REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 310 OF 2012

PETER ASWA & 42 OTHERS..... PLAINTIFFS/APPLICANTS

VERSUS

NATIONAL HOUSING CORPORATION... DEFENDANT/RESPONDENT

RULING

1.The facts in this case case be summarized as follows:-

2.The defendant (respondent) offered to sell its houses at Kabachia Estate Nakuru being house number 2, 3, 5, 7. 12, 16, 20, 32, 39, 40, 42, 45, 56, 59, 62, 64, 66, 69, 73, 85, 86, 97, 102, 103, 105, 108, 110, 112, 113, 118, 119, 134, 135, 136, 137, 138, 139, 146, 155, 162, 169 (hereinafter called **"the suit properties")** to the plaintiffs (applicants) who were its tenants. The appalicants accepted the offer and subsequently entered into various tenant purchase agreements for the houses they occupied.

3.Upon execution of the agreements, the applicants paid the agreed deposit and took possession of their respective houses. Apparently, the applicants defaulted in their rent payment obligations and the respondent, in a bid to enforce its rights issued them with notices to meet their contractual obligations or risk rescission of their contracts.

4.As the applicants' did not heed the notices, the respondent put up an advertisement in the Sunday Nation of 16th December, 2012 communicating its intention to repossess the suit properties.

5.Aggrieved by the said notices and the advertisement, the applicants brought this suit praying for judgment against the defendant/respondent for:-

a. an order declaring the notices dated 2nd, 9th, and 16th December, 2012 illegal, null and void in law;

b. An order of permanent injunction restraining the defendant from acting on the notices in (a) above or any other notice as long as the plaintiffs continue paying the balance of the purchase price pursuant to the tenant purchase agreement.

c. Costs of the suit.

6.Simultaneously with the plaint the applicants brought the application dated 19th December, 2012

seeking a temporary injunction to restrain the respondent from repossessing and/or interferring with their occupation or quiet enjoyment and peaceful use of the suit properties pending the hearing and determination of the suit.

The application is supported by the affidavit of the 1st applicant (Peter Aswa) and is premised on the grounds that the applicants bought the suit properties through tenant purchase agreements executed in 2010; that under the agreement the applicants were to pay the whole of the purchase price within 15 years. It is contented that despite the the applicants having regularly paid the agreed instalments to the respondent's bank account domiciled at Cooperative Bank of Kenya Ltd, Nakuru branch, the respondent has issued notices of repossession of their properties under the pretext of outstanding rent arrears. The applicants have also contended that the notices amount to unilateral variation of the terms of the agreements they executed; and that unless the respondent is restrained from acting on the notices, or in any way interferring with the respondents' occupation and use of the suit properties, the applicants will suffer irreparable harm.

7.In reply the respondent, through its officer in charge, James Ombese, has deposed that:-

1. The application is incompetent, misconceived and an abuse of the court process.

2. The applicants breached their contractual obligation and forced the respondent to issue the impugned notices in a bid to enforce its rights as provided in the sale agreement.

3. Instead of heeding the demand notices the respondents rushed to court and filed the instant suit which action amounts to gross abuse of the court process as the outstanding arrears remain unpaid and have continued to accumulate.

4. The claim that the applicants' cannot be said to be in breach of the contract before the end of the fifteen years within which the balance of the purchase price should be paid has no basis as clause 9(b) of the agreements clearly stipulated that if the applicants fell into arrears by failing to pay the monthly instalments stipulated in clause 2(b) and failed to remedy within 21 days, the respondent would take the necessary legal action against them.

5. In its bid to realize its rights under the agreements, the respondent adhered to laid down proceedings and the intended repossession of the applicant's houses was in accordance with the provisions of the agreements which the applicants had voluntarily entered into.

6. The allegation that the notices were meant to harass the applicant with the intention of re-allocating the suit properties to other people is not only malicious but also made in bad faith and with the aim of defeating the respondent's right to repossess the suit properties the applicants' breach of contract notwithstanding.

7. The the allegation that there are contentious issues in respect of valuation of the suit properties cannot hold any water as the agreements were executed on willing seller willing buyer basis. Further that any objection on the price ought to have been raised before the applicant entered into the contract.

