



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 416 OF 2012**

**SAMUEL NDUNG’U GRACE.....PLAINTIFF**

**VERSUS**

**ISAAC GATHUNGU WANJOHI.....1<sup>ST</sup> DEFENDANT**

**PRODIGY COMMERCIAL AGENCIES.....2<sup>ND</sup> DEFENDANT**

**RULING**

**The Plaintiffs’ Application**

What is before the court for determination is a Notice of Motion dated 17<sup>th</sup> July 2012 brought by the Plaintiff, seeking orders of a temporary injunction restraining the Defendants from proceedings to attach the Plaintiff’s goods of trade for alleged monies due and owing pending the hearing and determination of this suit. The ground for the application is that the Plaintiff is the legal proprietor of the suit premises having entered into an agreement for sale with the registered owner on 31<sup>st</sup> May 2010, and has paid the full purchase price of Kshs.12,500,000/=.

Further, that the Plaintiff is not a tenant of the 1<sup>st</sup> Defendant and is not indebted to the said Defendant in any way whatsoever. However, that the 1<sup>st</sup> Defendant has instructed the 2<sup>nd</sup> Defendant to proclaim the Plaintiff’s good of trade and the Plaintiff is apprehensive that the 2<sup>nd</sup> Defendant will proceed to attach the said goods.

The Plaintiff in his supporting affidavit and supplementary affidavit sworn on 17<sup>th</sup> July 2012 and 10<sup>th</sup> October 2012 respectively, stated that he executed a sale agreement with one Hariuti Waruguru who is the 1<sup>st</sup> Defendant’s daughter, to buy the premises known as L.R No. 209/9694 (I.R 61456) (“the suit property”) for the sum of Kshs.12,500,000/=. He annexed a copy of the said agreement for sale. Further, that he paid the requisite deposit of Kshs.2,500,000/= and obtained financing from Housing Finance Co. (K) Ltd for the balance of the purchase price amounting to Kshs.10,000,000/=.

The suit property was charged to National Bank of Kenya, and the Plaintiff stated that after various correspondence with the 1<sup>st</sup> Defendant in which completion of the sale was agreed upon, he paid the balance of Kshs 10,000,000/= to National Bank of Kenya on 13<sup>th</sup> July 2012. The Plaintiff annexed copies of various correspondence with the 1<sup>st</sup> Defendant including a letter by the 1<sup>st</sup> Defendant’s dated 9<sup>th</sup> July 2012, his letter dated 12<sup>th</sup> July 2012 and the Real Time Gross Settlement (RTGS) advice effecting the said payment as evidence.

The Plaintiff averred that he was therefore taken aback when the 2<sup>nd</sup> Defendant on the instructions of the 1<sup>st</sup> Defendant proclaimed his goods of trade in his business premises located on the suit property, for alleged outstanding rent of Kshs.1,025,000/=. He annexed a copy of the said proclamation dated 5<sup>th</sup> July 2012. He denied owing any rent to the 1<sup>st</sup> Defendant, and stated that although he was a tenant of the 1<sup>st</sup> Defendant prior to execution of the sale agreement on 31<sup>st</sup> May 2010, upon execution of the said sale agreement the landlord/tenant relationship immediately ceased to exist on the completion date as he was now a purchaser.

The Plaintiff further averred that it was the 1<sup>st</sup> Defendant who had frustrated completion of the sale agreement as he had initially declined to authorize the National Bank of Kenya Ltd to release the securities, even after the Plaintiff's Advocate had issued a professional undertaking to the said bank. The Plaintiff contended that the said proclamation and the intended attachment was unlawful, illegal and unenforceable in law in the circumstances, and that he stood to suffer irreparable loss and damage should the 2<sup>nd</sup> Defendant proceed to attach his goods as threatened.

### **The Defendants' Response**

The 1<sup>st</sup> Defendants opposed the Plaintiff's application and filed a replying affidavit sworn on 27<sup>th</sup> July 2012. He stated that the Plaintiff had been his tenant for over ten years at premises on the suit property, and he annexed copies of payments made thereto. He also stated that the suit property is owned by his daughter Hariuti Waruguru Wanjohi, who appointed him as agent to look for buyer, negotiate for the sale price and to receive finances on her behalf.

He confirmed that Hariuti Waruguru Wanjohi entered into the sale agreement with the Plaintiff, and that the balance of the purchase price was paid to National Bank of Kenya. He however averred that the Plaintiff is a tenant at the suit property under a controlled tenancy under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, and that as his landlord, he was entitled to payment of the rent arrears amounting to Kshs.1,025,000/= pending completion of sale. The 1<sup>st</sup> Defendant further stated that he had sent the Plaintiff several demands for rent copies which he annexed. Further, that the Plaintiff agreed to pay the balance of the purchase price only after his goods were proclaimed on 2<sup>nd</sup> July 2012.

