



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 90 OF 2014

DANIEL MASINJILAH CHISIKWAH.....PLAINTIFF

VERSUS

OLEKU OLE LAKATI KORES.....1ST DEFENDANT

MICHEAL MATANDA OLE OMIJOI.....2ND DEFENDANT

RULING

The application before Court is one dated **30th January 2014** filed by the Plaintiff seeking an order of injunction restraining the Defendants from selling, developing, charging, using, alienating, advertising, entering, and dealing or in any other way interfering with parcels of land known as **Kajiado Kitengela /44002 and 44003** pending the hearing and determination of the suit.

The application is premised on grounds that the Defendants have received a colossal amount of **Kshs. 15,580,000/-** as part of the purchase price leaving a balance of **Kshs. 420,000/-** which the Plaintiff is willing to pay but the Defendants have refused to honour their obligation to facilitate the transfer to the Plaintiff. Therefore it is in the interest of justice that the orders sought be granted as the Plaintiff stands to suffer irreparable damage in the event that the Defendants do dispose off the property.

The application is supported by an affidavit sworn by the Plaintiff wherein he reiterated that he had made a substantial payment towards the purchase of the suit property but that the Defendants have refused to cooperate to transfer the property to him. It was his deposition that they entered into two agreements dated **10th July 2012** for the purchase of the two properties but that on visiting the property in **January 2014**, he saw prospective buyers inspecting the suit properties with the intention to purchase.

The 1st Defendant swore a Replying Affidavit on **9th May 2014**, wherein he deposed that he and the 2nd Defendant are joint-owners of the suit properties. It was his deposition that they entered into a sale agreement with the Plaintiff on **10th July 2012**, for the sale of the two properties for a consideration of **Kshs. 16 Million**. In accordance with the agreement the Plaintiff paid the **10%** deposit upon execution and the balance thereof was to be paid within **90 days** from the date of the agreement. It was his deposition that the sole purpose of selling the property was to enable them purchase another parcel in Mashuru within Kajiado County.

The **90 days** completion period lapsed on **10th October 2012**, with the Plaintiff having only paid the **10%** deposit of the purchase price. They did not receive any further communication from the Plaintiff

until when the Plaintiff deposited **Kshs. 200,000/-** and **700,000/-** on **7th September 2012** and **18th October 2012**. With no further word from the Plaintiff, the 1st Defendant deposes that he wrote a short text message to him, notifying him of the cancelation for breach of contract. However, that despite warning the Plaintiff not to make further deposits into his account, he continued to do and thus far, they have received a total of **Kshs. 10 Million**. The 1st Defendant deposed that the Plaintiff approached him in **October 2013**, seeking to re-open the contract, which he agreed subject to an addition of **Kshs. 3 Million** to the purchase price. However, that the Plaintiff failed to show up on the date and time as agreed. The deponent states that transfer, according to the agreement was subject to completion of the purchase price which the Plaintiff failed to complete. Further, that he is ready and willing to refund the **Kshs. 10 Million** received as soon as the Plaintiff lifts the caution placed against the titles.

In a supplementary affidavit sworn by the Plaintiff on **30th May 2014**, he deposed that the Defendant did not issue a termination notice but continued to receive parts of the balance of the purchase price even after the lapse of the completion date. The Plaintiff, outlining the part payments deposited into the 1st Defendant's account deposed that the Defendant failed to disclose to the Court the total amount of **Kshs. 15,580,000/-** received, as follows:

10th July 2012 – Kshs. 1,600,000/-

7th September 2012 –Kshs. 200,000/-

18th October 2012 – Kshs. 5,540,000/-

23rd October 2012 – Kshs. 700,000/-

20th December 2012 – Kshs. 2,000,000/-

31st December 2012 – Kshs. 2,500,000/-

21st May 2013 – Kshs. 3,000,000/-

Cash Payment – Kshs. 30,000/-

It was the Plaintiff's deposition that the Defendants reneged on the agreement when they declined to accept the balance of **Ksh. 420,000/-** and instead made demands of an additional **Kshs. 4 Million**.

Parties filed written submissions in further support of their cases, which I have carefully considered. The issue before Court is whether the Plaintiff's claim falls within the ambit of the principles for granting an interlocutory injunction as set out in the case of **Giella v Cassman Brown & Co Ltd (1973) EA 358**, as follows:

a) A demonstration that the applicant has a prima facie case with a probability of success.

b) A demonstration that if an injunction is not granted, the applicant will suffer irreparable loss which cannot be compensated for in monetary terms.

c) Where the court, is in doubt about ingredient (a) – (b) it will decide the matter on a balance of convenience to both parties.

It is common that the parties entered into an agreement on **10th July 2012** for the sale of the suit properties. It was an agreed term of the agreement that the completion date would be **90 days** from the date of entering the agreement, hence **10th October 2012**. The affidavits by both parties reveal that the Plaintiff did not complete the purchase within the **90 days** completion period. As outlined by the Plaintiff, other than the **10%** deposit of the purchase price and **Kshs. 200,000/-** paid in **September 2012**, the other

part payments were made beyond the **90 days** completion period. The exact amount received by the Defendants towards the purchase price is in dispute with the Plaintiff claiming to have paid **Kshs.15,580,000/-** whereas the Defendant claims receipt of **Kshs.10 Million**. Nevertheless, the Defendants have received a substantial amount of the purchase price, upward of **Ksh. 10 Million**.

It was also a term of the agreement that the Law Society Conditions of Sale would be applicable for as long as the same was not inconsistent with the terms of the agreement. The Defendant deposes that he notified the Plaintiff of the cancellation of agreement for failing to abide by the terms therein through a short text message. **Clause 4(7) (b) & (c) of the Law Society Conditions of Sale** provides, in part, that:

“(b) If the sale shall not be completed on the completion date, either party (being himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition.

(c) Upon service of a completion notice it shall become a term of the contract that the transaction shall be completed within Twenty-one (21) days of service and, in respect of such period, time shall be of the essence of the contract.”

On perusal of the 1st Defendant’s Replying Affidavit, it is evident that they did not issue the Plaintiff with a completion notice. Kasanga Mulwa J. (as he then was) in the case of **Bernard Alfred Wekesa v John Muriithi Kariuki & 2 Others HCCC Nairobi 1059 of 1995 [2000] eKLR** made the following observation as to the purpose of a completion notice:

“The completion notice is important in such a transaction as it puts the purchaser on guard as to the consequences of non-compliance of the notice and it also gives the vendor a right of action against the purchaser.”

From the foregoing, it is my finding that the Plaintiff has established a prima facie case with chances of success and having paid substantial amounts of the purchase price, I find that he stands to suffer irreparable loss which may not be adequately compensated by damages.

Having now considered the Written Submissions, the Court finds it merited and allows it in the following terms:-

- 1. The Defendants are hereby restrained from selling, developing, charging, using, alienating, advertising, entering, and dealing or in any other way interfering with parcels of land known as Kajiado/ Kitengela/44002 and 44003 pending the hearing and determination of the suit, or until further orders of this Court.***
- 2. The injunction granted herein will last for a period of 12 months from the date hereof and will lapse at the expiry of that period unless the same is extended by the court following an application made to the court in that regard.***
- 3. Costs shall be in the cause.***

Dated, Signed and Delivered this 31st day of **July,2015**

L.GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff/Applicant

None attendance for the 1st Defendant/Respondent

None attendance for the 2nd Defendant/Respondent

Nyangweso: Court Clerk

L.GACHERU

JUDGE

Court:

Ruling read in open Court in the absence of the parties.

L.GACHERU

JUDGE