



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

LAND CASE NO. 138 OF 2017

ROCKLEAD TWENTY THIRTEEN LTD.....PLAINTIFF

-VERSUS-

KAHINDI YOGO CHUNGU.....1<sup>ST</sup> DEFENDANT

KAZUNGU KITSAO.....2<sup>ND</sup> DEFENDANT

RULING

1. This is the Notice of Motion dated 19<sup>th</sup> April 2017. It is brought under Order 40 Rules 1,2,3 and 4 of the Civil Procedure Rules 2010, and section 3A of the Civil Procedure Act.

2. It seeks orders;

1. Spent

2. Spent

3. That a temporary injunction do issue to restrain the defendants by themselves, their agents, servants, employees, family members and/or any person or persons deriving authority and/or title from the defendants or any of them from selling transferring transacting alienating and/or dealing in any other manner with all those parcels of land known as Kilifi/Kadzonzo/Madzimbani/2211 and Kilifi/Kadzonzo/Madzimbani/2212 pending the hearing and determination of this suit.

4. That the orders issued pursuant to this application be served upon and be effected by Kilifi/County (District) Land Registrar accordingly.

5. That costs hereof be provided for.

3. The grounds are on the face of the application hearing from paragraph (1-8). I will not reproduce them here.

4. The application is supported by the affidavit of Joshua Muriuki Anampiu, a Director of the plaintiff company sworn on the 19.4.2017.

5. The application is opposed. There is a replying affidavit sworn by Kazungu Kitsao the second Defendant/Respondent on the 22.5.2017.

6. On 4.8.2017 it was agreed between the parties that the application be disposed by way of written submissions.

7. I have considered the pleadings, the application and the response, submissions of counsel and authorities cited. In written submissions counsel substantiated their client's respective positions in their respective affidavits. The issue for determination is whether the Plaintiff/Applicant has met the conditions for grant of temporary injunctions.

8. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the precedent setting case of **Giella versus Cassman Brown And Company Limited [1973] EA358**. First, the applicant must show a prima facie case with a probability of success.

Secondly, that 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 should act on a balance of convenience.

9. It is the Plaintiff/Applicants case that it entered into a contact of sale with the defendants of a portion of land measuring approximately 14.5 acres to be excised from Land parcel Number Kilifi/Kadzonzo/Madzimbani/1142 then belonging to the defendants. The agreement of sale is dated 19.3.2013.

The Plaintiff/Applicant has so far paid kshs.1.8 million in terms of clause 2(a), (c) of the said agreement of sale. It is their case that it is ready and willing to complete their part of the agreement.

10. The Respondents on their part told the court that the Applicant is in breach of the terms of the contact under clause 2 (c).

That the Applicant has failed to clear the balance of the purchase price. They have relied on among others, the case of

**Maureen Wangui Kamande And 4 Others**

**-Versus-**

**Nicholas Mwaniki Waweru t/a Mambo Moto Media And 2 Others**

**Kajiado ELC, No. 511 of 2001.**

11. It is not in doubt that the Plaintiff/Applicant has so far paid a substantial amount. They have expressed their willingness to perform the remaining part of the agreement. The Respondents have not denied that the Applicant has paid some amount save that they have stopped remitting the instalments as agreed.

I find that the Plaintiff/Applicant has demonstrated that it has a prima facie case with a probability of success as set out in the case of **Mrao Limited –versus- First American Bank Limited And 2 Others [2013] eKLR**

12. The Respondents have admitted that they have sub divided the original title into Land parcel Numbers Kilifi/Kadzonzo/Madzimbani/2211, and 2212.

They have not told the court what steps they have taken to conclude their part of the agreement. It is the Applicants intention that the Respondents are preparing to dispose the property to a third party, Ukombozi Sacco Society.

I find that the Applicant has demonstrated that it is likely to suffer irreparable injury if the Respondents are allowed to go ahead with their plans to dispose the property to a third party.

I find that the Applicant's fear that the Respondents are planning to dispose the property to a third party is real. There is need to preserve the status quo pending the hearing and determination of the main suit.

13. The Respondent have taken issue with the Plaintiff/Applicant's supporting affidavit in that the company resolution showing that the deponent has authority to swear the affidavit on behalf of the company is not annexed.

It is my humble view that it is not the practice of the courts to interfere with the internal affairs of private entities. There must be minutes showing the deponent was given authority to swear the affidavit on behalf of the company. They must be somewhere within the company.

14. All in all I find merit in this application and I grant the orders sought namely;

(i) That a temporary injunction do hereby issue to restrain the defendants by themselves, their agents, servants, employees, family members and/or any person or persons deriving authority and/or title from the defendants or any of them from selling, transferring, transacting, alienating and/or dealing in any other manner with all those parcels of land known as Kilifi/Kadzonzo/Madzimbani/2211 and Kilifi/Kadzonzo/Madzimbani/2212 pending the hearing and determination of this suit.

(ii) That these orders be served upon and be effected by Kilifi County (District) Land Registrar accordingly.

(iii) Costs of this application to abide the outcome of the main suit.

**It is so ordered.**

**Dated, signed and delivered at Mombasa this 26<sup>th</sup> day of September, 2017.**

**L. KOMINGOI**

**JUDGE**

**26/9/2017**

**Mr. Alwenya :** We pray that we be issued with a copy of the ruling.

**Court :** To issue upon payment.

**L. KOMINGOI**

**JUDGE**

**26/9/2017**