



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 37 OF 2017**

**JOYCE IJAI JAHAVA.....PLAINTIFF / APPLICANT**

**-VERSUS-**

**GEOFFREY KEGODE MUDAVADI.....1<sup>ST</sup>DEFENDANT/ RESPONDENT**

**AGRICULTURAL FINANCE CORPORATION.....2<sup>ND</sup>DEFENDANT/ RESPONDENT**

**RULING**

The application is dated 22<sup>nd</sup> December 2016 and is brought by way of Notice of Motion under section 3A of the civil procedure act and order 40 Rules 1 (a) & (b) and 2 (1) &(2) of the Civil Procedure Rules 2010 and The Applicant seeks the following orders;

1. That this application be certified as urgent and its service be dispensed with in the first instance due to the nature of the urgency.
2. That the honourable court be pleased to grant a temporary injunction restraining the Defendants, their agents, servants and /or employees from meddling, interfering, selling, leasing, disposing, alienating or in any other manner dealing with all that parcel of land known as N/MARAGOLI/MBALE/1812 pending the hearing and determination of this application.
3. That the honourable court be pleased to grant a temporary injunction restraining the Defendants, their agents, servants and /or employees from meddling, interfering, selling, leasing, disposing, alienating or in any other manner dealing with all that parcel of land known as N/MARAGOLI/MBALE/1812 pending the hearing and determination of this suit.
4. That this honourable court be pleased to grant an order directing the 2<sup>nd</sup> Defendants to deposit the title deed over all that parcel of land known as N/MARAGOLI/MBALE/1812 with the office of the registrar of this court and the said registrar be pleased to execute the transfer documents in favour of the plaintiff.
5. That in the alternative this Honourable Court be pleased to grant an order directing the 2<sup>nd</sup> Defendant to deposit the title deed over the parcel of land known as N/MARAGOLI/MBALE/1812 at the strong room at the office of the Registrar of this court pending the hearing and determination of this suit.
6. That this honourable Court be pleased to make any other or further orders/ directions that the dictates of justice may require.

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

The Applicant and the Respondents both relied on their written submissions in this matter. The Applicant submitted that the Plaintiff is the rightful and beneficial owner of all that parcel of land known as N/MARAGOLI/MBALE/1812 having paid the full purchase price to the Defendants. That the Defendants have failed, neglected and/or refused to execute the transfer documents in favour of the Plaintiff despite having paid in excess of what she was supposed to pay as the purchase price. That after payment of the purchase price the 1<sup>st</sup> Defendant went missing, refused to communicate and threatened to sell, dispose and/or alienate all that parcel of land known as N/MARAGOLI/MBALE/1812 in favour of third parties to the detriment of the Plaintiff who was a bonafide purchaser for value. She relied on her affidavit filed in court on the 22<sup>nd</sup> December 2016.

The 1<sup>st</sup> Defendant/ Respondent submitted that the said suit parcel of land namely N/MARAGOLI/MBALE/1812 belongs to him. That sometime in 2008 he applied and received a loan from the 2<sup>nd</sup> Defendant/Respondent of Kshs 200,000/= and gave the said land as collateral. In 2009 he entered into a sale agreement to sell the land to the Applicant/Plaintiff for Kshs 500,000/=. The Plaintiff was well aware that the land was charged to the 2<sup>nd</sup> Defendant/Respondent. The Applicant then disappeared and never paid the balance. The sale was never completed within 90days as per the contract and hence she, the Plaintiff, rescinded the sale by her own actions. The Applicant did not seek consent from the 1<sup>st</sup> Defendants before communicating with the 2<sup>nd</sup> Defendants who were his lenders. The 1<sup>st</sup> Defendant/Respondent relied on the cases of EMO Investments Ltd vsStephanusPetrus Kruger (2010) eKLR and National Oil vsPipeplasticSamkolit (K) Ltd & Prof. Samson K. Ongeru CA Nbi 95/1999 and reiterated that the court cannot rewrite a written agreement which was entered into voluntarily.

This court has considered both the Applicant's and the 1<sup>st</sup>Defendant/Respondent's submissions and the supporting affidavits therein. The application being one that seeks injunctions, has to be considered within the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** and which are:-

- 1. The applicant must show a prima facie case with a probability of success at the trial**
- 2. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,**
- 3. If in doubt, the Court will decide the application on a balance of convenience.**

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity.

The Applicant states that the 1<sup>st</sup> Defendant/Respondent is presently the registered owner of the said parcel of land N/MARAGOLI/MBALE/1812. The Applicant/Plaintiff and 1<sup>st</sup> Defendant/Respondent entered into a sale agreement on the 7<sup>th</sup> January 2009, for the purchase of the land for a total sum of Kshs. 500,000/=. The Applicant paid the deposit which was half that amount. The Applicant later discovered there was a registered charge and moved to salvage the property by paying the loan owed to the 2<sup>nd</sup>Defendant/Respondent. The 1<sup>st</sup> Defendant / Respondent frustrated the completion of the agreement by refusing to transfer the property to the Applicant. I find that the applicant has shown a prima facie case with a probability of success at the trial. It is not in dispute that the Applicant has paid far in excess of the purchase price to the Defendant/Respondents. I find that the application has merit and grant prayer 3of the application i.e. the court grants a temporary injunction restraining the Defendants, their agents, servants and /or employees from meddling, interfering, selling, leasing, disposing, alienating or in any other manner dealing with all that parcel of land known as N/MARAGOLI/MBALE/1812 pending the hearing and determination of this suit. Cost of this application to be in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 6<sup>TH</sup> APRIL, 2017.

**N.A. MATHEKA**

**JUDGE**