



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.273 OF 2016

**UNITED WOMEN CO-OPERATIVE SAVINGS
AND CREDIT SOCIETY LIMITED.....PLAINTIFF**

VERSUS

CROSSLINK INVESTMENTS LIMITED.....1ST DEFENDANT

PETER NJUGUNA KIMANI AND KIARIES T/A

KIMANI, KIARIE & ASSOCIATES.....2ND DEFENDANT

RULING

1. The Application for my determination is the Notice of Motion of 11th July 2016 for two substantive prayers which are sought in the alternative:-

4. THAT the 1st and 2nd Defendants/Respondents be ordered to provide a security for the decree that might be passed against them, by obtaining an irrevocable performance Bond of Kshs.23,500,000.00 from a Bank or Insurance Company pending the hearing and determination of the suit;

5. THAT in alternative to order 4 above, the 1st Defendant/Respondent, its agents and employees be restrained by way of injunction from selling, charging or in any way disposing LR No.109/5 Ruiru measuring approximately 14.47HA (subdivided into 122 plots) pending the hearing and determination of the suit.

2. The Application is said to find its domicile in Sections 1A, 1B, 3, 3A and 63 of the Civil Procedure Act and Order 39 Rule 5 Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules.

3. It is common ground that on 26th September, 2014, the Plaintiff and 1st Defendant entered into an Agreement for sale of L.R No.169/5 Ruiru (hereinafter the suit property). The purchase price was Ksh.235,600,000/= and a deposit of 10% of the purchase price was paid to the 2nd Defendant by Advocate for Plaintiff, the 2nd Defendant being the Advocate for the 1st Defendant.

4. It is also common ground that the completion date for the Contract was 90 days from the date of the Agreement or such other date as the parties would in good faith negotiate and agree. The date of the

Agreement was 26th September 2014.

5. Leaving out details which in my view are unnecessary for now, the Plaintiff is aggrieved by the manner in which the 1st Defendant issued a completion notice herein. It is argued by the Plaintiff that the 1st Defendant could not have properly issued a completion notice when the 1st Defendant itself was not able and ready to complete the transaction. That this would be in breach of condition 17(1) of The Law Society conditions of sale whose terms were incorporated into the Agreement. It is alleged that the 1st Defendant had not obtained the Land Control Board Consent and was therefore not in a position to complete.

6. It is further alleged that the parties to the Agreement met even after the issuance of the completion Notice and it was agreed that the completion Notice dated 31st December 2014 be withdrawn and the completion period be extended to 31st March 2015. That the negotiations to enlarge time would be in consonance with clause 10 of the Agreement which provides:-

10. Completion shall take place within ninety (90) days from the date of this Agreement or such other date as the parties hereto shall in good faith negotiate and agree.(my emphasis)

7. That notwithstanding this subsequent Agreement, the 1st Defendant through the 2nd Defendant called off the sale Contract. And further, notwithstanding that there was an issue whether the 1st Defendant was entitled to a forfeiture of the deposit, the 2nd Defendant released the money held in stake holding to the 1st Defendant. The action of the 2nd Defendant is said to be negligence of a stakeholder's duty by failure to invoke Section 58 of Civil Procedure Act and order 34 of The Civil Procedure Rules and to take out interpleader proceedings. Particulars of negligence and breach of Duty are set out in paragraph 42 of the Plaintiff.

8. So as to protect its interests the Plaintiff registered a Caveat over the subject property on 22nd October 2015. The 1st Defendant has sought to have it removed.

9. Ultimately the Plaintiff seeks the following prayers:-

a) A declaration that the 1st Defendant was not ready, able and willing to complete the transaction when it purported to issue a completion notice on 31st December 2014.

b) A declaration that the 1st Defendant breached Clause 10 of the Agreement when it refused to negotiate in good faith.

c) A declaration that the 2nd Defendant acted negligently and breached its duty of care to the Plaintiff when it released the deposit money to the 1st Defendant for purpose of forfeiture.

d) That the Caveat registered by the Plaintiff against LR No. 109/5 Ruiru measuring approximately 14.47 HA (subdivided into 122 Plots) on 22nd October, 2015 e extended until the Kshs.23,500,000.00 is paid in full.

e) That the Defendants jointly and severally do refund Ksh.23,500,00.00 being the deposit irregularly forfeited by the 1st Defendant.

f) Interest of (b) above at the Court's rate from the day it was deposited till payment in full.

g) That the Defendants jointly and severally do pay the costs of this suit on an Advocate/Client together with interest; and

h) Any other relief this court may deem fit.

