



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 258 OF 2014

ANILKUMAR MANUBHAI PATEL

PATEL MANISHKUMAR RAMESH BHAI PLAINTIFFS

VERSUS

ANDREW ODONGO OKELLO DEFENDANT

RULING

1. By an agreement for sale dated 15th April 2014 made between the plaintiffs and the defendant, the defendant agreed to sell and the plaintiffs agreed to purchase from the defendant a portion measuring 0.05ha. of all that parcel of land known as **LR No. Kamagambo/Kabuoro/563** (“**the suit property**”) at a consideration of kshs. 4,050,000/= (hereinafter referred to as “the purchase price”). Under the said agreement, a sum of kshs. 500,000/= of the purchase price was paid before the execution of the agreement and the balance thereof amounting to kshs. 3,550,000/= was to be paid as follows:-
 - i. Kshs. 500,000/= on or about 30th April 2014
 - ii. Kshs. 3,050,000/= upon the completion of the transfer of the property sold to the plaintiffs.

On 12th May 2014, the parties entered into a supplementary agreement under which the plaintiffs paid to the defendant a further sum of kshs. 500,000/= and it was agreed that the balance of the purchase price then amounting to kshs. 3,050,000/= would be paid within one (1) month from the date of the said supplementary agreement. Pursuant to the said supplementary agreement, the said balance of the purchase price in the sum of kshs. 3,050,000/= was to be paid on or about 12th June 2014. On or about the 22nd day of May 2014, the plaintiffs lodged a caution on the title of the suit property to protect their interest in the property as purchasers thereof.

2. On 3rd June 2014, the defendant through his advocates on record wrote to the plaintiffs claiming that the plaintiffs had breached the agreement for sale dated 15th April 2014 that the plaintiffs had entered into with the defendant by failing to adhere to the payment obligations set out there under. The defendant also took issue with the plaintiffs’ decision to register the aforesaid caution on the title of the suit property. In the said letter, the defendant notified the plaintiffs that the agreement for sale dated 15th April 2014 stood rescinded and invited the plaintiffs to collect the sum of kshs. 1,000,000/= that the plaintiffs had paid towards the purchase price from his advocate’s chambers within seven (7) days.
3. The plaintiffs have brought this suit to compel the defendant to perform the agreement for sale dated 15th April 2014 and the supplementary agreement dated 12th May 2014. In the alternative,

- the plaintiffs have sought payment of a sum of kshs. 2,220,000/= being the amount that the plaintiffs claim to have spent towards the purchase of the property in dispute comprising of, the monies paid on account of the purchase price, the expenses incurred and the agreed damages for breach of contract. The plaintiffs have also sought a permanent injunction to restrain the defendant from disposing off or in any way interfering with the plaintiff's quiet and peaceful enjoyment of the suit property. Together with the plaint, the plaintiffs filed an application by way of Notice of Motion dated 3rd July 2014 seeking a temporary injunction restraining the defendant from charging, offering for sale and/or alienating the suit property in any way pending the hearing and determination of this suit. The plaintiffs' application was brought on the grounds that the plaintiffs have paid to the defendant substantial amount of money towards the purchase of the suit property and are ready and willing to pay the balance of the purchase price to the defendant.
4. The plaintiffs have contended that the defendant has become evasive and uncooperative on the issue of transferring the suit property to the plaintiffs. The plaintiffs have contended that the defendant has threatened to sell the suit property to third parties and would proceed to do so unless restrained by this court. The plaintiffs have contended further that if the defendant proceeds to sell the suit property to third parties as threatened, the plaintiffs would suffer irreparable loss. The plaintiffs have stated that they are ready and willing to pay to the defendant the balance of the purchase price provided the defendant transfers the property to them. The plaintiffs' annexed to the affidavit of the 1st plaintiff sworn on 3rd July 2014 in support of the application among others; a copy of the agreement for sale dated 15th April 2014 between the plaintiffs' and the defendant and the supplementary affidavit dated 12th May 2014 between the same parties. The plaintiffs also annexed to the said affidavit several correspondence exchanged between the advocates for the plaintiffs and the advocates for the defendant who are on record herein.
 5. The plaintiffs' application was opposed by the defendant through a replying affidavit sworn by the defendant on 22nd July 2014. In his response to the plaintiffs' application, the defendant contended that it is the plaintiffs who have breached the agreement for sale entered between the plaintiffs and the defendants and that the present application and the entire suit is an abuse of the process of the court brought merely to sanitize the plaintiffs' mischief. The defendant has contended that the plaintiffs have failed to pay the balance of the purchase price in accordance with the terms of the said agreement for sale despite several pleas and requests from the defendant.
 6. The defendant has contended that to add salt to the injury, the plaintiffs proceeded to register a caution on the title of the suit property without notice to the defendant and notwithstanding the fact that the plaintiffs are yet to pay to the defendant a sum of kshs. 3,050,000.00. The defendant has contended that the plaintiffs have been playing truancy since the registration of the said caution. The defendant has claimed that the plaintiffs are now alleging that the amount due by the plaintiffs to the defendant on account of the balance of the purchase price is kshs. 2,531,500/= only contrary to the contents of the supplementary agreement in which the plaintiffs admitted that the balance due under the agreement for sale dated 15th April 2014 is kshs. 3,050,000/=. The defendant has contended further that due to the plaintiffs' breach of the said agreement for sale, the defendant does not wish to continue with the sale of the suit property to the plaintiffs. The defendant has stated that he is ready and willing to refund to the plaintiffs, the sum of kshs. 1,000,000/= that the plaintiffs have so far paid according to him on account of the purchase price for the suit property.
 7. I have considered the plaintiffs' application and the replying affidavit filed by the defendant in opposition thereto. I have also considered the submissions that were made before me on 23rd July 2014 by the advocates for the parties. The principles guiding the court's discretion to grant temporary injunction are now well settled. An applicant for a temporary injunction must establish a prima facie case against the respondent with a probability of success and must also demonstrate that he stands to suffer irreparable injury if the injunction is not granted. If the court is in doubt as to the above, the application would be determined on a balance of convenience. See, **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**. It is not in dispute that the plaintiffs entered in an agreement for sale and a supplementary agreement for sale with the defendant dated 15th April 2014 and 12th May 2014 respectively in respect of a portion of the suit property. It is also not disputed that the purchase price for the said portion of the suit property was kshs. 4,050,000/=.

