



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 553 OF 2010

SAMIYAN KAUR DEVINDER SINGH.....PLAINTIFF

VERSUS

SPEEDWAY INVESTMENTS LIMITED.....1ST DEFENDANT

CFC STANBIC BANK LIMITED.....2ND DEFENDANT

R U L I N G

1. Before the Court is the Plaintiff's Chamber summons Application dated **16th August 2010** and filed on even date. The application is taken out under **Order XXXIX Rule 1 and 9** of the **Old Civil Procedure Rules** and **Sections 1A, 3A and 63** of the **Civil Procedure Act**. The application is seeking the following orders:
 - i. *Spent.*
 - ii. *The Court be pleased, by order, to grant a temporary injunction to restrain the 1st and 2nd Defendants/Respondents, jointly and severally, whether by themselves or through their respective Directors, Officers, Servants, employees and/or agents from selling, transferring, alienating, charging, wasting, damaging, or howsoever disposing off or interfering with the Plaintiff's enjoyment of quiet possession and ownership of Apartment No. C6 erected on L.R. No. 330/667, pending the hearing and final determination of the suit.*
 - iii. *Pending the hearing and determination of the suit, the Court be pleased to issue any further order that it may deem fit, to protect and preserve from interference, the Plaintiff's quiet possession, use and ownership of Apartment No. C6 erected on L.R. No. 330/667, as purported by the 2nd Defendant herein through its Advocate's letter dated 29th July 2010 and referenced GE/924/AG.*
 - iv. *The court be pleased to make an order for the inter-parties hearing of this suit at such date and such time as this Court may direct and/or deem suitable.*
 - v. *Costs of the application be awarded to the Plaintiff in any event.*
2. The application is premised on grounds outlined in the application and supported by an affidavit

- sworn on **16th August 2010** by the Plaintiff.
3. The background of the application is that the Plaintiff and the 1st Defendant executed an agreement for Sale dated **6th October 2006** for a two bed-roomed Apartment No. C6 at a consideration of Kenya Shillings Six Million Two Hundred Thousand (Kshs. 6,200,000) which apartment was to be developed alongside 31 other apartments situated on L.R. No. 330/667 (originally L.R. No. 330/237/6) Masanduku Lane, Lavington known as Cedar Valley Apartments. *The Plaintiff annexed in her affidavit a copy of a letter of offer dated 16th January 2006 and a copy of the sale agreement dated 6th October 2006 duly stamped at the Lands Registry marked "SKDS-1" and "SKDS-10" respectively.*
 4. Prior to executing the sale agreement, the Plaintiff carried out a due diligence search and established that the plot was registered in the names of Valerie Teresa De Mello and Louisa Maria De Mello Figueria and had a caveat registered against it. Through an e-mail dated **24th January 2006** the Plaintiff through her Advocate M/s Bowry & Co. Advocates inquired on the ownership of the property and the existing caveat registered against the property. In response to that e-mail, M/s Khan & Katiku acting for the 1st Defendant sent an e-mail dated **17th May 2006** confirming to the Plaintiff that the 1st Defendant had been registered as the proprietor of the property under a conveyance dated **2nd May 2006** executed between Valerie Teresa De Mello jointly with Louisa Maria De Mello Figueria and the 2nd Defendant under Presentation No. 574, Volume N 47, Folio 181/14, File No. 14781. *The Plaintiff in her affidavit annexed copies of e-mails dated 24th June 2006, 6th February 2006, 29th March 2006, and 22nd May 2006 marked "SKDS-2", "SKDS-3", "SKDS-4", "SKDS-5", "SKDS-6", and "SKDS-7" respectively.*
 5. As at the date of executing the sale agreement, there was no legal charge registered against the property in favor of the 2nd Defendant neither was there a legal charge or such terms of a legal charge disclosed or alluded to by the 1st Defendant to the Plaintiff in the sale agreement. In the sale agreement there was no obligation placed on the Plaintiff to seek consent from the 2nd Defendant but that there was a requirement that the 1st Defendant does obtain a discharge of charge of the apartment from the Chargee at a reasonable time and at any date prior to the completion date.
 6. On 8th August 2006 the 1st Defendant asked for a deposit towards the purchase price which was responded to in a letter dated 9th August 2006 forwarding a sum of Kshs. 2,200,000/-. *The Plaintiff annexed in her affidavit the two letters marked "SKDS-8" and "SKDS-9".* The Plaintiff has paid to the 1st Defendant the full purchase price of the apartment and was granted full possession of the property through a letter of release dated 11th June 2009 jointly signed by Messrs Eric Mungai and Jackson Mwangi, for and on behalf of the 1st Defendant. However, the 1st Defendant is yet to fulfill an obligation owed to the Plaintiff in the sale agreement as it has not forwarded the Share Certificate and a copy of the registered lease for the apartment and to discharge the apartment from the Chargee. This is despite the Plaintiff having executed the lease. *The Plaintiff annexed the letter of release and marked "SKDS-11, letter forwarding the lease marked "SKDS-12" and a letter demanding a registered lease marked "SKDS-13".*
 7. On 11th May 2010 M/s B.A Ouma & Associates for the 1st Defendant wrote to M/s Bowry & Co. Advocates for the Plaintiff stating that they were unable to proceed with the registration of the lease on behalf of the Plaintiff because the 2nd Defendant being the financiers of the 1st Defendant had failed to forward a partial re-conveyance of the mortgage in respect of Apartment C6. The Plaintiff avers that despite the existence of a binding agreement for sale executed between the Plaintiff and the 1st Defendant and executed prior to the creation, execution or registration of a legal charge in favour of the 2nd Defendant, the 1st and 2nd Defendants have jointly and severally failed to register the lease of Apartment No. C6 in favour of the Plaintiff and to give the Plaintiff a Share Certificate in respect of her shares in Cedar Valley Management Company Limited. The

