



REPUBLIC OF KENYA
IN THE E.L.C. COURT OF KENYA AT EMBU

E.L.C.NO. 44 OF 2017

PETER NYAGA NAMU.....PLAINTIFF/APPLICANT

VERSUS

NDIA JEREBASIO.....DEFENDANT/RESPONDENT

RULING

1. By a Plaint dated 2nd March 2017 and filed in court on 3rd March 2017, the Plaintiff sued the Defendant on account of alleged breach of a sale agreement for land between the parties entered into in 2016. It was pleaded that the Defendant had agreed to sell a portion of 0.10 ha out of his land parcel No. KAGAARI/KIGAA/3404 to the plaintiff.
2. It was further pleaded by the Plaintiff that the Defendant had reneged on the sale agreement and refused to complete the sale. The Plaintiff, therefore, sought general damages and liquidated damages for breach of contract; an order for specific performance and costs of the suit among other reliefs.
3. Simultaneously with the filing of the suit, the Plaintiff also filed an application for interlocutory injunction seeking an order restraining the Defendant from entering, cultivating, alienating, conveying, selling, sub-dividing, apportioning or disposing of Title No. KAGAARI/KIGAA/3404.
4. The said application was supported by the Plaintiff's supporting affidavit sworn on 2nd March 2017 in which the Plaintiff summarized the contents of the Plaint. The Plaintiff further specified the date of the sale agreement as 30th May 2016 and that he had paid a sum of Kshs 250,000/- out of the agreed purchase price of Kshs 350,000/-.
5. The Plaintiff further stated in his supporting affidavit that he was suspicious that the Defendant was out to dispose of the said portion of land the subject of the sale agreement with a view to defeating his interest therein.
6. The Defendant did not file any replying affidavit or grounds of opposition to the Plaintiff's said application.
7. The said application was listed for hearing on 14th March 2017 when Mr Guantai prosecuted the same on behalf of the Plaintiff. The Defendant did not appear at the hearing despite service.
8. The main issue in the application is whether the Plaintiff has satisfied the requirements for an order of interlocutory injunction as set out in the case of ***Giella v. Cassman Brown & Co Ltd [1973] EA 358.***
9. The first requirement is for the Applicant to establish a *prima facie* case with a probability of success.

The facts as stated by the Plaintiff were not controverted. The Plaintiff annexed a copy of the sale agreement signed by the parties on 30th May 2016.

10. A copy of the sale agreement reveals that the balance of the purchase price of Kshs 100,000/- was to be paid out upon the Defendant obtaining the consent of the Land Control Board and the signing of the transfer forms in favour of the Plaintiff.

11. There is no indication in the Plaintiff's supporting affidavit that such consent of the Land Control Board was obtained and no such consent was exhibited by the Plaintiff. The court is not, therefore, satisfied that such consent was obtained. It was a requirement both under clause 5 of the Sale Agreement and the ***Land Control Act (Cap 302)*** for such consent to be obtained. In the circumstances of the case, the court is not satisfied that the Plaintiff has made out a *prima facie* case with a probability of success. The Plaintiff has consequently not satisfied the first principle for the grant of an order of interlocutory injunction.

12. In view of my finding on the first principle, it is not necessary to consider the second and third principles since the Plaintiff's application has failed at the first hurdle. Even if I were to consider the second principle, I would most likely find that the Plaintiff could still be compensated by an award of damages.

13. The Plaintiff dated 2nd March 2017 seeks various reliefs including general and special damages. The sale agreement dated 30th May 2016 provides for payment of liquidated damages at the rate of 50% of the purchase price against the party in breach of the contract. The Plaintiff's demand letter dated 31st January 2017 to the Defendant also invokes the penalty clause in the sale agreement. On the basis of the material on record, the Plaintiff can, therefore, be adequately compensated by way of an award of monetary damages should he succeed at the trial.

14. The upshot of the foregoing is that the Plaintiff's Notice of Motion dated 2nd March 2017 is hereby dismissed. There shall be no orders as to costs since the Defendant did not oppose the application.

Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **13th** day of **APRIL, 2017**

In the presence of Mr Momanyi holding brief for Mr Guantai for the Plaintiff/Applicant and in the absence of the Defendant.

Court clerk Jane/Leadys.

Y.M. ANGIMA

JUDGE

13.04.17