp duty. Title has been processed and is in her name. The 5<sup>th</sup> Defendant has even an order in which she is seeking to levy distress against the Plaintiff on grounds that she is the owner and that since it is the Plaintiff enjoying the suit premises, she is entitled to rent.

26. I have already narrated in detail on how the 5<sup>th</sup> Defendant came to be registered as owner of the suit property while dealing with the application by the Plaintiff. I need not repeat those details here. The 5<sup>th</sup> Defendant's ownership has been supported by the 4<sup>th</sup> Defendant who has stated that there was a meeting at their offices over ownership of the suit property and how the issues were resolved.

27. The 2<sup>nd</sup> Defendant through her replying affidavit sworn on 16<sup>th</sup> April, 2019 supported the sale between her and the 5<sup>th</sup> Defendant and stated that the sale between the Plaintiff and the 1<sup>st</sup> Defendant did not materialize.

28. The 4<sup>th</sup> Defendant through two replying affidavits sworn 17<sup>th</sup> April, 2019 supported the title held by the 5<sup>th</sup> Defendant and gave an elaborate history of the same.

29. The Plaintiff opposed the application by the 5<sup>th</sup> Defendant through a replying affidavit sworn on 16<sup>th</sup> April, 2019. The Plaintiff contends that he had entered into an agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 3<sup>rd</sup> August, 2016 which agreement was drawn by the 3<sup>rd</sup> Defendant; that the agreement did not materialize as he was not given any completion documents. The Plaintiff denies that there was any meeting at NSSF and that he entered into the agreement of 4<sup>th</sup> October, 2017 with the 3<sup>rd</sup> Defendant after he learnt that the suit property had been sold to a third party.

30. The Plaintiff contends that the 5<sup>th</sup> Defendant cannot rely on a title which was obtained fraudulently to defeat his claim. He further argues that if he were removed from the suit property, he will suffer loss.

31. I have carefully considered the application by the 5<sup>th</sup> Defendant and the opposition to the same by the Plaintiff. What in essence the 5<sup>th</sup> Defendant is seeking a mandatory injunction. This is because a temporary injunction as prayed for in prayer (2) cannot be granted. This is because the Plaintiff is the one in the suit property. The suit property is in the 5<sup>th</sup> Defendant's name there is therefore no way the Plaintiff can charge or sell the same without title documents.

32. The Plaintiff is not a tenant of the 5<sup>th</sup> Defendant. There is no tenancy relationship which can be the basis of this Court ordering that the Plaintiff pays rent or that distress for rent be levied against him. What is clear is that the Plaintiff is a trespasser on the 5<sup>th</sup> Defendant's property. Once the Plaintiff agreed to enter into an agreement with the 3<sup>rd</sup> Defendant for a refund of what he had paid following a meeting at NSSF though he denies it, he acknowledged the title of the 5<sup>th</sup> Defendant and therefore became a trespasser from that time.

33. There is no iota of evidence that the 5<sup>th</sup> Defendant had any knowledge that the property which she purchased had any issues. As at the time the Plaintiff purported to enter into a sale agreement with the 1<sup>st</sup> Defendant on 20<sup>th</sup> May 2015, the title to the suit property was already in the 2<sup>nd</sup> Defendant's name. This title was later transferred to the 5<sup>th</sup> Defendant.

34. The principles for grant of a mandatory injunction are now well settled. A mandatory injunction can be given at interlocutory stage if there are special circumstances. In the instant case, it is clear that the Plaintiff knew that he had no chance in securing title to the suit property and that is why he readily entered into the agreement of 4<sup>th</sup> October, 2017 with the 3<sup>rd</sup> Defendant for a refund. The Plaintiff admits in his replying affidavit that he entered into the agreement with the 4<sup>th</sup> Defendant because he knew that the property had been sold. The question which one would ask is for what reason did he file this suit in which he is seeking to injunct the 5<sup>th</sup> Defendant from enjoying her property?

35. In **Kenya Breweries Limited & Another Vs Washigton O. Okeyo [2002]eKLR** the Court stated as follows:-

***“The test whether to grant a mandatory injunction or not is correctly stated in in Vol 24 Italsbury's Laws of England 4<sup>th</sup> Edition at paragraph 948 which reads;-***

***“A mandatory injunction can be granted on an interlocutory application as well as the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the Defendant attempted to steal a march on the Plaintiff... a mandatory injunction will be granted on an interlocutory application.”***

36. In the instant case the 5<sup>th</sup> Defendant has filed a counterclaim in which she seeks removal of the Plaintiff from the suit property. The

Plaintiff has by his own conduct shown that he is ready to have a refund of what he paid in the botched purchase. The Plaintiff does not deny that he entered into the agreement voluntarily. The 5<sup>th</sup> Defendant was not party to the agreement or the botched sale. The 5<sup>th</sup> Defendant has already paid for the suit property. As the Plaintiff pursues his refund, the 5<sup>th</sup> Defendant should also enjoy her property. The fact that the 3<sup>rd</sup> Defendant has not honoured the agreement cannot make the 5<sup>th</sup> Defendant not to enjoy the property which she purchased. I find that this is a clear case where a mandatory injunction can be given ordering the Plaintiff to vacate the suit property. Consequently, I allow the 5<sup>th</sup> Defendant's Notice of Motion dated 28<sup>th</sup> November, 2018 in terms of prayers six (6) eight (8) and nine (9).

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 26<sup>th</sup> day of August, 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of Mr Wachakana for 5<sup>th</sup> defendant and M/s Mbirwe for Mr Kamau for Plaintiff

Court Clerk : Hilda

**E.O.OBAGA**

**JUDGE**