



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 529 of 2010

MOTOR MEC MOTORS LIMITED PLAINTIFF

VERSUS

THE BOARD OF TRUSTEES

(Sued on behalf of the NATIONAL

SOCIAL SECURITY FUND) DEFENDANT

RULING

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The application before the Court is made by way of a Chamber Summons dated 3rd August, 2010, and is taken out under **Section 3A** of the **Civil Procedure Act** and **Order XXXIX Rules 1 (a), 2 (1) and (2), 3 and 9** of the **Civil Procedure Rules**. The Applicant thereby seeks an order for a temporary injunction to issue restraining the Defendant either by itself, its officers, servants and/or agents or otherwise howsoever from distressing, repossessing, attaching, selling and/or interfering with the Plaintiff's quite enjoyment of its tenancy in all that property commonly described as L.R. No. Kitisuru/101/159 C pending the hearing and determination of this suit. The Applicant also prays that costs of the application be provided for.

The application is supported by the affidavit of Yusuf K. Sayani, the Plaintiff's Managing Director, and is based on the grounds that –

- (a) *The Plaintiff is the legal tenant/proprietor of the suit property having accepted an offer by the Defendant to purchase the suit property on a tenant purchase basis.*
- (b) *The Plaintiff has already substantially invested the suit property having deposited with the Defendant a total sum of Kshs.2,190,000.00 towards the purchase price and it has further proceeded to improve the same by construction works.*
- (c) *The Defendant continues to make unilateral decisions adverse to the Plaintiff who is not in any arrears.*
- (d) *The Respondent has failed, without justifiable reasons, to prepare the promised tenancy Purchase Agreement further jeopardizing the Applicant's contractual relationship.*
- (e) *The Defendant intends, unless restrained by this Court, to make good its threat of repossessing the suit property or levy distress for the purported rent arrears and to continue to interfere with the Plaintiff's quite enjoyment of the suit property.*
- (f) *The Defendant's acts, unless restrained by this Court, will cause the Plaintiff suffering and irreparable loss and damage.*

On the hearing date, Mr. Masika appeared for the Plaintiff while there

was no attendance by or representation for the Defendant. On the Court record, however, is an affidavit sworn by Evan Nandoya Misingo, a Process Server of this Court. It shows conclusively that the Defendants were served on 10th August, 2010. Despite that service, the Defendants did not file any replying affidavit or Grounds of Opposition, nor did they attend Court on the hearing date. Being of the view that they were served in sufficient time to attend Court, but failed to do so without any explanation, the Court decided to proceed *ex parte*.

In his address to the Court, Mr. Masika highlighted the grounds upon which the application is based and emphasized that the Plaintiff has invested heavily in the suit property, having taken possession thereof in 2004. The Defendant has continued to make unilateral decisions which are adverse to the Plaintiff's interests and in the process has refused to avail the Plaintiff the

Tenant/Purchase Agreement and is therefore in breach of the said Agreement. The suit property was supposed to be availed at 30% level of completion but the Defendant availed it as a shell at 20% level of construction. To-date the roof and drainage have not yet been properly done.

Mr. Masika further argued that the Defendant had given the Plaintiff a Notice from 8th June, 2010 alleging that the Plaintiff was in arrears. However, he submitted that the Plaintiff is not in any arrears especially as the Defendant has not availed the Purchase Agreement for execution. He further contended that the Plaintiff has satisfied all the conditions laid out in **GIELLA v. CASSMAN BROWN & CO. LTD. [1973] 358** and urged the Court to find that the Plaintiff had made out a *prima facie* case. He further submitted that if the orders sought are not granted, the Plaintiff would suffer irreparable loss, and that the balance of convenience lies in favour of granting the said orders. He also referred the Court to **LUCY NJOKI WAITHAKA v. ICDC, HCCC NO. 321 OF 2001, Milimani Commercial Court**, and also **KENNEDY MWITA & ANOR.v. THE BOARD OF TRUSTEES, NSSF HCCC NO. 701 OF 2004, Nairobi High Court**.

After considering the pleadings and submissions of Learned Counsel together with the authorities cited therein, I find that the only issue for determination is whether the Plaintiff/Applicant has established that it is entitled to an interlocutory injunction as prayed.

The conditions for the grant of an interlocutory injunction were clearly spelt out in **GIELLA'S CASE (Supra)** in which the then Court of Appeal for East Africa held that the first condition to be satisfied is that an Applicant must show a *prima facie* case with a probability of success. Secondly, the Court further stated that an interlocutory injunction would not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Finally, if the Court is in doubt, it should decide an application on the balance of convenience.

With regard to the first condition, the Plaintiff has alleged that there was an Agreement between it and the Defendant to purchase the suit property in the Plaintiff's capacity as a tenant purchaser. To-date, however, the Defendant has not yet availed a copy of the Agreement even though the Plaintiff was given possession of the suit property in 2004 and has paid substantial amounts of money towards the purchase price. In its application, the Plaintiff has attached copies of receipts of monies paid to the Defendant and these receipts demonstrate beyond peradventure that the money was paid in respect of the suit property. The Plaintiff has now been in occupation for about six years and yet the Defendant has not supplied a copy of the Tenant/Purchase Agreement to-date. As the Defendant has not filed any documents denying these allegations, I find that the Plaintiff has made out a *prima facie* case with a probability of success. Secondly, the Defendant has given the Plaintiff hope that it would be the owner of a home of its own which expectation would be only met by specific performance. It is doubtful that a monetary compensation would assuage such an expectation. Finally, on the facts of this case, and given the trouble to which the Plaintiff has gone to acquire that home, and granted further the fact that the Defendant has not opposed the Plaintiff's application, I find that, the balance of convenience tilts in favour of granting the Plaintiff the orders which it has sought.

For the above reasons, I order that –

1. ***A temporary injunction be and is hereby issued restraining the Defendant either by itself, its officers, servants and/or agents or otherwise howsoever from distressing, repossessing, attaching, selling and/or interfering with the Plaintiff's quiet enjoyment of its tenancy in the suit property, to wit, L.R. No. Kitisuru/101/159 C pending the hearing and determination of this suit.***

2. *The costs of this application be in the cause.*

Orders accordingly.

Dated and delivered at Nairobi this 20th day of August, 2010.

L. NJAGI

JUDGE



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