



NO. 12/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

ELC CASE NO. 239 OF 2011

BEIGE INVESTMENTS LIMITEDPLAINTIFF/APPLICANT

VERSUS

COM-TRADE LIMITED LTD.DEFENDANT/RESPONDENT

R U L I N G

1. The matter is for ruling on application dated 9th August 2012 seeking the orders of injunctions against the Defendant/Respondent under **Order 40 Rule (1) (2) sub rule 1 and 4** and **Section 3A Civil Procedure Act** and omnibus enabling provisions.
2. The application is supported by the grounds on the face of the application and the Supporting Affidavit of **Simon Kagwanja** sworn on the 9th August 2012 and annexures thereto.
3. The application is opposed by the Respondent via the Replying Affidavit of **Zubeda Mohamed** sworn on 19th September 2012.

Applicant's Case:

4. The Applicant entered into a sale agreement with the Defendant for the Plaintiff to buy land parcel **LR No.12581/14** and Defendant to sell the same on the 8th July 2008. The acreage of the said property is **3.050 HA** and the purchase price was agreed at **Kshs.16 million**.
5. The Applicant paid **Kshs.3.2 million** deposit being **20%** of the price to the Respondent/Defendant's advocate **M.A. Khan Advocates** pending completion and successful registration of transfer.
6. The Applicant was to obtain loan to finance the balance purchase price.
7. Pursuant to aforesaid agreement, the applicant successfully applied loan and a professional undertaking was given to the Respondent's advocate.
8. Subsequently on 3rd October 2008, the Respondent's advocates wrote to the Applicant's advocate indicting that they were unable to complete sale within 90 days agreed and thereof sought an extension of time by 60 days.
9. After 60 days extended period, the Respondent yet failed to perform their part of contract and this time on the basis of **NBI HCC 1350/06** filed by a party who had previously placed a caveat against the property. The Respondent misrepresented to the applicant's Advocates that the caveat had been removed which information was not true.
10. The Applicant emphasizes the position that he is ready, able and willing to perform his part of contract and avers that the Respondent was all along aware of that fact.

11. The Applicant states that the Respondent who were all along aware of the caveat went ahead to enter into an agreement and received the deposit and thus are estopped and precluded from purporting to be unable to complete the sale.
12. The Applicant states further that the Respondents have proposed that in the event that it was to complete the sale, then it would revise the sale price with a view to increasing the same.
13. The Respondent has attempted to terminate the contract and refund the deposit paid which Applicant has refused to accept; and thus seeks the orders in the application to preserve the subject of the contract and the suit herein.

Respondent's Case:

14. The Respondent via the Affidavit of **Zubed Mohamed** who is the Respondent's director admits as to the content of the agreement including the entry into the agreement for sale, and the deposit of **Kshs.3.2 million** by the Applicant.
15. The Respondent denies that there was a professional undertaking given to their advocates by the Applicant.
16. The aforesaid Respondent states that the sale agreement was entered into in anticipation of **NAI HCC 1350/06** being dismissed pursuant to the Defendants application in that regard and the caveat registered being removed. The aforesaid was not achieved and thus the extension of time was sought to perform Respondent part of agreement.
17. The Respondent avers that the extension was denied unless and until same was to be accepted on condition that the deposit was to attract interest at a rate of 18% per annum by the Applicant.
18. The Respondent continues to state that there was no extension nor was agreement amended to sanction that extension.
19. Further on 11th December 2008 the High Court dismissed application in the matter aforesaid and thus the suit remained. By April 2009, caveat had not been removed despite Respondent's advocate's application to the registrar and therefore the transaction could not be completed in any event.
20. As a result of the foregoing, Respondent indicated that the transaction could not be completed. The Respondent reiterates that the Applicant is in breach of the agreement as it failed to deliver professional undertaking as required by **clause 4 (b)** and special conditions of the agreement.
21. It is the Respondent's case that Applicant insisted on inclusion in the agreement condition No. 7 for the refund of the deposit in full in event of non-completion of the transaction inter alia.
22. The Respondents belief that the insistence of inclusion of the said condition, was because the Applicant knew there was a caveat and the Nairobi case and in any event as a prudent purchaser must have conducted a search to reveal the existence of a caveat.

