



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT

CIVIL SUIT No. 440 OF 2010

CATHOLIC DIOCESE OF HOMABAY REGISTERED TRUSTEE).....PLAINTIFF

VERSUS

CHRISTINE NYANCHAMA OANDA.....DEFENDANT

RULING

The application before this court dated 21st September 2010. The Plaintiffs is seeking orders in the said application that pending the hearing and determination of this suit or until further orders, a temporary injunction do issue restraining the Defendant by herself, her servants, agents, representatives or any other person howsoever acting on her behalf from occupying or remaining in occupation or possession or and from working on or developing or in any other way howsoever trespassing on the property L.R No. 12778/260 – Langata (hereinafter referred to as the suit property).

The application is supported by an affidavit sworn by Fr. Michael Odiwa, the Vicar General of the Catholic Diocese of Homabay, on 21st September 2010, and a further affidavit sworn by the same deponent on 28th October 2010. The Plaintiff avers that that at all material times it was the registered owner of the suit property, and that by an agreement entered into and executed in the year 2008 but dated by the Defendant the 21st January, 2009, the Plaintiff agreed to sell to the Defendant greed to buy the suit property for the purchase price of Kshs.3,000,000/=. The Plaintiff further avers that the terms as to payment of the said sum were as follows:

- (a) The Defendant would pay the Plaintiff directly or to the Commissioner of Domestic Taxes (Land Rent) on behalf of, and to the Plaintiff's accounts at Lands Office Nairobi, the sum of Kenya Shillings Four Hundred and Twelve Thousand Nine Hundred and Eleven (Kshs.412,911/=) only upon execution for outstanding land rents, receipt whereof the Vendor acknowledged.
- (b) The balance of the Purchase price being Kenya Shillings Two Million Five Hundred and Eighty Seven Thousand and Eighty Nine (Kshs.2,587,089/=) would be paid upon the completion.
- (c)The agreement would be deemed to incorporate the terms of the Law Society Standards Agreement for sale in so far as the same were not inconsistent with any clause herein.

The Plaintiff acknowledges having received Kshs.412,911/= from the Defendant being the payment of its outstanding land rents.

The Plaintiff states that the sale agreement did not make any provisions as regards the date of completion, but provided that the agreement would be deemed to incorporate the terms of the Law Society Standard

Agreement, which provides that the date of completion should be 42 days from the date of the agreement. the Plaintiff alleges in this case the date of completion should then have been 12th March 2009, and that by the said date the Defendant had only paid Kshs.412,911/= as part payment of the purchase price, leaving a balance of 2,587,089/=.

The Plaintiff further states that on an unknown date in or about the year 2010, the Defendant took up vacant possession of the suit property without paying the full purchase price, and subsequently constructed some temporary and permanent developments thereon. Further, that having on numerous occasions through its Advocates called for the balance of the purchase and vacant possession of the property, and the Defendant having failed, ignored and refused to deliver the same, the Plaintiff consequently rescinded the said agreement *vide* its letter dated 09/09/09 to the Defendant's Advocates, and demanded a delivery of vacant possession of the said parcel of land.

The Plaintiff claims the Defendant has however refused to vacate the said parcels and continues to occupy, possess and develop the same to its detriment, and will continue to do so unless restrained by this Court. The evidence produced by the Plaintiff is a copy of the Sale Agreement, and a bundle of correspondence with the Defendant's Advocates including a copy of its Advocate's letter dated 09/09/09 demanding delivery of vacant possession of the said parcel of land.

The Defendant opposes the application in a Replying Affidavit sworn on 19th October 2010. The Defendant in the said affidavit states that she entered into a Sale Agreement with the Plaintiff on 21st January, 2009 for purchase of the suit property. The Defendant admits that the agreed purchase price was Kshs.3 million and that she paid a deposit of Kshs.413,411/= . The Defendant however claims to have paid a further Kshs.750,000/= and Kshs.500,000/= at the request of the Plaintiff through its Advocates on record M/S Wasuna & Co. Advocates. She claims to have so far paid Kshs.1,663,411/= as part purchase price of the suit property, and not Kshs.413,411/= as alleged. Further that the said payment was disbursed towards the payment of land rents on behalf of the Plaintiff's properties being L.R Nos. 12778/257, 258, 259, 260 and 261, and on procuring the titles to the said properties.

The Defendant's averments are that she has always been ready and willing to complete the transaction as per the sale agreement, and did forward the transfer to the Respondent's Advocates on record in good time, as well as deposited the balance of the purchase price with her then Advocates M/S Nyaenda Waichari & Co. Advocates. The Defendant also avers that she has not acted illegally or contrary to the agreement of sale, as vacant possession was to be upon payment of deposit and execution of the said sale agreement.

The Defendant concludes by stating that the Plaintiff has not disclosed material facts to the Court and having failed to do equity, the Plaintiff cannot continue to benefit from the equitable jurisdiction of the Court. The Defendant has annexed as evidence copy of the sale agreement, copies of bankers cheques and a paying in slip dated 28th February 2010 for Kshs 413, 411/= being payment land rent for L.R Nos. 12778/257, 12778/258, 12778/259, 12778/260 and 12778/261. Also annexed is a receipt for Kshs 1,250,000/= dated 19th May 2008 issued by Priority Management and Properties Ltd for services rendered in respect of the said parcels of land. The Defendant has in addition attached copies of correspondence with the Plaintiff's Advocates on the said payments and completion of the sale agreement.

