REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 163 OF 2010

EMO INVESTMENT LTD. ……..…… PLAINTIFF

VERSUS

STEPHANUS PETRUS KRUGER ……..…… DEFENDANT

R U L I N G

The Plaintiff filed suit vide the plaint dated 15th November, 2010 and filed in court on the same date. In that plaint the plaintiff stated that it entered into a sale agreement with the defendant for the purchase of certain parcels of land and certain moveable assets on those parcels of land. The original Agreement was dated 17.09.2008 and which was varied on the 09.06.2009. In both agreements the clause as to Arbitration in the event a dispute arose was left intact. The plaintiff made certain payments towards the deposit of the purchase price. The defendant advertised the same parcels of land for sale considering the contract rescinded and hence these proceedings in which the plaintiff contends that the defendant is in breach of contract and the dispute that has arisen should be referred to arbitration.

Contemproneously with the filing of that plaint was filed a Chamber Summons under the provisions of Section 3 and 3A of the Civil Procedure Act and Order XXXIX Rules 1,2,3 and 9 of the Civil Procedure Rules and all the enabling provisions of the law which sought the following orders;-

(a) ……..

(b) There be temporary orders of injunction restraining the defendant, his servants and/or agents from disposing land parcels numbers LR. 21792/3, 2179/4, 9127, 9278 and 8522 or any other moveable property therein in line with the sale agreement dated 17.9.2008 and 9.6.2009 pending the hearing and determination of this application and thereafter the main suit.

(c) There be temporary orders of injunction restraining the defendant, his servants and/or agents from disposing land parcels No. LR. 21792/3, 2179/4, 9217, 9278 and 8522 or the resultant subdivision thereof pending the arbitration proceedings between the parties herein.

(d) Without prejudice to the foregoing the dispute between the parties herein be referred to arbitration in terms of clause 17 of the sale agreement dated 17.9.2008.

(e) …….

The application was based on the grounds that the parties entered into a sale agreement on 17.9.2008 for the purchase of the aforementioned properties at an agreed consideration of Kshs.800,000,000/- and that agreement was varied on 9.6.2009. That the defendant has since breached the same and gone ahead to sub-divide the parcels of land and is in the process of selling to other third parties whilst he has received the sum of Kshs.112,000,000/- from the plaintiff. The final ground is that the matter should therefore be referred to arbitration after an injunctive relief of a temporary nature has been issued so as to protect the plaintiff's interest.

The affidavit in support of the application was sworn by one **Rev. John Kimeli Kipsangut** described as the plaintiff's director conversant with the issues herein and hence competent and authorized to so swear. He reiterated the averments in the plaint and showed how the sum of Kshs.112,000,000/- towards the deposit was made as well as annexed relevant documents to support the application. In paragraph 11 of the said affidavit is stated that any assertion that there is no dispute capable of being arbitrated is spurious, for the reason that the defendant is holding both the plaintiff's money as well as the land which he is already disposing to third parties. In paragraph 12 the deponent swears that the plaintiff has not breached the contract and there is therefore need to preserve the suit property otherwise the plaintiff shall suffer irreparable harm and loss together with its over 400 shareholders.

The Replying Affidavit in opposition to the application was sworn by the defendant on 18th November, 2010. He reiterated parts of the agreements between the parties and added that the plaintiff failed to abide by the terms of the agreements between the parties and such failure constituted a breach of the said agreement and further the plaintiff exhibited its wish to exit from the agreement due to its inability to pay as agreed and consequently the defendant as a formality, issued a notice of the defendant's rescission of the agreement. Following those events the defendant contended that he was at liberty to proceed to sell the suit land as stipulated in the agreements. It was the defendant's averment then that the plaintiff had not made out a prima facie case with any probability of success and further that it cannot suffer any loss which is not capable of being compensated by way of damages.

Both learned counsel Mr. Kathili for the plaintiff/applicant and Mr. Gicheru for the defendant/respondent made submissions in support of their rival positions.

In the nature of this application I propose to deal first with the issue of whether or not there has been a breach of the agreement between the parties. The plaintiff on the onset acknowledges the existence and terms of the Agreement for sale and its variation. It does not deny that the varied deposit of the purchase price became Kshs.252,500,000/- of which sum the plaintiff had paid only Kshs.34,000,000/- upto the completion date and only the sum of Kshs.112,000,000/- to-date which still falls short of the agreed deposit. That is a clear and unequivocal breach of the express terms of the agreements between the parties.

There was the argument that by accepting payment after the due date then the defendant rewrote the agreement between the parties, so to say, and thereby made the plaintiff think that it could proceed with the purchase and that by the defendant's such conduct, then it was estopped from denying the existence of a further variation and therefore the existence of a valid agreement between the parties. To this I say that all one has to look to is section 3. 3. of the **Law of Contract Act – "No suit shall be brought upon a contract for the disposition of an interest in land unless-**

(a) the contract upon which the suit is founded

(i) is in writing

(ii) is signed by the parties thereto;

(iii) incorporates all the terms which the parties have expressly agreed in one document and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

It must follow therefore that for the sale of land there cannot be an agreement by conduct, the same being required by law to be in writing.

