



REPUBLIC OF KENYA



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**Tindika v Vipingo Properties Limited (Environment & Land Case
10 of 2022) [2022] KEELC 2694 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2694 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 10 OF 2022**

**MAO ODENY, J
MAY 11, 2022**

BETWEEN

RANDOLPH M TINDIKA PLAINTIFF

AND

VIPINGO PROPERTIES LIMITED DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 17th February 2022 by the plaintiff/applicant seeking the following orders:
 - a) Spent
 - b) THAT an order of temporary injunction be granted restraining the Defendant by itself, its Directors, agents, assigns, servants and/or employees or anyone claiming in or through it or otherwise howsoever from selling or purporting to sell or offering to sell, advertising for sale, disposing off, charging, mortgaging, subdividing, pledging, or in any other manner parting with possession of all those pieces or parcels of land known as Land References Numbers: 5025/236, 5025/239, 5025/240, 5025/241, 5025/242 and 5025/249, Vipingo, south of Takaungu, Kilifi District, pending the inter partes hearing of this Application and further pending the hearing and determination of this suit or further Orders of this Honourable Court.
 - c) THAT this Honourable Court be pleased to issue an order of inhibition against the Defendants inhibiting the registration of any dealings with regard to all those pieces or parcels of land known as Land References Numbers: 5025/236, 5025/239, 5025/240, 5025/241, 5025/242 and 5025/249, Vipingo, south of Takaungu, Kilifi District, pending the inter partes hearing this Application and further pending the hearing and determination of this suit.
 - d) THAT the costs of this Application be provided for.



2. Counsel agreed to canvas the application by way of written submission which were duly filed

Plaintiff/Applicant's Submissions

3. Counsel who is the applicant relied on his supporting affidavit and gave a brief background to the case and stated that by an agreement dated 2nd June, 2017, the Respondent sold to the Applicant Land References Numbers: 5025/236, 5025/239, 5025/240, 5025/241, 5025/242 and 5025/249 at an agreed price of Kshs. 123,110,700.00. That the Applicant, paid Kshs. 12,311,070.00 to the Respondent being the 10% deposit and in part payment of the said purchase price, receipt whereof the Defendant duly acknowledged.
4. Counsel submitted that the transaction was not completed as before the completion of the transaction, by letter dated the 24th October, 2017 and received on 30th October 2017 the Respondent purported to rescind the Agreement and by letter dated the 8th November, 2022, in response to the Respondent's purported unilateral recession of the Agreement, the Applicant did not accept the said rescission and called for the Respondent to avail the Completion Documents.
5. It was counsel's further submission that by a letter dated the 15th November, 2017, the Respondent purported to forward the said Completion Documents, but only ended up sending unsigned Schedules of Deeds but not the documents. He submitted that the notice purporting to rescind the Agreement was premature and of no legal effect because the Respondent, purported to rescind the Agreement before performing its part of the bargain.
6. Counsel listed the following three issues for determination.
 - a) Whether the purported rescission of the Agreement was valid?
 - b) Has the plaintiff/applicant satisfied the conditions for grant of temporary injunction?
 - c) Whether the suit herein could be filed alongside Mombasa ELC Miscellaneous Application No. 45 of 2018
7. Mr Tindika submitted that there is no dispute that the parties herein executed the Agreement for Sale dated the 2nd June, 2017 whereby Clause 4 thereof provided: -
 - 4.1 On or before the Completion date, the Purchaser shall pay the balance of the purchase price by RTGS to the Vendor's advocate account against receipt by the purchaser's advocates from the vendor's advocates of the following completion documents (the "completion documents":
 - (a). The original Certificates of Title in respect of the Properties;
 - (b) The transfers of the Properties (each in triplicate) duly executed by the Vendor complete with passport size photographs of each of the Vendor's directors who witnessed the affixation of the Vendor's seal on the transfers;
 - (c) copy of the Vendor's Certificate of Incorporation and PIN Certificate together with copies of the Identity Card/Passport and PIN Certificates of each of the Directors of the Vendor who witnessed the affixing of the seal of the Vendor on the transfers;
 - (d) Original rent clearance certificates for each of the Properties;
 - (e) the consent of the Commissioner of Lands to the transfer of each of the Properties;
 - (f) original rates clearance certificates for each of the Properties; and