The 1<sup>st</sup> Defendant also denied frustrating the completion of the sale agreement and alleged that professional undertaking referred to by the Plaintiff was unprofessionally requested for by the Plaintiff's Advocates from National Bank of Kenya, as they were acting for the purchaser and not for the vendor who had charged the property to the bank. Further, that the said Bank also acted unprofessionally by demanding a professional undertaking from a firm of Advocates who were neither acting for the Bank or their client the Chargee.

### **The Submissions**

The Plaintiff's application was canvassed by way of written submissions. The Plaintiff's counsel filed submissions dated 10<sup>th</sup> October 2012 wherein he argued that there was a valid sale executed by the Plaintiff and Hariuti Waruguru Wanjohi that met the requirements of section 3(3) of the Law of Contract Act. Further, that the 1<sup>st</sup> Defendant was in breach of the said contract as he failed to adhere to the stipulated completion date and refused to release the completion documents.

The counsel further submitted that the 1<sup>st</sup> Defendant has instead instructed the 2<sup>nd</sup> Defendant to levy distress which is unlawful as the landlord/tenant relationship ceased to exist as the Plaintiff by virtue of the sale agreement became a purchaser and owner. The Plaintiff's counsel relied on Condition 6 of the Law Society Conditions of Sale in this regard. Further, that as the Plaintiff had performed all his obligations under the sale agreement, he had established a *prima facie* case, and as he was in possession of the suit premises and established his business thereon, the 2<sup>nd</sup> Defendant's actions will disrupt his business and cause him great financial loss.

The 1<sup>st</sup> Defendant filed submissions dated 19<sup>th</sup> February 2013 wherein he contended that it is not disputed that there was a sale agreement between the Plaintiff and Hariuti Waruguru Wanjohi, and that the 1<sup>st</sup> Defendant is not a party to the said agreement, nor did the vendor execute any power of attorney giving him any responsibilities or powers with regard to the said agreement. Consequently, that the said agreement cannot be enforced against the 1<sup>st</sup> Defendant and he cannot be in breach of the same.

It was further submitted that the Plaintiff was obliged to stop paying rent not upon execution of the sale agreement but upon completion, and that condition 6 of the Law Society of Kenya Conditions of sale were inapplicable as the Plaintiff took possession before the agreement for sale. Lastly, the 1<sup>st</sup> Defendant submitted that the Plaintiff had failed to demonstrate that the goods subject of the distress were goods of trade.

### **The Issues and Determination**

I have read and carefully considered the pleadings, annexed evidence and submissions made by the parties herein. The issue to be determined is whether the Plaintiff has met the threshold for the grant of the temporary injunction sought. The principles in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 1215** 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.”**

The Plaintiff relies on the sale agreement entered into with Hariuti Waruguru Wanjohi to purchase the suit property to show his rights to the same. He has provided a copy of the said sale agreement dated 31<sup>st</sup> May 2010 . It is admitted by the 1<sup>st</sup> Defendant that the said Hariuti Waruguru Wanjohi is the registered owner of the suit property, and he claims to be her agent for purposes of selling the suit property and receiving payments made. He also admits that the Plaintiff has paid the entire purchase price for the suit property, which he received as agent of the owner of the suit property. The 1<sup>st</sup> Defendant however claims that the Plaintiff still owes rent and was to stop paying rent upon completion of the sale agreement.

This Court notes that indeed as claimed by the 1<sup>st</sup> Defendant no power of attorney or other authorization to deal with suit property on behalf of Hariuti Waruguru Wanjohi has been produced in evidence. This requirement of proof of the 1<sup>st</sup> Defendant’s authorization applies equally to the tenancy over the suit property as it does to the sale agreement. Consequently, the 1<sup>st</sup> Defendant cannot therefore claim to distress rent on the strength of the said agency and claim that he is entitled to receive rent until completion of the sale agreement, yet at the same time deny that he has authority to complete the sale agreement. This Court finds this position not only to be inequitable but also unconscionable. This court also notes that the initial deposit of the suit property was paid on execution of the sale agreement on 31<sup>st</sup> May 2010, and if indeed any rent was due then it would be equitable and just for the 1<sup>st</sup> Defendant to account for the said payment.

In the circumstances I find that the Plaintiff has shown a *prima facie* case, and as he is the beneficial owner of the suit property by virtue of purchase of the same and full payment of the purchase price. In addition, the 1<sup>st</sup> Defendant has not indicated willingness or ability to compensate the Plaintiff by way of damages, and the issue of damages being an adequate remedy therefore does not arise.

I accordingly order that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant by themselves, their representatives, agents, and/or anyone working under their authority be and are hereby restrained from attaching the Plaintiff's goods of trade; or from selling, transferring or otherwise disposing of the premises known as L.R No. 209/9694 (I.R 61456) other than to the Plaintiff; or in any other way interfering with the Plaintiff's occupation and possession of the said premises pending the hearing and determination of this suit.

The costs of the Plaintiff's Notice of Motion dated 17<sup>th</sup> July 2012 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_17<sup>th</sup>\_\_\_\_ day of \_\_\_\_September\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**