



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

ENVIRONMENTAL & LAND CASE 617 OF 2008

ANDREW MURUGU MAINA.....1ST PLAINTIFF/APPLICANT

CAROLINE WANGARI MURIUKI.....2ND PLAINTIFF/APPLICANT

VERSUS

JOHNSON NGARARI MWAURA.....DEFENDANT/RESPONDENT

RULING

1. The application before the court is the Chamber Summons dated 22/12/2008 filed under Certificate of Urgency and brought under Order 39 rule 2 of the Civil Procedure Rules and Sections 3A and 63 of the Civil Procedure Act. The Plaintiffs seeks orders that:-
 1. *This application be certified as urgent and be heard ex parte in the first instance.*
 2. *An order of temporary injunction be issued restraining the defendant by himself or through his agents or servants from breaching or committing any or further breach of the Agreement for Sale to the Plaintiffs of L.R. No. 7785/897 Runda, Nairobi or in anyway cancelling, purporting to cancel, terminating, retracting or in any way withdrawing from the sale of the said property to the Plaintiffs.*
 3. *An order of specific performance do issue directing the defendant to complete the sale of the property known L.R. No. 7785/897 Runda, Nairobi to the Plaintiffs forthwith. (sic)*
 4. *Costs of this application.*
2. The application is premised on the ten grounds set out on the face thereof, namely that:-
 1. *There is a valid Agreement for Sale dated 12th June 2008 signed by the defendant for sale to the plaintiffs of L.R. No. 7785/897 Runda, Nairobi.*
 2. *The plaintiffs have always been ready and willing to complete the sale and have met all their obligations under the Agreement for Sale.*
 3. *The defendant has executed a transfer dated 12th June 2008 in favour of the plaintiffs.*
 4. *The transfer has been stamped with the applicable stamp duty paid for by the plaintiffs and is ready for registration.*

5. *Vide a letter dated 15th December, 2008 from Messrs. Maithya Mohochi & Company Advocates for the defendant to Messrs. Mboya & Wangong'u Advocates for the plaintiffs, the defendant has purported to cancel the sale transaction on the flimsy ground that that he is no longer interested in proceeding with the sale transaction.*

6. *The said cancellation is illegal, mala fides, void and has no basis at all.*

7. *The defendant is guilty of undue delay in completing the transaction.*

8. *The land in question is of unique value to the plaintiffs. It is in Runda, an upmarket and preferred residential area of Nairobi and it is not possible to get a similar piece of land elsewhere and the defendant should therefore be ordered to complete the sale transaction.*

9. *The plaintiffs' loss cannot be compensated by damages.*

10. *The defendant should therefore be restrained from committing a breach of the Agreement for Sale and be ordered to specifically perform the contract.*

3. The application is also supported by an affidavit sworn jointly by Andrew Murugu Maina and Caroline Wangari Muriuki on 22/12/2008. The essence of the said affidavit is a reiteration of the ten grounds on the face of the application. The main one being that the Defendant is in breach of a valid agreement that was mutually agreed between the parties and the advocates and that for this reason, the court ought to grant the prayers sought.

4. Contemporaneously with the Chamber Summons application, the Plaintiffs filed their plaint dated 22/12/2008 alleging breach of contract on the part of the Defendant. The Plaintiffs alleged that the Defendant acted mala fides in purporting to rescind a sale which had been completed for all intents and purposes. The Plaintiffs prayed for judgment against the Defendant for:-

a. *An order of injunction restraining the defendant by himself or through his agents or servants from breaching or committing any or further breach of the Agreement for Sale to the plaintiffs of L.R. No. 7785/897 Runda, Nairobi or in any way cancelling, purporting to cancel, terminating, retracting or in any way withdrawing from the sale of the said property to the plaintiffs.*

b. *An order of directing the defendant to specifically perform and complete the sale of the property known L.R. No. 7785/897 to the plaintiffs forthwith. (sic)*

c. *General damages for breach of contract*

d. *Special damages for Kshs.220,010.00*

e. *Costs of the suit*

f. *Any other or further order that this honourable court may deem just and fit to grant.*

5. The Plaintiff's application is opposed. The Replying Affidavit dated 30/01/2009 is sworn by Johnson Ngarari Mwaura, the Defendant herein. While admitting that he had entered into an agreement for Sale of a plot in Runda known as L.R. No. 7785/897 (the suit property) which agreement was executed on 12/06/2008, the deponent denies being in breach of the said agreement. He instead avers that the Plaintiffs did not complete the transactions within the sixty (60) days allowed under the agreement. The deponent denies that he was the one who had caused the delays of which the Applicants complain and instead avers that the completion period having expired with no extension made or sought to be made by either party, he cannot be accused of having caused any delay or breached the agreement.