Plaintiff annexed and marked “SKDS-18” a letter from the 1st Defendant dated **19th July 2010** asking her to send a copy of her National Identity Card and PIN certificate.

8. On 29th July 2010 Walker Kontos, Advocates for the 2nd Defendant made a written demand to the Plaintiff alleging that the 2nd Defendant was holding a legal charge over the 1st Defendant’s property and that no sale of the apartment would have taken place between the Plaintiff and the 1st Defendant without the 2nd Defendant’s consent and therefore demanded from the Plaintiff within 7 days to confirm that she would purchase the apartment at the prevailing market price of Kenya Shillings Twelve Million Five Hundred Thousand (Kshs. 12,500,000/-) by paying the difference of the contract price and the present market price. The Plaintiff annexed a copy of the letter dated 29th July 2010 and marked “SKDS-17”.
9. In the said letter dated 29th July 2010 the 2nd Defendant threatens to evict the Plaintiff from the premises and further sell the apartment to other interested purchasers unless the Plaintiff agrees to pay the difference of the contract price and market price. The Plaintiff seeks an order of injunction against the 1st and 2nd Defendants from interfering with her use, quiet possession and enjoyment of the apartment as she lawfully acquired the same under a binding agreement for sale and fulfilled her obligations under the said agreement. The prejudice she is likely to suffer cannot be compensated by way of damages because she will not get the property for the same value she purchased it in October 2006 because the value has since escalated.
10. The application is opposed. The 1st Defendant filed a Replying affidavit sworn by **Eric Mungai** on **14th September 2010** as well as a Grounds of Opposition dated **14th September 2010**. In the Replying Affidavit, the 1st Defendant concedes that it signed an agreement for sale on or about 6th October 2006 save that the said agreement was clearly expressed to be subject to the consent of the 2nd Defendant. It is averred that prior to the execution of the sale agreement, the 1st Defendant entered into a Loan Agreement with the 2nd Defendant for purposes of obtaining money for the construction and Development of L.R 330/667. Pursuant to that Loan Agreement, no agreement for the sale of the suit property or part thereof would be entered into unless the intended sale agreement was approved by the 2nd defendant.
11. In addition to the Loan agreement, the 1st Defendant executed a Mortgage over the said L.R 330/667 upon which the suit property is constructed. It is averred on behalf of the 1st Defendant that under the said Mortgage, the 1st Defendant as the Mortgagor would not sell, transfer, lease, agree to lease surrender, accept surrenders of leases, charge, dispose or part with the possession of the Mortgaged property or any part thereof other than in a manner set out or envisaged in the Supplemental Loan agreement without prior consent in writing of 2nd Defendant.
12. It is averred on behalf of the 1st Defendant that following the execution of the agreement by the Plaintiff and the 1st Defendant, a request was made to the 2nd Defendant for consent to proceed with the sale but the consent was declined. It is therefore the 1st Defendant’s case that the sale agreement dated 6th October 2006 for the disposition of interest in land is in the circumstances unenforceable for want of the 2nd Defendant’s consent.
13. The 2nd Defendant filed a Replying affidavit sworn by **Jasper Mbiuki** on **14th September 2010**. It is deponed that the 2nd Defendant entered into a loan agreement dated **2nd February 2007** with the 1st Defendant for the construction and development of Land Reference Number 337/667. *The 1st Defendant has attached various security documents including the Mortgage, Further Mortgage, Debenture further Debenture and the Loan Agreement exhibited at pages 1 to 116.* In accordance with the Loan agreement, no sale agreement for the sale of individual residential units would be entered into unless in accordance with the clauses enlisted at paragraph 6 of the Replying Affidavit sworn on behalf of the 1st Defendant.

