REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 619 OF 2014

JOSEPH NGUNJIRI GACHIMU……..…..…..…….PLAINTIFF

VERSUS

JOSEPHINE WAIRIMU KAGUNDA…….....…..……1ST DEFENDANT

PETER NJUGUNA KIMANI …….....…….……2ND DEFENDANT

NAOMI NYAMBURA KIRUMBA…….....……3RD DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 4th April 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants/Respondents from illegally entering the parcel of land known as Kikuyu/Kikuyu Block 2/(Ondiri 24) (hereinafter referred to as the "suit property") pending the hearing and determination of this suit. The Plaintiff/Applicant also seeks for a prohibitory order to stop the Defendants/Respondents from selling, charging or in any way disposing off the suit property pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Joseph Ngunjiri Gachimu, sworn on 4th April 2014 in which he averred that he entered into a Sale Agreement dated 10th October 2011 with the 1st Defendant for purchase of the suit property at an agreed price of Kshs. 600,000/-. He confirmed that he paid a deposit of Kshs. 550,000/- leaving a balance of Kshs. 50,000/-. He further averred that the 1st Defendant then increased the purchase price to Kshs. 700,000/- and later to Kshs. 950,000/- all of which he has paid off. He then stated that this notwithstanding, the 1st Defendant declined to supply him with the completion documents. He then added that upon conducting a search on the suit property recently, he was shocked to learn that the 1st Defendant sold the suit property to the 2nd and 3rd Defendants. He confirmed being in possession of the suit property and stated that he fears to be evicted or for the 2nd and 3rd Defendant proceeding to sell off the suit property thereby prejudicing his interest therein.

The Application is contested. The 1st Defendant, Josephine Wairimu Kagunda, filed her Replying Affidavit sworn on 26th May 2014 in which she confirmed having entered into a Sale Agreement with the Plaintiff for the sale of the suit property. She averred that the Plaintiff paid an initial deposit of Kshs. 300,000/- with the balance of Kshs. 300,000/- being payable in full upon her furnishing the Plaintiff with

the completion documents in line with clause 6.2 of the Sale Agreement. She further averred that upon receipt of all the completion documents on 23rd October 2011, she informed the Plaintiff who promised to pay the balance of the purchase price before the end of the month, a promise he did not honour. She further averred that despite repeated verbal demands, the Plaintiff failed to fulfill his part of the obligation upon which she sought the help of her lawyer who wrote a demand letter dated 19th December 2011 to the Plaintiff. She confirmed that upon receipt of that demand letter, the Plaintiff paid her a sum of Kshs. 250,000/- on 30th December 2011, leaving a balance of Kshs. 50,000/-. She stated that after that, the Plaintiff did not remit the balance and she was once again constrained to enlist the assistance of her lawyer who wrote yet another demand letter dated 7th March 2012 to the Plaintiff. She averred further that the Plaintiff did not respond to that demand letter and she called him for a meeting in July 2012. At the meeting, she stated that she gave the Plaintiff an ultimatum either to accept a refund of the monies he had paid her or agree to an increase in the purchase price of the suit property by an additional Kshs 100,000/-. She confirmed that the Plaintiff preferred the purchase price increase and that he paid her Kshs. 90,000/- on 26th July 2012 leaving a balance of Kshs. 60,000/-. She then stated that the Plaintiff again defaulted in paying off the said balance for a period of over one year. She further averred that she called him in October 2013 whereby she gave him notice of her intention to repossess the suit property and refund him the monies he'd paid her less the costs she had incurred because of his conduct. She averred further that the Plaintiff later deposited into her account Kshs. 60,000/- on 27th November 2013, Kshs. 150,000/- on 27th January 2014 and Kshs. 100,000/- on 20th February 2014. She then stated that she sought to refund all these monies to the Plaintiff but he declined to receive it. She concluded by stating that as far as she is concerned, the transaction was not completed due to breach of agreement by the Plaintiff.

In response to that, the Plaintiff/Applicant filed his Further Affidavit sworn on 5th June 2014 in which he averred that there was no official communication terminating the Sale Agreement from the 1st Defendant therefore it was still in force. He also averred that the 1st Defendant hiked the purchase price of the suit property to Kshs. 950,000/-. He further denied having had any communication with the 1st Defendant between July 2012 and October 2013 citing that the 1st Defendant was out of the country during that period.

