



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 599 OF 2012

LEONARD MUNYUA. APPLICANT/PLAINTIFF

VERSUS

VALLEY CREER LIMITED.RESPONDENT/DEFENDANT

RULING

The application before the court is the Notice of Motion dated 31st December, 2012 filed by the Plaintiff. The application seeks: -

- 1. A temporary injunction restraining the Defendant from selling, letting or leasing or in any other way, interfering with Apartment No. B2 of L.R. no. 330/713 Kingara Road, Nairobi until the suit is determined.**
- 2. A mandatory injunction do issue against the Defendant compelling him/it to release all completion documents including duly executed lease in respect of the said suit premises to the Applicants Financiers' advocates for the purpose of registration of the said lease pending the full hearing and final determination of this suit.**
- 3. A mandatory injunction do issue against the Defendant compelling him to give vacant possession of the said Apartment pending the final determination of this suit.**
- 4. Costs and any other relief.**

The court observes that an interim order in terms of prayer one above restraining the Defendant from selling, charging or in any other way alienating the suit property, was granted by this court on 31st December, 2012 until this application is finally heard and determined.

The court further observes that although both parties were given sufficient time and opportunity to file submissions in support or opposition of this application, the Defendant, apparently did not file any written submission in opposition to the application. Diligent search in the court file did not reveal such submissions although during the highlighting of the submission, Mr. Ogera Advocates, appeared and submitted in favour of the Defendant.

The summary of the facts in this application is as follows: -

The Plaintiff purchased Apartment B2 on L.R. No. 330/713, Nairobi under a proper Sale Agreement dated 25th May, 2011 signed by both the parties. He paid under the said Agreement a deposit of Ksh.4,280,000/-.

The latter amount represented

- a. Costs of purchasing shares in the Management Company and the reversionary interest.
- b. Costs for the preparation and registration of the relevant lease.
- c. Costs for the incorporation of the Management Company.
- d. Stamp Duty and registration fees
- e. 20% purchase price.

The Plaintiff also voluntarily paid to the Defendant an additional purchase amount towards the purchase price totaling Ksh.8,000,000/-. All the above funds were duly acknowledged receipt by the Defendants advocates who apparently, was then acting for both the Vendor and the Purchaser.

It is not in dispute also after the deposit above was made part of the Agreement that the Defendant was under obligation to release to the Plaintiff/Purchaser a Certificate of Occupation of the premises to the Purchaser within a period of 90 days.

Thereafter, and although it was not in the Sale Agreement, the Plaintiff secured a mortgage financing from Standard Chartered Bank of the remaining purchase price of 80%. The Financiers Advocates assured the Vendor's advocates for the release and payment of the said 80% balance of mortgage funds on condition that the Vendors Advocates do give the necessary and relevant professional undertaking to the Bank. The said Professional undertaking dated on 18th January, 2012 was given to the Financiers Advocates by the Vendors Advocates and was acknowledged received by the Bankers Advocates by their letter dated 19th January, 2012.

It is not disputed again that by 13th March, 2012 the Defendant's Advocates had not issued the Certificate of Occupation which if so issued, was supposed to invoke or trigger completion of the sale within 30 days. However, that did not happen. Instead the Defendant/Vendor all of a sudden demanded for a payment of interest on the remaining purchase funds.

Furthermore, the Defendant had apparently not prepared and/or released the relevant lease for approval and registration despite requests made to it by the Plaintiff.

In addition to the above issues, it is asserted by the Plaintiff and not denied by the Defendant, that on 5th March, 2012 the mother title of which the property sold to the Plaintiff i.e. Apartment B2, was part, was discovered to be still encumbered by an earlier mortgage transaction which had not been discharged to give way to the sale of the Apartments and of which the Plaintiff had not warned of.

In the meantime and as the Defendant appears to have been struck in some kind of continuous default to its part, the new Lands act of 2012, came into being and began to take effect on 28th May, 2012. This appears to put the Plaintiff's financiers, the Standard Chartered Bank ltd, into some caution, lest the new law may have come with some new changes that would adversely affect its lending policy and terms They in July, 2012 wrote to the parties indicating delay to release the relevant mortgage funds until the new laws ramifications, were understood or clarified.