14. It is averred that the Mortgage dated 8th November 2006 at clause 9 provided that the borrower would not sell, transfer, lease, agree to lease, surrender, accept surrenders of leases, charge, dispose or part with the possession of the mortgaged property or any part thereof other than in a manner set out or envisaged in the Supplemental Loan agreement without prior consent in writing of 2nd Defendant. It is further averred that the Debenture dated 8th November 2006 at clause 10.6 provided that the borrower expressly agreed not to do or cause or permit to be done anything which would in any way prejudice the value to the bank of the assets thereby charged. Any consent by the bank had to be obtained and would be subject to such terms and conditions as the bank deemed fit.
15. It is stated on behalf of the 2nd Defendant that, by a letter dated 29th July 2010, its Advocates informed the Plaintiff that the Bank had not consented to the sale. The 2nd Defendant offered the Plaintiff the opportunity of purchasing the apartment by topping up on the original sale price and meeting the market price. The Plaintiff's Advocates responded to the said letter on 9th August 2010 and stated that the 2nd Defendant was a stranger to the sale agreement.
16. It is the 2nd Defendant's case that the contract dated 6th October 2006 is void for lack of registration in accordance with sections 100 and 101 of the Government Lands Act (now repealed). It is also the 2nd Defendant's case that it cannot be forced to consent to a transaction when its prior consent was never sought and obtained. Therefore, the sale agreement cannot be specifically enforced as its consent was not obtained.
17. The Plaintiff filed written submissions dated **29th September 2010**. It is submitted that the Plaintiff became aware of some facts in this matter after filing the suit. The Plaintiff found that the 1st Defendant and the 2nd Defendant had entered into a loan agreement in which the 2nd Defendant was to advance the 1st Defendant the sum of Kshs. 33,000,000/= for the construction and development of Land reference number 337/667 Nairobi. The Loan Agreement was dated **2nd February 2007**. It also came to the knowledge of the Plaintiff that the 1st Defendant had registered a Legal Mortgage in respect of Land Reference Number 337/667 on **24th November 2006** for a loan of Kshs. 168,841,000/=. In addition, on **30th January 2008**, the 1st Defendant registered a Debenture in favor of the 2nd Defendant and pursuant to the said Debenture the 1st Defendant registered a further mortgage for a loan of Kshs. 20,864,368/=.
18. It is the Plaintiff's case that the Loan agreement dated **2nd February 2007** between the 1st Defendant and the 2nd Defendant came into effect four (4) months after she had already executed the sale agreement with the 1st Defendant. It is the Plaintiff's contention that no privity of contract exists as between her and the 2nd Defendant and that the Agreement for sale dated **6th October 2006** did not impose any legal obligations to be fulfilled by the Plaintiff in favour of the 2nd Defendant. According to the Plaintiff all encumbrances on the suit property were created after the sale agreement between the Plaintiff and the 1st Defendant.
19. It is submitted that the 1st Defendant has partly performed part of its obligations created in the agreement for sale dated **6th October 2006** but it is yet to discharge the apartment and register it in favor of the Plaintiff. On the other hand, the Plaintiff has complied with all her obligations and remains a stranger to the Loan agreement entered into between the 1st Defendant and the 2nd Defendant.
20. It is further the Plaintiff's case that the sale agreement gave the 1st Defendant authority to seek financial assistance but compelled it to obtain a discharge of charge at a reasonable time and in any case, before the completion date. The completion date in this case was the **11th of June 2009**, when the apartment was released to the Plaintiff. It is submitted that the 2nd Defendant failed in its due diligence test in that it ought to have established, before entering into a loan agreement with