Applicant's Submissions:

23. The Applicant submits that the Respondent is in breach of agreement as even at the time of entering the agreement it did not disclose there was to be difficulties to complete the sale and the Respondent offered the subject herein and received deposit while aware of the existence of the circumstances stated.
24. The Applicant thus submits that the Respondent is refusing to perform its part of the contract and now purports to cancel the contract and refund deposit it has held for a number of years.

The Applicant submits that the act of receiving and retaining the deposit created a constructive trust on subject property and thus Respondent holds same in trust for the Applicant.

25. The Applicant submits that it stands to suffer irreparable loss and damage unless injunctive orders are issued as prayed. Applicant cites the authority of **Abel Salim & Others versus Okongo and Others (1976) KL 32 P.48** which cited provisions of **Section 3 (3) of Cap 23** setting the ingredients of valid contract of sale of land of which he submits are met by the agreements herein and thus entitling the Applicant to relief of specific performance.
26. The Applicant has also cited **Agip(K) Ltd. Versus Appollos Kennedy Mwangi T/A Appollos Services Ltd. (1996) eKLR** where Court of Appeal held that temporary injunction under **Order**

39 Rule 1 (now Order 40) could only be issued where the Applicant had an interest in the land or on the basis that the Respondent threatened to dispose of the property in circumstances that could delay execution of any decree that would be passed against it.

27. The Applicant concluded by submitting that it has met all the 3 conditions of **Giella authority** for the grant of temporary injunctions and thus sought the orders to be granted as prayed.

Respondent's Submissions:

28. The Respondent submits that, the application is incurably defective and incompetent and must be struck out on that ground alone, in that,

- i. The headnote to the Application, the Plaintiff states that the application is brought under “Order 40 Rule 1, 2(1) and 4, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law.”
- ii. Order 51 Rule 1 of the Civil Procedure Rules 2010 specifically provides that “all applications to the Court **shall** be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.”
- iii. There has been no direction by the Court made in this matter that the application is to be heard in chambers, nor does Order 40 of the Civil Procedure Rules expressly provide that applications made under that Order are to be made by way of chamber summons.
- iv. However, the application is a chamber summons. This is clearly a breach of the mandatory provisions of Order 51 Rule 1 which states that the application **MUST** be by way of Notice of Motion. On this ground alone the application is incurably defective and incompetent for breach of the mandatory provisions of the law and must be struck out.

29. The Respondent submits further that, the Plaintiff's case does not fall within any of the provisions of **Order 40 Rule 1 or 2** of the **Civil Procedure Rules 2010** in order to qualify for the grant of the temporary injunctions sought thereunder.

1. **Order 40 Rule 1** of the **Civil Procedure Rules** provides that a temporary injunction may be granted where “it is proved by affidavit or otherwise:-
 - a. That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - b. That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit.”
2. The Plaintiff has made absolutely no effort to prove that the property in dispute in this suit, namely Land Reference Number 12581/14 (hereinafter called “the Suit Property”), is in any danger whatsoever of being “wasted, damaged or alienated” by the Defendant, or that the Defendant has threatened or intends to dispose of the Suit Property to obstruct or delay in the execution of any decree that may be passed in this suit. There is no such allegation anywhere in the Supporting Affidavit.

30. In this case, the Plaintiff has completely failed to satisfy any of these three conditions of Giella Authority.

The Plaintiff has failed to prove that it has a prima facie case with a probability of success against the Defendant.

It is the Defendant's submission that the Plaintiff does not have a prima facie case with a probability of success against the Defendant. This is for the following reasons:

- i. The Sale Agreement stands cancelled/rescinded under Special Condition 7 thereof;

- a. Special Condition Number 7 of the Sale Agreement dated 8th July 2008 (hereinafter) called “the Sale agreement”), which appears at page 101 of the Defendant’s list and Bundle of Documents dated 25th November 2011 and filed herein on 28th November 2011 (hereinafter called “the Defendant’s Bundle of Documents”), provides as follows:

“in the event the Vendor is unable to complete the sale on the completion date or registration is not possible through defects in the title or otherwise, the deposit together with any monies paid to the vendor or the vendor’s advocates shall be returned to the purchaser without any deduction whatsoever upon demand.”

