REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELC. NO. 184 OF 2013

STANLEY KIRUI.....PLAINTIFF

VERUS

WESTLANDS PRIDE LIMTIED.....DEFENDANT

RULING

The Applicant herein **Stanley Kirui** has brought this Notice of Motion dated 6th February, 2013 seeking for orders that;

1. Spent
2. Spent
3. That temporary injunction order do issue restraining the Defendant by itself, its agents, servants and/or employees or any other person claiming under it from selling, transferring, interfering, alienating and/or dealing with the suit properties namely apartments No. D9 and D10 erected on parcel of land known as LR No. 5/155 Nairobi comprised in a grant registered as No. I.R 13938/1 in any manner whatsoever including taking possession and/or occupation by any other person whomsoever pending the hearing and determination of the suit herein.
4. That costs of the application be provided for.

The application is premised on the grounds stated on the face of the application notably: -

a. Vide two (2) Sale Agreements both dated 25th May, 2009 between the Defendant as Vendor and the Plaintiff as Purchaser, the Defendant agreed to sell to the Plaintiff and the Plaintiff agreed to purchase by way of lease two (2) apartments being apartment No. D9 and D10 (suit properties) erected on LR No. 5/155 at a price of Kshs.8,800,000/= each both making a total cost of Kshs.17,600,000/=.
b. That as per the Sale Agreements, the plaintiff has already paid to the Defendants a sum of kshs.3,520,000/= being 20% of the deposit in respect of the suit properties.
c. That the Defendant has unilaterally rescinded the said Sale Agreements without any reference to the Plaintiff and further purported to sell the same to an alleged third party so as to cash in on the increase in the market value of the suit properties owing to the delayed completion of the same.
d. That the Defendant's conduct of purporting to have sold the suit properties to an alleged third party without reference to him is wrongful, illegal and unlawful and the same amount to a breach of contract.

e. That it is fair and just that orders sought herein be granted.

The application was also supported by the annexted affidavit of **Stanley Kirui,** the applicant herein.He reiterated that he entered into two sale agreements for purchase of two apartments from the Defendant for a total cost of Kshs.17,600,000/=.That he further paid a 20% deposit of kshs.3,520,000 to the Defendant vide cheque No. 00013.However, the Defendant delayed in construction of the said flats and also delayed the completion date.Later on the Defendant alleged that it sold the two apartments to un disclosed third party.

Applicant averred that the two Sale Agreements constituted a legally binding and enforceable contracts between the Defendant and himself.That the Defendant conduct of purporting to have sold the suit properties to undisclosed 3rd party is wrongful, illegal and unlawful and amounts to breach of contract.Applicant further alleged that he was ready and willing to perform his obligation and was only frustrated by the Defendant.

The application is opposed. One **Daniel Ojijo Agili,** the Managing Director of the Defendant Company swore a Replying Affidavit in opposition to the plaintiff's Notice of Motion.

He acknowledged that indeed the Defendant company entered into a sale agreement dated 25th May, 2009 with the plaintiff herein with intention of selling the suit premises to the plaintiff.He however, alleged that is was the plaintiff who frustrated the transaction by refusing and/or neglecting to pay the purchase price as per the mutually agreed schedule in the sale agreement and he subsequently abandoned the transaction.

That the plaintiff vide a letter dated 21st July, 2010, to the Defendant rescinded the sale agreement and informed the Defendant that he was nolonger interested in the transaction and demand his deposit back, with a threat of litigation if the deposit was not refunded.

The Respondent deposed that Defendant requested the Plaintiff for his Bank Account details to refund the full deposit to the Plaintiff as demanded by him. The Plaintiff was also duly informed that the premises had been sold to 3rd party.He further averred that the plaintiff cannot seek to unjuct what has already happened.He therefore required the court to dismiss the plaintiff's application.

The parties herein canvassed the application through written submissions which I have considered.The court has also considered the pleadings generally and the annextures thereto and makes these findings.

