



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC CIVIL SUIT NO.291 OF 2013

SAMUEL MWIHIA GITAU.....PLAINTIFF/APPLICANT

-VERSUS-

JOHN M. NG'ANG'A.....1ST DEFENDANT/RESPONDENT

BENSON M. KANGETHE.....2ND DEFENDANT/RESPONDENT

JAMES NJIRAINI KARANJA...3RD DEFENDANT/RESPONDENT

RULING

1. On **28th January, 2014** the plaintiff **Samuel Mwhia Gitau**, filed the notice of motion dated **27th January, 2014** seeking, inter alia, a permanent injunction to restrain the defendants by themselves, their servants agents and/or legal representatives from trespassing, entering, occupying, remaining and/or in any way whatsoever interfering with the 2.7 acres of the parcel of land known as **Nakuru/Rotharini/3** (hereinafter called the suit property) he sold to them in July 2007.
2. The application is premised on the grounds that in July 2007 the plaintiff entered into an agreement for sale of the said portion of the suit property; that the agreed purchase price was Kshs. 630,000/= for the 2 acres. The plaintiff contends that upon execution of the sale agreement the defendant paid Kshs. 550,000/= leaving a balance of Kshs. 80,000/= unpaid which was to be paid on or before **13th October, 2007**. That it was also a term of the said contract that if any of the parties thereto breached its terms, the party in breach would pay to the innocent party Kshs.63,000/= as general damages.
3. It is contended that, in breach of the said agreement, the defendants failed to pay the balance of the purchase price within the covenanted time and at all. Further that the defendants having failed to meet their part of the bargain within the covenanted time and/or within a reasonable time, the sale agreement has become frustrated and as such can no longer be completed.
4. Owing to the defendants' breach of agreement, it is argued that the plaintiff has not been able to utilize the said portion of the suit property or the outstanding proceeds of the sale thereof. It is also contended that the defendants in total disregard of the law have trespassed into the suit property and constructed cattle sheds for hire.
5. Attempts to evict the defendants from the suit property are said to have been in vain. For the foregoing reasons the plaintiff filed the current suit seeking to rescind the contract herein.
6. Since the suit property was not transferred to the defendants, the plaintiff contends that it would be in

the interest of justice to order the defendants to vacate the suit property.

7. In reply, the second defendant, **Benson M. Kangethe**, swore the replying affidavit sworn on **3rd February, 2013** in which he accuses the plaintiff for misrepresentation of facts. In this regard, he has deposed that under clause 5 of the sale agreement executed between the plaintiff and the defendants, the defendants (read the buyer of the suit property) was to take possession of the suit property immediately upon execution of the sale agreement; that clause 7 of the said sale agreement obligated the plaintiff to ensure that all necessary documents were prepared and signed to facilitate smooth transfer of the suit property to the defendants.

8. The defendants accuse the plaintiff of having frustrated the agreement by engaging in theatrics and tricks which made them even contemplate reporting him to be investigated and later charged with obtaining by false pretences.

9. Contrary to the allegation that the defendants trespassed onto the plaintiff's land, it is explained that the defendants earned the right to be on the suit property by virtue of the sale agreement herein.

The plaintiff is also accused of having come to court with unclean hands.

10. Contrary to the plaintiff's contention that the defendants refused or failed to co-operate with him to get the matter solved amicably, it is contended that it is the plaintiff who refused to sign the requisite documents to facilitate transfer. As a result of the plaintiff's failure to facilitate the transfer of the suit property, it is contended that the defendants have suffered and continue suffering loss and prejudice as they cannot use the suit property peacefully.

11. When the matter came up for hearing on **4th February, 2014** directions were issued to the effect that the application be disposed off by way of written submissions. Subsequently, advocates for the respective parties filed submissions which I have read and considered.

12. On behalf of the plaintiff/applicant, it is reiterated that the defendants breached the agreement signed on **7th August, 2007** by failing to pay the balance of the purchase price within the stipulated time and at all. It is submitted that transfer in favour of the defendants could only have been effected if they had paid the balance of the purchase price within the covenanted time. The defendants having failed and/or ignored to honour their part of the bargain, it is submitted that the sale agreement became incapable of being completed.

