



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 497 OF 2017

NOOR ABUBAKAR.....PLAINTIFF

=VERSUS=

GABABA ENTERPRISES LIMITED.....DEFENDANTS

R U L I N G

1. On 27/7/2017, the plaintiff brought this suit seeking orders of specific performance and permanent injunction against the defendant. The plaintiff contends that vide an agreement dated 22/3/2016, the defendant agreed to sell to him and the plaintiff agreed to purchase Unit No 18 erected on Land Reference Number 209/1025 situated in South B, Nairobi, at a price of Kshs 25,000,000. It is further contended by the plaintiff that pursuant to the said agreement, he paid the defendant Kshs 22,500,000, leaving a balance of Kshs 2,500,000 which was to be paid on completion. The plaintiff adds that, in breach of the agreement, the defendant failed to complete the sale, and it instead offered to sell the same property to other prospective purchasers.

2. Together with the plaint, the plaintiff presented a Notice of Motion dated 25/7/2017 seeking interim orders restraining the defendant against disposing the suit property pending the hearing and determination of this suit. The application is the subject of this ruling.

3. The application is supported by the plaintiff's affidavit sworn on 25/7/2017. Attached to the affidavit are: (i) undated and unattested agreement for sale drawn by M/s Maina Njuguna and Associates; (ii) Gulf African Bank credit slip dated 22/3/2016 for Kshs 10,000,000; (iii) First Community Bank deposit slip dated 24/3/2016 for Kshs 6,000,000; (iv) Gulf African Bank credit slip dated 6/4/2016 for Kshs 4,000,000; (v) Gulf African Bank credit slip dated 15/4/2016 for Kshs 500,000; (vi) Gulf African Bank credit slip dated 15/4/2016 for Kshs 1,020,000 and (vii) First Community Bank deposit slip dated 15/4/2016 for Kshs 980,000.

4. Also annexed to the affidavit is a letter dated 30/6/2017 from M/s Maina Njuguna to the plaintiff in which the advocates wrote thus:

Date: 30.6.2017

Your Ref:

Our Ref: GEL. Hs 18

M/S Noor Abubakar

PO Box 77883-00622,

NAIROBI.

Dear Sir,

RE; SALE OF HOUSE NO. 18

BY GABABA ENTERPRISES LIMITED

We refer to the above matter.

We regret to inform you that owing to the complication of this matter by the previous buyer who has gone to court seeking an injunction to restrain the house from being transferred and further owing to our undertaking to the previous buyer's advocates not to transfer this house to a third party, we have advised our client to refund the entire purchase price to you to

avert protracted legal proceedings

We once again regret this unfortunate turn of events.

Yours faithfully,

Maina Njuguna & Associates

CC. Client

5. The defendant opposes the application through Grounds of Opposition dated 30/8/2017 in which it contends that: (i) the application is an abuse of the process of the court devoid of any merit, and frivolous; (ii) the application is supported by an undated, unexecuted and unstamped sale agreement and offends **Section 3** of the Law of Contract Act; and (iii) the application is premised on hearsay evidence. The application was canvassed through written submissions.

6. I have considered the substance of the application, the supporting affidavit, the defendant's grounds of opposition, the parties' respective submissions, and both the law and the guiding principles on interlocutory injunctions. The single issue for determination in this application is whether the application satisfies the criteria for grant of an interim injunction. This criteria was laid down in **Giella V Cassman Brown (1973) EA 358** and is well settled. The applicant is obligated to demonstrate a *prima facie* case with a probability of success. Secondly, he is obligated to demonstrate that unless an injunction is granted, he would stand to suffer injury that cannot be indemnified through an award of damages. If the court were to be in doubt, the application is to be decided on a balance of convenience.

7. The present application is premised on a plea for specific performance of a land sale contract. In Kenya, land sale contracts are regulated by the **Law of Contract Act, Chapter 23** of the **Laws of Kenya**, which specifies certain formal requirements that must be satisfied for the land sale contract to be enforceable through court action. **Section 3 (3)** of the **Act** provides thus:

3(3) 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 resulting, implied or constructive trust.

8. Although the applicant has placed before the court materials that indicate that a total of Kshs 22,500,000 was remitted to the defendant's Bank Account by the plaintiff between March 2016 and April 2016, no compliant land sale contract has been exhibited. The copy of agreement for sale exhibited at this point is undated. Secondly, the execution part signed by the purchaser is unattested. Under **Section 3(3)** of the **Law of Contract Act**, attestation is a mandatory statutory requirement in land sale contracts in Kenya. In the absence of evidence of a properly attested land sale contract, the court has no basis for granting an injunctive order in favour of the plaintiff. I say so because, evidence of a fully compliant contract is the key pillar of a *prima facie* case in a plea for an order of specific performance of a land sale contract.

9. The upshot of this ruling is that, at this point, the court has not been furnished with sufficient material to demonstrate that the plaintiff has a *prima facie* case in his pursuit for orders of specific performance and permanent injunction. He has not presented evidence of a compliant land sale contract. I will not say more at this point. Suffice to say that, owing to the above grave omission, the plaintiff's Notice of Motion dated 25/7/2017 has failed. The same is hereby dismissed for lack of merit.

DATED SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF JUNE 2018.

.....

B M EBOSO

JUDGE

In the presence of:-

Mr Musundi for the Plaintiff

Mr Minishi for the Defendant

