



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 605 of 2009

JAMES A. TINDI MBUKA & 22 OTHERSPLAINTIFFS/APPLICANTS

VERSUS

MUNICIPAL COUNCIL OF THIKADEFENDANT/RESPONDENT

RULING

1. The Chamber Summons dated 25/11/2009 was brought by the 23 Plaintiffs under Order XXXIX Rules 1, 2, 3 and 7 of the Civil Procedure Rules, Sections 3A and 63(e) of the Civil Procedure Act seeking ORDERS:-
 - (a) **THAT** the application be certified urgent, service be dispensed with and the same be heard in the first instance.
 - (b) **THAT** the defendants by themselves, their servants or agents or anyone of them by themselves, whosoever be restrained by a temporary order of injunction from advertising for sale, disposing, selling, by public auction, private treaty, tender bids or at any time completing by Conveyance, transfer or surrender concluded by auction, private treaty, leasing, tender or otherwise or howsoever interfering with the plaintiffs/applicants prior right to purchase their houses in all those premises known as **KAMENU ESTATE, THIKA**, belonging to the defendant, pending the hearing and determination of this application, and of the suit.
 - (c) **THAT** an order of temporary injunction do issue to restrain the defendant/respondent its servants and/or agents from issuing a notice to vacate, threatening to evict, or evicting and/or otherwise interfering with the Plaintiffs quiet possession and enjoyment of their houses in all those premises known as **KAMENU ESTATE, THIKA** pending the hearing and determination of this application, and of the suit or until further orders of this Honourable Court.
 - (d) **THAT** the costs of this application be provided for.
2. The application is supported by the grounds appearing on the face thereof and the averments in the affidavit sworn by **James A. Tindi Mbuka** on the 26/11/2009. What the Plaintiffs are saying is that the Defendant has reneged on its undertaking to transfer to the Plaintiffs/Applicants certain houses at **KAMENE ESTATE** Thika even after the Plaintiffs paid their 10% deposit, and has instead chosen to transfer the houses to third parties. The Plaintiffs contend that if the Defendant is allowed to transfer the houses to the third parties, the Plaintiffs will suffer irreparable loss and damage, in view of the fact that the Plaintiffs have lived in the subject houses for long periods of time, and are now being threatened with evictions.
3. In the plaint filed contemporaneously with the Chamber Summons, the Plaintiffs state that they are the respective tenants of the Defendant's houses, namely numbers 813, 818, 850, 860, 766, 892, 761, 882, 835, 760, 783, 852, 755, 779, 763, 877, 756, 828, 756, 898, 855, 775 and 827 in and known as **KAMENU ESTATE**, within the municipality of Thika, in the Republic of Kenya. The Plaintiffs' case is that under some local arrangement between the Plaintiff and the NHC, the **KAMENU ESTATE** was sold to the NHC who in turn resolved to sell the respective houses to the Plaintiffs on condition that the Plaintiffs paid:-
 - (a) 10% of the value of the premises provisionally estimated at Kshs.500,000 within 90 days from the day of the offer;
 - (b) 20% of the provisional value within 90 days of (a) above.
 - (c) 70% and the difference between the provisional value, and the actual value within 90 days of (b) above.

