REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

CIVIL SUIT NO 298 OF 2014

WOODSTREET CLINIC & NURSING HOME LIMITED.....PLAINTIFF

VERSUS

SAMUEL KARANJA THUITA.....1ST DEFENDANT

REDEMPTOR NYABOKE……2ND DEFENDANT

RULING

1. For the determination of the Court was the application by the Plaintiff dated 15th July 2014. The application was brought pursuant to the provisions of Order 40 Rules 1 & 2 of the Civil Procedure Rules, as well as Section 3A of the Civil Procedure Act. The Plaintiff made prayers for orders inter alia;

> 1. **THAT there be an order restraining the Defendants by themselves, their servants or agents from selling, charging, transferring or in any way alienating the suit property being LR No 36/1/972- Eastleigh pending the hearing and determination of this application.**
>
> 2. **THAT the Defendants by themselves, their agents/servants be restrained from selling, charging, transferring, or in any way alienating, the suit property being LR No 36/1/972- Eastleigh Estate pending the hearing and determination of this suit.**
>
> 3. **THAT the title documents to the suit property deposited with Sheikh & Co Advocates continue to be so held pending the hearing and determination of this suit.**
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> 4. **Costs be provided for.**

2. The application was premised on the grounds that the Plaintiff and the Defendants had entered into a sale agreement on 3rd June 2014, whereby the Defendants has agreed to sell to the Plaintiff the suit property for a consideration of Kshs.40,000,000/-. The Plaintiff contended that in accordance with the terms of the sale agreement, the deposit of Kshs. 4,000,000/- had been paid to the Defendants, with the balance of Kshs. 36,000,000/- being paid once the transfer of the suit property had been registered. It was contended that the transfer of the suit property had not been concluded by dint and failure of the Defendants to deliver on their part of the agreement. Further, the Plaintiff was apprehensive that the Defendants may dispose of the suit property to third parties or further charge it yet they have failed to explain the non-completion of the terms of the sale agreement.

3. The application was further supported by the affidavit of Halima Said Farah, a director of the Plaintiff, sworn on 15th July 2015. It was deponed to that the Plaintiff had performed its obligations under the sale agreement, and that Defendants had failed to fulfill their obligation as therein. Further to reiterating the grounds as adduced, it was deposed to that the Defendants had continued to market the suit property, and that if the orders as prayed were not granted, the suit property may be disposed and thereby defeat the interest acquired under the sale agreement.

4. The application was opposed through the Replying Affidavit of the 1st Defendant sworn on 18th November 2014. It was deponed to that the suit property was acquired jointly by the 2nd Defendant and the deponent in 2009 and registered as proprietors in common. Further, it was deponed to that there had been no discussions or agreement reached between the deponent and the 2nd Defendant with regards to the sale of the suit property, and that the purported sale of the suit property without the deponent's concurrence, participation and authority was patently fraudulent.

5. It was further deposed to that the purported sale agreement was a forgery, and that could not therefore sign the conveyance that had been presented before him for his attestation. It was deposed to that the deponent never instructed the firm of Gitonga Mureithi & Co Advocates to act on his behalf in the purported sale of the suit property, and that therefore they did not have authority to receive the deposit of Kshs 4,000,000/- on his behalf. With regards to the attestation of the sale agreement, it was contended that the signature appearing on the document was a forgery, and that the Plaintiff did not exercise due diligence before executing the sale agreement and making payments ostensibly as deposit for the purchase of the suit property.

6. The Plaintiff alleges that they had entered into a sale agreement with the Defendants for the purchase of the suit property. They presented before the Court the impugned sale agreement dated 3rd June 2014 ("HSF-1") and further an RTGS receipt for the sum of Kshs 4,000,000/- that had been paid to the Defendants' advocates as deposit ("HSF-3"). Further, the Plaintiff contended that it had issued a completion Notice to the Defendants through their advocate in a letter dated 6th May 2014 ("HFS-4"), which notice expired without any substantive response thereto. With regards to the issue of fraud, the Plaintiff relied on the case of **Mutsonga v Nyati (1984) KLR 425**, stating the Defendants needed to prove the allegations of fraud.

