



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. E091 OF 2021

MARTIN KAVIU KIOKO.....PLAINTIFF/APPLICANT

VERSUS

KAMUTHI HOUSING & CO-OPERATIVE

SOCIETY LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This Ruling is in respect of the Chamber Summons Application dated 17th October, 2021 filed by the Plaintiff/Applicant seeking for the following orders;

a) Spent

b) Spent

c) That the Officer in charge KBC Police Station do enforce compliance and keep the peace.

d) That pending the hearing and determination of this suit or the intended arbitration, this Honourable Court be pleased to grant the Plaintiff an interim measure of protection by way of restraining the Defendant whether by itself, its agents, servants, assigns, successors or otherwise howsoever from interfering, hindering, entering into, occupying, offering for sale, or whatsoever manner dealing with the Plaintiff's property known as DONYO/KIBOKO BLOCK 4 (KOLOOSO)/605.

e) That a mandatory injunction does issue requiring the Defendant to forthwith return and surrender to the Plaintiff his Title Deed to the property known as DONYO/KIBOKO BLOCK 4 (KOLOOSO)/605.

f) That this case be referred to Arbitration.

g) That such further or other orders as are appropriate for the effective administration of justice be issued.

h) That the costs of this Application be met by the Defendant.

2. The Application is supported by the Affidavit of Martin Kaviu Kioko the Plaintiff in this matter who has deposed that the Applicant is the registered proprietor of land parcel No. DONYO/KIBOKO BLOCK 4 (KOLOOSO)/605; that on 23rd July, 2020, the parties herein entered into an agreement for sale of the said parcel at Kshs. 21,070, 500/=, which amount was to be paid by 19th April, 2021; that the Defendant only paid Kshs. 4,000,000/= leaving a balance of Kshs. 17,070, 500/=; that on 21st October, 2020, the Plaintiff surrendered his Title Deed to the Defendant in the hope that he will be paid the entire purchase price as agreed and that the Defendant subdivided the suit land and sold it to third parties instead of settling the consideration first.

3. Further, the Applicant averred that the Defendant having breached the agreement, on 31st March, 2021, the Plaintiff issued 21 days' Notice of Rescission, indicating that in default the agreement shall stand terminated; that the default was not rectified hence the agreement stood terminated on 21st April, 2021; that Clause 15 stated that in the event of a dispute, the suit be referred to arbitration, which decision shall be binding on the parties and final; that Clause 15.2.6 granted parties the liberty to seek preliminary injunctive relief from a court of competent jurisdiction; that the property is in danger of being transferred to third parties and therefore the Plaintiff will suffer irreparable injury; that the Defendant's trespass on the suit property is unlawful.

4. The Application is opposed. Eliud Perminus Njoroge, the Secretary of the Defendant swore a Replying Affidavit dated 9th November, 2021, where he deposed that on 15th November, 2019, the Defendant and the Plaintiff's family entered into a land sale agreement in respect

of sale of 36 acres to be hived from L.R No. 2706/8 delineated as land Survey Plan 206629, whereupon the Defendant deposited Kshs. 2,000,000/= to the Plaintiff; that at the time of the agreement, and unknown to the Defendant, the Plaintiff had entered into another agreement with a third party namely Airwaves Properties Limited; that consequently the Defendant demanded a refund of his money but the Plaintiff's family had no capacity to refund and therefore the parties entered a deed of variation dated 27th November, 2019; that this resulted in the Defendant being sued in Machakos ELC Case No. 139 of 2019, but the case was determined by consent on 19th May, 2021.

5. It was further stated on behalf of the Defendant that the parties herein entered the agreement dated 23rd July, 2020 due to the Plaintiff's family's incapacity to refund the consideration paid earlier by the Defendant; that the second property where the Defendant was subsequently induced to buy was far away from the earlier property and was not easy to sell; that the Plaintiff was made aware by the Defendant that the latter was acquiring the suit property to subdivide and sell to its members and clients; that the Covid 19 restrictions by government and the ensuing economic downfall, it was not possible for the Defendant to raise funds and the Defendant pleads the defence of force Majeure; that on 21st October, 2020, the Defendant surrendered the title of the suit property to the Plaintiff to facilitate subdivision and sale; that the resultant titles were to be registered in the Plaintiff's name yet the Plaintiff refused to sign the subdivision forms frustrating the sale and that the Plaintiff's family members engaged in chasing away the Defendant's clients leading to the Defendant's default.

6. Further that the Defendant is ready and willing to participate in the resolution of the dispute by an arbitrator; that the Defendant is opposed to surrender of the Title Deed before the issue of clients who had purchased part of the suit land is addressed and that the jurisdiction of this court is only limited to interim orders and thereafter parties ought to submit to the alternative dispute mechanisms provided in the contract.

7. The Application was canvassed by written submissions and on record are the Applicant's submissions filed on 1st November, 2021 and the Respondent's submissions filed on 11th November, 2021.

SUBMISSIONS

8. Counsel for the Applicant submitted that as the fact of default in the payment of the purchase price on the part of the Defendant was not in dispute, hence the Plaintiff was entitled to rescind the contract. Reliance was placed on the case of **Francis Wahiu Theuri v Monicah Njeri & 3 Others [2020] eKLR**.