- (g) a duly completed stamp duty valuation form in the form prescribed by the Collector of Stamp Duty.
8. It was counsel's submission that the Completion Documents were to be available and exchanged with the balance of the purchase price which the Respondent never availed as required or at all. Further that no completion documents were annexed to the replying affidavit but unsigned Schedule of Deeds indicating the purported documents at pages 65 to 69 of the said Affidavit. Further, that the said Schedules are dated the 15th November, 2017, despite the fact that the Respondent purported to rescind the Agreement by letter dated 24th October, 2017, three (3) weeks before attempting to avail Completion Documents.
 9. It was counsel's contention that under Clauses 5.1 and 5.1.2 of the Agreement, where a party feels that the other was not ready, willing or able to perform its part of the bargain, then the only recourse was to issue a Completion Notice, which was never issued by the Respondent before purporting to rescind the Agreement. The said Clauses 5.1 and 5.1.2 thereof states:-
 - 5.1. if for any cause whatsoever the sums due under clause 4.1 shall not have been paid by the due date or any part of the Purchase Price secured by the professional undertaking shall not be paid as mentioned under clause 4.3. within the stated period or if the Purchaser shall not have complied with any of his obligation under the Agreement, then:
 - 5.1.2. The Vendor will be entitled to serve a completion notice of twenty one (21) days upon the Purchaser for the payment of the Balance of the Purchase Price failing which the Vendor shall after the expiry of the completion notice be entitled at its sole discretion to either:
 - (ii). Rescind the Agreement and the Deposit shall stand forfeited to the Vendor absolutely.....
 10. Counsel also stated that the Clause 12.1 indicated that the Law Society Conditions of Sale (1989) Edition was to apply to the Agreement, inter alia. Condition 4 (7) of Law Society Conditions of Sale (1989) Edition and submitted that the Respondent neither availed the Completion Documents which were to be exchanged with the payment of the balance of the purchase price nor has it demonstrated that it was ready, willing and able to do so.
 11. Mr Tindika relied on the cases of *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others*, Civil Appeal No. 267 of 2016, Nairobi, [2018] eKLR, where the Court of Appeal held that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties.
 12. Counsel therefore urged the court to find that the respondent's rescission of the agreement was premature as the respondent did not avail the completion documents.
 13. On the second issue as to whether the plaintiff/applicant has satisfied the conditions for grant of temporary injunction, counsel relied on the *Mrao Limited -vs- First American Bank of Kenya Limited & 2 Others*, [2003] eKLR, the Court of Appeal set out the conditions to be met and stated that the plaintiff/applicant has established a prima facie case hence orders of injunction should be issued.
 14. Counsel further cited the cases of *Nguruman Limited v Jan Bonde Nielsen & 2 others, Civil Appeal No. 77 of 2012, Nairobi*, [2014] eKLR and *Joseph Mbugua Gichanga v Co-operative of Kenya Ltd* [2005] eKLR and submitted that the terms of the agreement were specific and if the injunction is not issued the applicant will suffer irreparable loss which is not capable of being compensated by way of damages.



- That the respondent is in possession of both the Certificates of Title and actual possession of all the properties herein and thus once the restraining orders sought herein are granted, the Respondent will not suffer any injury at all.
15. On the issue of grant of orders of inhibition, Mr. Tindika submitted that this Honourable Court has, under the provisions of Section 101 of the *Land Registration Act*, jurisdiction to hear and determine this application and powers to issue orders of inhibition forbidding dealings in the suit property.
 16. On the last issue as to whether this suit could be filed alongside Mombasa ELC Miscellaneous Application No. 45 of 2018, it was counsel's submission that the Respondent filed the above mentioned matter as a Miscellaneous Application specifically seeking the removal of caveats, to which the Applicant could not file a Counterclaim by the fundamental fact that a claim for specific performance, setting aside and injunction must be commenced by way of a Plaint. The Honourable Judge in Misc. 45 of 2018 appreciated the Applicant's right to file a suit for specific performance.
 17. Mr Tindika further submitted that this suit is for specific performance, as was alluded to by the Honourable Judge hence the Respondent cannot be heard to challenge the same since the issues in this matter were not and could not be litigated in the said Miscellaneous Application. Counsel cited the case of *Gharib Suleman Gharib v Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998*.
 18. On the issue of undertaking as to damages, counsel stated that as a demonstration of utmost good faith in commencing these proceedings in his supporting affidavit stated that he is willing to give an undertaking as to damages in the event that this will be a requisite condition for grant of restraining orders sought herein.
 19. Counsel therefore urged the court to allow the application as prayed