4. From the plaintiff Plaintiffs numbers 1, 3, 5, 9, 11, 13, 15, 16, 20 and 22 paid the 10% deposit and a further sum requested in condition (a) and/or (b) of the offer, while Plaintiffs 2, 4, 6, 7, 8, 10, 12, 14, 17, 18, 19, 21 and 23 did not comply with condition (a) above. The Plaintiffs aver that as a consequence of the non-compliance by some of the Plaintiffs, the Defendant by letters dated 11/05/2005 and 4/07/2005 revoked the proposed sale, leaving the Plaintiffs at a loss as to the status of the houses. The Plaintiffs state at paragraph 10 of the plaint that on or about 4/09/2009, the NHC officially handed **KAMENU ESTATE** back to the Defendant and that the Defendant resolved to go ahead with the stalled sale of the houses to the Plaintiffs as follows:-
 - (a) *Tenants who had fully complied with the terms of offer made by National Housing Corporation were to be formally issued with letter of allotment and individual title deeds;*
 - (b) *Tenants who had paid 10% or more of the deposit be allowed to fully pay the balance within 30 days after the adoption of the resolution by the full council.*
 - (c) *Tenants who did not pay 10% be denied the right to purchase on priority basis, and the houses to be advertised for sale to the public.*
5. It is the Plaintiff's contention that despite these elaborate arrangements by the Defendant, the Defendant fraudulently and in a discriminatory manner, unlawfully and without any justifiable cause refused to issue the Plaintiffs with the 30 day notice as resolved and/or to accept the Plaintiffs' respective monies tendered to it by the Plaintiffs in furtherance of the purchase, hence these proceedings. **REASONS WHEREFORE** the Plaintiffs pray for:-
 - (a) *An order of specific performance to compel the defendant to offer for sale and/or to continue the process of sale to the plaintiffs [of] their respective houses in all those premises known as **KAMENU ESTATE, THIKA MUNICIPALITY** on the like terms as offered to like tenants herein.*
 - (b) *An order of permanent injunction to restrain the defendant whether by itself, third agents, servants and/or representative or any one of them either by themselves or otherwise howsoever, from doing the following acts or any of them, that is to say, advertising for sale, disposing or selling by public auction, private treaty, tender or bids howsoever, at any time compelling by conveyance, transfer or any sale concluded by public auction, private treaty, leasing or otherwise interfering with the plaintiffs peaceful occupation and prior right to purchase their respective houses in all those premise (sic) situate in **KAMENU ESTATE, THIKA** to any third party other than the respective plaintiffs".*
 - (c) *Damages*
 - (d) *Costs of this suit.*
 - (e) *Interest thereon at court rates, until payment in full.*
6. The court granted an interim injunction when the Plaintiffs appeared ex parte on the 27/11/2009. The application is however opposed. The Replying Affidavit is sworn by **Geoffrey C.K. Katsolleh** who is the Town Clerk of the Defendant/Respondent. The deponent's side of the story is that when all the Plaintiffs herein failed to honour the offer made to them by the Defendant in conjunction with the NHC, the Defendant had to offer the houses for sale to the public. The deponent also says that the Defendant was not obliged to issue the 30 day notice as alleged by the Plaintiffs or at all, in the face of a breach of the terms of the offer of sale by the Plaintiffs. As regards the 15th Plaintiff, the deponent of the Replying Affidavit says that this party not being an individual, cannot purport to join the fray over the suit properties with the other Plaintiffs.
7. At the hearing of the application, learned counsel for the Plaintiffs reiterated the averments as per the grounds on the face of the application and in the supporting affidavit. Counsel submitted that after the Defendant resolved to proceed with the sale, by the resolution of 2/09/2009, the Defendant began to selectively take money from some of the Plaintiffs while leaving out others. Counsel also submitted that what the Defendant did went against the agreed program for the sale of the houses to the Plaintiffs as program was now being administered selectively. Counsel referred the court to the annexures accompanying the Supporting Affidavit which confirmed that the Plaintiffs, among others had paid upto Kshs.42 million towards the purchase of the houses and that to deny the Plaintiffs the ultimate desire of owning these houses was contrary to the rules of natural justice.
8. Counsel for the Defendant also reiterated the averments of the Replying Affidavit and said that though most of the Plaintiffs asked for more time to raise the required amounts, there was no seriousness their part of the to pay the outstanding balances of the purchase price.
9. I have now carefully considered the pleadings and the submissions. It is not denied that the Plaintiffs, among others, were offered and

they accepted to buy the houses in dispute. The Defendant admitted in the minutes of first meeting of the Project Committee for the Sale of Kamenu Estate Houses that from the offer made by NHC to the tenants of Kamenu Estate, payments to the tune of Kshs. 42 million had been received. The Committee resolved under MINUTE PCKHS/2009/06 – (iii) (2) –

*“**THAT** it would be a breach of contract and further negates the rules of natural justice to reverse the intended sale. Further the remedy should be to avoid legal liabilities in this sale subject.”*

The Plaintiffs in this case are apprehensive that unless the Defendant is restrained from selling the houses to third parties, they (the Plaintiffs) will be deprived of their houses and be ejected therefrom by the third parties who will have purchased the houses.

10. From a consideration of the above, I think that the Plaintiffs have established a prima facie case with a probability of success. The Defendant admits that the whole process, including issuance of the 30 day notice to the Plaintiffs to comply was not complied with. The Plaintiffs have said that they are still ready and willing to complete the transaction so that they can own these houses. If the Defendant is allowed to sell the houses to third parties, and particularly when fraud has been pleaded and particularized in the plaint means giving the Defendant an opportunity to steal a march on Plaintiffs. Moreover, the unrebutted evidence on record is that the Plaintiffs are in occupation of their respective houses. It is thus only fair and just the status quo be maintained until the issues raised in the main suit are heard and determined, otherwise the Plaintiffs will suffer prejudice.
11. Accordingly, the Plaintiffs application dated 25/11/2009 is allowed in terms of prayers (b) and (c) thereof until this suit is heard and determined. The Plaintiffs shall also have the costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 27th day of January, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. E. Oduk (present) for the Plaintiffs/Applicants

Mr. Mosoti holding brief for Momanyi (present) for the Defendant/Respondent

Weche – court clerk