



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 364 OF 2017**

**MOUNTAIN MALL LIMITED.....PLAINTIFF**

**VERSUS**

**MOHAMMED ALI MOTHA.....DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 11<sup>th</sup> October, 2017. It is brought under Order 40 Rule 1 and 2 of the Civil Procedure Rules 2010 and Section 3A and 63(e) of the Civil Procedure Act and all enabling provisions of the law.

2. It seeks orders;

**1) Spent.**

**2) Spent.**

**3) That this Honourable Court be pleased to issue a temporary injunction order restraining the Defendant whether acting by himself or through his proxies, power of Attorney, agents, servants, or workmen from doing any of the following, that is to say, entering into third party sale agreements, disposing off by private treaty or otherwise, transferring, engaging potential buyers and/or in any other manner dealing or interfering with all that parcel of land known as Land Reference No. 463/III/MN(CR 13065) pending the hearing and determination of the suit.**

**4) That costs of the application be in the cause.**

3. The grounds are on the face of the application and are listed as paragraph 1-6. I do not need to reproduce them here.

4. The application is supported by the affidavit of James Kiniiya Gachiri, the Managing Director of the Plaintiff/Applicant sworn on the 11<sup>th</sup> October, 2017.

5. The application is opposed. There is a replying affidavit by Mohammed Ali Motha, the Defendant/Respondent herein sworn on the 21<sup>st</sup> October, 2017.

6. It was agreed between the parties that the application be disposed of by way written submissions.

**7. THE PLAINTIFF'S/APPLICANT'S SUBMISSIONS.**

By a contract of sale dated 27<sup>th</sup> May, 2014, the Defendant/Respondent agreed to sell and the Plaintiff/Applicant agreed to purchase all that property known as Land Reference Number MN/III/463 (CR 13065) measuring approximately 51.3 Acres and situated in Mtwapa of the Mombasa County at a consideration of Kshs461,700,000/=.

At the time the property was charged to the Barclays Bank of Kenya who held a first charge over the property and had consented to the sale of the property by way of private treaty. The plaintiff/Applicant paid the Defendant/Respondent a deposit of 10% through the bank upon execution of the agreement.

The Plaintiff/Applicant had a legitimate expectation that the Defendant/Respondent would be able to complete and perform the contract after the removal of the caveat by a third party. The Plaintiff/Applicant has so far paid Kshs150,000,000/= towards the purchase.

8. Unknown to the Plaintiff/Applicant, the property had already been sub-divided fraudulently by the Respondent and new deed plans generated for new smaller plots. Upon these events being brought to light, the Plaintiff's/Applicant's financier who was to complete the debt due to the Barclays bank pulled out of the transaction thereby crippling completion of the contract which was devastating to the Applicant. Following these events a memorandum of understanding was entered into on 11<sup>th</sup> November, 2016 in which the Defendant/Respondent committed to refund Kshs150,000,000/= to the Plaintiff/Applicant.

On 3<sup>rd</sup> July, 2017 the Plaintiff/Applicant registered a caveat over the property forbidding registration of dealings with the property until its interests were taken care of. On 22<sup>nd</sup> September, 2017, the Defendant/Respondent had the caveat removed without the Plaintiff's/Applicant's knowledge.

9. The Plaintiff/Applicant has established a prima facie case with a probability of success. They have put forward the cases of;

***i. Giella –versus- Cassman Brown and Co. Limited (1973) EA 358.***

***ii. Panari Enterprises Ltd –versus- Lijoodi and 2 Others (2014) eKLR.***

***iii. Mrao Ltd –versus- First American Bank of Kenya Ltd and 2 Others (2003) KLR 125.***

***iv. Paul Gitonga Wanjau –versus- Gathuthi Tea Factory Co. Ltd and 2 Others (2016) eKLR.***

10. That an award of damages would not suffice as the adequate remedy to the Applicant. They have put forward the case of ***Hassan Zubeidi –versus- Patrick Mwangangi Kibaiya and Another (2014) eKLR.*** That the Plaintiff/Applicant's case is a kind with clear infringement of contractual rights as to warrant an injunction.

