



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 199 OF 2017

(Formerly Machakos HCCC NO. 135 OF 2016)

MARGARET WAMORO MUIGAI1ST PLAINTIFF

SAMUEL MUKUNA GICHINGA2ND PLAINTIFF

SOSPETER KIMANI3RD PLAINTIFF

VERSUS

JEFLINKS AGENCIES LIMITED.....DEFENDANT/RESPONDENT

RULING

By a motion dated the 21st September, 2016, brought pursuant to Order 40 rule 1A, B of the Civil Procedure Rules of 2010, Section 3A of the Civil Procedure Act, Cap 21 the Plaintiffs/Applicants are seeking the following orders:

1. spent
2. That an order of injunction do issue restraining the Defendant/Respondent from disposing, transferring, alienating, charging or in any way dealing with PLOTS NO. KAJIADO/ KAPUTIEI NORTH/ 60493, KAJIADO/ KAPUTEI NORTH/ 91393, KAJIADO/ KAPUTEI NORTH/ 60505 AND KAJIADO/ KAPUTEI NORTH/ 60503.
3. That costs of this application be provided for.

The application is based on the following grounds, which in summary are that the Defendant/Respondent is threatening to dispose of the plots in breach of its contract. Further that the Defendant/Respondent may transfer the plots to third parties to defeat the claim by the Plaintiffs/Applicants.

The application is supported by the affidavit of MARGARET WAMORO MUIGAI who is the 1st Plaintiff herein. She avers that together with her co-Plaintiffs/Applicants, they were registered owners of 15 plots known as KAJIADO/KAPUTIEI NORTH/60492; 60493; 60494; 60495; 60496; 60497; 60498; 60499; 60500; 60501; 60502; 60503; 60504; 60505 and 60506 on behalf of DANDORI INVESTMENTS. Further that on 10th September 2013 they entered into a Sale Agreement with JEFLINKS AGENCIES LIMITED who is the Defendant/Respondent herein for the sale of all the above mentioned 15 plots at a price of Kshs. 550,000 per plot, totaling Kshs. 8,250,000. She states that the sum of Kshs. 4,000,000 was paid, leaving a balance of Kshs. 4,250,000, and it was an express term of the Sale Agreement that the completion date would be 90 days from the date of the agreement. She avers that pursuant to clause 8 of the Sale Agreement, the Plaintiffs/Applicants' released to the

Defendant/Respondent all the completion documents to enable it to effect transfer to its name or its nominee upon payment of the total purchase price. Further that in breach of the said Sale Agreement, the Defendant/Respondent sold and transferred eight (8) plots to an entity known as SYNERGETICS SERVICES LIMITED; Plot no. 60501 to ISAAC MWANGI WAHINYA; Plot No. 60499 to FELIX ONGERA and MADRINE; and Plot No. 60497 to MAINA MUCHIRI. The Plaintiffs/Applicants' also state that Plot No. KAJIADO/KAPUTIEI NORTH/60503 remains in their names although the Defendant/Respondent withholds the title, transfer documents, consent to transfer and they are apprehensive it can dispose of the same. Further that it has subdivided KAJIADO/KAPUTIEI NORTH/60495 resulting into two plots namely 91392 - 91393, and the only plots that have not been disposed of are KAJIADO/KAPUTIEI NORTH/60493, 60505, 91392, 91393 and 60503.

The Defendant/Respondent filed a replying affidavit sworn by one GEOFFREY MUCHIRI NDEGWA who avers he is one of the directors of the Defendant/Respondent company and deposes that he has paid to the Plaintiffs/ Applicants' a total sum of Kshs. 4,040,000 leaving a balance of Kshs. 4, 040,000; and upon remitting the down payment of the purchase price, he discovered the properties in question had boundary disputes which the Plaintiffs/Applicants' failed to sort it out, despite his plea and he had to do so himself. He states that it was a mutual agreement between the Plaintiffs/ Applicants' and the Defendant/Respondent that since he has incurred a lot of expenses to resurvey the land and subdivide it, it was allowed to transfer eight (8) parcels of land to SYNERGESTICS SERVICES LTD and also sell plot number 60501 and 60499 to recover the expenses and pay to the Plaintiffs/ Applicants' the remaining monies. Further that the Defendant/Respondent has always been ready to release the balance of the purchase price and it is the Plaintiffs/Applicants' who have not been in agreement on which account the funds are to be deposited in, and since the signing of the Sale Agreement, the purchase price has been paid into two different accounts and Defendant/Respondent does not intend to deposit funds in a third account when the Plaintiffs/Applicants' are not in agreement.

Both parties filed written submissions.