What is in dispute in the case before me is the terms of the two (2) agreements for sale and the amount so far paid by the plaintiffs to the defendant towards the purchase price. The other main issue in dispute is whether it is the plaintiffs or the defendant who has breached the terms of the said agreements for sale if at all it has been breached.

8. As I have stated at the beginning of this ruling, according to the agreement for sale dated 15th April 2014 the plaintiffs paid to the defendant a sum of kshs. 500,000/= prior to the execution of the said agreement for sale. A further sum of kshs. 500,000.00 was to be paid on or about 30th April 2014 and the balance of kshs. 3,050,000.00 upon the transfer of the suit property into the names of the plaintiffs. It appears from the material before me that the plaintiffs did not pay the sum of kshs. 500,000/= that was payable on 30th April 2014 on the due date. This resulted in the parties entering into the supplementary agreement dated 12th May 2014 under which the plaintiffs paid to the defendant the sum of kshs. 500,000.00 that was payable on 30th April 2014 and agreed to clear the balance of the purchase price in the sum of kshs. 3,050,000/= within one (1) month of the said date of the agreement that was to be on or before 12th June 2014.
9. Before 12th June 2014 when the plaintiffs were to pay the balance of the purchase price, the defendant's advocates on record wrote to the plaintiffs on 3rd June 2014 purporting to rescind the agreement for sale between the plaintiffs and the defendant on the ground that the plaintiffs had breached the same by failing to pay the amount that was payable on 30th April 2014 on the due date and also for lodging a caution on the title of the suit property. The defendant having executed the supplementary agreement on 12th May 2014 under which he accepted the payment that was due on 30th April 2014 and also agreed to be paid the balance of the purchase price on 12th June 2014, it was not open to him in my view to go back on the agreement and start accusing the plaintiffs for their failure to pay the said sum of kshs. 500,000/= on due date. The defendant must be taken to have waived his right to be paid the said sum of kshs.500,000/= on 30th April 2014.
10. In any event, the said sum was to be paid on or about 30th April 2014. This means that it could be paid after 30th April 2014 and not necessarily on the 30th day of April, 2014. The defendant's contention that the said amount had to be paid on 30th April 2014 must be overruled also on this account. On the issue of the caution, I take judicial notice of the fact that it is a standard conveyance practice for the purchaser (buyer) of a property to register a caution against the title of the same to protect his interest on the property pending transfer. This is normally done after the agreement for sale has been executed by the parties and a deposit paid. I am at a loss therefore why the defendant took great exception to the plaintiffs' act of registering a caution against the title of the suit property. It was not necessary at all to provide in the agreement for sale that the plaintiffs would be at liberty to lodge a caution against the title of the suit property.
11. For the foregoing reasons, I see no reason or basis upon which the defendant could lawfully rescind the agreement for sale that he had entered into with the plaintiffs. I am satisfied therefore that the plaintiffs have established a prima facie case with a probability of success against the defendant. The issue as to the actual balance of the purchase price that is due to the defendant is not here or there as it is not what led to the purported rescission of the said agreement for sale. In any event, the issue that can be determined on affidavit evidence. I am also satisfied that the plaintiffs stand to suffer irreparable loss if the injunction sought is not granted. The plaintiff has sought specific performance of the agreement for sale that they had entered into with the defendant. The defendant has stated on oath that he is not interested in completing the sale of the disputed property. If the injunction sought is not granted, the defendant would be at liberty to dispose of the suit property to third parties. The property would therefore be out of reach of the plaintiffs. The defendant had submitted that the plaintiffs have in this suit sought the refund of the purchase price and damages. I have noted from the plaint that the said refund was sought as an alternative prayer. The plaintiffs' main prayer is specific performance. In any event, I see no reason in the circumstances of this case why the plaintiffs should be condemned to take damages when they have established that they are entitled to an injunction.
12. In conclusion, I find the plaintiffs' application dated 3rd July 2014 meritorious. The same is allowed in terms of prayer 3 thereof. The plaintiffs shall have the costs of the application.

Delivered, signed and dated at KISII this 31ST of October, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Bosire h/b for Ochoki for the plaintiffs

Mr. Sagwe h/b for Nyamurongi for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE