



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 96 OF 2017**

**LINCOLN MUTHUI MUTITA T/A LINCO STORES LTD.....PLAINTIFF**

**VERSUS**

**POSTAL CORPORATION OF KENYA.....DEFENDANT**

**AND**

**FAVE GAS OIL COMPANY LIMITED.....INTERESTED PARTY**

**RULING**

1. On 18<sup>th</sup> May 2017, the Plaintiff filed a plaint against the Defendant seeking the following reliefs;

*a. An order specific performance by compelling the Defendant to prepare a contract for sale of L.R. Embu/Municipality/986 to the Plaintiff and thereafter the Defendant be ordered to pay the Plaintiff damages for breach of tender for sale of L.R. Embu/Municipality/986. (sic)*

*b. Costs and interest of this suit.*

*c. Any other relief that the court deems fit to grant.*

2. The basis of the reliefs sought was that the Plaintiff had been awarded a tender to purchase *Title No. LR Embu/Municipality/986* (hereinafter known as *the "suit property"*) for a sum of Kshs 18,000,000/- but the Defendant had apparently failed to prepare a contract and complete the sale.

3. On 13<sup>th</sup> October 2017, the Plaintiff filed a notice of motion dated 12<sup>th</sup> October 2017 under certificate of urgency seeking the following orders;

*a. That this application be certified urgent and be heard on a priority basis.*

*b. That pending the hearing and determination of this suit inter-parties, the Defendant/Respondent or its lessees, agents, servants or any of them be restrained by a temporary injunction from dealing with, leasing or completing leasing arrangements, developing, remaining on or otherwise interfering with the suit property.*

*c. That costs of this ex-parte application be in the cause.*

4. The said application was based upon the grounds shown on the face thereof and supported by an affidavit sworn by the Plaintiff on 12<sup>th</sup> October 2017. The Plaintiff contended that he had successfully won a tender to purchase the suit property from the Defendant but the Defendant had ignored his interest and decided to lease the suit property to the interested party who intended to put up a petrol service station thereon whilst the suit was pending.

5. The Plaintiff further contended that unless the Defendant, its agents and leases were restrained by order of injunction, he would suffer irreparable damage. The only exhibit he annexed to his supporting affidavit was a copy of a public consultation questionnaire for the intended development of a petrol service station.

6. When the Plaintiff's said application was listed for hearing on 20<sup>th</sup> November 2017, the Plaintiff and Defendant agreed to have the same disposed of through written submissions. The parties also agreed on the timelines for filing submissions whereupon the court fixed the said application for ruling on 29<sup>th</sup> March 2018.

7. However, on 4<sup>th</sup> January 2018, the Plaintiff moved the court again under certificate of urgency seeking to restrain the Defendant, its agents and lessees from developing, dealing with or otherwise interfering with the suit property. It was contended that the Defendant and its agents had commenced excavations on the suit property with a view to putting up a petrol service station while a ruling on the application for injunction was pending. The court certified the said application as urgent and fixed it for *inter-partes* hearing on 17<sup>th</sup> January 2018.

8. On 16<sup>th</sup> January 2018, Fave Gas Oil Co. Ltd filed a notice of motion of even date seeking the following orders;

a. That this application be certified urgent and be heard *ex-parte* in the first instance.

b. That this application be heard and determined before the hearing of the notice of motion dated 3<sup>rd</sup> January 2018.

c. That the honourable court be pleased to enjoin the applicants as interested parties in this suit. (*sic*)

d. That the interim orders issued by this honourable court be stayed pending the hearing of this application *interparties*.

e. That pending the hearing and determination of this application, the honourable court be pleased to stay the interim orders issued on 9<sup>th</sup> January 2018.

f. That the costs of this application be provided for.

9. When the matter was listed on 17<sup>th</sup> January 2018, the court granted leave to Fave Gas Oil Co. Ltd to be joined as an interested party herein. The Defendant and the Interested Party were granted 21 days to file their responses and submissions to the Plaintiff's notice of motion dated 3<sup>rd</sup> January 2018. The court retained the ruling date of the Plaintiff's notice of motion applications dated 12<sup>th</sup> October 2017 and 3<sup>rd</sup> January 2018 as 29<sup>th</sup> March 2018. When it was discovered later on that 29<sup>th</sup> March 2018 fell with the court recess, the parties were notified that the ruling would be delivered on 21<sup>st</sup> March 2018.