8. The applicants don't deserve the aid of equity since their hands are unclean-having persistently failed to pay the outstanding arrears despite the respondent's forbearance.

9. The application has been brought in bad faith with the sole intention of denying the respondent its right to repossess the suit properties even after it adhered to the laid down procedures; and

10.Unless the order sought is denied the respondent will continue to suffer irreparable loss as the applicants will continue occupying the suit properties without meeting their contractual obligations.

8.It is common ground that the respondent and the applicants entered into a tenant purchase agreement in

which the respondent agreed to sell and the applicants agreed to buy the suit properties on the terms and conditions stipulated in their respective sale agreements.

9.Clause 2(b) of the agreements which provides:-

"the balance of the purchase price amounting to Kenya Shillings....only (amount in figures) together with interest on the amount of such balance for the time being remaining unpaid at the rate of 13% per cent per annum shall be paid by ... equal installments of principal and interest combined the amount of which shall be Kenya Shillings...only (amount in figures) each to be paid on the first day of every calender month the first such payment to be made on or before...and monthly thereafter until the whole balance owing shall have been paid." (Emphasis mine).

10.The applicants have argued that they cannot be held to be in breach of their respective agreements before the end of the fifteen years within which the balance of the purchase price ought to be paid. They also argue that there is a dispute regarding the actual value of the houses they bought.

11.Having read and considered the agreements signed by the applicants, contrary to the applicants contention that there remained something to be done, I find that the terms were clearly stipulated in the contract. The agreements provided for the agreed purchase price, the manner in which the purchase price was to be paid, the rights and obligations of the parties to the agreements; the consequences of breach of the terms of the contract and the manner of enforcing the rights created under the contract (Clause 2 as read with Clause 9 of the agreements).

Clause 2 provided for the purchase price and how it was to be paid. Clause 2(f) of the agreements provided:-

"If default shall be made in payment of any of the installment of principal and interest mentioned in clause 2(d) above twenty One (21) days after the same shall have become due and payable then the whole of the purchase price or the balance remaining unpaid together with the interest thereon as aforesaid shall forthwith become payable and be paid by the Tenant Purchaser to the Corporation on demand, but so that interest at the rate aforesaid shall continue to accrue until the actual date of payment of the principal."

12.Clause 9 (b), on the other hand provided that:-

"If the purchaser shall make default in payment of any equated installment specified in clause 2(b) hereof or the levy mentioned in clause 2(e) for a period of Twenty One (21) days after the date hereinbefore appointed for the payment thereof (as to which payment time shall be of essence of the contract) or if the purchaser shall fail to observe or fail to comply with any other stipulation on his/her behalf hereined contained and after being given notice in writing by the corporation shall thereupon (without prejudice to any other rights and remedies available to the corporation) be entitled to rescind this agreement by notice in writing to the purchaser. The Corporation will refund the deposit so paid by the tenant purchaser less all interest accrued due but remaining unpaid and all other moneys due under this agreement together with all all expenses involved in this rescission."

13.From the foregoing, it is clear that the applicants were contractually obligated to pay the balance of the purchase price by equal monthly instalments and not whimsically as contested.

14.It is noteworthy that the applicants' have blamed the respondent for their woes arguing that it refused to revise the repayment rates and/or harmonize the valuation reports.

15.Regarding the legal requirements for granting of a temporary injunction they have submitted that having paid 20% of the purchase price and made additional payments, they have established a *prima facie* case against the respondent. They have also submitted that if they are removed from the suit premises, which they have known as their homes for over 30 years, they will be rendered homeless and destitute.

Further, that removing them from the suit property will be in breach of their constitutional right to dignity.

16.While acknowledging that the respondent has the ability to refund the moneys paid by them and pay them damages, if they succeed in their suit, the applicants have submitted that no amount of damages can adequately compensate them for the indignity the repossession of the suit properties will expose them to; and that the balance of convenience tilts in their favour as they have lived in the suit properties for over 30 years.

17.As regards the respondent's interest in the suit property the applicants have submitted that the respondent's interest is payment of the purchase price which can be recovered even after ten years with interest.