10. The essence of the Defence to the Plaintiff's claim is that it was the Plaintiff who breached the terms of the Sale Agreement and that a Completion Notice was lawfully issued. The Plaintiff's breach was failure to pay the balance of the purchase price by the completion date.

11. It is averred that the 1st Defendant was ready able and willing to obtain the Land Control Board consent way before the completion date but that the Plaintiff failed to procure the incorporation of the nominee company to which the suit property was to be transferred and failed to forward the relevant Documents to the Defendants.

12. It is the Defendants contention that negotiations to extend the completion date failed and the 1st Defendant was entitled to retain the Deposit in terms of clause 17 of the Agreement. The Defendants see no negligence on the part of the 2nd Defendant in releasing the Deposit to the 1st Defendant. Indeed, it is asserted, it would have been professional misconduct on the part of the 2nd Defendant to withhold the deposit in the face of the default on the part of the Plaintiff.

13. This Court has considered the Application and reply together with the rival submissions made herein and takes the following view.

14. As pointed out by the Defendant's Lawyer, the Plaintiff's claim is expressly for refund of money being Kshs.23,500,000/= paid out as deposit. Alongside the claim for refund is a Prayer for interest thereon. The Plaintiff has given up on insisting on the completion of the Agreement and does not seek specific performance.

15. The main Prayer in the Motion before Court calls upon the 1st and 2nd Defendant to furnish security for the Decree that may be passed against them. The provisions of Order 39 Rule 5 are:-

5. (1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed

against him—

(a) is about to dispose of the whole or any part of his property;

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified".

16. A Court considering an application brought under Order 39 Rule 5 would be looking out for the following:-

(i) That the Applicant demonstrates that she/he has a good arguable case.

(ii) There is real risk (as opposed to speculative apprehension) that the Defendant's Assets will be removed from the jurisdiction of Court or otherwise dissipated if the order is not granted.

(iii) The removal or dissipation of assets is intended to obstruct or delay the execution of any decree

that may be passed against the Defendant.

These considerations may not be exhaustive. And the Court must be alert of any attempt to abuse the process as a way of harassing or blackmailing a Defendant into submission (see the Court of Appeal Decision in **Kanyoko t/a Amigos Bar & Restaurant Vs. Nderu & 2 Others** [1988] eKLR.)

17. As to what would amount to a good arguable case in the perspective of an application of this nature, Kariuki J. in **Beta Healthcare International Limited V Grace Mumbi Githaiga & 2 others** [2016] eKLR observed,

‘A good arguable case in the context of a freezing order is one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success. This was the holding in the case of **AFRICAN BANKING CORPORATION LIMITED VS. NETSATAR LIMITED & 6 OTHERS NAIROBI MILIMANI HCC NO.299 OF 2009(UR)**.

In practice however, it may be an intractable task to distinguish this test with “a prima facie case with a probability of success”. This is so because as held by the Court of Appeal in **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others** [2003] KLR 125, “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 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”.

18. The thrust of the Plaintiff’s case is that the 1st Defendant could not issue a completion notice when the 1st Defendant itself was not able and ready to complete. It being agreed that the sale Agreement was subject to The Law Society conditions of Sale (1989 Edition) in so far as they were not inconsistent with the terms of the Agreement or specifically excluded.

19. On completion Notice, Paragraph 4(7)(b) of The Law Society conditions provides:-

(7) This sub-condition applies unless a Special Condition provides that time is of the essence in respect of the completion date:

(a) In this condition “completion notice” means a notice served in accordance with this sub-condition;

(b) If the sale shall not be completed on the completion date, either party (being then himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition. A party shall be deemed to be ready, able and willing to complete;

(i) If he could be so but for some default or omission of the other party;

(ii) Notwithstanding that any mortgage on the property is unredeemed when the completion notice is served, if the aggregate of all sums necessary to redeem all such mortgages (to the extent that they relate to the property) does not exceed the sum payable on completion.

(c) Upon service of a completion notice it shall become a term of the contract that the transaction shall be completed within Twenty-one (21) days of service and, in respect of such period, time shall be of the essence of the contract.

(d) If the Purchaser does not comply with a completion notice;

(i) The Purchaser shall forthwith return all documents delivered to him by the Vendor and at his own expense procure the cancellation of any entry relating to the contract in

any register;

(ii) Without prejudice to any other rights or remedies available to him, the Vendor may forget and retain any deposit paid and/or resell the property by auction, tender or private treaty.