9. Further it was submitted for the Applicant that the Defendant illegally entered the suit property and purported to demarcate and sell the same to third parties, which is prejudicial to the proprietary rights of the Plaintiff. Counsel relied on the case of **Giella v. Cassman Brown (1973) E.A 358** to argue that the Plaintiff has met all the conditions for grant of temporary injunction. Counsel argued that the Plaintiff had established a *prima facie* case and the Defendant did not stand to suffer loss if the injunction is granted. Counsel relied on Section 7 of the Arbitration Act and submitted that this court has power to issue interim protection to the Plaintiff before arbitration proceedings are conducted.

10. Counsel for the Defendant/Respondent submitted that it is not in dispute that the Defendant had paid Kshs. 4,000,000/= towards acquisition of the property and that the Defendant had made the Plaintiff aware that the purchase of the property was for subsequent sale to its members. Counsel argued that the title of the suit property was surrendered to the Defendant without other transfer documents for purposes of subdividing the property but retaining it in the name of the Plaintiff to facilitate faster sales, which averment was not contested. Counsel argued that the Plaintiff reneged on this agreement by declining to execute subdivision forms.

11. It was further argued for the Defendant that Clause 16 of the Agreement provided that delay or failure in the performance of either party shall be excused if the same was caused by force Majeure. Counsel contended that at the time of the agreement, parties did not foresee the occurrence of the Covid-19 pandemic. Counsel averred that the Plaintiff's actions of chasing away the Defendant's staff and clients militated against goodwill and the parties' obligations under Clause 16 to mitigate the risk caused by the pandemic. Counsel argued that the Plaintiff could therefore not rescind the contract in those circumstances.

12. Counsel also contended that the Plaintiff had not referred the dispute to arbitration and was only enjoying interim injunctive orders. That the prayer for surrender of title should not be granted as the Plaintiff defaulted in the agreement of 15th November 2019, and the Defendants are entitled to assert their rights. Counsel also argued that the Defendant had already sold a portion of the suit property to third parties and should they surrender the title, third party interests shall be violated and that the issue of surrender of title is a substantive issue which ought to be determined by the arbitrator.

13. Counsel also urged that a party cannot rescind a contract under Force Majeure. In conclusion, counsel argued that the Plaintiff's case does not meet the conditions for grant of temporary injunction.

ANALYSIS AND DETERMINATION

14. I have carefully considered the Application, the response, the parties' submissions and authorities cited. The issue that arise for determination is whether the Plaintiff is entitled to the orders sought.

15. Conditions for grant of injunction were set out in the case of **Giella v. Cassman Brown (1973) E.A 358** as follows:

a) ***The Applicant must demonstrate a prima facie case with probability of success.***

b) ***The Applicant must demonstrate that if the injunction is not granted, they stand to suffer irreparable injury not capable of being compensated by an award of damages.***

c) That if the court is in doubt it ought to determine the application on a balance of convenience.

16. The Plaintiff has sought to restrain the Defendant from entering the suit property, occupying the same or offering the same for sale pending hearing of the suit or the intended arbitration. I have considered the Sale Agreement dated 23rd July, 2020 which is subject of this suit. The same provides in paragraph 15.2 that in the event of a dispute it should be referred to arbitration and that any aggrieved party may seek for preliminary interim injunction in court pending the award of the arbitrator. The parties are yet to refer this matter to arbitration. Clause 3.1.2 of the said agreement states that upon payment of the further deposit of Kshs. 700,000/= the Defendant was to take possession of the property and commence marketing to its prospective clients. It is therefore clear that the Plaintiff was aware that the property had been purchased with the sole aim of sale and had authorized the Defendant's possession and marketing to third parties. The Defendant has argued that third parties have purchased part of the suit land. It is therefore not correct for the Applicant to state that the Defendant's occupation of the suit land and offering the same for sale to third parties was unlawful as that had been agreed upon by the parties.

17. The Defendant has raised the issue of force majeure as being a reason as to why the Plaintiff should not rescind the agreement. As the parties have not in their agreement addressed the place of the third parties whose rights to the suit property have crystallized by virtue of clause 3.1.2 of the agreement, it will not serve the interests of justice to grant an order of injunction as prayed against the Defendant as that will amount to condemning the third parties unheard.

18. The Plaintiff has sought for a mandatory injunction to the effect that the Defendant do surrender the title to the suit property. Mandatory injunctions are granted only in the clearest of cases where a hearing is not necessary. In this case, both parties agree that this is a dispute that ought to be referred to arbitration. I therefore decline to grant the said prayers as that is a matter to be determined by the arbitrator.

19. In the premises, as both parties have a reasonable claim over the suit property, and both are in agreement that this matter ought to be referred to arbitration, it is necessary that the subject matter of this suit is preserved pending the intended arbitration.

20. In the end, I make the following orders:

a) An order that status quo be maintained so that there should be no eviction and no further sale, lease, charge, transfer or any dealings whatsoever in respect of land parcel No. DONYO/KIBOKO BLOCK 4(KOLOOSO)/605 pending intended arbitration.

b) That the Officer in charge KBC Police Station do enforce compliance and keep the peace.

c) This matter be and is hereby referred to Arbitration in accordance with paragraph 15 of the land sale agreement dated 23rd July, 2020.

d) Each party shall bear their own costs.

21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23RD DAY OF MARCH 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Aywa for the Defendant/Respondent

No appearance for the Plaintiff/Applicant

Ms. Josephine Misigo- Court Assistant