10. The Defendant in this matter filed a replying affidavit in opposition to the Plaintiff's said two applications for injunction. The replying affidavit was sworn by Joel Mageto who described himself as the Defendant's Manager, Facilities Management. He confirmed that the Defendant had advertised a tender for the sale of the suit property on 1<sup>st</sup> October 2010 which was eventually won by the Defendant. However, the sale could not proceed because of injunctive orders issued in Embu HCCC No. 167/2010 restraining the sale of the property.

11. It was the Defendant's case that consequently no contract of sale was ever prepared or signed by the parties. The said civil suit in which injunctive orders were issued was ultimately dismissed in 2014 for want of prosecution. However, by then so much time had lapsed that the Defendant terminated the process under section 36 of the Public Procurement and Disposal Act, 2005 (now repealed).

12. The Defendant further stated that it had since leased out the suit property to two tenants namely, the Interested Party herein and Joseph Rwanjau with whom they had contractual relations. The Defendant asserted that there was no contractual relationship between the Plaintiff and the Defendant for the sale of the suit property. The Defendant, therefore, asked the court to dismiss the Plaintiff's applications as lacking merit.

13. In its affidavit in support of the notice of motion dated 16<sup>th</sup> January 2018, the Interested Party stated that it was a bonafide lessee of a portion of 37,654 square feet of the suit property for a period of 10 years. The relevant lease agreement was signed on 28<sup>th</sup> September 2017. It was further stated that the third party took possession upon execution of the agreement and that upon obtaining relevant approval, it commenced excavating the ground and depositing building materials for the purpose of constructing a petrol service station.

14. The court has considered the applications on record together with the various affidavits in support and opposition thereof. The court has also considered the various submissions on record.

15. The principles for the grant of an interlocutory injunction are well settled. The first is that the Applicant must demonstrate a *prima facie* case with a probability of success as enunciated in the case of ***Giella Vs Cassman Brown & Co Ltd [1973] EA 358***. The main question in this suit is what interest or legal right of the Plaintiff has been violated or threatened with violation. The Plaintiff asserts that he won the tender to purchase the suit property but that the Defendant had refused to prepare and sign a contract of sale. That is why he is seeking an order for specific performance.

16. The obvious question which comes to mind is, if the Defendant refused to avail and sign a contract for the sale of the suit property, in respect of which contract is the Plaintiff seeking specific performance? The court is unable to find or imply any contractual agreement between the Plaintiff and the Defendant. The court is unable to infer a purchaser's interest in the absence of a contract between the parties.

17. As was held in the case of ***Mrao Vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125***:

**"a prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

18. On the basis of the material on record, the court is not satisfied that the Plaintiff has established a *prima facie* case with a probability of success at the trial.

19. The failure to demonstrate a *prima facie* case should be sufficient to dispose of the application for injunction. However, the court shall consider the second principle as well. The Plaintiff contended in his two applications that he stood to suffer irreparable loss or damage unless the orders of injunction were granted. He did not specify the nature of such irreparable loss.

20. In my opinion, irreparable damage is the kind of harm or loss which cannot be adequately compensated for by an award of monetary damages. The value of the suit property is capable of precise valuation. The amount of the bid which the Plaintiff placed is known. In my opinion, whatever loss the Plaintiff may suffer can ultimately be compensated for by an award of monetary damages. The court is, therefore, not satisfied that the Plaintiff shall suffer any irreparable loss of damages.

21. The upshot of the foregoing is that the court finds no merit in the Plaintiff's notice of motion dated 12<sup>th</sup> October 2017 and the same is hereby dismissed with costs. In the circumstances, it is no longer necessary to consider the prayers by the Interested Party for stay of the interim orders of injunction granted earlier on pending delivery of the ruling. For the avoidance of doubt, the interim orders are hereby discharged.

22. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 21<sup>st</sup> day of MARCH, 2018**

In the presence of Mr Muriuki for the Plaintiff, Ms Rose Njeru holding brief for Mr Wachira for the Defendant and Ms Migwi for the interested party.

Court clerk Njue/Leadys

**Y.M. ANGIMA**

**JUDGE**

**21.03.18**