- b. The clear and undisputed position in this case is that the Defendant as vendor was unable to complete the sale on the completion date AND registration of the transfer of the Suit Property in the Plaintiff’s favour is NOT possible and was NOT possible as at the completion date.
- c. It is not disputed that as at the completion date of 6th October 2008, the Suit Property was still subject to the following two encumbrances:-
1. The Caveat registered by Noskid (Africa) Asset Management Limited claiming purchaser’s interest against the title of the Suit Property as number I. R. 48118/5 (hereinafter called “the Caveat”), which entry appears at the bottom of page 89 of the Defendant’s Bundle of Documents: and
 2. Nairobi High Court Civil Case No.1350 of 2006 (hereinafter called “the High Court Suit”), a suit filed against the Defendant seeking specific performance of an alleged sale of the Suit Property to the Plaintiff therein. Noskid (Africa) Asset Management Limited, a copy of whose plaint appears at page 1 – 3 of the Defendant’s Bundle of Documents, and as a consequence whereof the Suit Property is subject to the doctrine of *lis pendens* under Section 52 of the Transfer of Property Act, 1882, of India (hereinafter called “the ITPA”), which provides as follows:-

“During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order made therein, except under the authority of the Court and on such terms as it may impose.”

- iv. The ITPA applies in Kenya under the provisions of Section 11(b) of the East Africa Order in Council 1897.
- ii. It is the Defendant’s submissions that the refusal by the Plaintiff to accept the refund of its said deposit does not alter the legal position in this matter, namely that the Sale Agreement stands cancelled/rescinded under Special Condition 7 thereof. Accordingly the Plaintiff has no valid lawful claim maintainable against the Defendant or specific performance of the Sale Agreement, and as such there is no prima facie case with any possibility of success against the Defendant in this matter.
- ii.

(a) Clause 4(b) of the Sale Agreement (page 100 of the Defendant’s Bundle of Documents) provides as follows:

“This Agreement is made subject to the Purchaser obtaining a loan to finance the balance of the purchase price and an appropriate letter of undertaking from the Financier or the Financier’s Advocates being delivered to the Vendor’s advocates on or before the completion date.

(b) Special Condition 2 of the Sale Agreement (page 100-101 of the Defendant's Bundle of Documents) provides:-

“Completion shall be by way of undertaking and on or before the Completion Date, the Vendor's Advocates shall upon receipt of an appropriate professional undertaking from the Financier's and/or the Purchaser's Advocates to pay the balance of the Purchase Price as indicted in clause 3 (ii hand over to the Purchaser's Advocates the following completion documents...”

(c) It was therefore an express condition precedent to the Agreement as well as the Plaintiff's express obligation that a suitable professional undertaking securing payment of the balance of the purchase price would be delivered to Defendant on or before the completion date of 6th October 2008. The Defendant submits that **no such professional undertaking was ever delivered or given as required.**

(d) In the case of **Wagichiengo - vs- Gerald** (1988) KLR 406 the Court of Appeal dealt with a case involving an agreement for sale of land which was subject to a condition precedent. In that case, the Court found that the agreement was subject to the appellant depositing a sum of 20,000 pounds in the Respondent's bank account, and held that since the same was not done the sale agreement was not enforceable and no order for specific performance could be given. Apaloo JA expressed himself thus (at page 417 line 29-37;-

“Looked at from the standpoint of the law of contract, I think the proper conclusion to draw, is that the Respondent offered to sell their Tigoi farm to the Appellant for the sum of Kshs.1.2 million on condition that of the purchase price, (pounds) 20,000 should be lodged into their overseas account before the conclusion of a binding contract of sale.

It is common ground that until he lodged his plaint, the appellant had not met that condition. I would in the circumstances conclude that no binding contract capable of being enforced by specific performance eventuated.”
(emphasis added)

(e) In the current case, since no professional undertaking securing payment of the purchase price was delivered to the Defendant on or before the completion date of 6th October 2008, no order for specific performance can be made in respect of the Sale Agreement.

31.The contract between the Plaintiff and the Defendant stands frustrated and is incapable of being enforced by way of an order for specific performance:

- a. As at the date of filing this suit, the Caveat was still in existence against the title of the Suit Property. In addition, the High Court Suit still remained pending.
- b. The Suit Property therefore cannot be transferred to the Plaintiff.
- c. In these circumstances, the Sale Agreement stands frustrated and incapable of being enforced by way of an order for specific performance as sought in the Plaint herein. The Plaintiff cannot therefore have any prima facie case with a probability of success against the Defendant.