18.Maintaining that the applicants are in breach of their contractual obligations the respondent has submitted that the impugned notices were issued in compliance with the contracts signed between it and the applicants; that the applicants' challenge to its right of possession is unfounded. The respondent contends agreements were based on willing buyer willing seller and that any objection to the terms of the contract could only be raised before execution of the contracts. Further, that the parties to the agreements hereto are bound by their terms and it would be pervese to justice for a party to try and wriggle himself/herself out of a contract duly executed and part performed. The attempt by the applicants to contest the contract they executed and part performed is termed as an afterthought and an admission of the fact that they have breached their contractual obligations to the respondent. It is further submitted that, being in breach of their contractual obligations to the respondent, the applicants have failed to establish a *prima facie* case with probability of success.

19.On whether the applicants can adequately be compensated by an award of damages, relying on **Mureithi** v. **City Council of Nairobi**, **Civil Appeal No.5 of 1979** where the Court of Appeal quoted with Approval the holding of Lord Diplock in **American Cynamid Co.** v. **Ethicon Ltd** (1975) AC 396 thus:-

"The object of the interlocutory injunction is the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial...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, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

20.the respondent has submitted that in the instant case the applicants can be redressed by an award of damages.

21.The respondent has also submitted that in considering whether or not to grant an interlocutory injunction, the court must also consider the conduct of the applicant to determine whether it warrants the granting of an equitable remedy. In this regard it is submitted that the applicants' persistent failure to pay the outstanding rent arrears despite the respondent's forbearance reeks of impunity and unclean hands and for this reason the applicants do not deserve the aid of equity.

22.I have considered the pleadings in this case, the affidavit evidence adduced in support thereof and the respective submissions by the advocates for parties.

23.Before I determine this application I wish to comment on the respondents contention that the application and by extention the suit does not lie as it is grounded upon fraud and illegality. The contention is premised on the fact that some of the plaintiffs (fifteen in number) have sworn affidavits disowning the suit and contending that they did not donate any authority to the first plaintiff to appear, plead or act on their behalf.

24.As regards the foregoing issue, this court is faced with two contradicting averments over the suit. One, that all the 42 plaintiffs donated their authority to the 1st plaintiff to swear the affidavit verifying the

averments in the plaint on their behalf. Two, that 15 of the plaintiffs did not donate their authorities as alleged.

25.There being no further evidence adduced to substantiate the claims, in determining this matter the court will be guided by the provisions of section 3 (4) of the Evidence Act, chapter 80 laws of Kenya; Order 1 rule 9 and Order 2 rule 4 of the Civil Procedure Rules.

26.Section 3(4) of the Evidence Act provides:-

"A fact is not proved when it is neither proved nor disproved".

27.Order 1 Rule 9 of the Civil Procedure Rules provides:-

"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

28.Order 2 Rule 4 of the Civil Procedure Rules, on the other hand, provides for matters which must be specifically pleaded. Among the matters that must be specifically pleaded are fraud and illegality.

29.Although the respondent has submitted that some plaintiffs were fraudulently enjoined in the present suit and application and as such tainted grounded upon fraud and illegality, it did not plead the illegality or fraud in its statement of defence. To rely on the alleged fraud and/or illegality it was, as a matter of law, required to plead those matters specifically. Having failed to do so, it cannot rely on the alleged fraud or illegality to defeat the application or the suit.

30.It is common ground that the subject matter of this suit are properties which the respondent sold to the respondent by way of Tenant Purchase Agreements. It is also not in dispute that upon execution of their various agreements with the respondent the appalicants took possession of the suit properties and began meeting their contractual obligations to the respondent, albeit irregularly.

31.Following default in their contractual obligations to the respondent the respondent sought to enforce its legal rights under the agreements by issuing notices on the applicants to meet their contractual obligations or risk rescission of their contract. Apparently, the applicants failed to heed the notices and the respondent put up an advertisement notifying them of its intention to repossess the suit properties.

32.Aggrieved by the notices and the advertisement, the applicants brought this suit to restrain the respondent from acting on the notices or the advertisement as long as they continued to meet their contractual obligations.

33.Although the applicants have admitted that they were not meeting their contractual obligations as provided for under their agreements, they blamed the respondent for having failed to review the terms of the agreements. They have also alleged hardship as the reason for failing to meet their obligations and argued that because the contractual period within which they are supposed to meet their contractual obligations has not lapsed, they should not be taken to be in breach of the agreement.

