



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 222 OF 2018**

**NICHOLAS THUO KABAIKU.....PLAINTIFF**

**=VERSUS=**

**SERAH NJERI MBATIA..... DEFENDANT**

**RULING**

This case is a good example of how things can go wrong when a firm of advocates takes it upon itself to represent both vendor and purchaser in a land sale transaction. The plaintiff and the defendant entered into an agreement for sale dated 8<sup>th</sup> September, 2017 in which the plaintiff agreed to purchase while the defendant agreed to sell all that parcel of land known as L.R No. 15003/30 (I.R 90348) (hereinafter referred to as “the suit property”). The agreement contained the usual terms for such transactions. The purchase price was agreed at Kshs. 30,000,000/= of which the plaintiff was to pay Kshs. 2,800,000/= as a deposit. The completion date was 8<sup>th</sup> December, 2017.

The plaintiff was to pay the balance of the purchase price in the sum of Kshs. 27,200,000/= on or prior to the completion date and in the event that the plaintiff wished to obtain finance from a financial institution for the balance or part of the purchase price, he was to deliver prior to the completion date an undertaking from his financier’s advocates’ regarding the payment of the balance or the portion of the purchase price being financed. The plaintiff and the defendant were represented in the transaction by the firm of Righa & Mburu Advocates.

The plaintiff paid a deposit of Kshs. 2,800,000/= and obtained funding to the tune of Kshs. 27,200,000/= for the balance of the purchase price. Before the completion date, the advocates for the plaintiff’s financier, Consolidated Bank of Kenya Limited (hereinafter referred to as “the bank”), Kale Maina & Bundotich Advocates wrote to the parties’ advocates, Righa & Mburu Advocates on 17<sup>th</sup> November, 2017 giving them a professional undertaking to pay the balance of purchase price within 15 days of registration of the transfer of the suit property in favour of the plaintiff and a charge in favour of the bank both of which were to be done simultaneously.

The parties are not in agreement as to what instructions each gave to the firm of Righa & Mburu Advocates after this letter of undertaking was received by the said firm on 21<sup>st</sup> November, 2017. The said firm which has not been joined in this suit as a party has also not come out to explain what informed the actions which it took after that date. For reasons which are not clear from the material on record, the firm of Righa & Mburu Advocates did not tender the completion documents to the bank’s advocates, Kale Maina & Bondotich Advocates on the strength of their professional undertaking aforesaid. Instead, the said firm purported to lodge the instrument of transfer of the property from the defendant to the plaintiff for registration at the land registry and proceeded to pay Stamp Duty on the same. The said firm also paid Capital Gains Tax which was payable by the defendant on the transaction. I have noted from the instrument of transfer that was lodged for registration by the said firm of advocates on 7<sup>th</sup> February, 2018 that the purchase price is indicated as Kshs. 5,000,000/= instead of the sum of Kshs. 30,000,000/= which is the purchase price contained in the agreement for sale between the parties; an indication that there was an attempt to cheat the Kenya Revenue Authority on the Stamp Duty payable on the transaction.

The plaintiff has denied that he gave the firm of Righa & Mburu Advocates instructions to register the said transfer. The plaintiff has claimed that the attempted transfer of the suit property to the plaintiff that was blocked by the defendant at the land registry was a scheme by the defendant and the firm of Righa & Mburu Advocates to frustrate and rescind the agreement for sale between the parties. The defendant on the other hand has claimed that the failure by the firm of Righa & Mburu advocates to forward the completion documents to the bank’s advocates and their attempt to transfer the suit property to the plaintiff was a fraudulent scheme by the plaintiff and the said firm of advocates to transfer the suit property to the plaintiff without paying the balance of the purchase price since the plaintiff would not have needed financing after the property was transferred to his name.