13. Because of the time lapse and the suit property's increased value, it is argued that it would be unfair to order the plaintiff to transfer the suit property to the defendants.

14. Concerning the prayer for eviction and a permanent injunction against the defendants, it is contended that the defendants unlawfully trespassed into the suit property in this year (2014).

The following cases have been cited in support of the plaintiff's case:- **Kenneth Kipruto Chebet vs. Laban Kipkering Murei** (2012)eKLR; **Gitonga Mwaniki and Onesmus Mwaniki Gichuri -vs- Annunciata Waithira Kibue** (2009) e KLR and **Philip Kibirech Ng'etich vs. Peter Owich Mangula & Others** (2009) e KLR.

15. In the submissions filed on behalf the defendants, it is submitted that pursuant to the terms of the sale agreements herein, the defendants are the rightful owners of the suit property. It is contended that the plaintiff's rights over the suit property were extinguished by the said sale agreement herein.

16. Referring to the legal principles enunciated in the celebrated case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358**, it is submitted that since there is evidence that it is the plaintiff who failed to honour his part of the bargain in the agreement herein, he is incapable of establishing a *prima facie* case with probability of success. The plaintiff is also said to have failed to demonstrate that he would suffer irreparable damage if the injunction sought is denied.

17. On the other hand, it is contended that it will be against the rules of natural justice and equity to order eviction of the defendants who are lawfully on the suit property.

18. As concerns the prayer for a permanent injunction, it is submitted that granting such a prayer, at this stage of the plaintiff's case, will occasion great injustice and prejudice to the defendants as they would have been condemned without having been accorded a full hearing.

19. On whether the plaintiff's claim is sustainable in law, it is submitted that given the fact that the plaintiff entered into a contract with the defendants, which contract, *inter alia*, allowed the defendants to take possession of the suit property upon execution of the sale agreement herein and which placed an obligation on the plaintiff to obtain the necessary documents to facilitate transfer of the suit property to the defendants, the plaintiff's suit is unmaintable.

20. In the circumstances, it is submitted that the plaintiff cannot be declared the owner of the suit property. It is further contended that the plaintiff has not demonstrated good faith by either having the property transferred to the defendants before claiming specific performance of the agreement.

21. It is reiterated that the defendants are lawfully in possession of the suit property and for that reason, cannot be restrained from doing what is sanctioned by the sale agreement.

22. The sole issue for the court's determination is whether the plaintiff has made up a case for issuance of the orders sought.

23. As pointed out above, the plaintiff's claim is based on alleged breach of Contract of Sale of a portion of the suit property to the defendants.

24. The sale agreement executed between the plaintiff and the defendants, *inter alia*, provides:-

“1. The Vendor hereby sells and the purchaser hereby purchases the said piece of land which has been identified by the parties hereto;

2. the vendor do hereby acknowledge the receipt of Kshs. 500,000/= upon signing this agreement;

3. the balance of Kshs.130,000/= to be paid on or before 13th October, 2007;

4. the survey costs to be met by the vendor;

5. the purchaser shall take possession of the said parcel of land upon signing of this agreement and the vendor shall not be entitled to any further benefits whatsoever in respect of the said piece of land;

6. the transfer of the said piece of land to be borne by the purchaser;

7. the vendor to obtain all relevant land control consents to subdivide and to transfer the said 2.7 acres to the purchaser;

8.

9.

10.

11. In event of non-completion of this sale agreement by willful default of either party the defaulting party shall be liable to the innocent party damages equivalent to sixty three thousand shillings (Kshs.63,000/=)

THE SCHEDULE

All that parcel of land situated within Nakuru District in the Republic of Kenya Known as NUKURU/ROTHARINI/3 measuring 2.7 acres.” (emphasis supplied).

