Fischer v National Bank of Kenya Limited & another (Civil Case E043 of 2021) [2021] KEHC 66 (KLR) (Commercial and Tax) (24 September 2021) (Ruling)

Neutral citation: [2021] KEHC 66 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E043 OF 2021

A MABEYA, J

SEPTEMBER 24, 2021

BETWEEN

MARY KISEKO FISCHER ..... PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED ..... 1ST DEFENDANT

KENCOM SACCO SOCIETY LIMITED ..... 2ND DEFENDANT

RULING

1. Before Court is an application dated 20/1/2021. It is brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 Rules 1, 2 & 3 and Order 51 Rules 1 & 3 of the *Civil Procedure Rules,2010*.

2. The Motion seeks an order of injunction to restrain the 1st respondent from demanding payment, harassing, intimidating or in any way interfering with the applicant's peaceful occupation of house no. 81 erected on the property known as L.R. No. 12825/195 situated in Runda ("the suit property") pending the hearing and determination of the suit.

3. The Motion was supported by the affidavit of Mary Kiseko Fischer sworn on 20/1/2021. The applicant's case was that vide an agreement dated 26/11/2013, she purchased an off plan house from the 2nd respondent at a consideration of Kshs. 28,000,000/=, which she fully paid on various days, to wit, 30/7/2013, 3/9/2013, 3/6/2015, 2/8/2016 and 6/9/2016 as per the agreement. Upon completion of the house, she signed a lease agreement and forwarded it to the 2nd respondent together with stamp duty for purposes of registration. That to-date she has not received the registered lease.

4. That unknown to her, the 2nd respondent subsequently entered into a loan agreement with the 1st respondent and thereby charged the suit property. That at the time of the purchase, the suit property was free of encumbrances as evidenced by the search results of 23/7/2013.

5. That by a letter dated 25/11/2020, the 1st respondent wrote to her and demanded full payment of the purchase price of Kshs. 28,000,000/=. The 1st respondent also threatened to institute recovery measures including re-possession and sale of the suit property. That although she had made full payment of the purchase price, the 1st respondent had declined to partially discharge the suit property.

6. The 1st respondent opposed the Motion vide its affidavit sworn by Agnes N. Mutisya on 18/2/2021. She stated that the 2nd respondent took out 2 loans with the 1st respondent vide letters of offer dated 9/9/2013 and 11/12/2013 for Kshs. 1,400,000,000/= and Kshs. 100,000,000/=, respectively. That the loan was for the construction of 113 units in Kiambu ("the project").

7. That it was a term of the loan agreement that all proceeds from the sale of the houses in the project were to be deposited into the 1st respondent's account. That the applicant did not make any payments to that account for the purchase of the suit property. That in the circumstances, the 1st respondent could not discharge the title document for the subject house.

8. In her further affidavit sworn on 12/3/2021, the applicant maintained that by the time the 2nd respondent obtained the first loan vide the letter of offer dated 9/9/2013, she had already signed the letter offer of 5/7/2013 and made part payment of Kshs. 5,600,000/= on 3/7/2013 and 3/9/2013 to the 2nd respondent.

9. In this regard, the applicant contended that any agreement between the two respondents did not bind her or affect her interest in the suit property.

10. The parties filed their respective submissions which the Court has carefully considered as well as the depositions of the respective parties.

11. The conditions for consideration in granting an injunction is now well settled as set out in the case of *Giella vs Cassman Brown & Company Limited* . First, an applicant must establish a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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.

12. On prima facie case, the applicant contended that she purchased an off plan unit known as House No. 81 erected on the suit property L.R. No. 1285/195 from the 2nd respondent. The applicant produced an agreement dated 26/11/2013 as "MKF-01". She also contended that she paid the full purchase price of Kshs. 28,000,000/= for which she produced copies of RTGS as "MKF-02". Upon completion of the house, the applicant and 2nd respondent signed a lease agreement for purposes of registration. The lease agreement was produced as "MKF=03".

13. From the evidence on record, the Court is satisfied that the applicant purchased the suit property from the 2nd respondent. A search produced by the applicant proved that as at the time the applicant entered into the subject agreement, the loan between the respondents had not been advanced. The suit property was unencumbered.

14. The gist of the dispute between the applicant and 1st respondent is that the 1st respondent declined to discharge the title for the suit property even after the applicant had fully paid for it. Instead, the 1st respondent demanded for full payment of the purchase price vide its letter dated 25/11/2020.

15. It was the 1st respondent's contention that the 2nd respondent obtained two loan facilities from it, on the understanding that any purchase of the units/houses would be paid directly to it. The applicant

on the other hand argued that the loan agreements between the respondents were entered subsequent to the house purchase that she made.

16. It is clear that the applicant performed due diligence before the purchase of the suit property. She confirmed that the title was free of encumbrances. She produced the search results for 23/7/2013 marked as "MKF-6".

17. The Court has seen the said documents. The 1st respondent admitted that the 1st loan facility was obtained by the 2nd respondent vide a letter of offer dated 9/9/2013. It is crystal clear that the loan agreement between the respondents was entered after the applicant's purchase of the suit property. Further, the applicant was not a party to the loan agreements and hence cannot be bound by any terms therein. The same was not brought to the applicant's knowledge so that she would be bound by its terms on the payment of the purchase price.

18. It is this Court's view that, it was upon the 1st respondent to carryout due diligence when engaging with the 2nd respondent. It should have confirmed that none of the units had been sold by the 2nd respondent. There was no evidence to show that the 1st respondent carried out any such due diligence. On a prima facie basis, the applicant had an interest by the time the loan agreements between the respondents was being entered into.

19. I disagree with the 1st respondent's submission that the applicant ought to have paid the purchase price to it. How could the applicant be expected to pay the purchase price to a third party who at the time of purchase was a stranger to her? How could the applicant know that she was supposed to pay the purchase price to the 1st respondent who had not brought to her attention its interest in the project or the suit property in particular?

20. The question that arises is whether the terms of the loan agreement between the respondents would apply to the units already paid for before the loan agreement. It is quite evident that the applicant was not aware of the existence of any loan agreement between the respondents. It is the Court's view that, the 1st respondent cannot shift the 2nd respondent's obligations under the loan agreement to the applicant, who was not privy to the same.

21. On the basis of the foregoing, the Court is satisfied that the applicant has established a prima facie case with a probability of success.

22. On whether the applicant will suffer irreparable harm which will not be adequately compensated by an award of damages, the answer is in the affirmative. Should the 1st respondent proceed to sell the subject house on account of the 2nd respondent's default, the applicant will lose the suit property which she has already fully paid for. It is thus imperative that the subject property is preserved until the suit is heard and determined.

23. In view of the foregoing, I need not consider the third limb of the Giella vs. Cassman Brown Case. However, if the Court's view was sought, the balance of convenience lies with granting the injunction sought. The applicant paid in full the purchase price long ago and should continue to be in occupation of the suit property pending the trial.

24. The upshot is that the application is meritorious and I allow the application in terms of prayer numbers 3 and 5 of the Motion.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE