



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT
MILIMANI LAW COURT
ELC.NO.214 OF 2016

ATHI PAPER MILLS LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

DAKAWOU TRANSPORT LIMITED.....DEFENDANT/RESPONDENT

R U L I N G

The matter for determination herein is the **Notice of Motion** application dated **3RD March 2016**, brought by the Plaintiff/Applicant herein ***Athi Paper Mills Limited*** against the Defendant/Respondent ***Dakawou Transport Limited***. The application is brought under Order 40 Rule 1, 2, 3(2) and 4 of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3A 63(c)&(e) of the Civil Procedure Act and all other enabling provisions of the law. The Applicant sought for the following orders:-

a) Spent

b) An interlocutory injunction do issue to restrain the Defendant and or any other third parties by themselves and or their servants and or agents and or employees and or howsoever from either entering upon occupying constructing on or developing or selling, transferring, charging, mortgaging or in any other manner whatsoever interfering with all that portion of land measuring three decimal one seven eight (3.178) hectares or thereabouts situated in Mavoko Township in Machakos District of the Republic of Kenya that is to say LR NO.337/1208 together with all rights, easements, advantages and privileges appertaining or belonging thereto or usually held and enjoyed therewith and all buildings and improvements being thereupon (if any) (which is hereinafter referred to as the "Suit Premises") and or in any other manner whatsoever from dealing with and or interfering with and or remaining on or continuing in occupation of all, pending the hearing and determination of this suit.

c) An interlocutory order do issue directing the Commissioner of Lands and the Registrar of Titles to ensure that no other titles or transfers or sub-divisions in respect of the Suit Premises are registered that derogate from or subtract from or in any other manner whatsoever diminish or take away from or negate the title of the Plaintiff in the aforesaid Suit Premises or alters the status quo hereinabove described, pending the hearing and determination of the suit.

d) THAT pending the hearing and determination of this suit, an order does issued directing the Commissioner of Police and the OCPD in charge of the area and the OCS in charge of the area Police Station to enforce the Court's Orders as issued herein

The application is premised upon the grounds stated on the face of the application and on **the Supporting Affidavit of Mohammed Parvez Ismail**. Among the grounds in support of the application are:-

- 1) That the Defendant is trespassing and is committing a continuing trespass upon the Plaintiff's land, the suit premises herein.**
- 2) That the Defendant is in breach of the contract between the parties and has failed, refused and neglected to pay the consideration agreed upon for the purchase of the Suit Premises.**
- 3) That despite the fact of non-payment of the consideration, the Defendant has fraudulently and maliciously proceeded to lodge and registered the transfer and has irregularly obtained the transfer of the property to its favour.**
- 4) That the Suit Premises are in danger of being sold, transferred, wasted, damaged, or alienated by the Defendant acting in conjunction with unknown third parties, or wrongfully sold.**
- 5) That the Defendant has no known assets or fixed abode or place of business and apart from the Suit Premises which the Defendant intends to fraudulently dispose off, the Defendant has no known ability or capacity to pay any decretal amount that may be ordered as against it in this suit.**
- 6) That the Defendant is perpetrating a fraud against the Plaintiff and is attempting to dispose of the plaintiff's land the subject matter of the suit to unsuspecting third parties, or hold out itself as owner to such third parties, despite the fact that the Plaintiff is the Registered legal and beneficial owner thereof.**
- 7) That the conduct of the Defendant is illegal, unlawful and reprehensible and ought to be stopped and punished by the law.**

In his Supporting Affidavit, **Mohammed Parves Ismail** averred that he is a Director of the Plaintiff's Company who are the owners of the suit property known as **LR.No.337/1208** and therefore the registered and legal owner of the same and entitled to possession of the same. Further that the Plaintiff and the Defendant entered into a Sale Agreement for Sale and purchase of the suit property by the Defendant for a consideration of **Kshs.16,500,000/=**. He further averred that in accordance with the said Sale Agreement the Defendant paid a deposit of **Kshs.1,680,000/=** to the advocate acting jointly for both the Plaintiff and the Defendant as stakeholders. It was his contention that despite the fact that the Defendant did not pay the full purchase price, as agreed or at all, the Defendant proceeded under unexplained circumstances and not authorized by the Plaintiff to lodge and effect the transfer of the suit premises to the favour of the Defendant and without the knowledge and consent of the Plaintiff. He also contended that the Plaintiff was ready, able and willing to complete its part of the contract and it infact executed the transfer and delivered it into the custody of their advocate who caused the same to be registered in favour of the Defendant on **31st July 2012** despite the fact that the Defendant had not deposited and/or paid the balance of the purchase price as stipulated in the contract. He also averred that the Defendant was not entitled to lodge the said transfer as it had not completed to pay the purchase price as per the Sale Agreement. He further alleged that after failure to meet the conditions of the Sale agreement, the Plaintiff repudiated the said contract and the Defendant accepted the said repudiation. Therefore the Plaintiff is discharged from further performance of the contract and is entitled to retain the suit premises for their own use and benefit. Further that the Defendant is not entitled to the ownership of the suit property and should not have the said property registered in its own name.

