



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL NO. 1241 OF 2013

GODFREY GITAHU KEEN..... PLAINTIFF

VERSUS

RUTH MONTHE IVULU..... DEFENDANT

RULING

The plaintiff by a Notice of Motion dated 12th February 2014 filed in court on 20th February 2014 interalia seeks the following substantive orders:-

1. That there be a temporary injunction stopping the Respondent from using the original Title **Mavoko Township Block 3/2168** or transacting with it at all pending the hearing of this application or the final suit.
2. That this Honourable court be pleased to order the Defendant/Respondent herein **RUTH MONTHE IVULU** to perform and complete her part of the contract agreement dated 15th July 2010 by accepting the balance of the purchase price, release all original documents relating to **L.R. NO. Mavoko Township block 3/2168**, sign the Transfer forms and transfer to the plaintiff the said land on receipt of the balance of the purchase price.
3. That in the alternative to prayer 2 above, there be an order compelling the defendant to deposit the Title Deed for **L.R. Mavoko Township Block 3/2168** in court with a correspondent order that the balance of the purchase price amounting to **Kshs.7,050,000/-** be deposited into court by the plaintiff/Applicant pending the hearing of the main suit.

The plaintiff basis his application on the grounds set out on the face of the application and the supporting affidavit sworn by the Plaintiff. The plaintiff avers that he entered into an agreement for sale with the defendant on 15th July 2010 to purchase the suit property at the agreed consideration of **Kshs.8,000,000/-** and paid a deposit of **Kshs.500,000/-** in cash upon execution of the agreement for sale. The agreement for sale provided for completion within 365 days from the date of execution of the agreement or such period as the parties may mutually extend. Possession as per the agreement was to be granted to the buyer upon payment of the purchase price and the seller was to obtain all the necessary completion documents including all the necessary consents required for the transaction to go through.

The plaintiff states that he made further deposits of **Kshs.450,000/-** to the Defendant's Bank account with Co-operative Bank of Kenya Machakos on various dates and sought to deposit the sum of **Kshs.5,000,000/-** towards the balance of the purchase but the Defendant had closed her account with the

Bank and the deposit was thus returned to the plaintiff. The plaintiff avers that the Defendant closed her Bank account with the objective of frustrating the sale transaction and contends that the Defendant deliberately refused to accept the balance of the purchase as she wanted to sell the property to other parties at a higher price as the value of the property had escalated and she could get a better price. The plaintiff further states that he remitted a sum of **Kshs.5,000,000/-** to the Defendants Bank account at the Co-operative Bank Machakos but the money was returned since the Defendant had closed her account with the Bank. The plaintiff states he has been ready and willing to pay the balance of the purchase price but the Defendant has refused to accept the payment without any genuine reason and asserts the Defendant has breached the agreement for sale and that the plaintiff is entitled to an order of specific performance.

The Defendant filed a replying affidavit sworn on 31st March 2014 in opposition to the plaintiff's application. The Defendant admits entering the agreement for sale with the plaintiff but states that on execution of the agreement the plaintiff paid a cash deposit of **Kshs.50,000/-** and issued two cheques for **Kshs.200,000/-** and **Kshs.250,000/-** on the same date as per annexures attached and marked "**RMI a & b**" respectively but avers that the cheques were on presentation for payment dishonoured which occurrence the Defendant states made her realize the plaintiff was not a straight forward person and she decided to opt out of the transaction.

The Defendant states that after the plaintiff's cheques bounced the plaintiff without the Defendant's knowledge and approval started making deposits into her account. The Defendant claims she became aware of the deposits made to her account by the plaintiff when she visited her bank and obtained bank statements. The Defendant states that there was no agreement that the plaintiff would make deposits to her account directly. The Defendant avers that following this discovery she blocked her account to prevent any further unauthorized deposits from the plaintiff. The Defendant further avers that the plaintiff was in breach of the agreement and she consequently exercised her right to repudiate the agreement.

The Defendant further states that the sale transaction was a controlled transaction within the meaning of the Land Control Board Act, Cap 302 of the Laws of Kenya and to the extent that the consent of the Land Control Board was not sought and obtained with the requisite period the agreement by virtue of section 8(1) of the Land Control Act became null and void for all. Purposes and the same cannot be specifically enforced as sought by the plaintiff. The Defendant contends that the only option available to the plaintiff is to seek a refund of any monies paid pursuant to the void transaction. The Defendant further avers that the plaintiffs application is frivolous, vexatious and an abuse of the process of the court and that the same ought to be dismissed.

The plaintiff and the Defendant filed written submissions as directed by the court to canvass the application. The plaintiff filed his submissions on 28/4/2014 and the Defendant filed hers on 23/5/2014. I have carefully reviewed and considered the application, the affidavits in support and in opposition and the parties written submissions. The issue to determine is whether the plaintiff has on the basis of the material placed before the court, and on the face of the response by the Defendant, established a prima facie case that can satisfy the threshold established in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358** to entitle him to the grant of an interlocutory injunction.