The applicant has sought for injunctive relief.The applicant needed to establish the and down principles which are to be considered before an order for injunction is granted.These principles were laid down in the case of *Giella vs Cassaman Brown and Co. Ltd (1973) EA 358 .*The applicant has to establish that; -

(i)He has a prima-facie case with high probability of success.

(ii)That he will suffer irreparable loss if orders not granted.

(iii)If court indoubt, to decide on the balance of convenience. See also *EA Industries vs Trufoods (1972) EA 420*.

The issue now for determination is whether the applicant herein has been able to establish the threshold principles to warrant this court grant him the injunctive relief sought.

There are facts that are undisputed.There is no doubt that the Defendant herein was at all material times the registered proprietor of parcel of Land known as Nairobi LR No. 5/155.

There is also no doubt that the Plaintiff and the Defendant herein entered into two Sale Agreements dated 25th May, 2009 for sale of two apartments No. D9 and D10 to the Plaintiff.The agreed purchase price was kshs.8,800,000/= per unit.The total cost was therefore Kshs.17,600,000/=.

It was agreed in the sale agreement that Plaintiff/Applicant was to deposit 20% of the purchase price upon the execution of the Sale Agreements.The applicant duly paid Kshs.3,520,000/= vide cheque No. 00013. Further, the applicant was to deposit another 20% of the purchase price on or before the last day of the six months another execution of the Sale Agreements.Finally the 60% deposit of the purchase price was payable upon completion.From the Sale Agreements, the completion date was 30th day next after the Vendor had sent the Purchaser a letter confirming that Certificate of Occupation of the said apartments had been granted by the City Council of Nairobi.

There is no doubt that the completion or construction of the said apartments took long and the plaintiff became impatient.Several letters were exchanged between the purchaser and Vendor's Advocates as evidenced by the bundle of letters attached to the applicant's supporting affidavit.In particular is letter dated 21st July, 2010, in which the Advocate for the Applicant demanded for refund of the deposit of part of purchase price i.e. Kshs.3,520,000 within a period of 7 days.He also intimated that the Applicant (his client) was nolonger interested in the two properties.There was also a threat of legal proceedings in case the refund was not done.

It is also evident that the applicant did not pay any further deposit and on 8th June, 2012, the Defendant requested for Applicant's Bank Account details so that he could refund the deposit of the purchase price. That has not been done and this suit was instituted.

Has the applicant herein been able to establish that he has a *prima-facie case* with high probability of success?

The Applicant and the Defendant indeed entered into Sale Agreements.The said Sale Agreements were binding on both parties.In the said Sale Agreements, in clause F it states as follows: -

" The purchaser agrees and confirms that the estimated time of completion of the Estate shall be 31st December 2009, orwithin thirty (30) days of the issue of the Certificate of Occupation by Nairobi City Council and receipt of the Clearance Certificate whichever is late."

From the above clause in the Sale Agreements, it was clear that completion date would have been on 31st December, 2009, or upon receipt of Certificate of Occupation by the City Council of Nairobi.

Having considered the various correspondences from the applicant's advocate to the Respondent's advocate, it is clear that the sale was not completed by 31st December, 2009.The applicant became impatient and threatened to rescind the contract.He even went ahead and demanded for refund of the deposit of the 20% of the purchase price.

Applicant alleges that the Sale Agreement were frustrated by the Respondent.However from the various correspondences between the two parties, it is evident that the Applicant is the one who frustrated the Contract.

I have also considered clause 5.1 of the Sale Agreements on the mode of payment.Applicant was supposed to have deposited kshs.1,760,000/= on or before the last day of 6th months after execution of the Sale Agreements.The Sale Agreements were executed on 20th May, 2009.Applicant was supposed to have paid Kshs.1,760,000/= by November 2009.There is no evidence that he ever deposited that amount.However, it is evident that on 18th May, 2012 the Defendant demanded for payment of this amount from the Applicant.Applicant did not deposit the same though he alleges in his affidavit that he was always ready and willing to pay the balance of the purchase price.