the 1st Defendant, that the 1st Defendant had already executed an agreement for sale with the Plaintiff in respect of the suit premises.

21. The Plaintiff submits that the 1st Defendant breached the terms of the sale agreement in so far as it refused to obtain a discharge of charge of the suit property and by creating encumbrances that were not disclosed as at the date of the execution of the agreement.
22. The 1st Defendant filed its written submissions dated **5th October 2010** on even date. It is the 1st Defendant's submissions that the Plaintiff's case is lacking in merit and devoid of any chances of success. According to the 1st Defendant, the Plaintiff has absolutely no interest in the suit property since as at the time when the charge against the suit property was being registered in favor of the 2nd Defendant, the property had not been transferred to the Plaintiff.
23. It is also submitted that it was the understanding of both parties that upon entering into the sale agreement, the Plaintiff was consenting to the 1st Defendant charging the suit property to a financier and that the agreement was subject to such an encumbrance. As submitted by the 1st Defendant, failure of consent of a Mortgagee deprives a putative purchaser any rights that would have accrued from the purchase of a mortgaged property. The 1st defendant referred to the cases of **Millicent Mugih vs Speedway Investments Limited & Stanbic Bank Limited HCCC (Milimani) No. 768 of 2009 (UR) and Opa Limited vs Speedway Investments Limited & Stanbic Bank Limited HCCC (Milimani) No. 930 of 2009 (UR)**.
24. The 2nd Defendant filed its submissions dated **6th October 2010** on even date. It is the 2nd Defendant's submission that the Plaintiff was aware that the land would be charged as the flats were constructed using a loan. The 2nd Defendant contends that the Plaintiff has no proprietary interest over the suit property and that her only remedy lies in damages against the 1st Defendant. It is also the 2nd Defendant's submission that specific performance cannot be granted on a void agreement for the disposition of land. According to the 2nd Defendant, it has not executed the sale agreement and has never granted consent for the sale of the suit property. In support of its submissions the 2nd Defendant cited the authorities of **Richard Kahia vs Edward Ng'ang'a civil Appeal No. 16 of 2001** and **Kukal properties Development Ltd vs Maloo and Others [1990-1994] EA 281**.

ANALYSIS

25. To determine whether the Plaintiff herein is entitled to an order of injunction in relation to the suit property, the main issue for consideration is whether the Plaintiff has any proprietary interest over the suit property. In this case, the Plaintiff is relying on a sale agreement executed between herself and the 1st Defendant as well as the fact that she has paid the full purchase price of the suit property and is in possession.
26. It is not in dispute that the Plaintiff and the 1st Defendant entered into a sale agreement dated 6th October 2006. However it is contended that the said sale agreement was not executed and that the agreement was subject to the 2nd Defendant's consent.
27. There is a duly registered Mortgage dated 8th November 2006 and registered on 20th November 2006 as well as a further mortgage dated 23rd January 2008 and registered on 30th January 2008 in favour of the 2nd Defendant.
28. It is evident that the aforesaid security documents were registered after the Plaintiff and the 1st Defendant had entered into the sale agreement dated 6th October 2006. Therefore at that time it is apparent that the property was free from encumbrances. At this juncture, I agree with the

