



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC. CASE NO. 862 OF 2012**

**LYDIA AKELO OCHUKA.....PLAINTIFF**

**VERSUS**

**CECILIA MWIKALI KALOKI.....1<sup>ST</sup> DEFENDANT**

**PHINAS MUNYWOKI.....2<sup>ND</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Chamber Summons dated 5<sup>th</sup> June 2013 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendants/Respondents from alienating and or in any way dealing with the parcel of land known as Plot Number A434 Dandora Phase 1 (hereinafter referred to as the “suit property”) pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, Lydia Akelo Ochuka, sworn on 5<sup>th</sup> June 2013 in which she averred that on 15<sup>th</sup> February 2011, she entered into a Sale Agreement with the Defendants/Respondents for the purchase of the suit property for a consideration of Kshs. 1,400,000/- which she paid in full. She annexed a copy of the said Sale Agreement. She added that according to their agreement, the Defendants/Respondents were to give her vacant possession of the suit property within a period of 3 months which they are yet to honour. She added that the Defendants/Respondents have also declined to sign the transfer document or submit to her the title document for the suit property. She further averred that unless this Application is allowed, the Defendants/Respondents may proceed to alienate or part with the suit property in disregard of their agreement with her.

The Application is contested. The 2<sup>nd</sup> Defendant/Respondent, Phinas Munyoki, filed his Replying Affidavit sworn on 2<sup>nd</sup> July 2013 in which he averred that he never entered into any agreement with the Plaintiff. He stated that he dealt with the Plaintiff’s husband, one Nicholas Otieno Okelo, who appeared before W.S. Ogola Advocate at Nairobi City Council offices in which Mr. Okelo signed the Sale Agreement for the purchaser and he signed for the 1<sup>st</sup> Defendant. He pointed out that the signature on the Sale Agreement on the part of the purchaser is not the same as the Plaintiff’s signature appearing on the Supporting Affidavit to this Application. He went ahead to aver that the said Nicholas Otieno Okelo signed the Sale Agreement on behalf of the Plaintiff without a power of attorney thus the stated execution was illegal. On that ground, he asserted that the Plaintiff never got into any Sale Agreement with the

Defendants/Respondents as she claims herein. He added that the 1<sup>st</sup> Defendant is the registered owner of the suit property. He averred further that though he signed the Sale Agreement on behalf of the 1<sup>st</sup> Defendant, he did not have authority to do so therefore the sale was void. He emphasized that the Plaintiff had no claim against the 1<sup>st</sup> Defendant because the 1<sup>st</sup> Defendant was never involved in any transaction with the Plaintiff, she never signed any document or had any meeting with the Plaintiff, she never signed or did a power of attorney to anyone to transact on her behalf. On those grounds, he sought for this Application to be dismissed.

The issue that I am called upon to determine is whether or not to issue an order of temporary injunction as sought by the Plaintiff/Applicant. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

***“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.”***

Does the Plaintiff/Applicant have a ‘genuine and arguable case’ and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must point out to the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

***“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”***

With that background laid down, I turn to assessing whether or not the Plaintiff/Applicant has met the three conditions for the grant of a temporary injunction. Firstly, I must assess whether the Plaintiff has established a prima facie case with a probability of success at the main trial. In her assertion that she is entitled to the suit property, the Plaintiff/Applicant has produced to this court a Sale Agreement dated 15<sup>th</sup> February 2011 between her as the purchaser and the 1<sup>st</sup> Defendant as the vendor. It was her assertion that she paid the entire purchase price of Kshs. 1,400,000/- to the Defendants/Respondents yet they have declined to sign and deliver to her the transfer documents and the title document for the suit property. However, the 2<sup>nd</sup> Defendant/Respondent asserted that the Plaintiff never signed the Sale Agreement and that it was signed by her husband purportedly on her behalf yet he had no legal authority to do so. The 2<sup>nd</sup> Defendant/Respondent also asserted that he is the one who signed the said Sale Agreement purportedly on behalf of the 1<sup>st</sup> Defendant/Respondent without any legal authority to do so. On those grounds, he averred that the Sale Agreement being relied upon by the Plaintiff is of no legal effect whatsoever. The Plaintiff/Applicant did not respond to these assertions of the 2<sup>nd</sup> Defendant/Respondent. I did compare the Plaintiff’s signature on her Supporting Affidavit to this Application and her signature on the Sale Agreement and do agree with the 2<sup>nd</sup> Defendant that the two signatures are not similar. They don’t appear to have been appended by the same person. The Plaintiff/Applicant has not made any effort to prove that those signatures are indeed her own signatures. The onus is on the Plaintiff to prove that she does indeed

have a “genuine and arguable” case and a prima facie case with a probability of success at the main trial. For me, based on my reasoning above, this threshold has not been met by the Plaintiff/Applicant.

Since the Plaintiff/Applicant has failed to prove the first ground in the grounds set down in the celebrated case of *Giella versus Cassman Brown*, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

*“The sequence of granting an interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury: and thirdly where the court is in doubt it will decide the application on a balance of convenience. See *Giella vs. Cassman Brown and Co. Ltd 1973 EA at page 360 Letter E*. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”*

Also, in the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the Court of Appeal had this to say:

*“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”*

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MAY 2017.**

**MARY M. GITUMBI**

**JUDGE**