34.For a temporary injunction to be granted in favour of the applicants, the applicants have to satisfy the conditions set out in **Giella v Cassman Brown & Co. Ltd. (1973) EA 358,** namely that they have a *prima facie* case with a probability of success, that unless an injunction is granted, they might suffer injury which cannot adequately be compensated by an award of damages; and should the court be in doubt, they must demonstrate that the balance of convenience tilts in their favour.

35.In view of the admission (implied in the applicant's pleadings and submissions) that the applicants have not been meeting their contractual obligations to the respondent, it is submitted that the applicants have failed to establish a *prima facie* case with a probability of success against the respondent. It is also submitted that an interlocutory injunction being an equitable remedy and the evidence on record having

demonstrated that the applicants are persistent defaulters in their obligations, they don't deserve an equitable remedy.

36.I find as a fact that the relationship between the applicants and the respondent was purely contractual. I also find the terms of the agreements entered into between the applicants and the respondent to be certain and ascertainable.

37.Although the applicants have argued that there remained something to be done, to determine the purchase price or the installments to be paid in respect thereof, that fact or contention is not borne out by the agreement or the evidence adduced in this application. I disregard it.

38.Have the applicants demonstrated a *prima facie* case with a probability of success?

39.My answer is negative. This is because, the relationship between the applicants and the respondent was strictly regulated by the various contracts they signed.

40.The agreements hereto provided for the parties' rights and obligations and the manner in which the parties' rights were to be enforced.

41.I am persuaded that the applicants breached their contractual obligations to the respondent. Under the contracts executed by the parties, the respondent was within its right to issue the impugned notices and advertisement if the applicants defaulted in their obligations. All what the respondent needed to do is to comply with the procedure of enforcing its rights under the contract, which it did.

42.In construing the contract entered into between the applicants and the respondent the duty of this court is to give effect to the contract which they executed, if the contract is certain and there is nothing that can vitiate it. The contracts were certain and there is nothing capable of viating them.

43.Having demonstrated that it complied with the terms of contracts, the respondent was entitled to issue the impugned notices and cannot lawfully or otherwise be faulted for the actions it took in a bid to enforce its rights under the contract.

44.On whether damages can adequately compensate the applicants unless a temporary injunction is issued in their favour, I hold the view that the applicants not being proprietors of the suit properties, their interest in the suit properties is limited to their contractual rights therein. Under Clause 9(b), of the various contracts the right of the applicants upon repossession of the suit property is refund of the deposit paid. The relevant part of the clause provides as follows:-

“The Corporation will refund the deposit so paid by the tenant purchaser less all interest accrued due but remaining unpaid and all other moneys due under this agreement together with all all expenses involved in this rescission.”(Emphasis mine).

45.Ordinarily the applicants being in occupation of the suit properties, would suffer greater prejudice if removed from the houses they occupy. However, in view of the special circumstances of this case firstly, the contracts provided for refund of deposit if the applicants breached their obligations necessitating the repossession of the suit properties. Secondly, The deposit paid by each applicant in this suit is ascertainable, thirdly there is no evidence that the respondent might not be able to meet its contractual obligation under the respective agreements, finaly an injunction being an equitable remedy, it can should only issue if the court is satisfied that, it will not be encouraging illegal or unlawful conduct. In the instant case, there is no doubt that the applicants are in breach of their contractual obligations. Instead of engaging the respondent with a view of meeting their contractual obligations, the applicants have moved to court to restrain the respondent from enforcing its contractual rights. Surely, no court of law or equity can issue the orders sought as doing so would be tantamount to encouraging impunity.

46.Consequently I find the balance of convenience in this application to be in favour of the respondent as it is not in breach of its contractual obligations.

The application has no merit and is dismissed with costs to the respondent.

Dated, Signed & delivered at Nakuru this 28th day of February, 2014

H.A OMONDI

JUDGE

Obiter

Given the special circumstances of this case and the fact that respondent is not obligated to issue a fresh notice and there being nothing stopping the respondent from executing forthwith, in the interest of justice the court is persuaded that it would be equitable to grant applicants a window of time within which to sort out their affairs within 30 days to comply.