



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 422 OF 2018

HIGH GROVE HOLDINGS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

PRAVINKUMAR JAYCHANDRA DAVE.....1ST DEFENDANT/RESPONDENT

ELIZABETH WANJIRU DAVE.....2ND DEFENDANT/RESPONDENT

SAIMON NTASIKOI NOONKANAR.....3RD DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated 18th December 2018, brought under the provisions of; Order 40 Rule 1 and 4 and Order 51 Rule 1 of the Civil Procedure Rules, Section 63(e) Civil Procedure Act and under the inherent powers of the Honourable court.

2. The Applicant is seeking for orders that, pending the hearing and determination of the suit, the court issue a temporary injunction and conservatory order restraining and/or barring the 1st and 2nd Defendants either by each one of them or jointly, or whether by themselves, their employees, servants, agents or nominees or any other person claiming through them from disposing, assigning, diminishing, transferring, alienating or otherwise dealing in any manner whatsoever with Villa Number Highgrove Village, Lower Kabete Road on Land Reference Numbers 4928/5 and 2951/53 (herein “the suit property”) together with one (1) share in the Management Limited.

3. Further the 1st and 2nd Defendants do deposit the sum of Kshs. 15,900,000.00 into court, being the amount due and owing from the Defendants to the Plaintiff with respect to the suit property and further deposit the sum of Kshs. 17,100,000.00 being the monthly rent of Kshs. 450,000.00 due on the suit property.

4. That an order be issued that the 3rd Defendant do provide the particulars of the purported sale of the suit property. The costs of the application be in the cause.

5. The application is premised on the grounds on the face of it and an affidavit dated 18th December 2018, sworn by the Plaintiff’s director Kirit Bhagwandas Kanabar. He deposed that in the year 2012, the Plaintiff developed inter alia twenty four (24) residential houses for sale on the property; L.R. No. 4928/5 and 2951/54 situate on Lower Kabete Road, Nairobi. By agreement for sale dated 6th July 2015, the Plaintiffs sold the suit property to the 1st and 2nd Defendants for the sum of; Kshs. 135,500,000. The 1st and 2nd Defendants paid the purchase price as follows:-

Date Amount Paid by:

(Kshs.)

11.2.2015 15,900,000 Saimon NtasikoiNoonkanar

17.2.2015 45,000,000 PJ Dave Flowers Limited

22.6.2015 72,600,000 Wanjiru Properties

6. In addition thereto, the Plaintiff sold Villas Nos. 23 and 28 to Hitesh Pravin Dave and PJ Dave Flowers Limited respectively. The payments for Villa No. 23 were made as follows:-

Date Amount paid by:

(Kshs.)

13.7.2012 20,000,000 PJ Dave Flowers Limited

1.11.2012 20,000,000 PJ Dave Flowers Limited

9.1.2013 3,000,000 PJ Dave Flowers Limited

2.5.2013 100,344,000 PJ Dave Flowers Limited

9.7.2015 10,000,000 PJ Dave Flowers Limited

7. Similarly the payments for Villa No. 28 were paid as follows:

Date Amount Paid by:

(Kshs.)

16.12.2014 13,000,000 PJ Dave Flowers Limited

18.12.2014 5,000,000 PJ Dave Flowers Limited

13.2.2015 161,500,000 Hitesh Dave

8. Subsequently, by an email dated 26th May 2015, the 1st and 2nd Defendants confirmed the schedule of payments save for payment of Kshs. 20,000,000 with respect to Villa No. 23, which payment was later traced as it had been paid through Taibjee and Bhalla Advocates. Having received the purchase price in full, the Plaintiff duly transferred and handed over all the three (3) Villas to the respective purchasers.

9. However on 25th August 2018, Mr. Kirit was arrested by Mr. Linus Lotulya and Mr. Julias Mwakio on the grounds that the Plaintiff had allegedly agreed to sell the subject suit property to, the 3rd Defendant herein Mr. Saimon Ntasiroi Noonkanar but had not given him the property. The deponent avers that he does not know the 3rd Defendant and neither has he ever entered into any agreement to sell a property to him. Therefore he was shocked to be charged in the Magistrate's Court in Kajiado case No. 1250 of 2018, for inter alia, obtaining money by false pretences.