Plaintiff's submissions that the cases cited by the 1st Defendant are distinguishable. In the said cases the purchasers were aware that there was an existing mortgage and consent was required from the bank before executing a sale agreement. In essence, the circumstances of the cited cases are different from the one at hand.

29. That notwithstanding, I have perused the Sale Agreement marked as exhibit "SKDS-10" and attached to the Plaintiff's supporting affidavit sworn on 16th August 2010. It is true that the said agreement at clause(c) gave the 1st Defendant the option to charge the land on which the suit property was erected in favour of a financier as security for obtaining financing of the said construction. The 1st Defendant went ahead and mortgaged the said property in favour of the 2nd Defendant.
30. The 1st Defendant had a duty to disclose to the 2nd Defendant that it had entered into a sale agreement with the Plaintiff for purchase of the suit property. The 1st Defendant should have also notified the Plaintiff that it had registered a mortgage in favor of the 2nd Defendant. However they failed to do so despite the fact that they were fully aware of the existence of the sale agreement. It would have been prudent if the Plaintiff registered a purchaser's interest over the suit property but since she did not I will say no more. The 2nd Defendant has established that it conducted a search before entering into a loan agreement with the 1st Defendant.
31. From the sale agreement, the 1st defendant was mandated to obtain a discharge of charge if any at a reasonable date and at a reasonable time and at any date prior to the completion date. As regards consideration, the Plaintiff was to pay a final balance of kshs. 1 million to the 1st Defendant upon successful transfer and registration of the lease in favour of the Plaintiff. As is evident in the current matter, a transfer to the said suit property is yet to be effected and no lease has been registered in favor of the Plaintiff since the 1st Defendant has not obtained a reconveyance of the mortgage in respect of the suit premises. In the circumstances, it follows that the plaintiff has not yet obtained proprietary interest in relation to the suit property. Needless to say, the Plaintiff paid the whole purchase price despite the fact that the 1st Defendant had not fulfilled an essential part of its bargain.
32. The parties herein, that is the Plaintiff and the 1st Defendant, are better placed to give an explanation how it is that the full purchase price was paid before the 1st Defendant fulfilled its vital obligations. The Plaintiff should have exercised more due diligence before completing part of her bargain. In view of the foregoing, if the Plaintiff has a case in relation to the suit property herein, then her recourse lies with the 1st Defendant. I must, however, note that the 1st Defendant's conduct in this matter appears shrouded in mystery and fraud. The 1st Defendant must account to the Plaintiff in terms of the sale agreement between it and the Plaintiff dated 6th October 2006. This Court cannot and shall not sanction commercial theft, regardless of how it is couched. The bottom line in this matter is that the 1st Defendant owes a commercial explanation to the Plaintiff and if that is not forthcoming, the Plaintiff has a clear recourse in damages against the 1st Defendant.
33. In the upshot, the Plaintiff herein has not established a *prima facie* case with a probability of success as envisaged in the case of **Giella vs Cassman Brown**. It is also evident that the Plaintiff's loss is quantifiable and can be compensated for by way of damages. As for the balance of convenience, this Court finds that the same tilts in favour of the 2nd Defendant as there is a duly registered Mortgage in its favour. The 2nd Defendant also exercised due diligence before entering into a loan agreement with the 1st Defendant.
34. The upshot of the foregoing is that the Plaintiff's Chamber summons Application dated **16th October 2010** is hereby dismissed with orders that each party shall bear their own costs.

DATED, READ AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER 2013.

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for the Plaintiff

Masika for the 1st Defendant

Akech holding brief for Ogunde for the 2nd defendant

Teresia – Court clerk