



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI**

CIVIL APPEAL NO.236 OF 1999

**THE OFFICIAL RECEIVER & PROVISIONAL LIQUIDATOR
OF KENYA NATIONAL ASSURANCE CO. LTD (IN
LIQUIDATION)APPELLANT
VERSUS
JOHN GITICHE MBAORESPONDENT**

**(An appeal from a ruling and order of the High Court of
Kenya at Nairobi (the Honourable Justice O' Kubasu),
dated the 28th day of July 1999**

in

respondent nor the appellant exhibited a copy of that notice. It is not possible, therefore, to know with particularity what it contained. What we, however, discern from the averments in the respondent's plaint and affidavit in support of his application for injunction is that the respondent had offered Kshs.125 million for the said property on condition that he was allowed to take possession of it forthwith, sub-divide the same into several plots, develop roads, instal water and electricity on those plots and sell the sub-divisions, all those within three months and make payment of Kshs.125 million to the appellant within the same period. The appellant denied all that, but the court below did not believe him and ruled in favour of the respondent.

This appeal challenges the learned Judge's exercise of judicial discretion. It is trite law that an appellate court will not lightly interfere with exercise of such discretion unless it is satisfied that the court below erred in principle or that its decision is plainly wrong. The appellant complains that the evidence which the respondent presented to the trial Judge did not disclose the existence of any contractual relationship between him and the respondent capable of enforcement. His main complaint is that, while it is true that he offered the property for sale and the respondent offered to buy it no consideration flowed from the latter as purchaser to him as seller. It is also his case that the respondent has never taken possession of the suit property or undertaken any developments on the property. In his view, therefore, there was no basis for the grant of the injunction to the respondent.

A decision on this appeal turns on the examination and evaluation of the evidence which was placed before the trial Judge. As we stated earlier, the sale of the property was by tender. The terms of the tender are not before us. The respondent says he responded to the notice of tender on 29th June, 1998, and offered to purchase the property for Kshs.125 million. It has not been suggested that that price was too low. His letter of offer was not exhibited, but the appellant's letter to him dated 30th March, 1999, in a way sets out in full its import. The letter reads as follows:-

"Mr J.G. Mbao
P.O. Box 22876
Nairobi

Dear Sir

RE: KENYA NATIONAL ASSURANCE COMPANY WINDING-UP CAUSE NO. 18 of 1996 - TENDER FOR SALE OF PLOT NO. L.R. NO.8480/2 KASARANI, NAIROBI Reference is made to your letter dated 29th June, 1998; my reply thereof dated 27th July 1998, and to our meeting this afternoon. I wish to inform you that I am ready to reconsider your offer of Kshs.125,000,000/= (Kenya Shillings One Hundred and Twenty Five Million Only) on condition that you remit the full amount within a period of 90 days.

Consequently, I hereby allow you to take possession of the property and carry thereon developments as pertains to services namely roads, electricity and water and sub-divide it for sale. If by the end of 90 days you will not have paid the said amount of Kshs.125,000,000/= (Kenya Shillings One Hundred and Twenty Five Million only) I will have no alternative but to terminate my acceptance of your offer whereby you stand to lose all the monies you will have spent on the development of the said services.

Yours faithfully

Sign.

Anne N. Mwangi (Ms)

FOR: OFFICIAL RECEIVER"

The respondent must have received the letter on the same day or on the following day as by his letter to the appellant dated 31st March, 1999, he responded, in pertinent part, as follows:

"Your letter dated 30.03.99 ref B.S./31 refers I wish to confirm my acceptance of the offer

and assure you that I shall proceed with speed so that we finalise this matter quickly as per the terms contained in your letter.

Thank you.
Yours faithfully,
Sign.
J.G. Mbau."

From the contents of the two aforesaid letters there was, prima facie, offer and acceptance which by the general principles of contract constitute a contract. The subject matter of the contract was land. The price for it was agreed upon and so was the time within which payment would be made. This much Anne Njeri Mwangi, who was dealing with the respondent on behalf of the appellant, concedes in her affidavit sworn on 29th June, 1999, in answer to the application. She however, contends that in spite of that there was no agreement of sale in law which was concluded between the parties. It would appear to us that initially the appellant through her, was basing his contention on the provisions of The Law of Contract Act, Cap 23, as amended by The Statute Law (Miscellaneous Amendments) (No.2) Act 1990, on the basis of which the appellant gave a Notice of Preliminary Objection on 24th June, 1999, but which objection he dropped when he was told that the amendment, which requires an agreement for the disposal of land to be in writing signed by both parties to it, had not come into force. Miss Mwangi also contended that the respondent had not been given possession and in effect therefore, that he was not telling the truth in that regard. Miss Mwangi was relying on information she says she received from the guards on the ground.

The property, from what we can make out, was, before the respondent allegedly took possession, undeveloped. That would, perhaps, explain why the appellant accepted an offer by the respondent to provide service roads and to instal both electricity and water. There was therefore nothing on the land which would have needed guards other than, we suppose, to keep away the respondent or any other person from the property. That, on the face of it, explains why on 17th July 1999, the respondent went to court to seek its assistance. Did the respondent at any time take possession of the suit property? The appellant says he did not. The respondent says he did so immediately he accepted the appellant's offer to him of buying the property on the terms spelled out in the appellant's letter of 30th March, 1999.