10. The Plaintiff avers that if the allegations by the 3rd Defendant are correct, then the 1st and 2nd Defendants have never paid for the suit property and the sale agreement with them needs to be rescinded. In the alternative, it is necessary for the 3rd Defendants to explain the circumstances under which the payment was paid into the Plaintiff's account as consideration towards the purchase price for the suit property by the 1st and 2nd Defendants. However believes that the Defendants with intent to defraud and injure it, have conspired and combined together to defraud it.

11. The Plaintiff averred that the relationship between him and the 1st and 2nd Defendants and their son Hitesh Pravin Dave has been cordial until a dispute arose in 2017. As a result thereof, the 1st and 2nd Defendants and their son accused him of various acts of wrong doing resulting in his arrest and charge in Kiambu Magistrate's Court criminal case No. 1554 of 2017. That Mr. Kirit's son Yogi Kirit Kanabar was also arrested by the same investigating officer, Linus. Further pursuant to a complaint raised by the Defendants actions, the Director of Public Prosecution called for the file in Kiambu Criminal Case No. 1554 of 2017 and his son was released without any charges being preferred and immediately after the British High Commission and Nation Television took up the issue of his arrest.

12. The Plaintiff averred that as a dispute has arisen with respect to the agreement for sale dated 6th July 2015, the court ought to issue the restraint orders prayed for herein, pending determination of the suit and reference of the dispute to Arbitration pursuant to the "Special Condition R" in the Agreement executed by the parties.

13. However the 1st and 2nd Defendants in response to the application filed a preliminary objection dated 20th December 2018, pursuant to Article 162 (2) of the Constitution of Kenya, 2010, Section 6 of the Arbitration Act, No. 4 of 1995, Section 12 and 15 of the Civil Procedure Act and all the enabling provisions of the law.

14. The preliminary objection is based on the grounds that, the court is devoid of jurisdiction to hear the Plaintiff's application and the suit, as the court empowered to hear and determine the issues and/or grant the orders sought, is the Environment and Land Court established under Article 162 (2) (b) of the Constitution as read together with the Environment and Land Court Act (No. 19 of 2011). Further by reason of the Arbitration clause (Clause R) in the sale Agreement dated 6th July 2015, between the Plaintiff and the 1st and 2nd Defendants which form the subject of the dispute between the parties, the court lacks the requisite jurisdiction as aforesaid. That the Plaintiff in paragraph 24 of the supporting affidavit confirms that, the sale agreement contained an arbitration clause mandating parties to go for Arbitration in the event of a dispute.

15. It was further argued that, the property which is the subject of the suit, is located in Lower Kabete, Kiambu County, where the 1st and 2nd Defendants reside by dint of Sections 12 and 15 of the Civil Procedure Act, ceases the jurisdiction of the court. Further, the orders sought by the Plaintiff deal with the use, occupation and ownership of land and/or property which falls under the purview of the Environment and Land Court. Therefore based on the foregoing, the suit deserves to be struck out with costs to the Defendants.

16. The 1st Defendant with the authority of the 2nd Defendant in addition to the preliminary objection swore a Replying affidavit dated 21st February 2019, and literally reiterated the grounds in support of the preliminary objection. However he averred that the 1st and 2nd Defendants adhered to the terms of the sale agreement, paid the purchase price in full in accordance to the terms of the agreement, whereupon the Plaintiff transferred the property to them and executed a lease in their favour. That the Plaintiff has never until the date herein issued them with a notice to complete and/or rescind the contract at all. Therefore the application herein is surprising and the entire suit baffling fuddling as they have been in quiet possession and occupation of the subject Villa Number 27, for more than three years now. Thus by accepting and acknowledging the full purchase price, transferring the property to the purchasers, failing to issue any notice and/or claim non-payment before the transfer of the property and the registration of the lease over the property, the Plaintiff is estopped from disputing the completion of the sale.