In response to that, the 1st Defendant filed her Supplementary Affidavit sworn on 20th June 2014 wherein she emphasized that the Sale Agreement was no longer in force due to breach of its terms by the Plaintiff. She confirmed being ready and willing to refund the Plaintiff's money but stated that the Plaintiff declined to give her his account details.

The issues I must determine is whether or not to grant the Plaintiff a temporary injunction and a prohibitory order which he seeks over the suit property. In deciding whether to grant the temporary injunction sought after by the Plaintiffs, 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 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."

Looking at the facts of this case, the Plaintiff lays claim over the suit property on the basis of a Sale Agreement entered into between himself and the 1st Defendant. Both the Plaintiff and the 1st Defendant have conceded that there was such a transaction between them which was embodied in the Sale Agreement dated 10th October 2011. However, the Plaintiff insists that the Sale Agreement is still in force and that he is entitled to have it specifically performed for him to be registered as the owner of the suit property. The 1st Defendant on her part contends that she rescinded the Sale Agreement when she called the Plaintiff and informed him that the sale had fallen through. What I need to determine for now is whether the Plaintiff has demonstrated that he has a genuine and arguable case in his claim to the suit property and by extension a prima facie case with high chances of success at the main trial. In answering that question, I must consider what the law provides.

Section 36(1) of the Land Registration Act provides as follows:

> **"A lease, charge or interest in land shall not be disposed of or dealt with except in accordance with this Act, and any attempt to dispose of any lease, charge or interest in land otherwise than in accordance with this Act or any other law, shall not extinguish, transfer, vary or affect any right or interest in that land or in the land, lease or charge."**

When it comes to the transfer of land, as is the issue in this suit, the relevant legal provision which applies is Section 37 of the Land Registration Act which provides as follows:

> **"(1) A proprietor may transfer land… to any person with or without consideration, by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve."**
>
> **(2) A transfer shall be completed by filing the instrument and registration of the transferee as proprietor of the land…"**

In this suit, it is conceded by the Plaintiff and the 1st Defendant that the suit property was registered in the name of the 1st Defendant. That being the case, the only way that the Plaintiff could become the proprietor of the suit property would have been if the 1st Defendant had transferred the suit property to him as provided in Section 37 of the Land Registration Act cited above. This did not happen. Accordingly, as matters stand, the position of the Plaintiff is the one described by section 36(1) of the Land Registration Act cited above which is that the attempt to dispose the suit property shall not extinguish, transfer or vary or affect any right or interest in the suit property. If that is the position, where does this leave the Plaintiff?

The answer to that question is captured in **section 36(2)** of the **Land Registration Act** which provides as follows:

> **"Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract."**

This essentially means that while the Plaintiff cannot be said to have any interest in the suit property for lack of a transfer, the Sale Agreement is a contract binding the 1st Defendant to honour the terms thereof. One of the terms of the Sale Agreement was to supply the Defendant with all the Completion Documents to enable the Plaintiff to lodge them for registration so that he could become the registered proprietor of the suit property. This did not happen. Is the Plaintiff entitled to an order for specific performance of the Sale Agreement? In answering that question, I will rely on the decision of Maraga J. (as he then was, now Court of Appeal Judge) in the case of **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited (2006) eKLR** where he elaborated on the remedy of specific performance as follows:

> "***Specific performance, like any other equitable remedy, is discretionary and the court will only***

grant it on the well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect of damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant."

Being an equitable relief, the Courts have also held that an Applicant seeking the remedy must come to Court with clean hands. **Lammers v Kamunge Civil Appeal No.125 of 1990.**

I will decline to order any specific performance in this matter at this stage owing to the fact that the Plaintiff was himself partly to blame for failing to make the requisite payment of the purchase price within reasonable timelines. Taking 2 years to pay up the purchase price is quite a long delay. Further, it is conceded that the suit property is now registered in the names of the 2nd and 3rd Defendant. Issuing an order for specific performance at this stage will no doubt impose severe hardship on them. I hold the view that the pertinent issues in this suit cannot be dealt with adequately at this interlocutory stage but must wait the full trial. To that extent therefore, I hold that at this interlocutory stage, the Plaintiff has not demonstrated that he has a genuine and arguable case or that he has a prima facie case with high chances of success at the main trial.

Since the Plaintiff 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 steps to be followed in the enquiry into whether to grant an interlocutory injunction is … sequential so that the second condition can only be addressed if the first one is satisfied…"

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

DELIVERED AND SIGNED IN NAIROBI THIS 20TH

DAY OF MARCH 2015.

MARY M. GITUMBI

JUDGE