Furthermore, the respondent says that he engaged various people, among them Bedan Komu Muniu, a building contractor, to fulfil his side of the bargain. Bedan Komu Muniu, swore the further affidavit in support of the respondent's application, and in it depones that pursuant to an oral agreement with the respondent entered into on 2nd April 1999, he deposited on the property four eight-ton lorry loads of ballast, 8 of sand, 100 bags of cement, 2000 running feet of timber and 1500 running feet of stones; he dug and laid the foundation of a site office, but was on 8th April, 1999, evicted from the site by guards who were acting on the appellant's instructions. He exhibited copies of photographs which although faint, show what appears to be heaps of stones, ballast and sand, and also what appears as the foundation of some house.

The appellant did not file any affidavit to controvert what Mr Muniu states in his affidavit. In view of that, there is, prima facie, some evidence that the respondent was, at some stage in possession of the suit property.

Then there is the issue of consideration. The appellant contends that no consideration flowed from the respondent to him, and that the respondent was seeking to enforce what he (the respondent) says is a contract but which lacks an essential ingredient of legal consideration. The respondent does not at all allege that he made any payment to the appellant. His case as pleaded and presented is not that he was a commission agent. He does not specifically state what consideration he gave before he was given possession.

However, from the facts, it would appear he accepted to improve the value of the suit property at his own expense, and to make it easily saleable. It appears to us that the appellant had difficulty

selling the land as a unit. The delay of about one year before responding to the respondent's offer is evidence of that. The respondent stood the risk of losing that expenditure if for any reason he would be unable to meet the deadline of 90 days the appellant gave him within which to remit the Kshs.125 M. agreed between the parties as the price for the land. That, on the face of it is some consideration. There was benefit passing to the appellant. There is no indication as yet as to whether the respondent was going to be compensated for the said developments upon paying the purchase price to the appellant. The trial Judge did not allude to the fact that on the terms agreed upon between the parties the respondent was required to spend his own money to develop the suit premises. Nor is there any evidence to suggest that the expenditure would be treated as additional consideration. He only referred to it merely as a risk, but did not indicate its legal effect. We suppose the matter will be canvassed fully at the trial when the parties and any witnesses they might call will be examined and cross-examined on the matter if such a need will arise. Suffice it to state here that, Mr Njogu for the appellant cannot possibly be right when he submitted before the court below and before us that the respondent failed to provide any evidence of a contract and consideration for it from him.

The often cited case of Giella v. Cassman Brown, and Co. Ltd [1973] EA. 358, sets out the general principles for the grant of an interlocutory injunction which principles we think were satisfied by the respondent. And this court's decision of Kamau Mucua v. The Ripples Ltd. Civil Application NAI. 186 of 1992 (unreported) deals with the grant of mandatory interlocutory injunctions. Mandatory injunctions, at interlocutory stage, are granted in special circumstances only. In the present case the appellant by his letter dated 8th April 1999, sought to cancel the respondent's "offer ... with immediate effect" and to withdraw his letter of 30th March, 1999, which we reproduced earlier. The reason for doing so, he said, was "due to unforeseen circumstances" which he did not disclose.

Yet six or so days later he addressed another letter to the respondent, dated 14th June, 1999, in the following pertinent terms:

"Reference is made to your tender bid for Kshs.125,000,000/= (Kenya Shillings One hundred and Twenty Five Million only) dated 9th June, 1998 for the purchase of the above mentioned property situated in Kasarani, Nairobi.

I wish to inform you that I am ready to reconsider your offer on condition that you remit Kshs.125,000,000/=(Kenya Shillings One Hundred and Twenty Five Million only) in full within 120 days as per your verbal request to the Official Receiver to give you more time.

My two letters ref: B.S./31 dated 30th March, 1999, and 8th April, 1999 are hereby withdrawn.
Yours faithfully, Sign Anne N. Mwangi (Ms)

FOR: OFFICIAL RECEIVER

Clearly, when the appellant wrote that letter he was trying to renege from the earlier agreement without stating why. The respondent could not have made the alleged verbal representations, because if indeed he had done so he would not have decided to go to court as he did, three days thereafter.

It is the appellant's seemingly slanted behaviour which justified the grant of a temporary mandatory injunction. The appellant knew the respondent had taken possession of the suit property, and that would explain why guards were stationed on the land, presumably to evict and keep away the respondent, or so we think. It is for the foregoing reasons that we agree with Mrs Nyaencha for the respondent that special circumstances exist for granting a temporary mandatory injunction. The respondent needed not to have prayed for specific performance of the sale agreement in order to become entitled to the temporary relief.

The upshot of the foregoing is that this appeal lacks merits and is dismissed with costs.

Dated and delivered at Nairobi this 7th day of July, 2000.

A.A. LAKHA

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

M. KEIWUA

.....

JUDGE OF APPEAL

**I certify that this is a
true copy of the original.**

DEPUTY REGISTRAR