17. The 1st and 2nd Defendant averred that they are strangers to the Plaintiff's statements with regard to its dealings with the 3rd Defendant. That a casual look at the emails annexed to the application reveals that none of them refer to, and/or mention the Plaintiff and the 1st and 2nd Defendant. Neither is any of the emails authored by and/or sent to the Plaintiff by the 1st and 2nd Defendant. The alleged emails cannot be presented by a third party who is not the author. Further the deponent of the affidavit in support of the Application has been charged in Kiambu Law Courts in Criminal Case No. 1554 of 2017 for an offense against one Hitesh P. Dave, and P.J. Dave Flowers Limited that are two separate and distinct persons from the 1st and 2nd Defendants. The 1st Defendant is a director of PJ Dave Flowers Limited and a prosecution witness in that criminal case.

18. That the Plaintiff's persistence attempt to link the 1st and 2nd Defendant to his woes seems like a pattern in a bid to exhort pressure and/or interfere with the ongoing criminal suits against him by filing civil proceedings against him as a witness in one such matter and the 3rd Defendant who is a complainant in another. There are adequate procedures and provisions founded under the Kenyan law and the Constitution that are readily available to any party feeling aggrieved by the instigation of Criminal proceedings against them.

19. As a result of the aforesaid, the 1st and 2nd Defendants invited the Honourable court to dismiss the Plaintiff's application dated 18th December 2018 and/or strike it out due to the Plaintiff's conduct with the entire suit, with costs to the Defendants at a higher rate.

20. However the Plaintiff filed a supplementary affidavit dated 28th February 2019, sworn by Kirit Bhagwanji Kanabar who deposed that it is obvious that the Defendants are deliberately skirting over the issues raised by the Plaintiff. That whereas the issue revolves around a payment of Kshs. 15,900,000.00 made by the 3rd Defendant, the Defendants have not provided any evidence that the payment was at his behest. That unless proven otherwise and in view of the allegations made by the 3rd Defendant in Criminal Case 1250 of 2018, it must be assumed that the payment of Kshs. 15,900,000.00 was not from the 1st Defendant. In the circumstances, it is only just and fair for an injunction to issue as prayed.

21. The 3rd Defendant filed grounds of opposition dated 21st February 2019 and argued that, the Applicant has not shown sufficient grounds to warrant grant of interim order of injunction. That the Plaintiff received Kshs. 15,900,000.00 from him hence the burden is on it to justify otherwise. That the prayers sought in the application against the 3rd Defendant cannot be granted at this stage and that the Plaintiff has peddled falsehoods in the application. Therefore as the Plaintiff has not made out a prima facie case, the application should be dismissed.

22. The parties disposed of the application by filing written submissions. The Plaintiff submitted that the key issues for determination are whether;

(a) *this matter ought to be referred to arbitration;*

(b) *the Applicant has satisfied the test to be awarded the temporary injunction orders sought; and*

(c) *the court should proceed to grant the orders sought.*

23. It was submitted that the 3rd Defendant who is a necessary party in this suit, was not a party to the agreement for sale between the Plaintiff and the 1st and 2nd Defendants. He cannot therefore be compelled to go before an Arbitrator and cannot be bound by the Award thereof. Therefore the Arbitral clause cannot be performed. Reference was made to the case of; Damaris Wanjiru Nganga vs Loise Naisiae Leiyen & KCB (2015) eKLR, was relied on where the court refused to refer a matter to Arbitration because although the second Defendant was a necessary party in the dispute, it was not a party to an Agreement between the Plaintiff and the 1st Defendant. The Plaintiff further relied on Court of Appeal decision in the case of; Eunice Soko vs Suresh Parmar & 4 Others (2017) eKLR.

24. The Plaintiff submitted that a thorough review of the pleadings herein reveals that the Plaintiff is raising, tortuous claims against the Defendants that are not covered within the provisions of the agreement for sale and which can only be resolved through the court process and not Arbitration. It is imperative for the Honourable court to note that under Section 35 of the Arbitration Act, any Arbitral award may be set aside on the basis that the Arbitral tribunal lacked the jurisdiction to hear and determine the dispute. As is the case herein, it will be improper for the court to refer the matter to Arbitration with the full knowledge that the Arbitral Tribunal lacks the jurisdiction to hear and determine the dispute given the third party involved. The provisions of; Order 40 Rule 1(a) of the Civil Procedure Rules was cited and relied on.

