Lesedi Developers Limited v Nine Forty Investments Limited (Environment & Land Case E002 of 2022) [2022] KEELC 15594 (KLR) (22 June 2022) (Ruling)

Neutral citation: [2022] KEELC 15594 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ENVIRONMENT & LAND CASE E002 OF 2022

AK BOR, J

JUNE 22, 2022

BETWEEN

LESEDI DEVELOPERS LIMITED ..... APPLICANT

AND

NINE FORTY INVESTMENTS LIMITED ..... RESPONDENT

RULING

1. This dispute emanated from the sale agreement dated January 18, 2022, *vide* which the respondent agreed to sell the properties known as Nanyuki West Timau Block 1/251, 1/253, 1/257, 1/259, 1/567 And 1/568 (Mutirithia) ("the suit properties") to the applicant at the agreed consideration of Kshs 28,380,382.30/=. In compliance with the terms of the agreement, the applicant paid a deposit of 10% of the purchase price to the respondent and the completion date was set for April 3, 2022.

2. The applicant brought the application dated May 5, 2022 under sections 1A, 1B, 3 and 3(a) of the *Civil Procedure Act* and order 37 rule 3, order 40 rule 1 and order 51 rule 1 of the *Civil Procedure Rules* seeking an injunction to restrain the respondent from selling the suit properties and an order to compel the respondent to drill three boreholes on the suit properties. In the alternative it seeks to be granted 45 days from the date of the order to complete the sale agreement by paying Kshs 25,542,344.10/= or the sum of Kshs 22,542,344.10 if the respondent failed to drill three boreholes on the suit properties.

3. The application was supported by the affidavit of the applicant's director, Geoffrey K Kiragu sworn on May 5, 2022. Mr Kiragu deponed that during the negotiations the respondent represented that there were boreholes on the suit properties which is the basis on which the applicant proceeded to enter into the agreement. He averred that the balance of the purchase price was to be paid on or before April 4, 2022 in exchange for completion documents including the handing over of the three boreholes and in the circumstances, the 21-day completion notice which the respondent issued was premature because it had not completed its end of the bargain.

4. He added that during the period of the completion notice, the applicant informed the respondent that it was seeking financing from a reputable commercial bank and requested an extension of the completion period to accommodate the financing process which request was declined. He averred that soon thereafter the applicant learned that the suit properties did not have a single borehole contrary to the representation made by the respondent in correspondence exchanged between the parties. Mr Kiragu stated that the applicant is still willing to purchase the suit properties at the agreed purchase price but less Kshs 3,000,000/= being the borehole cost.

5. Mr Kiragu averred that the boreholes appeared to be on Nanyuki West Timau Block 1/258 (Mutirithia) which the parties removed from the sale agreement because of a caution registered against that title. He averred that the vendor used the existence of the three boreholes in the bargain for the purchase price. He further deponed that *vide* a letter dated April 27, 2022, the respondent indicated that it was proceeding to sell the suit properties to third parties. He contended that the respondent did not come with clean hands and that the intended resale would be prejudicial to the applicant, which he claimed was at an advanced stage of securing financing.

6. The applicant filed submissions dated May 19, 2022 which raise two issues for the court's determination. Firstly, whether the respondent should be compelled to drill three boreholes on the suit properties or in the alternative the purchase price be reduced by Kshs 3,000,000/=; and secondly, whether an injunction should be issued restraining the respondent from selling the suit properties to third parties or dealing with them in any other way other than completion of the sale agreement. The applicant submitted that the respondent fraudulently misrepresented facts which it relied on to enter into the sale agreement by stating during negotiations that the suit properties had three boreholes and not just one as the respondent averred in the replying affidavit. The applicant contended that this is a case where the court should deviate from the rule not to rewrite contracts for parties. The applicant cited section 120 of the *Evidence Act* and the decision in *Muriithi Imanyara & 2 others v Equity Bank Limited & 3 others* [2019] eKLR. The applicant urged the court to direct the respondent to drill the three boreholes or in the alternative, the purchase price of the suit properties in the agreement be reduced to Kshs 22,542,344.10/= which it claimed it was ready to pay within 45 days of the court making the order.

7. The applicant relied on the case of *Carol Construction Engineers Limited & another v National Bank of Kenya* [2021] eKLR and submitted that it had fulfilled the five elements of estoppel against the respondent.

8. The respondent opposed the application through the replying affidavit sworn by its director, Donald Earle Smith on May 12, 2022. Mr Smith averred that the sum of Kshs 3,000,000/= was included in the total purchase price for the suit properties, being the amount that was used to construct a borehole on Nanyuki West Timau Block 1/259 (Mutirithia). He exhibited a borehole completion report. He averred that in the correspondence exchanged between the respondent's advocates, M/s Njeri Ngujiri Advocates and the applicant specifically the email dated January 6, 2022, it was communicated that the borehole was located on Nanyuki West Timau Block 1/259 (Mutirithia). Mr Smith deponed that nowhere in the sale agreement did the respondent agree to drill three boreholes while pointing out that the applicant confirmed that it had inspected the suit properties and purchased them with full knowledge of their actual state and condition as stipulated in clause 11.2 of the sale agreement. He averred that on April 4, 2022 the respondent was ready to forward all the completion documents and annexed various completion documents for the suit properties. He stated that the respondent issued a 21 days completion notice to the applicant during which the applicant sought a further extension of 30 days which was unacceptable to the respondent.

