



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC. CIVIL SUIT NO.1130 OF 2013**

**MBUTHIA D. K. JAMES ..... PLAINTIFF**

**VERSUS**

**UNITED INSURANCE COMPANY LTD.....1<sup>st</sup> DEFENDANT**

**MUMUT OLESIALO STATUTORY MANAGER**

**UNITED INSURANCE COMPANY.....2<sup>ND</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 23<sup>rd</sup> September 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the 2<sup>nd</sup> Defendant/Respondent from selling land parcel known as KAJIADO/KAPUTIEI NORTH/15660 and 15661 (hereinafter referred to as the “suit properties”) pending the hearing and determination of this Application and suit together with costs.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, James D.K. Mbuthia, sworn on 23<sup>rd</sup> September 2013 in which he averred that he was employed by United Insurance Company Limited from the year 2003 to 2005. He further averred that during his employment period, he bought the suit properties from United Insurance Company Limited for the sum of Kshs. 220,000/- which sum was deducted from his monthly salary. He produced a copy of the sale agreement between him and the said company. He also averred that he additionally took a car loan from CFC Stanbic Bank which he similarly paid off through a deduction from his monthly salary.

He further averred that in the year 2005, he resigned from United Insurance Company by which time he had paid a total of Kshs. 119,171 leaving a balance of Kshs. 100,829 for the suit properties. He further averred that he was deducted this balance from his terminal dues at United Insurance Company. He then averred that having paid off the entire purchase price of the suit properties, he requested the company to transfer the suit properties to him but was informed that he had to clear the car loan with CFC Stanbic first before the transfer could be effected. He then stated that after clearing the car loan, the company was placed under statutory management before the suit properties could be transferred into his name. He then stated that the company, now under statutory management, advertised in the local newspapers the sale of inter alia the suit properties yet the transfer to him had not been effected.

The Application is contested. The Defendants filed their Replying Affidavit sworn by Mumut Ole Sialo, sworn on 7<sup>th</sup> October 2013, in which he averred that Kenya Reinsurance Corporation Company Limited

was appointed as statutory manager of United Insurance Company Limited by the Commissioner of Insurance in July 2005. He further averred that the term of the statutory manager was extended by the court to enable disposal of the company's assets for use in settlement of claims. He further stated that the company had purchased various parcels of land mainly in Kajiado county using monies paid by policy holders and that it is against this background that the statutory manager has pursued realization of immovable assets of the United Insurance Company, the suit properties included. He further averred that it is now almost over 8 years since the Plaintiff's purported clearance of the purchase price of the suit properties yet the law only allows claims made within 6 years of accrual of the cause of action where the claim is based on contract as is the case with the Plaintiff.

He therefore averred that the Plaintiff's claim is statute barred. He further denied that the sale agreement referred to by the Plaintiff provided for payment of the purchase price of the suit properties through deductions from the monthly salary of the Plaintiff. He contested the validity of the payslip and terminal dues statements stating that the same did not emanate from United Insurance. He further averred that there were no records either in its possession or produced by the Plaintiff to show that the Plaintiff paid off the purchase price of the suit property within 24 months from 26<sup>th</sup> August 2004 to August 2006. He also sought to be struck out from the suit as he claimed he was non-suited.

In response thereto, the Plaintiff filed his Further Affidavit sworn on 14<sup>th</sup> October 2013 in which he averred that he obtained leave to sue the statutory manager which leave he was granted on 18<sup>th</sup> September 2013. He further averred that time started running in 2009 when he cleared the car loan as directed by the Defendants and therefore the suit was not time barred.

In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, 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/Applicant 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.”***

Has the Plaintiff/Applicant made out a prima facie case? In determining whether the Plaintiff/Applicant has established a prima facie case, I must consider whether he has shown that he has a right to specific performance. Looking at the facts of this case, the Plaintiff has sought to rely on a sale agreement dated 26<sup>th</sup> August 2004 between himself and United Insurance Company for the purchase of the suit properties at a purchase price of Kshs. 220,000/- which sum he swore that he paid in full through monthly deductions as well as a deduction of the outstanding balance from his terminal dues. He averred that his employer required him to pay off a car loan with CFC Stanbic before the transfer of the suit properties into his name which would explain why the Plaintiff had no title documents to the suit properties. The Plaintiff therefore seeks specific performance of the said sale agreement. The Defendants have disputed the Plaintiff's claim of having paid off the entire purchase price. The Defendants have also argued that the Plaintiff's claim is now time barred as it has been brought more than 6 years since the cause of action arose bearing in mind that it is based on contract. In their submissions, the Defendants highlighted **section 4(1)** of the **Limitation of Actions Act Cap 22** which provides as follows:

## **Actions of contract and tort and certain other actions**

- 1. The following actions may not be brought after the end of six years from the date on which the cause of action accrued-**
  - a. Actions founded on contract;**
  - b. -**

This legal provision is very clear and cannot be ignored. It is quite categorical that actions founded on contract must be brought to court before the end of 6 years from the date the cause of action arose. In this particular case, the cause of action arose in the year 2005 after he completed paying off the purchase price for the suit properties. Having filed this suit in the year 2013, it is clear that a time period of over 8 years had lapsed from the date the cause of action arose to the date of filing this action to claim the suit properties. This is well over the time period allowed by the law cited above. This suit is therefore essentially time barred and the Plaintiff does not have a high chance of success at the main trial. I therefore find that he has not made a prima facie case with high chances of success.

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.

**SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MAY 2014.**

**MARY M. GITUMBI**

**JUDGE**