25. In further submissions, the Plaintiff cited and relied on the case of; the Siskena (1977) 3 AER where the court held that the right to obtain

an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action and is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties. That similarly in the case of; Kenleb Cons Ltd vs New Gatitu Service Station Ltd & Another (1990) KLR 557 Justice Bosire JA as (he then was) held that, “to succeed in an application for injunction, an applicant must make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right, legal or equitable which requires protection by injunction.” The court was also referred to the cases of Giella vs Cassman Brown & Co. (1973) EA 358 and Appeal in Nguruman Ltd vs Jan Bonde Nielsen & 2 Others (2014) eKLR, to support the principles that govern the grant of an injunction order. Similarly the case of; Mrao Ltd vs First American Bank of Kenya & 2 Others (2003) EKLR, whereas prima facie case was defined.

26. Finally the Plaintiff submitted that given piece of land and the annexures thereto are unique and no one parcel can be equated in value to another and though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. That damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach as is the present suit. Reference was made to the case of; JM Gichanga vs Co-operative Bank of Kenya Ltd (2005) eKLR.

27. However, the 1st and 2nd Defendants reiterated that, the Plaintiff is seeking for rescission of the sale agreement, as well as claiming rent over the property which is in the jurisdiction of the Environment and Land Court. That the locus classicus on jurisdiction is the celebrated case of; Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (1989) KLR 1, where Justice Nyarangi JA (as he then was) held that:-

“a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law does not sit in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

28. The 1st and 2nd Respondent argued that the Plaintiff has failed to prove all the allegation herein as required under section 107 of the Evidence Act, and/or establish the irreparable harm, loss or damage it shall suffer, which cannot be compensated by way of damages, should the orders sought in the application not be granted.

29. Finally the 3rd Defendant submitted that the claim against him cannot be granted at this stage as the Plaintiff has not met the threshold set in granting injunction and/or established a prima facie case against him, having admitted that it received Kshs. 15,900,000 from him as purchase price for the suit property. The said amount has not been refunded, neither has the Plaintiff transferred the property him. Therefore the balance of convenience lies in his favour.

30. At the close of the arguments and the submissions by the parties, I have considered the application and I find that several issues have arisen and among those issues is the issue as to whether the court has jurisdiction to hear and determine this matter and/or whether this matter should the suit be referred to the Environment and Land Court and/or be struck out. Apparently the issue of jurisdiction entails twin arguments of whether the court should hear the matter as aforesaid and/or whether it should be referred to Arbitration.

31. The law is settled, that jurisdiction is everything and without it the court must down its tool (see; Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (supra)). It is therefore paramount that the court determines the issue of jurisdiction before delving into the merits or otherwise of the application. To determine the issue, I have taken into account the documents annexed to the affidavit sworn in support of the application. I note a copy of the sale agreement dated 6th July 2015, executed by the parties in relation to the subject matter of the suit property; being Villa No. 27, Highgrove Village, Lower Kabete Road on L.R. No. 4928/5 and 2951/54, Nairobi, together with one (1) share in the Management Limited.

32. I note there from that, clause A of the subject agreement describes Plaintiff as “the vendor” while the 1st and 2nd Defendants are described as “the purchasers”. This position is supported by the pleadings and/or the facts in the supporting affidavit. The Plaintiff states at paragraphs 5, 6, 7 and 12 of the Plaintiff and paragraphs 2, 4, 5 and 12 of the supporting affidavit that, it developed 24 units inclusive of the subject suit property and sold and transferred the same to the 1st and 2nd Defendants. The first schedule to the agreement clearly describes the parties and the purchase price and the mode of payment. The agreement is duly signed by the respective parties and the signatures properly witnessed. There is no dispute that the agreement was entered into by the parties.