(e) If no such re-sale contracted within six (6) months after the completion date the Vendor incurs a loss, the Purchaser shall pay to the Vendor liquidated damages. The amount payable shall be the aggregated of such loss, all cost and expenses reasonably incurred in any such re-sale and any attempted re-sale and interest at the contract rate on such part of the purchaser money as is from time to time outstanding (giving credit for the amount of the forfeited deposit (if any) and for all sums received under any re-sale contract on account of the re-sale price) after the completion date:

(f) If the Vendor does not comply with a completion date, the Purchaser, without prejudice to any other rights or remedies available to him, may give notice to the Vendor forthwith to pay to the Purchaser any sums paid by way of deposit or otherwise under the contract and interest on such sums at the contract rate from four (4) working days after service of the notice until payment. On compliance with such notice, the Purchaser shall not be entitled to specific performance of the contract but shall forthwith return all documents delivered to him by the Vendor and, at the expense of the Vendor, procure the cancellation of any entry relating to the contract n any register;

(g) Where, after service of a completion notice, the time for completion shall have been extended by agreement or implementation, either party may again invoke the provisions of this condition which shall then take effect with the substitution of "Ten (10) days" for "Twenty-one (21) days" in paragraph (c) of this sub-condition.

20. Of course there is no unanimity as to who was responsible for the failure to obtain the Land Control Board Consent on time. That is a matter that I would rather leave for the Trial Court to decide.

21. What is of interest is that even after expiry of the Completion Notice, the parties continued to hold discussions and the Plaintiff sought an extension of the completion period. Following these discussions some draft addendum to the earlier Agreement was exchanged between the Advocates for the parties. And there is an email of 20th February 2015 by the 2nd Defendant seeking some amendments to the addendum. As is now common ground, those discussions on the proposed addendum came to nought. A question that would arise however is whether the discussions that came after the expiry of the completion notice had the effect of waiving the Completion Notice and whether in fact the 1st Defendant was not obliged to issue a fresh Completion Notice. This could be a good arguable point.

22. Although the Application targets both Defendants, the substance of the application is that it is the 1st Respondent who is disposing of its only known asset. Is there any reason to believe that this apprehension is real?

23. In paragraphs 50 and 51 of her Affidavit Nancy Mutugu depones as follows:-

50. THAT I am aware that the 1st Respondent is negotiating with potential purchasers of the subject land and there is a real likelihood that the vendor will sell the land.

51. THAT the Applicant is not aware of any other assets of the Respondents and therefore will be obstructed or delayed in the execution of any decree that may be passed against the defendants in the suit.

24. While not addressing this issue directly, Daniel Mburu Wainaina on behalf of the 1st Defendant states:-

“THAT no evidence has been provided to substantiate allegations of intended sale as claimed in paragraphs 22,23 and 24 of the Further Affidavit but nevertheless, I verily believe that given that the Applicant breached the Agreement, the 1st Respondent is entitled to sell property without any reference to the Applicant whose only claim is in any event liquidated and has nothing to do with the suit property”.

The 1st Defendant is not unequivocal firstly as to whether or not there is an intention to sell the asset and secondly whether or not it is the only asset of the 1st Defendant. Because of this rather guarded response by 1st Defendant, I hold that the Plaintiff’s apprehension on the twin issues is not a trifle.

25. That said it would seem that if there is an intention to sell then it may not be motivated by an intention to merely obstruct or delay the execution of any Decree that may ensue herefrom. I say this because in entering the botched sale agreement the 1st Defendant already had the intention to dispose of its property even before this dispute arose.

26. However, as this Court has found that the Plaintiff may have a good arguable case and that there is a real likelihood that the 2nd Defendant will sell a property which may be its only Asset, this Court is inclined to give a measure of protection to the Plaintiff. Nevertheless the measure proposed is not one that will stifle the 1st Defendant’s Right to dispose of its property nor will it be unnecessarily oppressive.

27. It is for this reason that the Court will ask the 1st Defendant to elect whether to provide security by way of an irrevocable Performance Bond as sought in Prayer 4 of the Notice of Motion of 11th July 2016 or to abide by the Interim order made by this Court on 19th July 2016 until the hearing and disposal of the substantive matter. The Order was that should the 1st Defendant sell, charge or in any other way dispose of LR.109/5, NorthWest of Ruiru, then it shall deposit a sum of Kshs. 23,500,000/= (Twenty five Million, Five hundred Thousand) into Court or a joint interest earning Account to be opened in the names of Counsel for the Plaintiff and the 1st Defendant within seven days of completion of the Sale or Registration of the Charge or completion of any such disposal.

28. The 1st Defendant shall communicate its election to the Plaintiff and Court within 7 days of this Ruling to enable Court make its final order.

29. Each party to bear the costs of the Application.

Dated, Signed and Delivered in Court at Nairobi this 20th day of April, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Njoroge for Defendants

N/A for Plaintiffs

Alex - Court Clerk