32.This is a clear indication that the Plaintiff itself recognizes that it can be adequately compensated by a sum of money if the transaction under the Sale Agreement is not completed. The Plaintiff has also itself proposed a method of assessment of that sum of money, and confirms that the amount it seeks is 20% of the current market value of the Suit Property.

33.In the event, the Plaintiff has produced no proof anywhere that damages would not adequately compensate it for any loss it may suffer in the event the injunction sought is not granted. There is therefore no basis upon which the Court may make any such finding in order to entitle the Plaintiff to the grant of the injunction it seeks.

34. Since the Plaintiff has so clearly failed to meet any of the two other conditions requiring to be met to be entitled to a grant of a temporary injunction, the court does not need to consider the balance of convenience.

35. **Issues:**

1. Whether the Applicant's Application is fatally defective?
2. If not, whether the Applicant has established that it is entitled to grant of interim injunction?
3. What is the orders as to costs?

It is now trite law that for an Applicant to get an order of temporary injunction, it must satisfy the conditions set in **Giella versus Cassman Brown Ltd. (1973) EA 35.**

The conditions are:-

- a. Establish a prima facie case with probability of success.
- b. Prove non issuance of injunction would occasion irreparable loss which cannot be compensated by award of damages.
- c. If the court is in doubt, Applicant must show that the balance of convenience tilts in its favour.

36. In the matter herein, the Applicant has to establish on prima facie basis that it is entitled to orders of specific performance and/or recover its monies paid to the Respondent's inter alia.

37. What emerges clearly herein is that the twin problems are that, whereas the Applicant blames the Respondent for not completing the sale transaction due to the caveat in subject matter, the Respondent blames the Applicant for not giving and delivering a professional undertaking.

38. The caveat stalled the completion of the deal herein and the same caveat still subsists.

39. The Applicant insists that they are still ready, able and willing to complete part of their bargain as the loan to pay balance purchase price was approved and they continue to pay interest on the same loan.

They are apprehensive that the Respondent might dispose the subject matter and thus be deprived the opportunity to recover either the property subject herein or the decretal amount which may be award hereof.

40. The Respondent has raised the issue of the defects of the Chamber Summons in which the reliefs herein are sought. Though **Order 51 Rule 1** ordinarily require the Applications be inform of notice of motion save where otherwise specified, the court is alive to the provisions of **Order 2 rule 12 Civil Procedure Rule** which states that no technical objection will be raised on a pleading for want of form in any event Section 1(A) Civil Procedure Act and Article 159 (2) (d) of Constitution of Kenya mandates court to do substantive justice without undue technicalities. The court is prepared to treat Chamber Summons herein as a notice of motion in interest of justice. The objection thus is overruled.

41. On where the Applicant has satisfied the conditions of grant of temporary injunction, the court makes the following findings:

- On prima facie case, it is undisputed that the parties entered into a valid agreement, deposit paid and timelines set for completion of sale transaction while they were aware or ought to have known that there was a caveat. The Applicant went ahead to apply for loan to pay the balance purchase price which was approved and insists to date its ready, able and willing to perform its part of bargain. The Respondent is still holding the deposited amount **Kshs.3.2 million** which has been outside Applicant's possession since 2008 (over 6 years).

Now the Respondent wishes to refund the same without even the proposed interests at a rate of 20%.

42. There is no guarantee that if the Applicant is awarded a decree in the matter herein, he will be able

to enforce it in event the subject matter is out of the Respondent's control in event same is alienated or charged.

43.The Applicant may never recover the money or the land. It is in the interest of justice that the subject matter be preserved to protect the interest of all parties.

44.The issue of whether specific performance will be granted eventually will be determined at the trial.

45.For now it is apparent that the prima facie case has been established with probability of success. The failure to grant orders may render the Applicant to eventually have a hollow decree.

46.The balance of convenience tilts in Applicant's favour who may be inconvenienced by failing to recover the land or his money.

47.In the premise, the court makes the following orders:

1. Interim injunction is granted in terms of prayer 3 of Chamber Summons dated 9th August 2012 until suit herein is heard and determined.
2. Costs in the cause.

DATED, SIGNED and DELIVERED at MACHAKOS this 24TH day of OCTOBER, 2014.

CHARLES KARIUKI

JUDGE