



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

ELC CASE NO.127 OF 2014

SAMSON MAINA KAMAUPLAINTIFF

VERSUS

PETER LEKENAYA SUIYANGA..... 1ST DEFENDANT

DICKSON M. TUMBO AND P. JOY OUKO t/a SADIQUE ENTERPRISES ... 2ND DEFENDANT

RULING

1. The Applicant via a **Notice of Motion** dated **15.10.2014** seeks injunctive reliefs against the Defendants over suit premises **Kajiado/Kaputiei-North/6484**. The application is brought under Order 40 Rules 1(a) 3 and 4(1) of Civil Procedure Rules, Section 3A and 63(e) Civil Procedure Act and all enabling provisions of the law.
2. The application is based on the grounds on the face of the Motion and is supported by the affidavit of Samson Maina Kamau sworn on 15.10.2014. The applicant has further filed affidavit sworn on 14.11.2014. The application is opposed by the 1st Respondent who has filed a replying affidavit sworn on 31.10.2014. The parties agreed to canvass the application by way of written submissions but only the Applicant filed submissions.
3. The Applicant's case is that, he entered into a sale agreement with the 1st Defendant on 2.12.2013 for sale of Kajiado/Kaputiei-North/6484 hereinafter referred to as the suit premises. The purchase price was KShs.5,750,000/-. The Plaintiff deposited KShs.100,000/-. The Plaintiff avers that it was agreed the balance was to be financed by a financial institution and the Co-operative Bank agreed to finance the purchase of the same property. The 1st Defendant and his advocate instructed bank to stop process until the Plaintiff added KShs.500,000/- over and above the purchase price. The 1st Defendant resorted thereafter to sending people to force the Plaintiff out of the suit premises. The 1st Defendant thereafter sent 2nd Defendant an auctioneer to proclaim plaintiff's goods in distress for rent.
4. The 1st Respondent case is that the Applicant was to raise purchase price via a financial institution using his own property. The completion date agreed was 90 days. The Applicant did not seek extension of time thus on 11.8.04 a notice for recession was issued to the Plaintiff. To-date the Plaintiff has paid only KShs.280,000/- despite the fact that he took possession of the suit premises. The Plaintiff was 1st Respondent's tenant paying KShs.15,000/- per month before the agreement subject herein was entered into.
5. After the completion date expired on 3.3.2014 the position of land and tenant status reverts back

- and thus the 1st Defendant avers that the Plaintiff is liable to pay rent as from 4.3.2014 to date. He avers that the agreement is null and void and thus Plaintiff is a trespasser and he is only entitled to the refund of the deposit paid on sale agreement less rent due from March 2014 until he delivers possession.
6. The 1st Defendant avers that there is no case for specific performance in the instant case. He avers that he only sent auctioneers to levy distress but not thugs. The property is currently charged in favour of KCB and thus not available for another charge. He thus seeks the Application to be dismissed with costs. After perusing the Affidavits and submissions on record, the court finds that the application would be determined on *prima facie* basis by the provision of the parties agreement.
 7. The agreement of 2.12.2013 stipulated that vide clause 5 – 5(2) the vacant possession was to be handed over on completion of sale and on payment of the balance of purchase price to the vendor. The completion date was 90 days after the entering of the agreement i.e. 3.3.2014. The completion date is long gone and the parties seem not to be heading anywhere in the consumption of the sale transaction.
 8. The Applicant blame 1st Defendant for shifting goal posts in form of enhancing the purchase price unilaterally and thus frustrating the financing process of the payment of the balance purchase price. The agreement did not stipulate that the purchase price was to be procured via financial facilities arising from charge of suit premises. No party has demonstrated exercising the options set out in clause 15, 15(1) and 15, (2) in event of default.
 9. Due to the stalemate arising in the circumstances, the Plaintiff instituted suit seeking specific performance. The court will determine the same whether it obtains in the circumstances. At the moment, the court is supposed to decide whether in the circumstances of the case the Applicant should be granted the interim orders sought?
 10. If I may start with prayer No.5, the same is in form and shape of specific performance which will be determined at the conclusion of the case. This is because compelling the 1st Defendant to complete the sale agreement will be pre-empting the suit as same prayer is the principle relief in the Plaint. The Applicant is at the same time averring that the financial institution is incapable of releasing KShs.5,462,500/- where then is the Plaintiff to get the balance purchase price if the court was to compel the 1st Defendant to complete the sale transaction? The Plaintiff has not stated.
 11. The Plaintiff's possession as from 2.12.2013 was pegged on sale going through. The sale completion date has passed now for a period of almost one year. Although the Applicant has paid KShs.280,000/- he has not been paying rent nor is sale transaction going on. To safeguard all parties' interests, the court will have to strike a balance pending hearing of the suit.
 12. The court therefore makes the following orders:
 1. The prayers No.3 and 4 are granted on condition that as from March, 2015, the Plaintiff will be paying rent for the suit premises, KShs.15,000/- per month pending hearing and determination of the suit.
 2. In case of default of payment of any monthly rent, the orders herein to stand vacated.
 3. The issue of deposit of purchase price, rent for March 2014 to February, 2015 and status of enforcement of the agreement to be determined in the main suit.
 4. Costs in the main cause.

Dated and Delivered at Machakos this 13th day of February, 2015.

CHARLES KARIUKI

JUDGE