The Plaintiff in its further affidavit reiterates that sale agreement was entered into and executed in the year 2008, but was unilaterally changed in ink by the Defendant to 21st January, 2009, and that the Defendant's unilateral alteration of the date of the contract after execution renders it void. The Plaintiff admits in the said affidavit that it authorized the Defendant to disburse a maximum of Kshs.750,000/= by its letter of 4/4/08, but that the Defendant had no authority to disburse another Kshs.500,000/=, neither did she notify the Plaintiff or its Advocates on record of her letter of 28/10/2010 that she had disbursed Kshs.1,250,000/= in 2008.

The Plaintiff also alleges that the invoice and receipt by Priority are a sham because the deed plans had been surrendered by Plaintiff to Commissioner of Lands in 2006. The Plaintiff has annexed as evidence a

copy of its letter dated the 5th October 2006 to the Commissioner of Lands, and of a deed plan No. 268402 dated 2nd August 2006.

After consideration of the pleadings filed in this case and submissions made by the parties, the main issue before the court is whether the Plaintiff has met the conditions necessary to grant it injunctive relief. These conditions are laid down in ***Giella v Cassman Brown & Co Ltd (1973) EA 358***. The first requirement is whether the Plaintiffs have shown a *prima facie* case. The issues I need to determine at this stage is whether there was a completion date in the said sale agreement, and if so, whether the Defendant defaulted in completion by not paying the balance of the purchase price as alleged. There are many other issues arising in this application which can only be decided after presentation of evidence at the hearing of the main suit. Issues as to the time of execution and dating of the sale agreement and the legal effect of the same; the actual payments made by the Defendant in relation to the Plaintiff's parcels of land; and authenticity of the receipts tendered by the Defendant are not issues the court can determine at this stage.

For the purpose of this application and issues arising stated in the foregoing what is evident is that there is a sale agreement dated 21st January 2009 which has been presented as evidence and relied on by both the Plaintiff and Defendant. The Plaintiff concedes that the said sale agreement does not contain a completion date. The Plaintiff has stated in the pleadings and also in its letter dated 9th September 2009 that the 42 days provided for in Clause 2(c) and (d) of the Law Society Conditions of Sale lapsed on 12th March 2009.

The Plaintiff in the letter dated 9th September 2009 however still proceeds to give the Defendants 21 days to complete the sale by paying the balance of the purchase price, and after perusing the correspondence annexed as evidence, this is the only instance I can identify that time is made of the essence. Any completion date implied by the Law Society Conditions of Sale is also effectively waived by this notice of completion.

The Defendant's Advocates replied to the notice of completion on 17th September 2009 forwarding the transfer for signature, and followed up with another letter dated 25th September 2009 showing their willingness and readiness to complete and pay the purchase price. The Plaintiff's Advocate then wrote on 21st October 2009 rescinding the agreement. The said letter makes reference to a letter to the Defendant's Advocates from the Plaintiffs Advocates dated 17th September 2009, which purportedly raises issues not responded to by the Defendants. No such letter was produced as evidence by the Plaintiff.

On the second issue of payment of the balance of the purchase price, the Plaintiff has admitted to having authorized the Defendant to expend 750,000/= to facilitate registration of all the titles registrable in the Plaintiff's name, and to deduct the same from the purchase price in its Advocate's letter to the Defendant dated 4th April 2008. The Defendant has brought evidence of such expenditure on 19th May 2008. Whether the expenditure was authorized or not, and whether it is a sham, are issues to be proved at the main trial. What is relevant for this application is that by the Plaintiff's own admission, it is clearly not the case that at the time of the purported notice of completion on 9th September 2009 or of filing this application on 21st September 2010, the balance due and owing by the Defendant was Kshs 2,587,089/=. Further the Defendant has brought evidence to show that she had indicated her willing and readiness to complete the sale transaction and pay the purchase price before the completion date.

In the circumstances I find that the Plaintiff has failed to demonstrate a *prima facie* case, and I will therefore decide the application before me on a balance of convenience. In my opinion the balance of convenience tilts in favour of the Defendant who has expended money pursuant to the sale agreement, and who is entitled to possession by clause 5 of the said agreement. The said clause states that the Vendor is to give vacant possession of the suit property upon execution of the agreement. The sale agreement produced as evidence has been executed by both parties. For the reasons given in the foregoing I hereby order as follows:

1. The Plaintiff by itself or through their representatives, agents or servants are restrained from selling,

transferring, or charging the land parcel identified as LR L.R No. 12778/260 – Langata in Nairobi, or interfering with the Defendant’s possession and occupation of the same pending the determination of the suit filed herein or until further orders.

2. The Defendant to give a written undertaking as to damages to the Plaintiff within 14 days, and the said undertaking to be filed in Court within the said 14 days.

The Plaintiffs shall bear the costs of the application.

Dated, signed and delivered in open court at Nairobi this __23rd__ day of _____February____, 2012.

P. NYAMWEYA

JUDGE