Prior to the presentation of the instrument of transfer of the suit property for registration in favour of the plaintiff as aforesaid, the firm of Righa & Mburu Advocates had purported to issue the plaintiff with 21 days completion notice on 26<sup>th</sup> January, 2018 although it had received the professional undertaking from the plaintiff’s financiers as aforesaid. After the defendant blocked the attempted transfer of the suit property to the plaintiff without payment of the balance of the purchase price and managed to get back the title for the suit property and other completion documents from the land registry, the defendant through another law firm served the plaintiff through the firm of Righa & Mburu Advocates with a three (3) days notice dated 9<sup>th</sup> February, 2018 to complete the agreement for sale by paying the balance of the purchase price failure to which the agreement was to stand rescinded. It is this notice that prompted the filing of this suit on 10<sup>th</sup> May, 2018.

Together with the plaint, the plaintiff filed an application brought by way of Notice of Motion dated 9<sup>th</sup> May, 2018 seeking a temporary injunction to restrain the defendant from leasing, charging, selling, transferring or alienating in any way whatsoever the suit property pending the hearing and determination of this suit. The plaintiff contended that he had fully complied with the terms of the agreement for sale dated 8<sup>th</sup> September, 2017 by paying the deposit and providing the necessary professional undertaking by the advocates for the bank for the payment of the balance of the purchase price. The plaintiff contended that the defendant had refused and/or neglected to release the completion documents to the said advocates for the bank but had instead purported to issue a three (3) days rescission notice to the plaintiff to complete the agreement failure to which she would rescind the agreement and retain the deposit paid by the plaintiff in the sum of Kshs. 2,800,000/=.

The plaintiff contended that the said notice was illegal as it was not only unjustified but the same did not also comply with the terms of the agreement for sale as it was not served through the plaintiff's address for service and was also for a shorter period than the 21 days provided for in the agreement for sale. The plaintiff contended that the said notice was null and void and of no legal effect since the plaintiff was not in breach of the agreement for sale. The plaintiff contended that he was able and willing to complete the agreement for sale between him and the defendant but had been prevented from doing so by the defendant.

The plaintiff averred that he was apprehensive that the defendant was likely to sell, charge or transfer the suit property to third parties if not restrained by the court. The plaintiff contended that he stood to suffer irreparable harm if the injunction sought was not granted.

On 16<sup>th</sup> July, 2018, the defendant filed in court a document with a heading "Authority to swear affidavit". The document was filed purportedly under Order 4 Rule (1) 4 of the Civil Procedure Rules which provides as follows: -

**"Where the plaintiff is a corporate, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."**

The document filed by the defendant provided as follows: -

**"SERAH NJERI MBATIA**, the defendant herein has authorized **WILLIAM NGUGI MBATIA** of I.D number 20622403 who is her brother to swear a replying affidavit on her behalf and to swear on her behalf any other affidavit and/or depositions that may be necessary in the said suit.

**SIGNED** by the Plaintiff **SERAH NJERI MBATIA** this day 31<sup>st</sup> of May, 2018."

On 18<sup>th</sup> June, 2018, the defendant's advocates filed a replying affidavit in response to the plaintiff's application sworn by one, William Ngugi Mbatia on 5<sup>th</sup> June, 2018. In the affidavit, William Ngugi Mbatia stated that he had been authorised by the defendant to swear the affidavit on her behalf through a notice dated 31<sup>st</sup> May, 2018. William Ngugi Mbatia (hereinafter referred to as "the defendant's agent") stated that it was the plaintiff who was in breach of the agreement for sale dated 8<sup>th</sup> September, 2017 between him and the defendant in that he ignored rescission notices served upon him dated 26<sup>th</sup> January, 2018 and 9<sup>th</sup> February, 2018 and also attempted to fraudulently transfer the suit property to his name. The defendant's agent stated that the plaintiff had approached the court with unclean hands and as such he was not entitled to an equitable remedy. The defendant's agent averred that it was the defendant who had suffered loss as a result of the plaintiff's breach of the said agreement for sale and that no loss or damage could be suffered by the plaintiff if the orders sought were not granted. The defendant's agent averred that after the bank's advocates, Kale Maina & Bondotich Advocates gave a professional undertaking in respect of the balance of the purchase price on 17<sup>th</sup> November, 2017 to Righa & Mburu Advocates, the defendant delivered the completion documents to Righa & Mburu Advocates which was acting for both parties so that the said firm could on the basis of the said professional undertaking complete the agreement.

