



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

Civil Suit 87 of 2012

**CATHERINE NJRI NGUGI, GRACE WANGECI NJUGUNA, HANNAH KABUI NDIITHI,
MARY NJOKI GACHARA T/A VISIONA SISTERS
ENTERPRISE..... PLAINTIFFS**

VERSUS

TERESIA WAITHERADEFENDANT

RULING

1. The Plaintiffs/applicants hereinafter referred as the applicantsS has filed a Notice of Motion dated 21st February 2012, under Article 159 of the Constitution of Kenya, Sections 1A, 1B, 3A, 63E and Order 40 rules 1,2,3 order 51 Rule 1 of the Civil Procedure Act Chapter 21 and any other enabling provisions of Law, seeking the following orders.

i. That this Honourable Court do grant an order of injunction to restrain and prohibit the defendant either by herself or through her servants and/or agents from subdividing, selling, transferring disposing, alienating, charging or otherwise dealing with the parcel of the land comprising L. R. No. 7240/33 in any other manner that is adverse to the plaintiffs' claim herein and pending the hearing and final determination of this suit.

ii. That the defendant be ordered to deposit forthwith the original title for the suit property L. R. No. 7240/33 in Court or with the plaintiffs' Advocates on a reciprocal professional undertaking by the latter not to part with the same to any party pending orders of this Honourable Court.

iii. That the defendant be condemned to pay the costs of this application.

2. The application is based on the following grounds.

- a) That on 17th February, 2009, the plaintiffs entered in to a written sale of land Agreement for 10 acres out of the Land Parcel L.R. No. 7240/33 for sum of kshs. 10,000.000/=
- b) That at the signing of the Agreement the plaintiffs had paid a deposit of Kshs.5,000,000/- to the defendant as a deposit towards the purchase of the suit property a sum which the defendant acknowledge receipt of payment.
- c) That one of the terms for the agreement was that the completion date for the agreement was 90 days form the execution of the agreement or upon defendant delivering to the plaintiff's documents or whichever was earliest.
- d) That one of the terms of the agreement was that the defendant would point out the beacon of 5 acres of the property on 24th February, 2009 and hand over the possession of the 5 acres to the plaintiffs.
- e) That another term of the agreement was that in the event of default of the plaintiffs, the defendant would after payment of 20% of the purchase price as damages transfer the 5 acres to the plaintiffs and in the event of default by the defendants, the plaintiff would be entitled to a transfer of 5 acres and 20% of the purchase price as damages.
- f) That the defendant pointed the beacon of the handed over possession of the 5 acres to the plaintiffs.
- g) That the plaintiffs have subdivided and sold the 5 acres of the suit property to third parties who are in physical possession of the suit premises.
- h) That the defendant has failed, refused and or neglected to honour her part of the bargain to avail the agreed completion document to process the transfer of the suit property to the plaintiffs.
- i) That the plaintiffs have fulfilled and have at all material times been ready willing and able to pay the balance of the purchase price and to fulfill their obligation under the subject contract for sale.
- j) That the defendant has breached the express terms of the said content mutually agreed on by the parties.
- k) That the plaintiffs have learnt that the defendant wants to vary the express terms of the contract
- l) That the plaintiffs stand to suffer irreparable injuries the defendant is allowed to vary the terms of the contract release only 5 acre to the plaintiff.
- m) That is only fair and equitable that the defendant either by herself or through her servants and/or agents be restrained and/or prohibited from taking actions that will adversely affect the plaintiffs' claim under the said contract.
- n) That costs be provided in the cause.

The respondent though served with the application did not attend the inter partes hearing. The application is supported by the Supporting affidavit of Catherine Njeri Ngugi, Grace Wangeci Njuguna , Hannah Kabui Ndiithi and Mary Njoki Gachara.

3. Briefly this is the applicants case; they are an investment group, in the year 2008 the four of them pulled resources together to invest in the real estate business, purchasing and reselling parcels of land. They christened the group as Visiona Sisters Enterprises. They later registered a business name under that name. That in January 2008 they entered into an agreement with Teresia Waithira Muiruri to purchase 10 acres of land out of L. R. No. 7240/33. The purchase price was agreed at Kshs. 1,000,000/- per acre. The Sale Agreement that was prepared by the Vendors Advocates J. K. Ngaruiya. The vendor executed the agreement on 9th February, 2009 which was duly endorsed by her three sons namely:- Patrick Ngugi, Joseph Ndonga Muiruri and Raphael Njoroge. That the vendor informed them that she had another son who was not included in this transaction as his share was not part of the land from which 10 acres was to

be excised and transferred to them. The term of the agreement was that they would pay to the vendor half of the purchase price that is Kshs. 5,000,000/- which was way above the ordinary deposit of 10% because they agreed that they would take up possession immediately upon execution of the agreement. The vendor said that she would only allow them to take possession of half of the portion they were purchasing then take possession of the other half after they have paid the full purchase price. That from the onset, they made it categorically clear that upon taking possession of the parcel of land, they shall embark on subdividing into portions of 1/8 of an acre which they would then source for buyers to purchase them.