The purchaser was therefore the one who was in breach of the Sale Agreements.Clause 3 of the Sale Agreements, is also very clear on the completion date.There was no evidence that the Defendant received the Certificate of Occupation of the said apartment and he failed to complete the transaction. Instead, it was the applicant who threatened to rescind the Sale Agreements and even demanded for refund of the deposit of the part of the purchase price that he had already paid.

He also categorically stated in the letter dated 21/7/2010, that he was nolonger interested in the purchase of the said apartments.

Clause 10 of the Sale Agreements is very also clear on what could happened in the even the purchaser fails to comply with any of the provisions of the Sale Agreements.Demand for payment of amount due to the Defendant was made on 18th May, 2012.There is no evidence that the applicant herein paid the demanded amount.

The court finds that indeed, both the Plaintiff and the Defendant were bound by the terms of the Sale Agreements.However, it is very clear that the applicant breached the said terms.The applicant cannot blame the Defendant for the collapse of the transaction.The court therefore finds and hold that the applicant herein has not established that he has a *prima-facie* with probability of success.

The applicant also needed to establish that he will suffer irreparable loss which cannot be compensated by damages.

What is not in doubt is that the applicant was purchasing the two apartments from the Defendant.Applicant only paid a deposit of kshs.3,520,000/= out of the total cost of 17,600,000/=.Applicant had not taken possession of the said suit properties.Whatever amount the applicant paid is quantifiable.If indeed the Defendant would be found to be in breach of contract, then the applicant would be entitled to damages.Applicant cannot therefore claim that he will suffer irreparable loss.He had not taken possession of the suit premises and he can indeed be awarded damages in the event the main suit is decided in his favour.In the case of *Remo Lenzi & 3 others vs. Coss Corrando and 3 others, civil Appeal No. 56 of 1997 (1997) LLR 5276*, the court held that ***"injunction pending appeal cannot be granted for breach of a contract...."***

Again in the case of the *Ripples Limited v Kamau Mucuha Nairobi High Court Civil Case Number 4522 of 1992*. It was held, ***"It is trite law that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party as that would be inequitable"***

Similarly applicant herein is claiming breach of contract, the court hold and finds that injunction cannot be granted.

It was further held in the case of *Wilfred Oanda Kirochi vs. David Pius Magambi, Civil Appeal No. 76 of 1995 (1995) LLR 5259*, the Court held that ***"If damages can suffice injunction cannot be granted."***

The court finds that in the instant case, award of damages would suffice and there are no need of granting an injunction.

The Defendant herein has contended that it has already sold the two apartments once the applicant alluded to the fact that he was no longer interested in them (vide the letter dated 21/7/2010 from his advocate).

If that is the case, the court cannot injunct what has already happened.I will be guided by the findings in case of *Mavoloni company Ltd vs Standard Chartered Estate Management Ltd, Civil Appeal No. 266 of 1997 (1997) LLR 5086*, where the court held that ***"an injunction cannot be granted once the event intended to be injuncted has been overtaken by events."***Similar findings were held in the case of *Esso Kenya Ltd Vs Mark Makwata Kiya, Civil Appeal No. 69 of 1991* where it was stated ***"an injunction cannot issue to restrain an event that has taken place."***

The court cannot restrain what has already happened. If indeed the Defendant has already sold the two apartments, the balance of convenience tilts in their favour.

Having now carefully considered the applicant's Notice of Motion dated 6/2/2013 and the written submissions and the relevant law, the court finds that the applicant has failed to establish that the said application is merited.

Consequently the court dismisses the Applicant's Notice of Motion dated 6/2/2013 with costs to the Defendant.

Applicant/Plaintiff to set down the main suit for hearing so that the issues in dispute can be resolved on merit.

It is so ordered.

Dated this29th day of August, 2013.

GACHERU

JUDGE