11. The balance of convenience tilts in favour of the Plaintiff/Applicant. If the injunction is not granted, the Defendant/Respondent will dispose of the suit property without due regard to the agreement to refund Kshs150,000,000/=. Further that the power of attorney donated by the Defendant/Respondent is valid. The caveat was wrongly removed.

## **12. THE DEFENDANT'S/RESPONDENT'S SUBMISSIONS.**

That under the sale agreement the Plaintiff/Applicant was obligated to pay all monies to the client account of Kithure Kindiki and Associates Advocates and where there was default on the part of the Plaintiff, the Defendant was at liberty to rescind the sale agreement and retain all monies paid to the Defendant as agreed liquidated damages as per clause 5.3 of the agreement.

The Plaintiff/Applicant has not established a prima facie case against the Defendant in how it will suffer irreparable loss and damage to entitle it to the equitable relief of injunction.

13. The orders sought will prejudice the chargees who are not a party to this suit. The Plaintiff/Applicant acknowledges that the subject property is charged to Barclays Bank of Kenya Limited as a secure creditor.

The agreement, the basis of these proceedings is rescinded. The Plaintiff/Applicant cannot claim any right on the property. That the Plaintiff's case is not supported by facts that would allow the court to exercise discretion in its favour. They pray that the application be dismissed.

14. I have considered the pleadings, the Notice of Motion, the affidavit in support and the annexures. I have considered the replying affidavit and the annexures. I have considered the written submissions and the authorities cited. The issues for determination are;

**i) Whether or not the Plaintiff/Applicant's application meets the threshold for grant of temporary injunctions.**

**ii) What orders should the court make?**

**iii) Who should bear costs?**

15. At this juncture, it is necessary for this court to briefly examine the legal principles governing the applications of this nature. In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction.

An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles. The conditions for grant of temporary injunctions were set out in the precedent setting case of ***Giella –versus- Cassman Brown And Company Limited (1973) EA 358.***

16. In the case of ***Mrao Limited –versus- First American Bank of Kenya Limited and 2 Others (2003) KRL 125*** the Court of Appeal in determining what amounts to a prima facie case stated;

**“A prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

I am guided by the above authorities.

17. It is the Plaintiff/Applicant's case that the Agreement was rescinded. It follows that it cannot seek to pursue any right or interest in the Agreement. The Defendant/Respondent has disowned the terms of the memorandum of understanding dated 11<sup>th</sup> November, 2016.

As to whether it is true or not will come out during the hearing. I am not persuaded by the facts presented by the Plaintiff/Applicant that it deserves the orders sought.

18. In the case of *Kenleb Cons Limited –versus- New Gatuti Service Station & Another (1990) KLR 557*, Bosire J.(as he then was) held that;

**“to succeed in an application for injunction an applicant must not only make full and frank disclosure of all relevant facts to the just determination of the application but must show he has a right, legal or equitable, which requires protection by injunction.”**

I am not persuaded that the Plaintiff/Applicant's deserves this kind of protection.

19. I find that the Plaintiff/Applicant has failed to establish a prima facie with a probability of success at the trial. I also find that the Plaintiff/Applicant has failed to demonstrate that it will suffer irreparable injury that cannot be compensated by an award of damages if these orders are not granted. It has admitted that the Agreement for sale has been rescinded. In their plaint it claims damages for breach of contract and refund of deposit. This means that an award of damages would be an adequate remedy.

20. In the case of *Paul Gitonga Wanjau –versus- Gathuti Tea Factory Co. Ltd and 2 Others (2016) eKLR* Mativo J. held;

**“The court in determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on one hand would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant on the other hand might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the Applicant will suffer if the injunction is refused is greater than that which the Respondent will suffer if it is granted lies on the Applicant.”**

21. I am of the view that in the present case, the Plaintiff/Applicant has failed to discharge this burden to the required standard.

22. All in all, I find that this application lacks merit and the same is dismissed. The costs of the application do abide the outcome of the main suit.

**It is so ordered.**

**DATED and SIGNED at MOMBASA on the 22<sup>nd</sup> day of May 2018.**

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**L. KOMINGOI**

**JUDGE**

**DATED, SIGNED and DELIVERED at MOMBASA on the 14<sup>th</sup> day of June 2018.**

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**A. OMOLLO**

**JUDGE**