Defendant/Respondent's SubmissionS

20. Counsel for the respondent opposed the application and submitted that the dispute between
21. the parties relate to breach of an agreement by the Applicant to buy properties from the Respondent whereby both parties were blaming each other for breach.
22. Mr Kahora submitted that on 9th February 2022, the Honorable Justice Sila Munyao conclusively found in *Mombasa Misc. Civil Application No.45 of 2018* that the Applicant was in breach of that very agreement and stated:

“I regret to inform the respondent that it was actually him who breached the sale agreement by failing to avail the balance of the purchase price on or before the completion date.”
23. It was counsel's submission that the applicant filed this application seeking injunctive orders eight days after the ruling and did not disclose the existence of the Mombasa ELC suit in the application or its supporting affidavit. That by failing to disclose all relevant facts to the Court, the Applicant misled the Court into issuing the orders of 22nd February 2022. Counsel submitted that the orders so issued ought to be discharged for material non-disclosure and that the Applicant has not met the threshold for grant of an injunction
24. On the issue of the applicant's willful and material non-disclosure, counsel submitted that it is not in dispute that the parties herein were involved in *Misc. Civil Application No. 45 of 2018 (OS) Vipingo Properties Limited v Randolph Tindika*; Registrar of Titles (Interested Party) (“The Mombasa Matter”) and that the Plaintiff applying for ex parte relief must disclose to the court all matters



- relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. That the ex-parte injunction in this matter was obtained through willful material non-disclosure of the Mombasa Matter and the judgment hence the ex parte order of injunction should be discharged.
25. Mr Kahora further submitted that the applicant was under a duty to disclose the previous matter in respect of the Mombasa matter and relied on the case of *Republic v Kenya Medical Training College & another Ex-Parte Kenya Universities and Colleges Central Placement Service* [2015] eKLR where the court held that a party appearing before the court without notice to the other (ex parte) must exhibit a high quality and degree of sincerity and honesty. That in considering the effect of the lack of disclosure, the Court stated that so strong is the rule that where disclosure has not been met the court will not even decide the applicant's application on its merits.
 26. Mr. Kahora submitted that the applicant being an advocate of the High Court, clearly understands the duty to disclose all facts to the Court, yet he failed to disclose the existence of the Mombasa Matter and the conclusive judgment against him.
 27. Counsel relied on the cases of *Nyanja Holdings Ltd v Finance Bank Ltd* [2008] eKLR, where the Court cited *National Bank of Sharjah v Deliboerg and Blue Planet Group Ltd v William Downie* [2018], a decision by the Bahamas Court of Appeal, where the appellant sought to have an injunction which had been discharged for material non-disclosure, reinstated. The appellant there argued, as does the Applicant here, that the disclosure was made in the Statement of Claim. In dismissing the appeal, the Court was categorical that disclosure is to be done in the affidavit.
 28. On whether the applicant has met the threshold for grant of injunction, counsel relied on the cases of *Giella v Cassman Brown & Co Ltd* (1973) EA 35, *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* Civil Appeal No.21 Of 2014, *Mrao Ltd v First American Bank of Kenya Ltd and 2 others* (2003) KLR 125, and submitted that the applicant needed to adduce evidence which establishes that he has a right which has been or is threatened by violation or show an infringement of a right, which counsel stated that the applicant has not met the threshold for grant of injunctions. Further that this matter is res judicata.
 29. On damages, counsel submitted that the applicant can be compensated by damages if he had established a prima facie case which counsel states that he has not. Further that the Applicant himself acknowledges that his shares have a monetary value at paragraph 5 of his Complaint and the supporting affidavit where he states at paragraph 4 that he agreed to buy property from the Respondent at a consideration of KES 123,110,700.00 which means that the applicant has already quantified the claim.
 30. Mr Kahora submitted that it is not in dispute that the Applicant has been able to prevent the Respondent from selling its property by way of caveats which have now been declared unlawful by the court hence the balance of convenience tilts in favour of the respondent.

Analysis and Determination

31. This is an application for temporary injunction by the plaintiff/applicant. This matter came under certificate of urgency where the court granted temporary orders of injunction pending the hearing and determination of this application inter partes .
32. The issues for determination are whether the applicant is guilty of material non-disclosure of a case in respect of the same issue in Mombasa Misc. Civil Application No. 45 of 2018 (OS) Vipingo Properties Limited v Randolph Tindika; Registrar of Titles (Interested Party) and whether the applicant has met the threshold for grant of temporary injunction.



