



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. NO. 1323 OF 2013

ABDELHAFID TCHOKETCH.....1ST PLAINTIFF

VERONICA MARIE KEMUNTO OGETO.....2ND PLAINTIFF

VERSUS

MERCY NYAMBURA KANYARA..... DEFENDANT

RULING

Coming before me for determination is the Notice of Motion dated 28th October 2013 in which the Plaintiffs/Applicants seek for a temporary injunction restraining the Defendant/Respondent from selling, dealing with or constructing any structure on the land parcels known as Land Reference Nos. 7380/23, 7380/24 and 7380/25 original Land Reference Number 7380/16 (hereinafter referred to as the “Suit Properties”) pending the hearing and determination of this Application and suit and that further this court do declare that the Suit Properties belong to the Plaintiff and the Registrar of Titles Karen area be ordered to effect transfer of the Suit Properties to the Plaintiffs’ upon the Plaintiffs depositing Kshs. 78,300,000/- being the balance of the purchase price into court. The Plaintiffs also request that costs of this Application be provided for.

The Application is premised upon the grounds appearing on the face of it together with the Supporting Affidavit of the 1st Plaintiff, Abdelhafid Tchoketch, sworn on 28th October 2013 in which he averred that on 2nd April 2013, both he and the 2nd Plaintiff entered into a written Sale Agreement with the Defendant, Mercy Nyambura Kanyara, for the sale of the Suit Properties to them at a purchase price of Kshs. 87 million. He exhibited a copy of the Sale Agreement. He further averred that their advocates paid a sum of Kshs. 8.7 million being 10% of the purchase price to the Defendant via RTGS dated 15th April 2013 and agreed to pay the balance of the purchase price upon receipt of copies of the completion documents. He further stated that in contravention of the clear terms of the Sale Agreement, the Defendant has since failed to release the completion documents. He further averred that his advocates forwarded the draft transfer document to the Defendant for approval but that the Defendant has failed to approve the same. He also stated that despite visits, telephone conversations and even letter correspondence the Defendant has failed to respond. He also stated that on 8th July 2013, he served the Defendant with a completion notice of 21 days demanding the release of completion documents and that the Defendant responded on 9th July 2013 stating that there were delays at the Ministry of Lands in processing the new grants occasioned by the change of user process. He further stated that his advocates sent the Defendant a

demand letter dated 16th August 2013 demanding the release of completion documents within 7 days and that on 22nd August 2013 the Defendant responded stating that the completion documents could not be availed and that the Defendant could not complete the transaction as agreed. He also averred that subsequent meetings were held with the Defendant who sought the help of their advocate to obtain the completion documents.

The Application is contested. The Defendant filed her Grounds of Opposition dated 18th November 2013 in which she stated that she opposed the Plaintiffs' Application on the following grounds:

1. That the orders sought by the Plaintiffs are not available to them as title in the Suit Properties has not passed to them.
2. The completion of the transaction has been frustrated by matters beyond the Defendant's control.
3. The Application is premature, lacks merit and is brought in bad faith as the Defendant is and has always been ready and willing to complete the transaction were it not for the frustrating factors.
4. The Defendant is ready and will to refund the 10% deposit plus interest paid in view of frustration of the Agreement.

Both the Plaintiffs and the Defendant filed their written submissions which have been read and taken into account in this ruling.

In determining whether or not to grant the Plaintiffs/Applicants the orders they seek of an interlocutory injunction, I will refer to and rely on the principles laid down in the celebrated case of **Giella versus Cassman Brown (1973) EA 358** as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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.”

The issue I am required to determine here is whether the Plaintiffs/Applicants have made a genuine and arguable case entitling them to the order of specific performance which they seek in this suit. Specific performance is an equitable remedy which the court has discretion to grant. In **Manzoor vs Baram (2003) 2 EA 580 at 592** it was stated as follows,

“Specific performance is an equitable remedy grounded in the equitable maxim that ‘equity regards as done that which ought to be done’. As an equitable remedy it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy, such as damages, would be adequate to put the applicant in the position he would have been but for the breach. In that regard the courts have long considered damages an inadequate remedy for breach of contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course.”

It is undisputed that the parties herein signed a Sale Agreement on 2nd April 2013 for the purchase of the Suit Properties at a cost of Ksh 87,000,000 and that Ksh 8,700,000/= being the 10% deposit thereof was paid by the Plaintiffs/Applicants to the Defendant. The Plaintiffs/Applicants now claim that the

completion date within which this Sale Agreement should have been concluded has expired and therefore want this court to grant them the order of specific performance for the reason that they have paid the 10% of the purchase price and are willing and able to pay the balance of the purchase price. On her part, the Defendant/Respondent has pleaded her frustration in supplying the completion documents owing to the failure to obtain the certificates of title from the Ministry of Lands. The Defendant/Respondent has also intimated that she is willing to complete the transaction once the certificates of title have been released by the Ministry of Lands. It is a well-established doctrine that the court will not order the specific performance of a contract the result of which would be to impose great hardship on either of the parties. The court has looked at the Sale Agreement and the correspondence exchanged between the parties and finds that the Plaintiffs/Applicants are not candid when they state that the Defendant/Respondent has refused to transfer the Suit Properties to them as Clause 13.5 allowed the parties to negotiate in good faith and amend those terms that are unenforceable so as to make the same valid and enforceable. The Plaintiffs/Applicants ought to have taken advantage of this clause considering that the Defendant/Respondent had stated in her letters dated 9th July, 2013 and 22nd August 2013 that she was willing to complete the sale transaction once the certificate titles were released by the Ministry of Lands. This court having considered the submissions of both parties finds that enforcing specific performance would be imposing upon the Defendant/Respondent a condition that will cause hardship as the certificates of title are not yet ready. Obtaining the certificates of title to the Suit Properties is a function which is not in the control of the Defendant/Respondent and therefore this court cannot issue an order compelling her to procure the same for purposes of transferring the Suit Properties to the Plaintiffs. With that finding, I find that the Plaintiffs have failed to establish that they have a prima facie case with high chances of success at the main trial. In view of this finding, this court sees no need to further interrogate whether the Plaintiffs have satisfied the other two conditions outlined in the **Giella** Case cited above.

In light of the foregoing, I do not consider that the Plaintiffs/Applicants are entitled to the orders they seek and I dismiss this Application. Costs shall be in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 28th DAY OF February 2014

MARY M. GITUMBI

JUDGE