



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ENVIRONMENTAL AND LAND DIVISION**

**ELC CIVIL SUIT NO. 71 OF 2013**

**LEE MWATHI KIMANI..... PLAINTIFF**

**VERSUS**

**NATIONAL SOCIAL SECURITY FUND..... DEFENDANT**

**RULING**

The Plaintiff by a Notice of Motion application expressed to be brought under order L Rule 1 order XL Rules 1 and 2 and sections 3 and 3A of the Civil Procedure Act. Quite evidently the cited order L. Rule 1 and order XL Rules 1 and 2 can only relate to the Civil Procedure Rules before they were amended but even then they would have no application to the substantive application before the court. The court nonetheless shall consider the application on its merits. The application seeks an order of injunction in the following terms:-

That pending the hearing and determination of this application an injunction do issue restraining the Defendant whether by itself, servants or agents or advocates or any of them or otherwise be restrained by a temporary order of injunction from doing the following acts or any of them, that is to say from interfering with the plaintiff's right of possession, advertising for sale, offering to sell, receiving offers to sell, disposing or otherwise however interfering with the plaintiff's ownership of the piece of land known as **NAIROBI/BLOCK 97/490 TASSIA ESTATE** also known as **TASSIA-11-97/490**.

The plaintiff premises the application on the grounds that are set out on the face of the application and the further grounds set out in the annexed supporting affidavit sworn by **Lee Mwathi Kimani** the plaintiff herein on 16<sup>th</sup> July 2013. The plaintiff contends that he is a bonafide purchaser of the suit property from the Defendant under an existing Tenant purchase scheme and claims that the Defendant in breach of the Tenant Purchase Agreement the Defendant on or about 15<sup>th</sup> October 2012 purported to offer for sale to the plaintiff the suit property at the price of **Kshs.30,000,000/-** notwithstanding that the plaintiff had already entered into the tenant purchase agreement with the Defendant for the purchase of the property at **Kshs.1,310,000/-**. The plaintiff contends that he made several payments under the tenant purchase agreement which were accepted by the Defendant and is of the view that the Defendant is bound to honour the tenant purchase agreement and that the Defendant should not be permitted to re-write the contract as they are purporting to do.

The Defendant opposes the application for injunction and **Mr. Aggrey Nyandong** the Defendant's officer in charge of the tenant purchase Scheme has sworn a replying affidavit in opposition to the plaintiff's application for injunction. It is the Defendant's position that the Defendant on 28<sup>th</sup> April 2004 made an offer to sell to the plaintiff the suit property at Kshs.1,310,000/- on the terms set out in the offer letter

dated 28<sup>th</sup> April 2004 attached to the replying affidavit and marked “AN2”. The plaintiff as per the offer letter was required to pay a minimum deposit of 15% of the sale price being Kshs.196,500/- for the application to be processed further. The deposit was to be paid to the Defendant within 14 days from the date of the offer letter failing which the offer would lapse.

It is the Defendant’s contention that the plaintiff did not meet the terms of the offer and thus the offer to sell the property lapsed. The Defendant vide a letter dated 5<sup>th</sup> January 2006 marked “AN2” lamented that the plaintiff had only paid a sum of Kshs.20,000/- towards the purchase price and invited the plaintiff to pay the balance of Kshs.1,290,000/- within 90 days and further by a letter dated 22<sup>nd</sup> September 2006 the Defendant still reiterated that the plaintiff had not paid the balance of Kshs.1,290,000/- despite the earlier requirement that same was to be paid within 90 days of 5<sup>th</sup> January 2006. The Defendant vide the letter of 22<sup>nd</sup> September 2006 notified the plaintiff that if the balance aforesaid was not paid within 30 days of the date of the letter the Defendant would take appropriate action to repossess the suit plot.

The plaintiff in support of his application places reliance on the transaction account statement annexed to his affidavit and marked “LMK1” and the staggered payments that he made to the account on various dates. The plaintiff has not annexed any agreement to show what the terms of the **tenant purchase agreement** (if any) were. The Defendant thus contends the plaintiff has no basis to seek an order of injunction when he cannot demonstrate that the Defendant has infringed any legal right of the plaintiff.

The parties have respectively filed written submissions in which they each articulate their respective positions. The plaintiff submits that he entered into a purchase scheme “TPS” with the Defendant for the suit property and as evidence for this the plaintiff states that annexure “LMKI” the abstract of the statement of account showing the repayment period was 180 months at monthly installments of **Kshs.18,335/00** with effect from 1<sup>st</sup> September, 2009 demonstrates the agreement with the Defendant. The Defendant has denied there was any such agreement and states that the plaintiff failed to comply with the terms of the offer and in effect the offer lapsed and there could therefore be no agreement as alleged by the plaintiff.