On the 3rd May, 2017 when the matter came for highlighting of submissions, the Plaintiffs/Applicants Counsel was absent but the Defendant/ Respondent's Counsel was present.

The Court will hence refer to the Plaintiffs/ Applicants' written submission where they reiterated that they had entered into a Sale Agreement with the Defendant/Respondent, for sale and purchase of land at Kshs. 8,250,000, and a deposit of Kshs. 4,000,000 was paid leaving a balance of Kshs. 4,250,000. Further that the Defendant/Respondent was in breach of the agreement as it transferred eight (8) plots to SYNERGETICS SERVICES LTD and sold a further three (3) plots to individuals. The Plaintiffs/Applicants' furnished copies of the Sale Agreement and Green Cards. They submitted that they had established a case for granting an interlocutory injunction and relied on the case of **Giella Vs. Cassman Brown**; further that they had established a prima facie case with a probability of success, by proving that their legal right has been infringed on or about to be infringed on. They relied on the case of **ELRCC No. 88, Paul Kamau Maina Vs. Kenya Civil Aviation Authority**.

The Plaintiffs/Applicants' stated they had suffered irreparable harm as they had a land sale agreement which the Defendant/Respondent who had breached its terms and they stood a risk of losing both the unpaid balance together with the land that would have already been transferred to third parties. They averred that on a balance of probability, they are likely to suffer injury which may not be adequately remedied by damages if the injunction is denied.

The Defendant/Respondent's Counsel highlighted his submissions and stated that they are in agreement with the Sale Agreement which the parties entered into and concur that the full purchase price had not been paid after the expiry of the 90 days. However, he stated that the balance of the purchase price is disputed as the Defendant/Respondent has paid a total of Kshs. 4,300,000 leaving a balance of Kshs. 3,950,000. He reaffirmed that the Defendant/Respondent is ready to pay the balance of the purchase price. He however pointed out that the suit parcel was sold with encumbrances and there was also a dispute as to which account the balance is to be deposited into. He insists the claim the Plaintiffs/Applicants have against the Defendant/Respondent is contractual, as it hinges on breach of contract, and they should have sued for

specific performance and not seeking injunctive relief as the same does not touch on the suit property. The Defendant/Respondent's relied on the case of **Giella Vs Cassman Brown** and stated that the Plaintiffs/Applicants are not entitled to the orders of interim injunction sought.

Issues and Determination

Upon perusing the application, the supporting/replying affidavits and the written submissions filed herein, the Court finds that the issue for determination is:

Whether the Plaintiffs are entitled to the interlocutory injunction sought.

It is now established in Kenya that the principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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."

Bearing this principle in mind, it is upon this honourable court to interrogate whether the Plaintiffs/Applicants have made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the Plaintiffs/Applicants have demonstrated a prima facie case with probability of success, the Court notes that the Plaintiffs/Applicants and the Defendant/Respondent entered into a Sale Agreement, for sale and purchase of land at Kshs. 8,250,000, which the Defendant/Respondent paid a deposit of Kshs. 4,000,000 while Kshs. 4,250,000 was the outstanding balance. This fact is not disputed by the Defendant/Respondent. The Defendant/Respondent even admits that he has delayed in paying the balance of the purchase price because there was a disagreement on the outstanding balance and to which account the monies were to be deposited into. The Court hence finds that the Plaintiff had demonstrated a prima facie case with a probability of success.

On the second limb as to whether the Plaintiffs/ Applicants' might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. In the instant case, both the Plaintiffs/Applicants and the Defendant/Respondent agree on one point that some of the suit parcels of land have already been sold to third parties. Further that even though plot number KAJIADO/KAPUTIEI NORTH/60503 remains in the Plaintiffs/Applicants' names but the pursuant to clause 8 of the Sale Agreement, they had released all the completion documents to the Defendant/Respondent who withholds the title, transfer documents and consent to transfer, to enable it to effect transfer to its name or its nominee upon payment of the total purchase price. Both parties admit the balance of the purchase price has not been paid, though the Defendant/Respondent has already transferred around eleven (11) plots to third parties. The Court finds that if the injunctive relief sought is not granted the Plaintiffs/Applicants might suffer irreparable loss which cannot be compensated by an award of damages.

On a balance of convenience, the Court finds that the Plaintiffs/Applicants are likely to suffer more inconvenience if the injunction is denied than which will be suffered by the Defendant/Respondent if the injunction is allowed.

The upshot of the matter is that prayers 2 of the instant motion dated 26th September, 2016 is allowed. The Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 30th day of June, 2017.

CHRISTINE OCHIENG

JUDGE