



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI

ELC CASE NO 1420 OF 2014

DAVID MUSHOKAMBERE.....PLAINTIFF

VERSUS

QWANZA HOMES LIMITED.....DEFENDANT

RULING

The application before this court for consideration is the Notice of Motion dated **7th November 2014** brought under **Sections 1A, 1B and 3A of the Civil Procedure Act** and the Arbitration Act seeking for orders that:-

- 1. Pending the hearing and determination of this application the rescission notice issued by the respondent to the applicant dated 16th October 2014 be stayed.**
- 2. Pending the hearing and determination of this application, an order of injunction do issue restraining the defendant whether by itself, its agents, employees, servants and/or otherwise howsoever from selling, disposing of, leasing, charging pledging alienating or in any other manner whatsoever dealing with the property known as apartments Number B3 and B4 erected on LR No. 76/476 or any part thereof.**

This application is premised on the grounds stated on the face of the application and the plaintiff's supporting affidavit. Applicant averred that by a letter dated **3rd December 2013**, the Respondent offered the purchase of two apartments erected on **LR No 76/476-Thindingwa**, in Kiambu County being number B3 and B4. That it was a term in the letter of offer that either party could source for financing in which the party seeking financing would underwrite the costs attendant to. Further that the parties executed the agreement for sale on **3rd October 2014**, and applicants remitted **Ksh 4,000,000/=** to the Respondent towards the purchase price. He stated that he sought for mortgage, financing for the balance of the purchase price from CFC Bank Limited. That upon the approval of the mortgage the bank demanded for completion documents to enable it issue an undertaking to the Respondent so that it could register a charge over the apartments B3 and B4. He then communicated the bank's request to the respondent who suggested the specific wording of the undertaking the Respondent would require to enable it release the completion documents. However, the Respondent refused to forward the document to the bank and insisted that no amendments would be made to the sale agreement and later issued a notice to rescind the agreement on **16th October 2014** for the reason that he had failed to complete the transaction. He believes that the notice to rescind was misconceived, in bad faith and a breach of the clear terms of the agreement for sale.

He further averred that he has no problem meeting his obligations as the balance of the purchase price is available in the bank which awaits disbursements to the Respondent upon the availability of the

documents demanded by the bank. He contends that the apartments are not complete therefore the issue of balance of the purchase price being due does not arise and the reason given by the Respondent for rescission of the transaction being failure to complete within the stipulated time constitutes a dispute as to interpretation of the terms of the agreement regarding completion date and for that reason, he has instructed his advocates to issue notice of a dispute to the Respondent and nominated an arbitrator this is a matter to be determined by arbitration. Further, he is genuinely apprehensive that the Respondent who has acted in bad faith may proceed to sell the two apartments before the issues are determined unless the court restrains them. He also filed a supplementary affidavit reiterating the contents of his supporting affidavit.

This application is opposed. The Respondent's **Director Caroline Wanjiku Onsando**, filed a replying affidavit on **17th November 2014**. She stated that the plaintiff's application for loan from **CFC Bank** was never approved as no letter of intent was ever presented to the Respondent and that exhibit 4 of the supporting affidavit was clear that approval was subject to certain conditions being met which the plaintiff has not showed that he met them which included a duly executed, stamped and certified sale agreement. She added that the completion notice was rightfully issued pursuant to the sale agreement because the defendant obtained an occupational certificate dated **1st October 2014**, from the County Government of Kiambu, and the plaintiff's advocates were duly notified of the same. Therefore the plaintiff had to accept and comply with the completion notice. She confirmed that the apartments were complete and those apartment owners who have performed their obligations had taken possession effective **18th October 2014**. The deponent finds no dispute as claimed by the plaintiff because he is in clear breach of the terms of the agreement in so far as payment of balance of purchase price is concerned. She relied on the letter dated **15th October 2014**, wherein the plaintiff's advocates acknowledged that the completion date had lapsed and had requested for a variation of the terms of the agreement or the extension of the completion period and upon refusal of the plaintiff's request his advocates proceeded to issue a notice of dispute. She further averred that upon the expiry of the completion notice, the Respondent's advocate dispatched to the plaintiff's advocates a banker's cheque totaling **Ksh 3,597,800/=** being the deposit paid by the plaintiff less 10% liquidated damages. She stated that this application was brought in bad faith and was meant to further delay the completion of the contracts since completion cannot continue ad infinitum.

The Respondent in her further Replying Affidavit stated that the plaintiff accepted the refund of the deposit and the matter now stands extinguished by virtue of the plaintiff accepting the refund of the deposits. Further that there was no financing option expressed unequivocally in the sale agreement and letter of offer adding that the letter from CFC Bank was a letter of intent conditional upon fulfillment of the matters contained therein and not a letter of offer. She further contended that the letter of intent did not constitute a **promise to offer** a financing facility and that the plaintiff had never presented to the defendant a letter of offer issued to him by the purported financier. Therefore the Plaintiff had no right to seek remedies on matters which have arisen as a result of his laches.

The parties herein canvassed this application by way of written submissions which I have carefully considered. The court has further considered the pleadings generally, the annexures thereto and makes these findings.

