



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 261 OF 2013

MICHAEL NJENGA..... PLAINTIFF

-VERSUS -

RAJMUK INVESTMENTS LIMITED.....1ST DEFENDANT

STANLEY MUKIRA KIDIAVAYI2ND DEFENDANT

SAVINGS & LOANS KENYA LIMITED

(Also known as KCB BANK)3RD DEFENDANT

REGISTRAR OF TITLES NAIROBI.....4TH DEFENDANT

RULING

1. The plaintiff prays for injunction to restrain the defendants from transferring or dealing with his property known as apartment number A1 and two parking bays. He also craves for repossession of the premises. The apartment is one of many units erected on L.R. 209/118/56. The 1st defendant was the developer and vendor of the apartments. Apartment A1 was sold to the 2nd defendant who is still the registered lessee for a term of 50 years from 1st August 2007. The sub-lease is dated 16th March 2009 and registered against the grant as entry number 3.
2. The genesis of the dispute is a subsequent agreement for sale of the apartment from the 2nd defendant to the plaintiff. That contract is contained in two agreements: the original sale agreement dated 30th November 2009; and, an addendum to it executed on 2nd November 2010. The consideration was Kshs 7,700,000. It is common ground that the plaintiff paid 10 % deposit upon execution of the first agreement and that he took possession. It is instructive that the 2nd defendant had charged the property to secure a loan from the 3rd defendant.
3. A dispute erupted between the plaintiff and 2nd defendant. The 2nd defendant claimed that the plaintiff breached the sale agreement by failing to pay the purchase price or to meet the installment payments. The 2nd defendant or his agents evicted the plaintiff from the premises.
4. The plaintiff's case is that he had paid Kshs 6,146,000 and that the 2nd defendant had no right to evict him. The pith of the plaintiff's suit is a prayer for specific performance of the contract and for a permanent injunction against his removal from the premises. There are other prayers for

- general and special damages; *mesne* profits; and, and for rectification of the register. The motion as drafted also seeks an interlocutory mandatory injunction or vacant possession of the premises. The motion is contested by the defendants.
5. On 7th October 2013 the court directed that the plaintiff's motion dated 25th June 2013 be heard and determined on the depositions of the parties and written submissions. The depositions on record are as follows: the plaintiff's affidavit sworn on 25th June 2013; the replying affidavit of the 1st defendant's director sworn on 5th July 2013; the replying affidavit of the 2nd defendant sworn by his attorney, Isaac Kidiabayi, on 16th July 2013; and, the 3rd defendant's reply sworn on 19th July 2013. The 4th defendant has not filed any pleadings. The plaintiff, the 1st, 2nd and 3rd defendants have all filed written submissions.
 6. I have considered the pleadings, depositions and rival submissions. I take the following view of the matter. The principles governing the grant of prohibitive injunctions are now well settled. When a litigant approaches the court for prohibitive injunction, he must rise to the threshold for grant of interlocutory relief set clearly in Giella Vs Cassman Brown and Company Limited [1973] E.A 358. 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 compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself 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. See also the 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] e KLR.
 7. The conditions stated in Giella's case 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" Kenya Commercial Finance Company Ltd Vs Afraha Education Society [2001] 1 E.A. 86.
 8. In Mrao Limited Vs First American Bank of Kenya Ltd and others [2003] KLR 125 the Court of Appeal stated that a *prima facie* case is one –

"Which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter".

9. The prayer numbered 4 in the plaintiff's motion seeks to "take over, possess, occupy, enjoy and own" the apartment. Since the plaintiff has been evicted from the suit premises, the nature of the relief sought is a *mandatory* injunction. The principles governing the grant of mandatory injunctions are also well settled. The court must have a high sense of assurance that the applicant would be entitled to that relief at the conclusion of the suit. See Halsbury's Laws of England 4th Edition volume 24, paragraph 848, Locabail International Finance Limited Vs Agro Export et al [1986] 1 ALL ER 901, Mucuha Vs Ripples Limited [1990 – 94] E.A. 388. Those are thus the legal parameters or principles guiding me in this matter.
10. When I juxtapose those principles against the available evidence, I find as follows: The 1st defendant is *non-suited*. Rajmuk Investments Limited was the *original* owner and developer of L.R. 209/118/56. It sold its interest in the disputed apartment to the 2nd defendant who is now the *registered* lessee. The reversionary interest in the lease was *transferred* to a new entity known as Kipkabus Apartments Limited. This is clear from the grant marked "AMM1" to the replying affidavit of Abraham Munene sworn on 5th July 2013. Fundamentally, there is no *privity of contract* between it and the plaintiff. I am completely at a loss how an injunction against the 1st defendant would aid the plaintiff. The prayers against the 1st defendant are hereby dismissed.
11. From the replying affidavit of the 3rd defendant bank sworn by Bertha Musazi, it is apparent that the 2nd defendant took a loan from the bank secured by the property. The plaintiff has never been a party to that contract. True, the plaintiff was making deposits or installments towards purchase of the apartment into the bank account. The plaintiff has not shown that the bank has issued any statutory notice to realize its security: The plaintiff is merely apprehensive that a transfer may be

effected. At paragraph 25 of his affidavit he deposes as follows:

“I am apprehensive that unless the sought [sic] orders are issued the defendants will transfer the apartment thereby inevitably [sic] frustrating my interests and rights and I will suffer irreparable loss.....”