It was not until 11th July, 2012 that the Defendant finally released the reconveyance in respect of the suit property and sought immediate release of the balance purchase funds which is the request which was presumably, regarded with caution by the Bank while awaiting the ramifications of the new Lands Act, 2012 as earlier stated. The facts show that the Financier did not offer to release the said balance purchase funds until the 25th October, 2012.

The Vendor responded to the offer to release the said funds by purporting to rescind the whole contract by its letter dated 29th October, 2012 but again, purporting to backdate the rescinding to 12th September, 2012.

Those are the circumstances that apparently alarmed and prompted the Plaintiff to file this suit and this

application seeking the injunctions to restrain the Defendant from alienating the suit property. The Plaintiff's arguments are, if the court understands them properly, that: -

- i. The defendant failed to comply and perform its part of the contract by failing to release the certificate of occupation and by failing to release the relevant reconveyance for processing, until the Financier's Bank took caution not to release the funds after about seven months delay and by terminating the contract retrospectively to September, 2012 even when at the time the Financier had expressed willingness to release the said funds.

The Plaintiff further argued that these facts demonstrate a prima facie case with good chances of success. The Plaintiff also submitted that these facts demonstrate a contract under which damages would not be easily assessable taking into account that the period involved was rather long and uncertain. He finally argued that if the court was in doubt, the balance of convenience is favour of the Plaintiff as the Defendant was responsible for Plaintiff's woes under the contract and Defendant should not be allowed to enjoy the benefits which appeared to accrue from its breach of the contract.

The Defendant, through its Counsel Mr. Ogera, merely tended to assert that the Plaintiff had failed to demonstrate the three principles of granting ordinary injunction let alone, mandatory injunctions. He sought the dismissal of this application with costs.

I have carefully perused the grounds upon which this application is based. I have also considered the arguments submitted by both side. As touches the issue of mandatory injunctions and while basically, the same are granted on the now famous three principles enunciated in **Giella Vs Brown case**, the former are nevertheless not easily granted unless a certain higher ground is demonstrated. This is so because mandatory injunctions if granted often bring the whole suit into a full or almost full settlement at an early stage upon affidavit evidence, thus denying the other parties the right to cross-examine the major evidence. Hence the reason that the court would demand a much higher standard of proof of the affidavit evidence before relying on it to grant the mandatory injunctions.

In this case, the Plaintiff did not demonstrate the above stated higher standard of proof. For that reason the issues raised in the application must go to trial during the hearing of the main suit. The court, therefore, is not sufficiently persuaded and declines granting mandatory injunctions.

As to temporary injunctions in prayer (2) this court is persuaded that the Applicant/Plaintiff has demonstrated a prima facie case with good chances of success. This is so because, on the face of evidence which is yet to be tested, there is an alleged proper Sale Agreement backed by substantial considerations. The Defendant not only is said to have received substantial part of the purchase price but also assurance of receiving the balance from the Purchaser's Financier. There is undenied evidence on record that the whole delay and failure to complete was first and foremost caused by the Defendant who on the face of things, is again allegedly trying to use its own default to rescind the contract.

Secondly, the subsistence of the contract has taken long and it is not clear when it may be adjudged to have come to an end, if at all. Assessment of general damages would not accordingly be easily viable, or clear-cut. The Plaintiff is therefore likely to suffer irreparable damage if the subject matter is not protected.

However, even if the court is doubtful of the proof of the second principle above, it is of the view that the balance of convenience would lie in keeping the subject suit intact until the suit is heard and finally disposed of on merit.

For the above reasons the court hereby grants the temporary injunction sought in terms of prayer (2) until the suit is finally decided with costs to the applicant. Orders are made accordingly.

Dated and delivered at Nairobi this 26th day of March, 2015.

D A ONYANCHA

JUDGE