6. The parties made oral submissions to me and reiterated the averments contained in the pleadings and in the respective affidavits. Mr. D. Mwaura who appeared for the Plaintiffs submitted that:-

- (a) *the agreement of sale between the Plaintiff and the Defendant dated 12/06/2008 was duly executed by both parties*
- (b) *the agreement provided for a completion period of 60 days from date of execution or such other date as the parties may agree in writing*
- (c) *the purchase price of Kshs.5.5m was to be paid within 7 days of completion of transfer in favour of the purchasers*
- (d) *the purchase price was to be secured by a professional undertaking from the purchaser's advocates*
- (e) *the professional undertaking was given by the purchasers advocates on 9/06/2008*
- (f) *by the 9/06/2008 when the professional undertaking was given the purchasers had completed their part of the bargain and that the letter of undertaking dated 9/06/2008 also requested the vendor's advocates for certain documents*
- (g) *pursuant to the request for documents under (f) above, the purchaser's advocates prepared a transfer which was then executed by all the parties and subsequently the transfer was stamped with the requisite stamp duty – all these details are visible on pages 15 – 23 of the plaintiff's application*
- (h) *the vendor did not supply the Rates Demand note for the parent title as well as receipted payment bills, thus stalling the whole process of transfer to date*
- (i) *despite demand by the purchaser's advocates to the vendors advocates calling for the remaining documents, the documents have not been supplied and instead the vendor has purported to rescind the sale on the ground that he (vendor) was no longer interested in proceeding with the sale.*

7. The letter dated 15/12/2008 by which the Vendor, purported to rescind the sale reads:-

Our Ref: MM/mwafa/con/08
Your Ref: M18/001/V/2008/W

15th December, 2008

MBOYA & WANGONGU ADVOCATES
LONHRO HOUSE 7TH FLOOR
STANDARD
NAIROBI

Dear Sir/Madam,

RE: SALE OF LAND REFERENCE NO. 7785/897, NAIROBI JOHNSON NGARARI MWAURA TO ANDREW MURUGU MAINA AND CAROLINE WANGARI MURIUKI

We refer to the above matter.

Our client's final instruction to us are that he is no longer interested in proceeding with this sale transaction and instructs us that he has already conveyed the said position to your client. In the circumstances the sale transaction now stands cancelled.

We do apologize for any inconveniences that may have been caused thereof.

Yours faithfully
MAITHYA MOHOCHI & CO.

F.M. MAITHYA
Advocate”

8. Regarding the Replying Affidavit, Mr. Mwaura submitted that whereas the Vendor alleges that he could not complete the sale because he completion date had expired the letter dated 15/12/2008 did not make any reference to the completion date, but only said that the Vendor was no longer interested in proceeding with the sale transaction. Mr. Mwaura cited a total of eight decisions all of which I have considered, in addition to the well known case of **Giella – vs- Cassman Brown & Co. Ltd. [1973] EA 358.**
9. Mr. J. Kihara for the Defendant/Respondent submitted that the Plaintiff/Applicant had not satisfied the conditions set out in the **Giella case** (above) for the granting of the injunction sought. It was contended on behalf of the Defendant/Respondent that since the Plaintiff/Applicant has neither set foot on nor lived on the suit property, he cannot be heard to say that the suit property is of unique value to him, and that if anything, the Plaintiff can be compensated by payment of damages. Further, the Defendant submitted that the order sought seeks to injunct the Defendant from doing something that has already taken place and worse still, the Defendant submitted that the contract on which the Plaintiff seeks to rely died some 60 days after execution of the Agreement for sale on 12/06/2008. Counsel for the Defendant relied on the case of **Hussein t/a N.N. Transporters –vs- Agro Chemical & Food Company Ltd [2002] KLR 1.** On the basis of this authority, counsel for the Defendant submitted that once a contract expired, a party cannot go to court claiming breach of such a contract.
10. The facts in the **Hussein case** were that the Plaintiff had a written contract with the Defendant upon whose terms the parties traded. Upon expiry of the contract, the Defendant prepared a fresh contract, sent it to the Plaintiff for approval but the Plaintiff never signed the contract; though the parties continued trading. After two months, the Defendant terminated the contract after giving two months’ notice of its intention to do so. The original contract provided for six months notice. The Plaintiff filed suit against the Defendant claiming damages for breach of contract. The Defendant counter claimed for loss during transportation and certain monies due to the Government. On the basis of the above facts, the court (Mwera J) held that once the previous contract expired, there was nothing more between the parties binding them. I think that the facts in the above case are distinguishable from the facts of the present case, in that in the above case, the contract had actually expired.
11. Counsel for the Plaintiff/Applicant submitted in reply that the Defendant/Respondent was the aggressor when he deliberately failed to supply the Rates Clearance Certificates to the Plaintiff/Applicant and therefore can not be heard to hide behind the expiry of the contract when he is trying to steal a march on the Plaintiff/Applicant. Counsel for the Plaintiff submitted that the contract in this case had not expired since the Defendant still had to do certain things in the process.
12. After considering the application in light of submissions made and the authorities cited to me by both counsel, I would agree with counsel for the Plaintiff/Applicant that the Plaintiff/Applicant has demonstrated and satisfied the requirements for the granting of an injunction as set out in the **Giella case**. I also agree with counsel for the Plaintiff/Applicant that the Plaintiff/Applicant need not show that he was in occupation of the suit premises in order to qualify for an injunction, and that it was enough for the Plaintiff/Applicant to show that he has been and will continue to be prejudiced by loss of opportunity. In any event, I agree with Mr. Mwaura that the Defendant/Respondent had gone as far as signing the Transfer, thereby confirming to the Plaintiff/Applicant that the contract was alive and that the deal was going ahead.
12. In the result, I am persuaded that the Plaintiff’s Chamber Summons application dated 22/12/2008 and filed on the same date is merited. I hereby grant orders in terms of prayer 2 thereof with costs to the Plaintiff/Applicant.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of February, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. D. Mwaura (present) For the Plaintiffs/Applicants

Mr. Maithya (present) for the Defendant/Respondent

Weche – court clerk