It is an admitted fact by parties on each side of this agreement that the plaintiff was in breach of the first requirement of the contract between them, that of payment of the deposit of the purchase price. Any dealings thereafter were outside the agreement between the parties and this court is not enjoined to re-write a contract between the parties – **NATIONAL OIL –VS- PIPEPLASTIC SAMKOLIT (K) LTD. & PROF. SAMSON K. ONGERI CA Nai. 95/1999** where it was stated

"A court of law cannot rewrite a contract between the parties. The parties are bound by their contract, unless coercion, fraud, or undue influence are pleaded and proved."

The conduct of the defendant of having received further payment, after the time given by the agreement, and which payment did not in any event make the full deposit amount, did not create a new term of the contract between the parties as in dealings with land agreements are not by the conduct of any or all the parties but must be in writing.

It was a term of the contract that if there was a breach of the agreement then the defendant would be entitled to refund the amount paid as deposit within one year and without interest. The plaintiff bound itself to that agreement upon executing the agreement. In the authority of **CAMPBELL DISCOUNTS CO. LTD. V. BRIDGE (1961) 2 ALL ER 97** which was followed in the case **of BEHANGE V. SCHOOL OUTFITTERS (U) LTD. Court of Appeal of Uganda at Kampala case No. 53/1999** it was stated-

"The courts did not concern themselves with the question whether adequate value had been given or whether the agreement was harsh or one sided. The fact that one person paid too much or too little did not in itself affect the validity of the contract. In the absence of fraud, duress , undue influence, mistake and misrepresentation, the courts would enforce a promise so long as some value had been given."

This is to emphasis that it is not the role of the court to rewrite contracts for parties, whatever a party thought about a clause in an agreement once that agreement was entered into.

I find therefore that the plaintiff breached the contract when it failed to abide by the clause as to the payment of the deposit of the sale price in the manner therein provided or at all. Further and in addition to the failure to so pay the deposit, the plaintiff itself advertised such failure/inability to pay for the land and thereby gave its membership notice of failure to abide by the agreements.

I have looked at clause 17 of the agreement dated 17.09.2008 and it states as hereunder;-

"In the event of any dispute arising out of the Agreement or the terms thereof such dispute will be referred to an arbitrator to be appointed jointly by the vendor and the purchaser or failing agreement to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrations (Kenya Chapter) who shall act in accordance with the provisions of the Arbitration Act (Act No. 4 of 1995)."

What is the dispute that has arisen as anticipated by the above clause? What term(s) of the agreement between the parties now require(s) reference to an arbitrator? I was not referred to any. If the dispute is the plaintiff's inability to pay, then remedy for such inability or failure is given by the agreement – rescission – which although preserved by the rescission clause in the agreement for the defendant, the plaintiff was the first in time in exercising that right when it offered to exit from the agreement and followed that with an advertisement in the print media of its inability to pay – and thereby failure to abide with the terms of the agreement. Rescission of the contract by first, the plaintiff and then the defendant included rescission of the provision for the settlement of any dispute by arbitration although I must hasten to add that I was not shown what dispute as anticipated by the agreement, arose. Mere failure to pay does not give rise to a dispute see **GEOMAX CONSULTING ENGINEERS V. KPT HCCC. No. 1210/1996** quoting the following passage from **RUSSEL ON ARBITRATION;-**

"Mere refusal to pay upon a claim which is not really disputed does not necessarily give rise to a dispute calling an arbitration clause into operation. It does not follow that the courts cannot be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which the trader merely persists in not paying."

As stated earlier, rescission of the contract included rescission of the arbitration process – see the words of Lord Summer in the case of **HARJI MULJI V. CHEONG YISE STEAMSHIP CO. LTD. (1926) AC 497** followed in the case **of NAKURU OIL MILLS LTD. VS. LAKHANI (1976-80)I KLR 44**

"…….. a contract that has determined is in the same position as one that has never been concluded. It founds no jurisdiction. An arbitration clause is not a phoenix that can be raised again by one of the parties from the dead ashes of its former self. By its very terms, as well as by the fact that it was only one part of the indivisible charter, it has come to an end also."

The above sufficiently deals with the rescission of the agreements between the parties herein, in my view. It also covers the arbitration clause. And in those circumstances then does the plaintiff satisfy the principles established in the case of **GIELLA VS. CASSMAN BROWN & CO. LTD. (1973)EA 358**, to earn itself the equitable relief of an interlocutory injunction? Has the plaintiff made out a prima facie case with a probability of success at trial? I think not. And any loss it may suffer can indeed be adequately compensated by an award of damages. It is not true that the defendant has both the money and the land. If at the expiry of the one year period stipulated in the agreement between the parties he has not repaid the plaintiff its money, then the plaintiff can sue for recovery of the same. In these premises the balance of convenience lies with the party not in default, the defendant. For those reasons the application under consideration is found to be unmeritorious and is dismissed with costs.

Orders accordingly.

DATED SINGED AND DELIVERED AT ELDORET THIS 30TH DAY OF DECEMBER, 2010.

P.M. MWILU
JUDGE

In the presence of;

Advocate for the Plaintiff/Applicant
Advocate for the Defendant/Respondent
Court Clerk

P.M. MWILU
JUDGE