The plaintiff has submitted that he was intent on honouring his part of the agreement but the Defendant has reneged on the agreement. The plaintiff submits the Defendant established Bank Account NO.01109276503000 at the Co-operative Bank was particularly set up for specifically handling the sale transaction. As regards the dishonoured cheques the plaintiff explains that these were replaced with cash deposits as per the deposit slips annexed and that these deposits were in addition to the cash received by the Defendant at the execution of agreement. The Defendant vehemently refutes this stating that only cash deposit of **Kshs.50,000/-** was made on execution of the agreement while the plaintiff issued two cheques for **Kshs.200,000/-** and **Kshs.250,000/-** on the same date of execution to make the acknowledged sum of **Kshs.500,000/-** as per the agreement for sale.

I have perused the agreement for sale dated 15th July 2010 and the same does not provide the manner in

which the balance of the purchase price was to be settled and indeed the Bank Account of the defendant was not even disclosed in the agreement. The agreement provided for payment of **Kshs.500,000/-** cash deposit on execution of the same. The Defendant states only **Kshs.50,000/-** was paid cash and the balance of **Kshs.450,000/-** was represented in two cheques for **Kshs.200,000/-** and **Kshs.250,000/-** dated the same date of the agreement but which cheques were dishonoured when presented for payment. In my view the Defendant's protestations that she was only paid **Kshs.50,000/-** in cash and the other **Kshs.450,000/-** by way of the 2 cheques that bounced cannot be just waived off as there is no explanation as to why the plaintiff would pay **Kshs.500,000/-** in cash which apparently was acknowledged and **Kshs.450,000/-** by cheques on the same date but which was not acknowledged. My view is that it is probable that the plaintiff paid the **Kshs.500,000/-** acknowledged by the plaintiff in the manner the Defendant claims it was paid.

The Defendant submits that the transaction was one that required the consent of the Land Control Board which she states was not obtained under the provisions of the Land Control Act which rendered the agreement for sale void. The plaintiff while he does not deny the transaction required the consent of the Land Control Board states that the completion period under the Agreement was within 365 days from the date of execution of the agreement and further submits it was the obligation of the Defendant to apply for and obtain the consent of the Land Control Board and that the Defendant cannot use the lack of consent to the transaction to defeat the transaction.

The suit property as per the certificate of official search dated 25th May 2011 is stated to be approximately 18.80 hectares and quite clearly could not be a township plot which could be exempt from the provisions of the Land Control Act and therefore most probably was subject to the provisions of the Act.

Section 6(1) of the Land Control Act provides-

6.(1) Each of the following transactions that is to say-

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land controlled area,

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and use of Land (Planning) Regulations, 1961 for the time being apply

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area.

Is void for all purposes unless the Land Control Board of the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

Section 8(1) of the Act provides for the application of the consent of the Land Control Board to be made within 6 months of the date of the Agreement for sale.

Section 8 (1) provides:-**An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land control board within six months of the making of the agreement for the controlled transaction by any party thereto.(emphasis mine).**

Provided that the High Court may notwithstanding that the period of six months may have expired extend the period where it considers that there is sufficient reason so to do, upon such conditions, if any as it may think fit.

The law is express that where a transaction falls under the controlled transactions as under section 6 of the

Land Control Act consent for the transaction from the relevant Land Control Board of the area has to be obtained within a period of 6 months from the date of making the Agreement.

As the parties do not dispute the transaction they entered into was one that fell under the provisions of section 6 of the Act it would follow that the agreement for sale became void after the expiry of 6 months from 15th July 2010 when it was entered into for want of consent of the Land Board. Whether or not the agreement provided for completion within 365 days consent of the Land Control Board had to be obtained within six months of the date of the agreement. This was not done and hence the agreement was rendered void for all purposes. The court cannot enforce a contract that has become void by operation of the law. There would simply be no contract to enforce.

Either party to a sale transaction in a controlled transaction has a right to apply to the Land Control Board for consent and thus even the purchaser/plaintiff could have applied for the consent of the Land Control Board if the defendant failed to apply (section 8(1)). In my view the order of specific performance that the plaintiff seeks in the suit could only have been available if the consent of the Land control Board had been sought and obtained. I would therefore in the circumstances of this matter find and hold that the plaintiff and has not established and/or demonstrated he has a prima facie case with any probability of success against the Defendant. The plaintiff has therefore not satisfied the first limb for the grant of an interlocutory injunction which is to establish a prima facie case and thus I do not need to consider the second limb whether or not irreparable harm or injury is likely to be suffered if the injunction is not granted. At any rate my view is that no irreparable harm is likely to be suffered by the plaintiff as damages would be an adequate remedy. I am therefore satisfied that the plaintiff has not met the threshold for the grant of injunction as established in the **GIELLA –VS- CASSMAN BROWN & CO. LTD (Supra)** and therefore cannot be entitled to an order of injunction.

The plaintiff further is asking the court to make orders under prayers 3 and 4 of the Notice of Motion which can only be available and/or made as final orders at the conclusion of the trial after the court is satisfied the plaintiff has proved its case on a balance of probabilities. These prayers therefore cannot be available to the plaintiff at this interlocutory stage and have to await the final determination. I find no basis to grant the orders sought by the plaintiff in the Notice of Motion.

In the premises and for the reasons I have stated in this ruling I find and hold that the plaintiff Notice of Motion dated 12th February 2014 lacks merit and I order the same dismissed with costs to the Defendant.

Ruling dated, signed and delivered this **28th** day of **October** 2014.

J. M. MUTUNGI

JUDGE

In presence of:-

...Mr. Murage..... For the Plaintiff

...Mr. Nthiwa..... For the Defendant