12. True, the plaintiff prays in the suit for recovery of the sums he paid into the 2nd defendant’s account at the bank. Prayer “1” in the plaint is crafted in the following terms –

“The 3rd defendant to recover from the 2nd defendant the loan amounts payments which he made to the 2nd defendant’s account under the terms of the agreement but which the 2nd defendant deceptively withdrew the [sic] money from for [sic] purposes of frustrating the 3rd defendant’s recovery”.

13. First, those are matters of evidence best left to the trial court. Secondly, I have no tangible evidence that the bank is leasing or about to transfer the suit premises. Thirdly, the relationship between the plaintiff and the bank is tenuous. As I have stated the lending contract and charge is *between* the bank and 2nd defendant. The cause of action against the bank thus hangs on a loose and thin thread. Fourthly, if the injunction is granted in the proposed terms, it will unfairly prejudice the bank’s accrued rights under the contract of lending to the 2nd defendant. It follows that the plaintiff has not proved a *prima facie* case against the bank. The motion as against the 3rd defendant bank is dismissed.

14. I will now turn to the pith of the dispute. The contract of sale in the agreements dated 30th November 2009 and the addendum dated 2nd November 2010 is not in contest. What is in contention is *whether* the plaintiff kept his part of the bargain. The consideration was agreed at Kshs 7,700,000. The plaintiff paid 10% deposit of 770,000. That is acknowledged. Under clause 2.2 of the agreement, he was to pay monthly installments of Kshs 500,000. Completion was initially set for 28th February 2010 (now past), being 90 days from the date of the agreement. The sale was *subject* to the Law Society Conditions of Sale. Under the addendum, the completion date was extended to 3rd December 2010 (now past). The plaintiff was now to pay a further Kshs 2,040,000 on or before 30th April 2010. The 2nd defendant acknowledged receipt of that sum. The plaintiff was then to pay monthly installments of Kshs 500,000 from 1st August 2010 to the completion date out of which a sum of Kshs 87,000 would go to reduce the outstanding loan to the 3rd defendant.

15. Parties are bound by commercial agreements and must keep their part of the bargain. It is not the true province of the courts to rewrite contracts for parties. See *Morris & Company Vs Kenya Commercial Bank* [2003] 2 E A 605 and *National Bank of Kenya Limited Vs Pipeplastic Samkolit and another* [2001] KLR 112. See also *Balbir Singh Sadhu and another Vs Rose Detho and others* Nairobi, High Court case 259 of 2003 [2012] e KLR, *Isaac Gathungu Wanjohi Vs Samson Njoroge and another* Nairobi, High Court case 615 of 2010 [2013] e KLR, *Prime Bank Limited Vs Mulji Devraj & Brothers Limited and 2 others* Nairobi, High Court case 318 of 2007 (unreported), *Consolidated Bank of Kenya Limited Vs Securicor Security Services Kenya Ltd* Nairobi, High Court case 594 of 2003 [2013] e KLR.

16. From the plaintiff’s concession at paragraph 9 of his affidavit, he had issued a number of *dishonoured* cheques to the bank. Although he claimed to have paid Kshs 6,146,000 to the 2nd defendant, it still fell short of the purchase price. The bank statements marked “IK3” to the replying affidavit of Isaac Kidiabayi do not show that the plaintiff *regularly* paid the monthly installments towards the loan account. By the time of the suit and his affidavit of 25th July 2013, the completion date had long passed. The plaintiff thus misconducted himself by breaching the agreement. A court of equity would not look favourably in his direction. See *Kenya Hotels Limited Vs Kenya Commercial Bank and another* [2004] 1 KLR 80. That is not to say that the 2nd defendant has acted completely in good faith or is as white as cotton. But this is the plaintiff’s suit: he must rise to the threshold of grant of interlocutory prohibitive or mandatory injunctions.

17. The apartment is still registered in the name of the 2nd defendant. I have also seen two letters dated 30th April 2012 to the plaintiff and 4th June 2012 to the plaintiff's advocates rescinding the sale. Although the plaintiff was in possession, it did not *ipso facto* make him the owner of the premises *unless* the contract was consummated. Until then, the plaintiff was in the position of a licensee. I have not heard the plaintiff to say he has paid the full purchase price under the terms of the contract or faithfully met installment payments. In a word, the plaintiff has not established a *prima facie* case for a *prohibitive* injunction. As a corollary, I do not have a high sense of assurance that he is entitled to a *mandatory* injunction.
18. If I be wrong on those findings, the plaintiff can be fairly compensated in *damages*. The claim is liquidated. The plaintiff has in the plaint sought special and general damages for breach of contract. The plaintiff claims to have made additions to the premises valued at Kshs 500,000. Clearly, if the plaintiff prevails at his trial, I find that he can be adequately compensated in damages. I am thus unable to say that the plaintiff shall suffer *irreparable* harm. Granted all of those circumstances, I need not determine or weigh the balance of convenience at this stage.
19. In the result, the plaintiff's notice of motion dated 25th June 2013 is devoid of merit. It is dismissed with costs to the 1st, 2nd and 3rd defendants. The 4th defendant did not appear and is not entitled to costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 21st day of January 2014

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for Plaintiff instructed by Moses Odawa & Company Advocates.

No appearance for the 1st Defendant instructed by Muri Mwaniki & Wamiti Advocates.

Mr. D. Gwaro H/B for Morara for the 2nd Defendant instructed by Morara Ngisa & Company Advocates.

Mr. D. Njoroge for the 3rd Defendant instructed by Macharia Mwangi & Njeru Advocates.

No appearance for the 4th Defendant.

Mr. C. Odhiambo, Court clerk.