7. The Court has considered the application by the Plaintiff, the responses thereto and the documents submitted before the Court as evidence. The Plaintiff seeks to reliefs inter alia for injunction to issue against the Defendants and for the specific performance of the contract. The Court considered the case of **Giella v Cassman Brown & Co Ltd & Another (1973) EA 358** in which the grounds to consider in an application for injunction are set out, which the Court need not consider by replicating them herein.

8. They are well known, as are those set out in **Mrao v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** and **American Cyanamid v Ethicon Ltd (1975) AC**. In **Mrao v First American Bank of Kenya Ltd** (supra) it was held that;

> ***"But as I earlier endevoured to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show that an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."***

9. The 1st Defendant had denied that he entered into any sale agreement with the Plaintiff, or had received any money from the alleged sale. He went as far as retorting that the signature embossed on the sale agreement was a forgery, and that the names in the sale agreement did not refer to him. To this end, he contended that a *prima facie* case with regards to a reading of the case of **Giella v Cassman Brown & Co Ltd & Another** (supra), had not been established.

10. It was averred that there was no valid contract in accordance with the provisions of Section 3(3) of the Law of Contract, as read together with Section 38 of the Land Act which required that all contracts for

disposition of an interest in land be in writing and signed by all parties thereto and attested. However, the Plaintiff reiterated that there was a clear and undisputed contract (see **Hampstead & Suburban Properties v Diomedous [1969] 1 Ch 248**) and as such the Court must compel the Defendants by ordering for an injunction to restrain them.

11. In **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Ltd (2006) eKLR** on the issue of specific performance, Maraga, J (as he then was) stated inter alia;

> ***"Specific performance, like any other equitable remedy, is discretionary and the Court will only grant it on the well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant."***

12. Further in **Chitty on Contracts: Sweet & Maxwell Vol. 1 at paragraph 28-005** it is stated that;

> ***'Hence the traditional view was that specific performance would not be ordered where there damages are an "adequate" remedy. But more recently the courts have reverted to the earlier approach by focusing attention on the appropriateness of the remedy of specific performance in the circumstances of each case. The question is not whether the damages are an adequate remedy but whether specific performance will do more perfect and complete justice than an award for damages'.***

13. The Plaintiff has not shown that there was money that had been remitted to the account of the law firm that had purportedly been duly appointed by the Defendants to carry out the transaction on their behalf. The document annexed to the application marked as "HSF-3" shows an application for SWIFT/RTGS which shows the applicant as M/s M Jivanjee. There is no corresponding receipt to the said application such as the one annexed and marked as "HSF-2" which clearly shows that the sum of Kshs 4,000,000/- was paid into the account of M/s Jivanjee Advocate.

14. Without such proof, the Plaintiff would have failed in showing that indeed there had been the remittance of the deposit of the purchase price to the Defendants or their duly appointed advocates to necessitate the completion of the transaction.

15. Further, there was the issue of the signing of the transfer documents. The same were not signed, and the implication of such action is self-evident and/or explanatory; without the signing of the transfer by both Defendants, no right vested in the suit property was transferable to the Plaintiff.

16. Quite curiously, and which the Court has noticed with great trepidation, is that the 2nd Respondent has been conspicuously quite throughout these proceedings. She did not file any response to the application, neither in support of nor against thereof, nor called upon to shed light on any of the dealings with regards to the sale of the suit property. Further, the alleged witness who attested the sale agreement, has neither been called as witness nor his statement been presented before the Court to buttress the Plaintiff's arguments.

17. As it stands, there are serious doubts arising as to the validity of the entire agreement for sale. The Plaintiff has not been able to establish a *prima facie* case that would be enable the Court consider the application. Further, the Plaintiff has not shown what loss they stand to suffer that would not be adequately remedied with an award in damages. Subsequently, the balance of convenience would not tilt in their favour, as they have neither taken possession nor invested in the suit property. The deposited amount can be refunded. There are several serious issues, including fraud and forgery, which need to be

fully ventilated during the trial. To that end, the Court finds that the application lacks merit, and the same is dismissed with costs to the Defendants.

Dated, signed and delivered in court at Nairobi this 16th day of December, 2015.

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C. KARIUKI

JUDGE