The deponent alleged that the suit premises are in danger of being sold, transferred, wasted, damaged or alienated by the Defendant acting in conjunction with unknown third parties and therefore dispossess the Plaintiff the said property. It was his further allegation that the Defendant has no known assets or fixed abode or place of business, apart from the suit premises which the Defendant intends to fraudulently dispose off. Further that the Defendant has no known ability or capacity to pay any decretal amount that may be ordered as against it in this suit.

The deponent further deposed that the conduct of the Defendant is illegal, unlawful and reprehensible and ought to be stopped and thus this application.

The application is vehemently opposed by the Defendant/Respondent, **Ahmed Abulle Noor**, who swore a Replying Affidavit and averred that he is a Director of the Defendant Company who are bonafide lawful and registered owners of the suit property **LR No.337/1208**. He averred that as the registered owner of the suit property, the Defendant is entitled to possession of the suit premises. He also admitted that the Defendant did purchase the suit premises from the Defendant for **Kshs.16,500,000/=** as is evident from the Sale Agreement dated **16th April 2009** marked **DT.I**. It was his contention that the Plaintiff paid the initial deposit of **Kshs.1650,000/=** to their joint advocate and later made further payment of **Kshs.6,850,000/=** as part payment of the balance of the purchase price. It was his contention that the Plaintiff duly and voluntarily signed the transfer documents of the suit premises and also gave unreserved and unqualified consent for registration of the transfer. It is therefore dishonest for the Plaintiff to state that the transfer was undertaken without their consent.

He reiterated that the said transfer documents were duly, willfully and voluntarily executed by the Plaintiff and they further consented to the transfer registration. It was his contention that the Defendant is ready and willing to offset the balance of the purchase price except that one of the Directors of the Plaintiff expressly warned him against making further payment stating that there were wrangles amongst Plaintiff's Directors. It was his further contention that the Defendant duly performed its fair share of its obligations and was only prevented to complete performance by the deliberate action of the Plaintiff. It was his contention that the Defendant is entitled to quiet possession and ownership over the suit premises. The deponent further averred that the Defendants is in a lawful possession and occupation of the suit premises since it is the registered legal owner and the said lawful possession and occupation was conclusively settled vide a valid **Court Order** issued by the High Court at Machakos as evident from **DT 5**.

Further, the Respondent denied that it intends to sell and or dispose off the suit property as it is undertaking improvement on the same. It was his contention that the Defendant is a corporate entity dealing with petroleum products and logistics with a turnover of **1 billion** and the Plaintiff cannot claim that the Defendant lacks known assets. Further that the Defendant is willing and has been willing at all times to settle the balance of the purchase price and can at any time dispose any amount of money regarding this suit. He also deposed that as a registered legal owner, the Defendant has the right to deal with the property it deems fit. The Defendant /Respondent urged the Court to dismiss the instant applications.

The Court directed that the instant application be canvassed by way of Written Submissions. In compliance with the above directions, the **Law Firm of Taib A.Taib & Company Advocates** for the Plaintiff filed their Written Submissions on **11th July 2016** and urged the court to allow the instant application. It was submitted that the Plaintiff had established the well settled principles as set out in the case of **Giella Vs Cassman Brown (1973) EA 358**. The Plaintiff further submitted that available evidence shows that the Plaintiff rescinded the sale agreement in issue and therefore no right could emanate from the same. The Plaintiff relied on various decided cases, among them is the case of **Nguruma Ltd Vs Jan Bonde Nielson & 2 others, Civil Appeal No 77 of 2012**, where the Court held that:

“The Party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion”

It was also submitted that the Plaintiff's property is at risk of being disposed off to unsuspecting members of the public and if that is done, the Plaintiff will suffer irreparable loss which cannot be compensated by an award of damages. The Plaintiff relied on the case of **Olympic Sport House Ltd Vs School Equipment Centre Ltd HCC No. 190 of 2012**, where the court held that:

“Damages are not and cannot be substitute for the loss which is occasioned by a clear breach of

the Law. In any case, the financial strength of a party is not always a factor to refuse an injunction more so, a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an Order of Injunction”

On the grant of the Defendant, the Law Firm of ***Joshua Kiptoo & Company Advocates*** filed the Written Submissions on ***30th August 2016***, and submitted that the Plaintiff has failed to meet the threshold for grant of ***Injunctive Orders*** as was laid down in the case of ***Giella Vs Cassman Brown & Company Ltd (1973) E.A 358***.