4. That they paid the Vendor the agreed deposit vide a Cheque No. 051812 for Kshs. 4,900,000/- and a further amount of Kshs. 100,000/- which was paid through her Advocates. That the vendor and her sons assured them that the process of subdivision and transfer would only take less than 90 days. This was incorporated in the agreement for sale as clause no. 8. They informed them that they had already commissioned a surveyor to undertake the process of subdivision. That they took possession of the 5 acres portion; on 24th February, 2009 and thereafter they commissioned a surveyor to undertake the process of subdivision of the 5 acres plot into portions of 1/8 of an acre and also to mark out road reserves. Their intention was to sell the portions to willing buyer. That they engaged Agnes Njeri Ngugi as an agent to procure buyers and sell the 1/8 portion on their behalf. She sourced buyers. Some agreed to buy the full purchase price whereas other said they would only pay upon us obtaining title for the 10 acres portion. That the 90 days completion period lapsed without the vendor delivering all the completion documents to them. They followed up with her son Joseph Ndonga who informed them that the process was still ongoing and they had actually substituted the surveyor who had started the process because he was too slow. That after a while they agreed with the vendor and her son Joseph Ndonga that they would deposit a cheque for kshs.5,000,000/- with their lawyer M/S. J. K. Ngaruiya & Co. Advocates and upon be allowed to take up possession of the other portion of the 5 acres. That they took possession of the other 5 acre portion on and commissioned a surveyor to subdivide the land 1/8 acre plots. However when their surveyor went on the ground to carry out the process he was confronted by one of the vendor's sons who prevented him from continuing with the subdivision and ordered him out of the land. Joseph Ndonga dealt with his brother.

5. That after subdivision, they again commissioned Agnes Njeri to sell the promotion to willing buyers. However Agnes Njeri was called by Joseph Ndonga and he requested that she stop selling the plots as there had answer disputes in the family and it would be prudent to settle them first. That after the incident they followed up with Joseph Ndonga to complete the transaction he kept giving them verbal assurances that the process was nearing completion and it is now almost four years since then. That at some point, Joseph Ndonga informed them that he had run out of funds to carry out the subdivision and requested that they advanced an amount of Kshs.200,000/- to facilitate this amount. This amount would be deducted from the deposit of the purchase price. They first gave him kshs100,000/- and later on gave him an extra Kshs.100,000/-. That their relentless efforts to have the vendor and her sons to expedite completion have fruitless. The said Joseph Ndonga has ceased completely communicating with them or advise them on the process and/or when they should expect the process to be completed. That the purchasers of the 1/8 plots have continued putting unbearable pressure on them to issue them with titles for their portion and it is now becoming the fact that they do not have a title for the 10 acres that excesses. That over the last two years they have been waiting for the completion of the agreement. The value for the land has appreciated significantly and they are apprehensive that the vendor may dispose of the property to another buyer and disregard their agreement with her. That is it the interest of justice and protection of their rights and those of purchases of the 1/8 acre plots that the vendor should be completed by this Honourable Court to expedite the completion of the transaction.

6. I have carefully considered what has been deponed in the affidavit together with counsel's oral submissions in Court. The applicants have exhibited the agreement they had with the defendant over purchase of ten acres out of L. R. 7240/33. They paid 4.9million as per exhibit VSE4 and 5million as per exhibit VSE7. They have also made a demand to have the defendant comply with the terms of the sale agreement dated 17th February 2009. It is evident as per VSE2 that the parcel of land L. R. 7240/33 belongs to Teresia Waithera Muiruri. According to the sale agreement dated 17th February 2009 the applicants were buying 10 acres out of the L. R. 7240/33. The completion date was supposed to be 90 days whereupon the defendant was to hand over certain documents to the applicants as per the agreement.

According to the applicants the defendant has failed to own part of her agreement to process the transfer of the suit property to them. The applicants are seeking injunctive orders against the defendant. In doing so the applicants have to establish the principles set out in the case of Geilla Vs. Cassaman Brown E. A 1973 ;-

- i. That they have a prima facie case with a probability of success;
- ii. That they will suffer irreparable injury if the injunction is not granted
- iii. If the Court is in doubt, it will decide the application on the balance of convenience.

7. From the facts before me which have not been controverted, I find that the applicants have established that they paid the full purchase price for the 10 acres they were purchasing from the defendant. They have shown that they have a prima facie case with a probability of success. They further argue that the value of the land has since appreciated significantly and they are apprehensive that the defendant may dispose off the property to other buyers and disregard their agreement and thus suffer injury. The defendant having been paid the full purchase price should honour her part of the agreement. I therefore grant prayer 3 as follows; that an order of injunction shall issue to restrain and prohibit the defendant either by herself or through her servants and/or agents from subdividing, selling, transferring disposing, alienating, charging or otherwise dealing with the 10 acres sold to the applicants of the land comprising L. R. No. 7240/33, in any other manner that is adverse to the plaintiffs' claim herein and pending the hearing and final determination of this suit.

8. I decline to grant prayer 4 as there is no just reason at this interlocutory stage to grant the said order. I note that the title is in the defendant's name; further the order sought is a mandatory order that should not be granted at this interlocutory stage. The defendant is condemned to pay cost of the application. Orders accordingly.

Dated and delivered this 4th Day of May 2012

R. OUGO
JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk