



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC NO. 1384 OF 2014**

**PATRICK GATHITU KARIUKI.....PLAINTIFF**

**VERSUS**

**H W H.....DEFENDANT**

**RULING**

There is a dispute between the Plaintiff and the Defendant over a parcel of land known as L.R. No. 2951/[particulars withheld](hereinafter referred to as “the suit property”). The Plaintiff has averred that on 28<sup>th</sup> May, 2013 he entered into a written joint venture agreement with the Defendant under which the parties agreed to construct twenty two (22) luxurious four and five bedroomed houses on the suit property on the terms and conditions which were contained in the said agreement. The Plaintiff has averred that pursuant to the said agreement, he paid to the Defendant a sum of Kshs.1,000,000/= as a deposit and spent a further sum of Kshs.25,085,232.64 on project design and architectural work. The Plaintiff has averred that the Defendant has been reluctant to complete the agreement and the delay on the part of the Defendant to complete the agreement has exposed the Plaintiff to loss and risk of litigation.

The Plaintiff brought this suit against the Defendant seeking, specific performance of the said joint venture agreement dated 28<sup>th</sup> May, 2013 and in the alternative, the payment of Kshs.26,085,232.64 and damages for breach of contract. What is before this court is the Plaintiff’s application by way of Notice of Motion dated 14/3/2016 seeking among others, an injunction to restrain the Defendant from dealing with the suit property and its seven (7) sub-divisions namely, L.R No. 2951/ [particulars withheld]. In the body of the application and the affidavit of the Plaintiff sworn on 14<sup>th</sup> March, 2016 in support thereof, the Plaintiff averred that after he had entered into the said joint venture agreement with the Defendant he caused a caveat to be registered against the title of the suit property to protect his interest herein. The Plaintiff averred that while this suit was pending hearing, he learnt from land brokers that the Defendant had proceeded to remove the caveat that he had registered against the title of the suit property and caused the same to be sub-divided for sale to the public. The Plaintiff has averred that the said caveat was removed without notice to him and that the Defendant’s action was calculated to defeat the ends of justice.

The application was opposed by the Defendant through a replying affidavit and grounds of opposition both dated 23<sup>rd</sup> March, 2016. In opposition to the application, the Defendant contended that when she entered into the joint venture agreement dated 28<sup>th</sup> May, 2013 she was not in her right state of mind because she was recovering from stroke for which she had been hospitalized for a very long time. The Defendant contended that her sister one, C N M who was running her affairs during her illness took her to an office in Westlands where she was given some agreement which she was told was a joint venture agreement to sign after which she would be paid some money. The Defendant averred that following the effects of the stroke, she was unable to read and as such although she signed the said agreement she did

not appreciate its implications. The Defendant contended that the caveat registered against the title of the suit property was removed lawfully by the land registrar on 22<sup>nd</sup> July, 2014. The Defendant averred that since there was no caveat against the title of the suit property, the subsequent subdivisions of the property were lawfully done. The Defendant contended that if the Plaintiff had an issue with the removal of the said caveat, he should have joined the Land Registrar in this suit.

The Plaintiff's application was argued by way of written submissions. I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition and replying affidavit which were filed by the Defendant in opposition to the application. Finally, I have considered the submissions on record. The principles upon which this court exercises its discretion in applications for a temporary injunction were enunciated in the case of Giellavs. Cassman Brown & Co. Ltd. (1973) E.A 358. An applicant for a temporary injunction must establish a prima facie case with a probability of success against the respondent and must also show that he will suffer irreparable harm which cannot be compensated in damages unless the order is granted. In case the court is in doubt as to the above, the application would be determined on a balance of convenience. I am satisfied that the Plaintiff has satisfied the conditions for granting an interlocutory injunction. The Defendant has admitted that she entered into a joint venture agreement with the Plaintiff. The Defendant has not denied that the Plaintiff has made some payments to her pursuant to that agreement. The Defendant has admitted that she is unwilling to complete the said agreement. The defence that has been put forward by the Defendant to the Plaintiff's claim and application is that she was not in a stable state of mind which she executed the said agreement. The Defendant has not placed any credible evidence before the court in proof of her allegation that she was suffering from mental incapacity on 28<sup>th</sup> May, 2013 when she executed the joint venture agreement of that date. I am satisfied that the Plaintiff has established a prima facie case with a probability of success against the defendant.

The Defendant has not denied that while this suit is pending she has sub-divided the suit property into several portions with a view to selling the same. There is in fact an affidavit on record by one, Nancy Njoki Oginde who claims to have purchased one of the subdivisions of the suit property from the Defendant. If the orders sought by the Plaintiff are not granted, there is a high likelihood that the Defendant would put the sub-divisions of the suit property beyond the reach of the Plaintiff. It has not been demonstrated that the Defendant would be able to pay the sum of Kshs.26,085,232.64 which the Plaintiff has sought as alternative to the specific performance of the said joint venture agreement. The Plaintiff would no doubt suffer irreparable harm if the orders sought are not granted. I would add that even if the Plaintiff would not have met the conditions for granting a temporary injunction, I would still have allowed the prayers sought by the Plaintiff on the basis of the doctrine of *lis pendens*. In the case of Mawji Vs. U.S International University & Another (1976) KLR 185 which was cited by the Plaintiff, Madan J. A. stated as follows:-

*“The doctrine of lis pendens under section 52 of T.P.A is a substantive law of general application apart from being in a statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It...prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other..”*

In the case of Naftali Ruthi Kinyuavs. Patrick Thuita Gachure & Nairobi City Council (2015) eKLR, the Court of Appeal stated that the doctrine of *lis pendens* is still applicable in Kenya despite the repeal of the Indian Transfer of Property Act, 1882.

The upshot of the foregoing is that the Plaintiffs Notice of Motion dated 14<sup>th</sup> March, 2016 has merit. The same is allowed on the following:

1. Pending the hearing and final determination of this suit or further orders by the court, a temporary injunction is issued restraining the Defendant whether by herself or by her servants or agents or otherwise howsoever from in any manner whatsoever constructing, disposing, charging, mortgaging or creating alien, charge, caveat or any other encumbrance on Plot No. 2951 [particulars withheld].

2. The costs of the application to be in the cause.

**Delivered and Signed at Nairobi this 27<sup>th</sup> day of June, 2017**

**S. OKONG'O**

**JUDGE**

**In the presence of**

Ms. Simiyu for Plaintiff

Mr. Mungai for Defendant

Kajuju Court Assistant