The Defendant relied on various decided cases among them the case of ***Benjamin Airo Shiraku Vs Fauza Mohammed HCC No 272 of 2011*** where the Court held that:

“When one party by his words or conduct made to the others a promise or as assurance which was intended to effect their legal relations and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise assurance had been made by him”

The Defendant submitted that the Plaintiffs application is ***bad in law, vexatious, frivolous, incompetent*** and lacks merit and it should therefore be dismissed with costs.

This Court has now carefully considered the instant ***Notice of Motion*** and the annexures thereto. The Court has also considered the pleadings in general, the Written Submissions, the cited authorities and the relevant provisions of law and the Court renders itself as follows:-

There is no doubt that the Plaintiff herein and the Defendant entered into a Sale Agreement dated ***16th April 2009***, for sale and purchase of the suit property ***L.R No 337/1208*** for a consideration of ***Kshs.16,500,000/=***. There is also no doubt that the Defendant paid a consideration of ***Kshs.1,650,000/=*** upon execution of the sale agreement. Further, it is evident from the Transfer document attached to the pleadings that the suit property was transferred to ***Oil City Services Ltd*** on ***5th August 2009***. The said transfer was executed by the Directors of the Plaintiff Company and ***Oil City Ltd***. The said title was registered on ***3rd December 2009***. There is no doubt that the suit property was later accordingly registered in the name of the Defendant herein on ***31st July 2012***. The Plaintiff has alleged that after entering into a sale agreement with the Defendant, the Defendant failed to pay the full purchase price and therefore the Plaintiff repudiated the contract. The Plaintiff further alleged that the Defendant fraudulently caused the suit property to be registered in its name before the completion of the payment of the purchase price. It was alleged by the Plaintiff that this act of the Defendant was illegal and unlawful. Further that the Defendant intends to sell the suit property to third parties and if the Defendant is allowed to carry on with its intention, then the Plaintiff will suffer irreparable loss which cannot be compensated by an award of damages. However, the Defendant has alleged that it indeed entered into a Sale Agreement with the Plaintiff, and has paid substantial amount of money as the purchase price and the Plaintiff willfully signed the transfer documents and therefore the Defendant is legally registered as the ***bonafide*** owner of the suit property and should not be enjoined at all. The Defendant has asked the Court to dismiss the Plaintiff's instant Notice of Motion.

The question now for determination is whether the Plaintiff/Applicant is deserving of the Orders sought. The applicant has sought for injunctive Orders which are equitable reliefs granted at the discretion of the Court. However, the said discretion must be exercised judicially. See the case of ***Giella Vs Cassman Brown & Company Ltd 1973 E.A 358*** where the court held that:

“The granting of an Interim Injunction is an exercise of Judicial discretion and an appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially”.

Since the Applicant herein has sought for Injunctive Orders which Orders have been opposed by the Defendant, the Court will therefore embark on the analysis of the evidence to determine whether the

Applicant has established the laid down principles for grant of **Injunctive Orders**. These Principles were set out on the case of **Giella Vs Cassman Brown (Supra)**. Their principles are:-

- a) **The Applicant must establish that he has a prima facie case with probability of success.**
- b) **That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.**
- c) **When the Court is in doubt, to decide the case on a balance of convenience.**

As the Court combs through the evidence to determine whether the cardinal principles have been established, the Court will also caution itself that at this juncture, it will not be dealing with the disputed facts or issues conclusively through affidavit evidence. See the case of **Edwin Kamau Muriu Vs Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where the court held that:

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria---“

Therefore this Court at this stage will not make conclusive findings, that may prejudice the interest of the parties at the hearing of this main suit.

Firstly, the Court will determine whether the Applicant has established a *prima facie* case with probability of Success. In the case of **Mrao Ltd Vs First American Bank Ltd & 2 others (2003) eKLR 125** the court stated that:

“so what is a prima facie case----- In civil cases it is a case which on the material presented to the Court on a tribunal properly directing itself with concludes that there exist a right which has apparently been infringed by the opposite party as to call for a explanation on rebuttal from the latter”

Therefore from the above description, *Prima facie* case means more than an arguable case, the evidence must show an infringement of a right and the probability of success of the Applicants case at the trial. In the case of **Habib Bank A.G Zurich ..Vs ..Eugene Marion Yakubs Civil Application No 43 of 1982** the Court of Appeal held that:

“probability of success means the court is only to gauge the strength of the plaintiffs’ case and not to adjudge the main suit at that stage since proof is only required at hearing stage”

