



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 553 OF 2013**

**KIPKIRUI L. TANUI BINOT .....PLAINTIFF/APPLICANT**

**VERSUS**

**EZEKIEL KIPKULEI C. KOMEN..... DEFENDANT/ RESPONDENT**

**RULING**

1. The Notice of Motion dated **8<sup>th</sup> October , 2013** was filed by **Kipkirui L Tanui Binot** , the plaintiff/applicant herein under **Order 51 Rule 1, Order 40 Rule 1,2, 4** of the Civil Procedure Rules, **Section 3A** of Civil Procedure Act and all enabling Laws seeking the following orders among others *interalia* ;

1. **That pending the hearing and determination of this suit this honourable court be pleased to restrain the respondent, its agents, servants, employees and or proxies from dealing with, alienating, selling or in any way interfering with all that flat situate in Nairobi District known as Madaraka MF14-L flat.**
2. **That pending the hearing and determination of this suit this honourable court be pleased to order the respondent to stop receiving rent in respect of all that flat situate in Nairobi District known as Madaraka MF14-L Flat but the same be deposited in Nakuru Law courts. (hereafter referred to as the suit property).**
3. **That the cost of the application be borne by the defendant/ respondent.**

2. The application is premised on the grounds which are found in the body of the application and supporting affidavit sworn by the applicant on **8<sup>th</sup> October, 2013**. Interim orders were granted *ex parte* to the applicant on **9<sup>th</sup> October, 2013**.

3. The respondent despite being served with the order, this application and other pleadings on **18<sup>th</sup> October, 2013** did not enter appearance nor respond to this application. This application is therefore unopposed.

4. Before this application could be heard and determined, the applicant filed another application under certificate of urgency on **20<sup>th</sup> December, 2013** seeking among other orders, *interalia*,

1. **That pending the hearing and determination of this suit, this honorable court be pleased to order the firm of Kiplenge and Kurgat Advocates to deposit in court all the original conveyance documents in relation to this case and the same be kept in the strong room to wit title deed, transfer forms, letter of consent to transfer, land rates**

**clearance certificate, 3 coloured passport photographs of the vendor, copies of vendor's PIN certificate and national identity card.**

**2. That the cost of the application be borne by the defendant/ respondent.**

5. The application was heard *ex parte* but no interim orders were granted. Instead, the court directed that the application be served upon the respondent and both applications be disposed off together during inter parties hearing.

6. The process server in his affidavit of service dated **4<sup>th</sup> February, 2014** deponed that the respondent from **3<sup>rd</sup> February, 2014** avoided personal service and therefore he was unable to effect service in person. However he was able to serve the firm of Kiplenge and Kurgat Advocates **on 3<sup>rd</sup> February, 2014**. In paragraph 4 of his affidavit of service he avers that the conduct of the respondent showed he was avoiding service and it would therefore be appropriate for this court to order alternative service and / or deem service already effected upon the respondent's advocate to be sufficient for hearing and determination of the application.

7. By the time this application came up for hearing no such application had been made by counsel for the applicant.

8. The defendant did not enter appearance in person or through counsel or respond to the application.

9. The brief facts of the plaintiff's case are that the plaintiff and defendant entered into a sale agreement on **11<sup>th</sup> November, 2012** for the purchase of all that flat situate in Nairobi District known as Madaraka MF14-L for Kshs. 5,300,000. A sale agreement (**KLTB1**) evidencing the same has been exhibited.

10. The plaintiff in compliance with the terms of the agreement by **25<sup>th</sup> October, 2012** had paid a total of Kshs.4,000,000 (**see KLTB 2, KLTB 3 and b**). The balance of Kshs.1,300,000 under clause 3.1.3 of the agreement was to be paid after the vendor's advocate released completion documents to the applicants counsel but since this never happened the parties prepared an addendum exhibited as (**KLTB 5**) and the applicant paid the vendor a further Kshs.300, 000.