The defendant's agent averred that the said firm of Righa & Mburu Advocates in collusion with the plaintiff declined to forward the completion documents to the bank's advocates and instead, elected to lodge the instrument of transfer at the land registry for registration notwithstanding the fact that the defendant had not been paid the balance of the purchase price in the sum of Kshs. 27,200,000/=. The defendant's agent averred that when the defendant got wind of the fraud, she asked the firm of Righa & Mburu Advocates to withdraw the documents from the land registry but the firm declined to do so forcing the defendant to instruct its advocates on record to block the registration of the transfer of the suit property in favour of the plaintiff. The defendant's agent averred that the rescission notices given to the plaintiff were valid and proper. The defendant's agent contended that the plaintiff was always aware of his breach of contract and that the present application was an abuse of the court process.

The application was heard by way of written submission. The plaintiff filed his submissions on 12<sup>th</sup> October, 2018 while the defendant filed her submissions on 22<sup>nd</sup> January, 2019. I have considered the plaintiff's application together with the supporting affidavits. I have also looked at the replying affidavit and the submissions of counsels. I am in agreement with the plaintiff's submissions that the affidavit of William Ngugi Mbatia sworn on 5<sup>th</sup> June, 2018 has no evidential value as he is a stranger to the proceedings herein. Order 4 Rule 1(4) of the Civil Procedure Rules relied on by the defendant to authorise the said William Ngugi Mbatia to swear an affidavit on her behalf only applies to corporations. The defendant is not a corporation and as such cannot purport to authorise an agent to swear an affidavit on her behalf in a suit against her. In his affidavit, the said William Ngugi Mbatia has not stated that what he has deposed to is within his own knowledge. There is no indication that he was involved in any capacity in the transaction between the plaintiff and the defendant. The mere fact that he is a brother to the defendant does not give him legal standing to swear an affidavit on her behalf on matters in respect of which he has no idea. If the defendant wanted the said William Ngugi Mbatia to appear on her behalf or to represent her in the suit, she should have given him a power of attorney and sought leave of the court to allow him to appear in the matter and plead on her behalf as her attorney.

In the absence of any sound legal basis to anchor the said affidavit sworn by William Ngugi Mbatia, the same is incompetent. I wish to add that even the attachments thereto indicate that the affidavit was sworn by Serah Njeri which is not the case. The affidavit is worthless and is accordingly rejected by the court. I will consider the plaintiff's application as undefended.

Whether the application was defended or not, the plaintiff had a duty to meet the threshold for granting orders of temporary injunction. The principles upon which the court exercises its discretion in applications for temporary injunction are settled. As it was held in the case of Giella v. Cassman Brown & Co. Ltd (1973) E.A 358, an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In the case of Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited v. First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows: -

**“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”**

The plaintiff had a duty to demonstrate that he has a prima facie case against the defendant and that he stands to suffer irreparable harm if the injunction sought is not granted. At the beginning of this ruling, I have given a broad analysis of the parties’ respective cases. From the cases presented by the parties, I am of the view that the issues in contention cannot be determined on affidavit evidence. It is not possible in the absence of oral evidence to determine whose fault resulted in the non-completion of the agreement between the parties. I am unable therefore to say with certainty that the plaintiff has a prima facie case against the defendant with a probability of success and that he will suffer irreparable harm unless the injunction sought is granted. The order that commends itself to me to make in the matter is one that will preserve the suit property pending the hearing of the main suit. I am of the view that the balance of convenience favours the preservation of the suit property. This has so far been achieved by the order of inhibition that was made herein on 10<sup>th</sup> May, 2018.

Due to the foregoing, I hereby extend the order of inhibition made herein on 10<sup>th</sup> May, 2018 until the hearing and final determination of this suit or further orders by the court. The costs of the application shall be in the cause.

**Delivered and Dated at Nairobi this 31<sup>st</sup> day of October 2019**

**S. OKONG’O**

**JUDGE**

**Ruling read in open court in the presence of:**

N/A for the Plaintiff

Ms. Kanyara h/b for Mr. Wachira for the Defendant

C.Nyokabi-Court Assistant