25. Vide an addendum to the sale agreement herein, executed on **7th August, 2007** the defendant paid a further Kshs. 50,000/= leaving a balance of Kshs.80,000/= to be settled as agreed in the sale agreement dated **13th July, 2007**.

26. It is noteworthy that in his supporting affidavit, to the application herein, the plaintiff only annexed a portion of the sale agreement executed on **13th July, 2013**. Even though no reasons are provided for doing so, given that the contents of paragraph 4, 5, 7 and 11 of that agreement don't support the plaintiff's case, it is reasonable to infer that the plaintiff wanted to mislead the court on what the terms of the agreement executed between himself and the defendants were.

27. It is trite law that where parties have entered into a contract whose terms are ascertainable, the duty of the court is to give effect to the intention of the parties and not to remake the contract for the parties. See **Jiwaji & others v. Jiwaji & another (1968)E.A 547** where **Clement De Lestang, V.P** observed:-

“The courts will not, of course, make contracts for the parties but they will give effect to their clear intention....”

28. In the instant case, the parties to this dispute made provision for what would happen upon execution of the sale agreement to wit:-

(a) the purchaser shall take possession of the said parcel of land upon signing of the agreement and the vendor shall not be entitled to any further benefits whatsoever in respect of the said piece of land;

(b) the vendor was to obtain all relevant land control consents to subdivide and to transfer the said 2.7 acres to the purchaser;

(c) In event of non-completion of the sale agreement by willful default of either party the defaulting party was obligated to pay the innocent party for damages equivalent to sixty three thousand shillings (Kshs.63,000/=).

29. From the foregoing, it is clear that contrary to the plaintiff's contention that the defendants have trespassed into the suit property, the entry thereto was permitted by the agreement executed between themselves hence lawful. It is also clear that under the sale agreement, the remedy for default on either party was not rescission of the contract but entitlement to damages for breach of the contract.

30. It is settled law that the guiding principles for an injunction are as set out in **Giella –Vs- Cassman Brown and Company Ltd [1973]E.A**. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensatable in damages; and thirdly, if in doubt, the court must assess the balance of convenience.

31. An injunction being a discretionary remedy, there is ample authority that a party, who has acted in a manner not acceptable to a court of equity, will be denied the remedy. See **Kenya Hotels Limited Vs Kenya Commercial Bank and another** [2004] 1 KLR 80, **Public Trustee Vs Nicholas Kabucho Murimi** HCCC ELC 610 of 2011 [2012] e KLR, **George Munge Vs Sanjeev Sharma & 3 others** HCCC ELC 677 of 2011 [2012] eKLR.

32. The conditions outlined in the **Giella's** case (supra) are sequential “so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed” See **Kenya Commercial Finance Company Ltd Vs Afraha Education Society** [2001] 1 E.A. 86 and **Karen Bypass Estate Ltd v. Print Avenue & Company Ltd; Nairobi HCCC No. 284 of**

33. Has the applicant's established a *prima facie* case? In answering this question I take note of the fact that the plaintiff's claim is based on alleged breach of the terms of the contract executed between himself and the defendants. As pointed out above, the contract entitled the defendants to take possession of the suit property upon signing of this agreement, it also expressly stipulated that the remedy for breach of the contract is payment of damages. The contract put the damages payable for breach of the contract as Kshs.63,000/=. It also expressly provided that the vendor shall not be entitled to any further benefits whatsoever in respect of the said suit property.

34. The duty of this court being purely to give effect to the contract executed between the parties, I find and hold that the plaintiff has failed to establish a *prima facie* case with a probability of success against the defendants who are lawfully in possession of the suit property.

35. The upshot of the foregoing is that the application has no merit and is dismissed with costs to the defendants.

Dated, signed and delivered in open court at Nakuru this 30th day of January, 2015

L. N. WAITHAKA

JUDGE

In the presence of:

Mr. Biko holding brief for Mr. Atsiemo for plaintiff/applicant and in the absence of the defendant/respondent.

Court Clerk – Emmanuel Maello