11. The applicant finally completed full payment of the purchase price by paying the balance of Kshs. 1,000,000 (**KLTB6**) which was duly acknowledged by the respondent (**KLTB7**) notwithstanding that he still had not received the completion documents. When the much awaited documents were finally ready the vendor demanded an additional Kshs 1,500,000 which conduct was not only inequitable but also unconscionable as the applicant had raised the money with great difficulty including taking out a loan.

12. The applicant now prays that the respondent be restrained temporally and permanently from dealing and selling or interfering with the suit property in any manner including collecting rent.

13. When the applications came up for hearing on **19<sup>th</sup> February, 2014** counsel for the applicant reiterated what was contained in the grounds of the application dated **8<sup>th</sup> October ,2013** and supporting affidavit of the applicant. In addition he submitted that the applicant had bought the suit property under the sectional properties Act and followed the requirements of section 3 (3) of the Law of Contract by ensuring that the agreement was in writing. Having complied with the terms of the sale agreement, he had established a prima facie case for grant of an injunction. The balance of convenience also favored the applicant as there was a tenant of the suit property who was paying a monthly rent of Kshs.40, 000.

14. On the second application dated **19<sup>th</sup> December, 2013** he submitted that if the completion documents remained in possession of the firm of Kiplenge and Kurgat Advocates, the respondent could easily retrieve them as the firm had been fully paid their legal fees and therefore had no alien over the documents but the firm had no objection if the said documents could be released into the court's custody.

15. The conditions upon which an interlocutory injunction may be granted, although not cast in stone,

were settled in the case of **Giella V Cassman Brown & Co. Ltd (1973) EA 358**. They are:-

- “1. The applicant must demonstrate that he has a prima facie case with a probability of success;**
- 2. An interlocutory injunction will normally not be granted unless the applicant will suffer irreparable loss that cannot adequately be compensated in damages;**
- 3. If the court is in doubt, it will decide the application on a balance of convenience.”**

16. At this stage the court is not required to make any final findings on the facts. That will be for the main hearing. The issue is therefore whether the applicant satisfies the above conditions. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the appellant has a prima facie case.

17. I have reviewed and considered the material placed before the court and the oral submissions by counsel for the applicant and I am persuaded that the applicant has demonstrated a prima facie case with a probability of success. The applicant has tendered evidence that there was an agreement for sale with the respondent for the purchase of the suit property from the respondent for Kshs.5,300,000; that he paid the full purchase price and has annexed the respective documents to support his claim. This is uncontroverted as the respondent did not enter appearance. It would therefore be unfair to allow the respondent to continue holding on to the applicant’s money and at the same time benefit from the income from the flat.

18. On a balance of convenience, discretion must favour the applicant and I have said why.

19. Regarding the second application, I deem it inappropriate to consider it because it is clear from the affidavit of service of **Hebron Odhiambo Omolo** sworn on **4<sup>th</sup> February, 2014** that the applicant was not served in person and substituted service was not applied for. The respondent in the current suit has not retained any counsel to represent him and therefore service upon the firm of Kiplenge and Kurgat is of no effect.

20. This court therefore makes the following orders under the circumstances:

**1. A temporally injunction is issued restraining the respondent, his agents, servants, employees and or proxies from wasting, damaging, alienating, disposing off, selling and or transferring all that flat situate in Nairobi District known as Madaraka MF14-L Flat pending the hearing and determination of the suit.**

**2. The respondent is ordered to;**

**(a) Deposit the amount of Kshs.5,300,000 received from the applicant in an interest earning account in joint names with the applicant within 14 days from the date hereof.**

**(b) Deposit rent collected from the suit property effective 1<sup>st</sup> July, 2014 in the same account until the final determination of this case.**

**Failure to deposit the money within the period given, execution for the above sum to follow.**

**3. Costs for this application are awarded to the applicant.**

**Dated signed and delivered this 20<sup>th</sup> day of June 2014**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

Ms Manyal for the plaintiff

N/A for the Defendant

Emmanuel Maelo : Court Clerk.

**L N WAITHAKA**

**JUDGE**