33. The fundamental principles of disclosure of material facts can be summarized as follows:
- a) The Applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge,
 - b) The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made sufficient inquiries.
 - c) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries.
 - d) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application.
 - e) The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
 - f) Finally, it is not every omission that the injunction will be automatically discharged

34. In the case of *Tate Access Floor v Boswell* [1990] 3 All ER 303, the court held at page 316 thus:-

“No rule is better established and far more important than the rule (the golden rule) that a Plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court’s discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the Plaintiff, the court will discharge the exparte order and may mark its displeasure, refuse the Plaintiff further inter-partes relief. even though the circumstances would otherwise justify the grant of such relief. ”

35. It is not disputed that there is a judgment in Mombasa Misc. Civil Application No. 45 of 2018 (OS) *Vipingo Properties Limited v Randolph Tindika; Registrar of Titles* (Interested Party) where the respondent herein sought for the removal of caveats on the suit parcels of land which were subject to the agreement between the applicant herein and the respondent.

36. The Court at the heading stated as follows:

“Parties having entered into an agreement for sale of the suit properties which agreement was never completed but which led to the respondent registering caveats; parties entering into a subsequent agreement reviving the sale and making provision for removal of the caveats in the event that the respondent does not pay the balance of the purchase price within the completion period; agreement providing that payment be made against the completion documents; respondent not paying the balance of the purchase price within the completion period and maintaining the caveats in place; vendor now filing suit for removal of the caveats; respondent arguing that the interpretation of the agreement is that he must first be given the original completion documents before he can pay the balance of the purchase price; court holding that respondent needed to first make payment before he could be given the original



completion documents; respondent not making payment within the stipulated time thus not entitled to maintain the caveats; judgment entered for the applicant”

37. It is evident from the proceedings in the above case that it is in respect of the same agreement and the same transaction where the court held that the applicant in this case is not entitled to maintenance of the caveats on the suit land having not paid the balance of the purchase price. The applicant did not disclose that there was a similar suit which the court had made a determination that the applicant is not entitled to the placement of the caveats on the suit parcels of land.
38. The applicant has not told the court whether the non-disclosure was innocent or that the fact that there was Mombasa ELC case was not known to the applicant or that its relevance was not perceived. The existence of the Mombasa ELC case is of sufficient materiality to justify immediate discharge of the order without examination of the merits as the facts are important in the determination of this application.
39. The applicant wants the court to grant an order of inhibition and injunction which in effect is similar to placing caveats on the suit land which the court has decreed by a judgment that the applicant is not entitled to.
40. If the applicant was dissatisfied with the judgment, then he should have filed an appeal in the Court of Appeal to challenge the removal of the caveats. There is no evidence that there is an appeal that has been filed in respect of the Mombasa judgment. I have perused the judgment and notice that all the issues raised in this application are similar to the ones raised in the previous Mombasa case. In fact, the arguments and the submissions are similar as the judgment was delivered in Mombasa on 9th February 2022 and this application was filed on 17th February 2022.
41. Still on material non- disclosure of material facts amounts to coming to court with unclean hands, an order of injunction being an equitable remedy an applicant must come to court with clean hands and good faith in order to benefit from the courts discretion. This in one of the cases where the court would not exercise its discretion in favour of the applicant as the applicant is guilty of non-disclosure as was held in the case of *Nabashon Njage Nyaggah V Savings & Loan Kenya Limited & another* [2006] 1 Eklr - Kasango J.) stated in discharging interim injunctive reliefs that:

“When a party approaches a court for such a remedy they are expected to be even handed in the presentation of evidence before court. The court requires such a party to act uberrima fide in seeking for an injunction order. A party should not suppress the truth nor should such a party tell untruths with a view to persuading the court to grant an injunction.”
42. Counsel for the applicant also submitted that contracts are voluntary undertakings as was held in the case of *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others, Civil Appeal No. 267 of 2016, Nairobi*, [2018] eKLR (supra) where the Court of Appeal held that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties.
43. Having found that the applicant is guilty of material non-disclosure I will not go into the next issue as to whether the applicant has met the threshold for grant of injunction. I therefore discharge the order of interim injunction and direct that the parties comply with Order 11 with 30 days and fix the matter for hearing.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MAY 2022.



M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