The issue thus does arise whether infact there was any **Tenant Purchase Agreement** for the purchase of the suit property by the plaintiff from the Defendant. That the Defendant made an offer to the plaintiff for the purchase of the suit property in April 2004 as per letter of 28/4/2004 annexed as “AN2” in the Defendants replying affidavit is not denied”. There is evidence that the plaintiff did not meet the terms of the offer as the Defendant’s letters of **5<sup>th</sup> January 2006** and **22<sup>nd</sup> September 2006** illustrate. It is thus not clear when the alleged Tenant purchase Agreement (“TPS”) was entered into and what the terms of the agreement were. The tenant purchase agreement would amount to a disposition of an interest in land and would in terms of section 3 (3) of the law of Contract Act (Cap 23) of the Laws of Kenya be required to be in writing and signed by each of the parties to the contract and their respective signatures attested.

Section 3 (3) of the Law of Contract Act provides as follows:

**3.(3) No suit shall be brought upon a contract for the disposition of an interest in hand unless-**

**(a) the contract upon which the suit is founded**

**(i) is in writing**

**(ii) is signed by all the parties thereto, and**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by each party.**

The plaintiff has not exhibited any signed contract between him and the defendant for the purchase of the suit property. The abstract of the statement of account alone cannot in my view satisfy the requirements of section 3(3) of the Law of Contract Act and in the absence of the formal signed agreement between the

parties cannot supplement the agreement. The payments the plaintiff claims to have made to the Defendant were made at the whims of the plaintiff and not in conformity with any agreement between the parties. It does appear that the plaintiff was the sole determinant of what to pay and at what time because even if there was a tenant purchase agreement (which the Defendant denies) the plaintiff would have been required to make regular monthly payments and it would not have been open to the plaintiff to make payments whenever he chose.

I have considered the material placed before the court, the affidavits by the parties and the respective submissions and authorities tendered on behalf of the parties and I am not satisfied that the plaintiff/Applicant has established that he has a prima facie case with any probability of success. The plaintiff has not in my view met the threshold established in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358** for the grant of an interlocutory injunction.

- i. **That he has a prima facie case with a probability of success.**
- ii. **That damages would not be an adequate remedy and he would otherwise suffer irreparable damage that could not be compensated in damages.**
- iii. **That the balance of convenience tilts in his favour.**

The plaintiff has contended that he is in possession and thus the balance of convenience ought to be resolved in his favour. Possession alone which is not pursuant to an agreement whose terms are discernable and/or which is not in conformity with any agreement cannot entitle an applicant to an order of specific performance and much less to an order of injunction which is an equitable remedy granted at the discretion of the court.

A party cannot in flagrant breach of an agreement take possession of a property and thereafter set up the fact of possession as entitling him to an injunction. Such a party would be adjudged as approaching the court with “**unclean hands**” and that would disentitle him to an order of injunction.

In the present case it is not shown that the plaintiff accepted the terms of the offer and/or met the terms of the offer. What is apparent is that the plaintiff set out what he wanted to do and when. That in my view cannot constitute terms of an agreement between the parties as one party cannot dictate what the terms of the agreement will be as then that cannot be an agreement between the parties. An agreement denotes there being an offer that the other party accepts and performs the terms and/or conditions set out in the offer. That definitely is lacking in the present matter. The formalization of the acceptance of the offer by way of execution of a formal agreement incorporating all the terms is also lacking in the instant matter.

Having found and held that the plaintiff has not established he has not established he has a prima facie case with a probability of success I need not consider the other two conditions of irreparable damage and balance of convenience as the conditions for grant of an injunction are sequential such that if the first one fails the other conditions would be inapplicable and would only be considered where the court entertains any doubt as to whether or not a prima facie case has been established and/or demonstrated.

On my part I have no doubt that the plaintiff has not established he has a prima facie case with a probability of success and even if I was wrong on that holding I would still not hold that the plaintiff has demonstrated he would suffer any irreparable harm if the injunction was not granted. This is a contract for the purchase of property and in my view damages would be an adequate remedy as the value of the property can be ascertained through valuation at any stage.

In the premises and for the above reasons I hold and find that the plaintiff’s application dated 16<sup>th</sup> January 2013 lacks any merit and the same is ordered dismissed with costs to the Defendant.

Ruling dated signed and delivered in Nairobi this 20th day of March

2014.

**J.M. MUTUNGI**

**JUDGE**

**In presence of:**

..... for the plaintiff

..... for the Defendant