



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 460 OF 2017

PETER NDERITU KAMAKIA.....PLAINTIFF

VERSUS

KAHAWA SUKARI LIMITED.....DEFENDANT

RULING

1. The application under consideration is the plaintiff's Notice of Motion dated 29/6/ 2017 in which the plaintiff seeks a temporary injunction to restrain the defendant from repossessing, re-allocating, disposing off or in any other manner interfering with the plaintiff's beneficial ownership of Plot No. 1921 and Plot No 1928, Mwihoko, Kahawa Sukari (the suit properties) pending the hearing and determination of this suit.

2. The applicant's case is that he entered into a sale agreement with the defendant for the sale of the suit properties at a purchase price of Kshs 2,500,000/- for each plot. The plaintiff paid the deposit on 3/3/2014 and was issued with an Allotment Certificate. The plaintiff further contends that he has paid Kshs 2,500,000/- for the two plots and that his efforts to settle the balance of the purchase price have been frustrated by the defendant on grounds that the plots have been allocated to other persons. The plaintiff contends that his claim against the defendant is for an order of specific performance and that he has a prima facie case with high chances of success.

3. Further, the plaintiff contends that if an injunctive order is not granted he will suffer irreparably because damages will not adequately compensate him as he may not get similar properties for the same value. The plaintiff add that the balance of convenience is in his favour because the defendant is holding his money, title documents and is in possession of the suit properties. In the further affidavit, the plaintiff denied being in breach of the agreement. He also further denied that he accepted Plot No. 1901 in place of the suit properties.

4. The defendant opposes the application through Grounds of Opposition filed on 29/7/ 2017 and a replying affidavit sworn by Alice Wacheke Muiruri on 12/9/2017. The defendant contends that the application is misconceived, bad in law and without reasonable cause. The defendant also states that the suit properties are located within Kiambu County outside this court's jurisdiction. The defendant states that the plaintiff has approached the court with unclean hands and has failed to disclose material facts. According to the defendant, the plaintiff paid a deposit of Kshs 1,000,000/- for the suit property and was unable to complete the transaction within the agreed period leading to a termination of the contract as evidenced by a termination letter dated 4/1/ 2017. It is the defendant's case that following the termination, the plaintiff requested to be allocated another plot and that the Kshs 1,000,000/- already paid be allocated towards the newly allocated Plot No. 1901. The plaintiff made an additional payment of Kshs 1,300,000/- for the new plot no. 1901 leaving a balance of Kshs 200,000/- which he is yet to settle.

5. The plaintiff filed submissions dated 5/10/ 2017 in which he argues that under Article 162(2)(b) of the Constitution, this suit was properly before this court which has powers to order transfer to the Environment and Land Court sitting in Thika not for want of jurisdiction, but for administrative purposes. The plaintiff further submitted that he has satisfied the requirements for grant of a temporary injunction as set out in **Giella vs. Cassman Brown (1973)EA 358**.

6. Counsel for the plaintiff contended that there is no agreement to substantiate the defendant's allegations that the plaintiff accepted Plot No. 1901 in place of the suit properties. He argued that the receipt showing that the plaintiff made payment for Plot No. 1901 was an error or mischief on the part of the defendant since the plaintiff only paid for the suit properties.

7. It is also the plaintiff's submission that the alleged termination letter was never served upon him and was in any event invalid because the agreement for sale did not provide for a completion date and therefore, that he ought to have been notified of the default since time was not of essence. The plaintiff relied on the case of **of Elijah Kipkorir Barmalele & another vs. John Kiplagat Chemwono & 3 others(2010)eKLR; Mrao vs. First American Bank of Kenya & 2 others(2003)KLR 125; and United Five Company Ltd vs. Hellen W. Kirumba & another(2013)Eklr**.

8. On irreparable damage, counsel submitted that damages would not adequately compensate the plaintiff for his lifelong investment bought over a long period of time. The plaintiff added that he will not get similar properties at the same value. The plaintiff further reiterated that the balance of convenience was in his favour since the defendant was holding his money, title documents and was in possession, he could only rely on court orders to protect his interest.

9. There are no submissions on the court record filed on behalf of the defendant.

10. The issue for determination in the present application is whether the plaintiff has satisfied the criteria for grant of a temporary injunction as established in **Giella vs. Cassman Brown (1973)EA 358**. In this regard, the plaintiff was required to show that he has a prima facie case with high chances of success; that he will suffer irreparable loss which cannot be compensated by an award of damages and where the court is in doubt, the application is to be determined on a balance of convenience.

11. In his plaint, the plaintiff has sought an order for specific performance against the defendant, directing the defendant to accept the balance of the purchase price and transfer the suit properties in his favour. The plaintiff has averred that the defendant has refused to accept the balance of the purchase price. On the other hand, the defendant avers that the plaintiff breached the sale agreement leading it to issue him with a termination notice.

Determination

12. The contract giving rise to the dispute in this suit is a land sale contract. For an order of specific performance to issue in a land sale contract, the applicant/claimant must satisfy the court that all the statutory requirements on formalities of a land sale contract were met. In Kenya, the formal statutory requirements are spelt out in Section 3(3) of the Law of Contract Act. For avoidance of doubt, Section 3(3) provides as follow:

No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party;

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act ([Cap. 526](#)), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

13. I have carefully perused the documents annexed to the application under consideration. They include Plot Application Forms, Allotment Certificate Number 1921 and 1928, Allotment Advice and various Receipts. None of these documents satisfies the mandatory statutory requirements of Section 3(3) of the Law of Contract Act.

14. Consequently, my finding at this point is that the plaintiff has not presented to the court evidence to demonstrate the existence of a valid and enforceable land sale contract which would form the basis of an interlocutory injunctive order. The net result is that the plaintiff has failed to satisfy the criteria in **Giella Vs. Cassman Brown**. Consequently, the Notice of Motion dated 29/6/2017 fails. The same is dismissed. Costs shall be in the cause.

Dated, signed and delivered at Nairobi on this 9th day of February 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr. Gatumuta holding brief for Mr. Koceyo for the Plaintiff

No appearance for the Defendant

Halima Court clerk