



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

ELC NO. 581 OF 2010

MBAABU MBUI.....1ST PLAINTIFF
FRIDAH MUCHINA.....2ND PLAINTIFF

V E R S U S

LANGATA GARDENS
LIMITED.....DEFENDANT

R U L I N G

The Defendant is the registered proprietor of all that land known as LR. No. 18591/9 situate in Langata in Nairobi on which it has developed 128 Apartments together with other conveniences. There is no dispute that the Plaintiffs sought to purchase Apartment No. 4 in Block 5 of the suit land and the Defendant agreed to sell. That culminated in an Agreement for Sale dated 4th May 2010 which the parties signed. They had been signed a Letter of Offer in 2009 following which the Plaintiff had paid KShs. 250,000/= on 17th April 2009, KShs. 110,000/= on 17th April 2009 and KShs. 550,000/= to the Defendant and/or his selling agent. The Agreement shows the purchase price to be KShs. 5,500,000/= to be paid as follows:-

- a) Kshs. 910,000/= to be paid before execution (and which payment was acknowledged); and
- b) The balance of KShs. 4,590,000/= to be paid to the Defendant's advocates 14 days after the registration of the sub-lease in favour of the Plaintiffs.

The completion dated was to be 31st May 2010 or on the 14th day from the registration of the sublease which was later.

On 16th July 2010 the Defendant's advocates wrote to the Plaintiffs' advocates giving a 21 days notice to

rescind the contract on the basis that the Plaintiffs had not provided a professional undertaking for the balance of the purchase price. The Plaintiffs were required to provide the undertaking failing which the contract would stand rescinded. On 11th August 2010 the Plaintiffs' advocates responded to the notice which was to expire on 13th August 2010. They sought the extension of time to enable the provision of the professional undertaking. On 18th August 2010 the Defendant's advocates wrote declining extension and declared that the Agreement had been rescinded. They stated that the Defendant had forfeited KShs. 550,000/= deposit and a further KShs. 40,000/= for expenses incurred. The letter said that the Defendant was going to refund Kshs. 320,000/= after reselling the Apartment. Then, there is letter dated 24th August 2010 through which the Plaintiff's advocates issued to the Defendant's financier's advocates a professional undertaking to pay the balance.

The Plaintiffs filed this suit on 30th November 2010 seeking a declaration that the rescission of the Agreement was unlawful, void and ineffectual. They sought specific performance of the Agreement and an order compelling the Defendants to execute the transfer and have it registered or to have the Deputy Registrar sign all documents of transfer and registration. Damages were sought in lieu of or in addition to specific performance. Then an order for a permanent injunction and costs. With the suit was filed a chamber application under Order 39 rules 1, 2, 3 and 9 of the Civil Procedure Rules for a temporary injunction to restrain the Defendant and all those acting under it from disposing of, selling, leasing, charging, transferring or in any other manner interfering with the Apartment until the suit was heard and finalized. This is the application under consideration.

The Plaintiffs' case is that they were all the time ready and willing to perform their part of the bargain but that it was the Defendant who was in breach by not transferring the Apartment on time, or at all. They alleged that the Apartment could not be occupied because the Defendant had failed to obtain an Occupation Certificate from the City Council of Nairobi; and that the suit property was charged to Equity Bank to the tune of KShs. 220 million and the Apartments was therefore incapable of transfer. It was pleaded that the Defendant should not, in these circumstances, have issued a rescission notice because it was not ready, able or willing to performance to contract.

It was further argued that the payment of the balance of the purchase price was supposed to be 14 days after the registration of the sublease. Since the sublease was not registered, the demand for the balance was premature, they said.

The Defendant pointed to Special Condition A of the Agreement to say that professional undertaking was to be provided as soon as possible after the signing of the Agreement for sale. Their case was that such undertaking had not been provided by the time of the notice and therefore that the Plaintiffs were in breach. Further, the Plaintiffs were required to provide payments of the fees and costs (Special Condition Q) which they had not done. This is why the sublease was not forwarded to the Plaintiffs for signature, it was said.

The Defendant then stated that the Apartment has since been sold to a third party as shown in "WNM11".

It would appear not to be in dispute that by 31st May 2010 the Plaintiffs had not provided a professional undertaking to pay the balance of the purchase price. Up to 16th July 2010 when the notice was issued the undertaking had not been provided. Equally, the Plaintiffs had not paid the fees, costs and duties in Special Condition Q. My preliminary finding is that they were in breach of the Agreement and should not complain about the notice of rescission. The other way of looking at it is that, the Plaintiffs have not established a *prima facie* case that is capable of success (**Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358**). What was paid under the Agreement was KShs. 910,000/= which the Defendant should be able to refund. Even if damages for breach of contract were to be ordered, I find the same would be recoverable.

Regarding the balance of convenience, I have found the Plaintiffs to be in breach. An injunction is a discretionary and equitable remedy that can only be granted to a deserving applicant. The balance of convenience should tilt in favour of the Defendant.

I dismiss the application with costs. For the avoidance of doubt, the interim injunction granted herein is vacated.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH 2011

A. O. MUCHELULE

J U D G E