33. The dispute as I understand, relates to whether; the full purchase price for the suit property was paid and if so, by who and/or whether the sum of Kshs 15,900,000 allegedly paid by the 3rd Defendant was paid by him on behalf of the other Defendants or on his own behalf or on behalf of the 1st and 2nd Defendants as the purchasers of the subject suit property. In the light thereof, the question that arises therefore is whether, the issue(s) in dispute are within the jurisdiction of the High Court or the Environment and Land Court.

34. The Supreme Court in the case of; Macharia and Another vs Kenya Commercial Bank Ltd & 2 Others (Civil Appl. No. 2 of 2011) (UR), had this to say on jurisdiction:-

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a Court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature will be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.” (Emphasis added).

35. In that regard, jurisdiction of the High court is provided for under Article 165 of the jurisdiction of Kenya and subsection (3) and

(6) provides for the jurisdiction thereof states as follows:-

“(3) Subject to clause (5), the High Court shall have--

(a) unlimited original jurisdiction in criminal and civil matters

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of--

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court”.

36. To the contrary the Environment and Land Court is established under Article 162 (2) which stipulates that:-

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(b) the environment and use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and function of the courts contemplated in clause (2)”.

37. In furtherance of the above provisions Parliament enacted

Environment and Land Court Act, 2011 which provides for the jurisdiction of the court under section 13 as follows:-

“(13)(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land”

38. It is therefore clear from the provisions above that, the court with exclusive right to deal with the issue of; use, occupation and/or ownership of the land, is the Environment and Land Court. Therefore this matter should have been filed in that court. On that point alone I uphold the objection raised by the 1st and 2nd Defendants that this court has no jurisdiction to hear and determine the suit herein and the accompanying application.

39. Be that as it were the Plaintiff/Applicant further argues the court ought to issue the restraint orders prayed for herein, pending determination of the suit and reference of the dispute to Arbitration pursuant to the Special Condition R in the Agreement. However I find that under Section 13 (7) of the Environment and Land Court Act, the Environment and Land Court court has powers as stipulated here below;-

“ (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution; (

h) declaration; or

(i) costs” (Emphasis added).

40. Therefore with utmost due respect, the argument justifying the filing of the matter in the High court, Commercial & Tax Division herein, on the ground that the suit property should be preserved pending the hearing and the referral of the dispute to Arbitration does not lie. Neither does that argument clothe the court with jurisdiction where in the first instance it does not have any. In that regard, it is noteworthy that this court can only grant interim measure of protection under Section 7 of the Arbitration Act No. 4 of 1995. However such measures can only be granted by the court where it has jurisdiction over the subject matter as provided for under Article 165 (3) of the Constitution referred to herein. Even then the Applicant did not invoke the provisions of; Section 7 of the Arbitration Act No. 4 of 1995.

41. Finally the court Defendant notified the court that the parties agreed to refer any dispute in relation to the agreement to Arbitration. The Plaintiff does not dispute that the dispute should be referred Arbitration. In that case based on the provision of Section 10 of the Arbitration Act No. 4 of 1995 this court has no jurisdiction to hear and determine this matter. Similarly, having ruled that, the matter should be heard by the Environment and Land Court, then the issue of referral can only be dealt with at the hearing of the application before that court.

42. In view of the above finding, I shall not delve into the merits of the matter, I down my tool. Therefore the upshot of all this is that, I find the court lacks jurisdiction to hear the suit and the subject application. I order the matter be transferred to Environment and Land Court. I therefore uphold the Preliminary objection raised by the 1st and 2nd Defendants with costs in their favour.

43. It is so ordered.

Dated, signed and delivered on this 25th day of September 2019 in an open court in Nairobi.

G. L. NZIOKA

JUDGE

In the presence of;

Mr. Husa for Mr. James Singh for the Plaintiff/Applicant

Ms. Ndumia for Mr. Murage for the 1st and 2nd Defendants/Respondents

Mr. Odongo for Mr. Itaya for the 3rd Defendant/Respondent

Dennis -----Court Assitant