This Court will therefore comb through the available evidence to determine whether the Plaintiff’s right has been infringed and whether the Plaintiff has a case with probability of Success. As I embark on the above exercise. I will be guided by the findings of the case of **Nguruman ..Ltd.. Vs Jan Bonde Nielson & 2 others (Supra)** where the court held that

“----in considering whether or not a prima-facie case has been established, the court does not hold a mini-trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an Injunction has a right which has been or is threatened with violation”

There is no doubt that the Plaintiff and the Defendant entered into a Sale Agreement. The bone of contention is whether the said contract was rescinded or not and whether the Defendant registered the suit land in its name with or without the approval of the Plaintiff/Applicant. The parties herein hold contradictory positions. The Plaintiff alleges that the contract was rescinded or repudiated and therefore the suit property should revert back to it whereas the Defendant alleges that it has paid a substantial amount of the purchase price to the Plaintiff and it is still were able, willing and readily to pay the balance and that it was only prevented from completing the payment by one of the Directors of the

Plaintiff who alleged that there were wrangles among the Directors and the balance should not be paid.

The Plaintiff did not controvert that allegation but this Court cannot at this juncture hold with certainty that indeed there were wrangles among the Directors of the Plaintiff and thus delay in completion of the sale herein. The Court finds that such an issue will only await the calling of evidence in the main suit. Further on whether the registration of the transfer was done with the consent of the Plaintiff or through fraudulent actions of the Defendant, that also have to await the calling of witnesses through oral evidence and testing the said evidence through cross-examination. For now, what is not in doubt is that the suit property is registered in the name of the Defendant. As provided by **Section 26(1)** of the **Land Registration Act**, the said registration is a *prima facie* prove that such a registered owner is the absolute and indefeasible proprietor of the suit property. The Defendant being the registered owner, then *prima facially* it is the *indefeasible* and *absolute* proprietor with rights protected under sections 24 and 25 of the said Land Registration Act.

However, the said ownership can only be challenged under the instances provided by **Section 26(1)(a) & (b)** which provides that:-

“The certificate of title issued by the Registrar upon registration, or to a purchase of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The above challenge can only be done by calling of evidence in the main trial. For now the Court finds that the Defendant is the registered owner of the suit property and has its right protected under Section 24 and 25 of the Land Registration Act and therefore this Court cannot injunct it as prayed by the Plaintiff.

The court has also noted that there is in existence a **Court Order** issued on **14th September 2010** at **Machakos High Court** against the Plaintiff herein who were Defendants in **HCCC No.214 of 2010** at Machakos High Court. The Plaintiff was supposed to be evicted from the suit land **Lr.No.337/1208**. The Plaintiff/Applicant herein did not disclose the existence of the said case and Court Orders. The Court Order is in respect of the suit property herein. The Plaintiff had a duty to disclose the existence of the said Court Order. It did not do so. The Plaintiff therefore is guilty of material non-disclosure and did not come to court with clean hands. See the case of **David Kamau Gakuru ..Vs.. National Industrial Credit Bank Limited, Civil Appeal No.84 of 2001** where the Court held that:-

“An injunction being an equitable remedy cannot be granted to a party who had demonstrated openly by his conduct that he is undeserving of the equitable relief”

Having failed to disclose the existence of another Court Order over the suit property, the Court finds that the Plaintiff/Applicant has not come to court with clean hands and is undeserving of the equitable relief.

Therefore, having carefully considered the available evidence, the Court finds that the Defendant has not established that it has a *prima facie* case with probability of success.

Having found that the Plaintiff has not established a *prima facie* case with probability of success, I find no reason to deal with the other conditions. This was the finding in the case of **Kenya Commercial Finance Co. Limited..Vs.. Afraha Education Society (2001) 1EA 87**, where the court held that”-

“The conditions in the case of Giella ..Vs.. Cassman Brown for granting of temporary injunction 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.”

This Court will therefore not deal with the other two conditions as the Plaintiff/Applicant has failed to establish the first one.

For the above reasons, the Court finds that the Plaintiff/Applicant's ***Notice of Motion*** dated ***3rd March 2016***, is not merited. Consequently, the instant ***Notice of Motion*** dated ***3rd March 2016***, is dismissed entirely with costs to the Defendant/Respondent.

It is so ordered.

Dated, signed and delivered at NAIROBI this ..14th...day ofJuly....., 2017.

L. GACHERU

JUDGE

14/7/2017

In the presence of

Mr. Zahid holding brief for Taib for Plaintiff/Applicant

Mr. Marwa holding brief for Kiptoo for Defendant/Respondent

Hilda: Court clerk

Court – Ruling read in open court in the presence of the above states advocates.

L. GACHERU

JUDGE

14/7/2017