9. Mr Smith averred that the applicant had not come to court with clean hands because the issue of drilling boreholes only materialised after the applicant defaulted in paying the balance of the purchase price of Kshs 25,542,344.10/=. He maintained that the applicant was aware of all the improvements on the suit properties because it had been provided reasonable access to the land.

10. The respondent raised two main issues for determination in its submissions dated May 25, 2022. These are whether the applicant had met the threshold to be granted an interlocutory injunction and whether the applicant had proved that there was fraudulent misrepresentation with respect to the boreholes. The respondent submitted that the applicant had not demonstrated that it has a *prima facie* case with a probability of success as was stated in *Giella v Cassman Brown* (1973) EA 360. It contended that the applicant was a cash buyer but upon realising that it was unable to complete the transaction sought a financier. It was emphatic that the court cannot rewrite a contract between parties and urged the court to consider both the application and the main suit as delay tactics being employed by the applicant.

11. The respondent submitted that the applicant could be adequately compensated by an award of damages if the court were to eventually determine that the respondent was in breach of the terms of the sale agreement. It added that the balance of convenience tilted in favour of the respondent because according to clause 12 of the sale agreement time was of the essence and the respondent was at all times ready to finalise the transaction. On the second issue, the respondent submitted that *vide* the email from the respondent's advocates of January 6, 2022, the applicant was duly informed that the borehole was located on Nanyuki West Timau Block 1/259. The respondent contended that being a prudent purchaser whose business is buying and selling land, the applicant ought to have confirmed the existence of improvements on the land. Further, that nowhere in the sale agreement was the number of boreholes indicated as three and pointed out that the presence of the borehole had been used in both its singular and plural form in their correspondence.

12. The respondent argued that the applicant entered into the agreement on the basis of its contents and not upon any representations made to it by the respondent or its agents; and that the applicant confirmed that it had inspected the suit properties and was purchasing them with full knowledge in accordance with clauses 2.3 and 11.2 of the sale agreement respectively. It added that this was buttressed by the applicant having placed beacons on the suit properties.

13. The respondent argued that the applicant's allegations of fraudulent misrepresentation did not arise at the execution of the agreement or when the applicant's directors attended a meeting at the respondent's advocates' offices to seek an extension of time to obtain financing but was only brought up after the expiry of the completion notice issued by the respondent. It contended that fraudulent misrepresentation must not only be pleaded but also strictly proved and relied on the cases of *Wild Living Company Limited v Varizone Limited* [2019] eKLR; *R G Patel v Lalji Makanji* [1957] EA 314 and *David Mburu Kamau v National Industrial Credit Bank* [2010] eKLR.

14. The respondent submitted that the applicant had failed to prove that it had a *prima facie* case entitling it to an interlocutory injunction and that there was fraudulent misrepresentation on the part of the respondent.

15. The court has considered the application, the affidavits and the submissions filed by the parties. The issue for determination is whether the applicant has proven that it deserves the orders it seeks in the application. The principles governing the grant of interlocutory injunctions were laid down in *Giella v Cassman Brown & Company Ltd* (1973) E.A 358. An applicant has to demonstrate that he has a prima facie case with probability of success and that he will suffer irreparable loss or damage if the interlocutory injunction is not granted which cannot adequately be compensated by an award of

damages. If the court is in doubt on the two requirements, then it will decide the application on the balance of convenience.

16. Looking at the sale agreement which the parties entered into, clause 2.3 provided that the purchaser was entering into the agreement on the basis of what was contained in it and not upon representations made by the vendor. Clause 3.1 states that the purchase price was Kshs 28,380,382.30/= out of which the purchaser was to pay 10% upon execution. Regarding completion, the agreement gave 45 days from the date of execution date with an option of an extension of 21 days subject to interest on the outstanding balance. The agreement would be rescinded if the purchaser breached it, forfeiting the 10% deposit. However, if the vendor breached the agreement the purchaser was to give the vendor 21 days' notice to comply and an option of a further 21 days or rescind the contract with the 10% deposit being reimbursed.

17. Clause 6.2 states that the purchaser had inspected the property and was purchasing it with full knowledge of its state and condition, and the vendor was not be required to effect any repairs or improvements to the property.

18. It is not in dispute that the applicant has not fulfilled its obligations under the sale agreement even after the respondent agreed to extend the completion period by 21 days. On the face of it, the respondent has demonstrated by documents it annexed to the affidavit that it was ready to complete the sale agreement on the date agreed upon.

19. The applicant has not demonstrated that it will suffer irreparable damage if the injunctive orders it seeks are not granted. In the court's view, whatever harm or loss it may suffer can adequately be compensated by an award damages. The orders sought in prayers 4 to 9 of the application will best be dealt with in the main suit. The issue as to whether or not the respondent should drill the boreholes as the applicant seeks can only be determined at the trial when the parties will have an opportunity to ventilate their positions on the dispute regarding the terms of the sale agreement.

20. The court notes that in the originating summons, the applicant seeks orders similar to those it seeks in this application. It is prudent to fast track the hearing of the case.

21. The court declines to grant the orders sought by the applicant in the application dated May 5, 2022. The respondent is awarded the costs of the application. Parties are directed to take steps to have the suit heard and determined expeditiously.

DELIVERED VIRTUALLY AT NANYUKI THIS 22ND DAY OF JUNE, 2022.

K. BOR

JUDGE

In the presence of: -

Ms. Ruth Ndichu holding brief for Ms. E Mwendwa for the Applicant

Ms. Njeri Ngunjiri for the Respondent

Ms. Stella Gakii- Court Assistant