The plaintiff has sought for injunctive relief. These are equitable remedies granted at the discretion of the Court. See the case of **CMC Motors Group Ltd and another Vs Evans Kageche Boro, Civil Appeal No. 295 of 2001**, where the Court held that:-

“In granting the injunctive reliefs, the superior court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the learned judge if it is satisfied that the learned Judge did not exercise his discretion judicially”.

He therefore needed to establish that he has met the grant of the principles for granting injunctions. These principles were laid down in the case of **Giella vs Cassaman Brown and Co. Ltd (1973) EA 358**. The applicant had to establish that:-

(i) He has a prima-facie case with high probability of success.

(ii) That he will suffer irreparable loss if orders not granted.

(iii) If court in doubt, to decide on the balance of convenience.

The issue now for determination is whether the plaintiff has been able to establish the threshold principles to warrant this court grant him the injunctive relief sought. It is not in dispute that the plaintiff got into an agreement with the defendant to purchase the two apartments B3 and B4 and paid Ksh 4,000,000/= and was later to pay Ksh 16,200,000/= for the full purchase of the two apartments. It was agreed in the sale agreement that the purchaser shall pay Ksh 2,000,000/= on execution of the sale agreement and the remaining balance of the purchase price of Ksh 6,000,000/= shall be

payable to the vendor on or before the completion date of **30th September 2014**. The completion date was indicated to be **30th September 2014** or the 15th day next after issuance of the occupation certificate by the relevant Municipal council.

It is not in doubt that the plaintiff did not have the balance of the purchase price and sought financial assistance from CFC Bank. The bank needed among other requirements a duly executed letter of undertaking and a stamped, signed and certified sale agreement. However this was not the case as the defendant's advocates did not draft the letter of undertaking despite indicating so in their letter dated **2nd October 2014**. Further the defendant in their letter dated **3rd October 2014**, indicated to the plaintiff that they would not allow the entry of a financier or financing party into the agreement as the plaintiff failed to disclose this fact when he executed the letter of offer in **December 2013** and also when he executed the sale agreement. Therefore the agreement of sale could not be amended to allow the entry of the financier into the agreement. The plaintiff therefore missed out on financing and at the end of the day ended up breaching the term of the agreement on the payment of the balance of the purchase price. The plaintiff further made a claim that he was not given the occupation certificate but looking at the annexures **DM7**, a letter dated **21st October 2014**, the defendant actually forwarded the said certificate to the plaintiff. The court finds that indeed, both the Plaintiff and the Defendant were bound by the terms of the Sale Agreements. However, it is very clear that the plaintiff breached the said terms. The defendant later refunded the deposit of Ksh3, 597,800/= and Plaintiff has not disputed this refund, therefore the defendant cannot be blamed for the collapse of the transaction. I will refer to the case of **Ripples Limited v Kamau Mucuha Nairobi High Court Civil Case Number 4522 of 1992**, where the court held that, ***"It is trite law that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party as that would be inequitable"***

The court therefore finds and hold that the applicant herein has not established that he has a *prima-facie* case with probability of success.

The Plaintiff also needed to establish that he will suffer irreparable loss which cannot be compensated by damages. What is not in doubt is that the Plaintiff was purchasing the two apartments from the Defendant and only paid a deposit of kshs.4,000,000/= out of the total cost of 16,200,000/=. The plaintiff had not taken possession of the said suit properties and whatever amount the Plaintiff paid is quantifiable. If indeed the Defendant would be found to be in breach of contract, then the applicant would be entitled to damages. He therefore cannot claim that he will suffer irreparable loss. He had not taken possession of the suit premises and he can indeed be awarded damages in the event the Arbitration award is decided in his favour. The court finds that in the instant case, award of damages would suffice and there is no need of granting an injunction. See the case of of **Wairimu Mureithi vs City Council of Nairobi, Civil Appeal No. 5 of 1979, KLR 332**, where the court held that:

"However strong the Plaintiff's case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them". See also American Cyanamid Co. Lt vs Ethicon Ltd (1975) AC 396.

The defendant has stated that it had refunded the deposit to the Plaintiff. If that is the case, this court finds that there is no contractual obligation between the two parties and court cannot grant that which has already happened. See the case of *Jane Kemunto Mayaka Vs Municipal Council of Nakuru & others, High Court Civil case No.124 of 2005*, where the Court held that;-

“ Injunctions are issued to prevent the occurrence of an event that has not occurred or that is threatened to occur that would likely injure an applicant and are not issued where such an event has taken place”.

The balance of convenience therefore tilts in favour of the defendant as it is the legal owner of the apartments.

Having now carefully considered the Notice of Motion dated **7th November 2014**, and the argument for and against the same, the Court finds that the Plaintiff has failed to establish that the said application is merited. Consequently the court dismisses the Plaintiff’s application herein entirely with costs to the Defendant.

It is so ordered.

Dated, Signed and Delivered this **21st** day of **May, 2015**

L.GACHERU

JUDGE

In the Presence of:-

Mr Midwa holding brief for Mr Karanja for Plaintiff/Applicant

Mr Midwa for the Defendant/Respondent.

Court Clerk: Nyangweso

L.GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of Mr Midwa for the Defendant/Respondent and holding brief for Mr Karanja for the Plaintiff/Applicant.

L.GACHERU

JUDGE

21/5/2015