



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 165 of 2008

HON.DR.JAMES GESAMI1ST PLAINTIFF

RACHEL GESAMI:.....2ND PLAINTIFF

VERSUS

JOHN KEEN1ST DEFENDANT/RESPONDENT

JOHN KEEN INVESTMENT:.....2ND DEFENDANT/RESPONDENT

ALI HUSSEIN:.....3RD DEFENDANT/RESPONDENT

R U L I N G

The Applicant herein entered into a Sale Agreement with the 1st Defendant Company and which was executed by the 2nd Defendant on 24th April 2003 and thereafter made payments totaling to Kenya Shillings five million (Kshs.5,000,000) leaving a balance of Kshs. Four million and five hundred thousands only (Kshs.4, 500,000/=) which was to be paid on or before the completion date, time being of the essence. The completion date was nine (9) months from the said date of 24.04.2003. The property to be bought by the Applicants from the Defendant was land Reference Number 12778/25 measuring about one Decimal one Nine Eight (1.198) hectares or thereabouts situate in Karen Nairobi.

The sale was not completed between the 1st, and 2nd Defendants and the plaintiff but instead the suit property was sold to a third party and hence these proceedings. The Applicants have filed suit seeking, inter alia, a permanent injunction prohibiting the Defendants from interfering with, selling, disposing off or in any other way dealing with the suit property and for specific performance. In the alternative they have prayed for the refund of the Kshs.5, 000,000/= already paid to the 1st and 2nd Defendants. The 1st and 2nd Defendants filed their statement of Defence in which they denied any wrong doing on their part and averred that the Plaintiffs/Applicants breached the sale Agreement and also left it to lapse. As at the time of hearing the Application, no Defence by the 3rd Defendant was on record.

The Applicants' Chamber Summons dated 31st March 2008 was brought to court by way of certificate of urgency on the said date and heard during vacation exparte and a temporary injunction issued restraining the Respondents from selling, disposing off or in any manner whatsoever dealing with the suit property pending inter parte hearing. There were two other prayers one for costs and the other for an injunction until hearing of the suit.

The grounds upon which the Application is based are that the Applicants have at all material times

been in possession and entitled to complete purchase of the suit property; that the 1st and 2nd Defendants have received part payment of Kshs.5,000,000/= and as the same has not been returned, then disposal of all the property must be prevented and specific performance of the agreement be enforced and that the Applicants' interest and rights over the property clearly pre existed any and all claims and any alleged deal between the 2nd and 3rd Respondents. At the oral hearing learned counsel merely reiterated the above and added that having deleted special condition 'e' of the Law Society conditions of sale (1989 Edition), time was no longer of the essence. He went on to add that failure to provide the title document and a change of user by the 1st and 2nd Defendants as agreed frustrated the contract thereby occasioning the non-completion of the contract. No completion notice was issued and hence the sale to a third party was said to be an illegality. The court was referred to the case of **BENARD ALFRED WEKESA –VS- JOHN MURIITHI KARIUKI & 2 OTHERS HC.CC.NO.1059/1995** on this point. It was further submitted that the conduct of the 1st and 2nd Defendants vitiated the title. The Applicant's further case is that each land is unique and there must be specific performance in this case as the Applicants had obtained approval of drawings to build a hospital on the suit land. Counsel then relied on the celebrated case of **GIELLA** and stated that the Applicants have a case with a good probability of success at trial and prayed that the injunction be extended until the suit was heard. The Applicant's supporting and Further Affidavits all go to support the above.

In addition to filing a statement of Defence the 1st and 2nd Defendants filed a Replying Affidavit sworn by the 1st Defendant on his behalf and that of the 2nd Defendant. It is deponed thereto that the sale Agreement was breached by the Applicants by their act of not paying the balance of the purchase price and also that the said contract had lapsed. The Applicants never took possession of the suit land and the 1st and 2nd Defendants waited for five years and when the balance of the purchase price was not forthcoming the 1st and 2nd Defendants sold the suit property to the 3rd Defendant and title issued to him and he took possession. It is denied that there was any wrong doing by the Defendants and it was submitted that the orders sought are not obtainable as that has been overtaken by events. There is no application to nullify the title. It is the 1st and 2nd Respondents case that time was of the essence and further that there cannot be specific performance of a contract that was breached by the Applicants. It was further stated that the Applicants were indolent and Equity does not aid such persons. The Applicants are blamed for non-disclosure of material facts which if they had disclosed to the court then the court would not have issued the orders granted at the exparte hearing. The Respondents state that they refunded the amount of Kshs.5, 000,000/= by way of a banker's cheque which the Applicants refused to accept and instead ran to court.

The third Defendant/Respondent has sworn a Replying Affidavit in which he depones that he is a bona fide purchaser without notice and opposes the Application. Submissions by counsel on his behalf were strongly in support of that position and also blamed the Applicants for failure to give to the court material facts.

Upon reading all the proceedings herein and hearing all counsel herein appearing I now am in a position to consider the Application. On the onset let it be known that time was of the essence in the sale Agreement dated 24th April 2003 between the 1st and 2nd Defendants and the plaintiffs herein. Clause 'e' of the special conditions and which was deleted concerned itself with the non-forfeiture of the paid deposit in the event of not complying with the completion date. That is not the something as saying that time was no longer of the essence. If that were so the parties through advice from the counsel who drew the sale Agreement for them would have deleted section 6 of the Sale Agreement. Section 6 of the said Agreement was not deleted. Contrary to submissions by Counsel for the Applicants that they were waiting for title documents and a change of user from the 1st and 2nd Defendants, I find in clause (b) of the special conditions' in the sale Agreement that such documents amongst others, were to be delivered to the Applicants **“On or before the completion date, time being of the essence, and upon receipt by the vendor in cleared funds of the balance of the purchase price.....”(emphasis mine)**. On this ground the Applicants fail to make out a prima facie case with any chance of success at trial.

I find that the Applicants did not make disclosure of material facts when they first appeared in court

exparte. It was in their knowledge that the cheque for the deposit they had paid five years earlier had been returned to them and they had refused to accept it instead choosing to rush to court. Confronted with this at the inter parte hearing all counsel for the Applicants stated was that money is not static and returning the exact amount paid five years earlier was an insult. If what counsel and Applicants wanted was interest on the said amount as indeed they prayed in the plaint, then nothing could have been easier than stating so in their Application. The Applicants have failed to explain what action they took for the five years their amount lay with the 1st and 2nd Defendants without urging for completion of the contract. Their conduct must deny them what they come to court to seek.

I find and hold that the third Defendant is a bona fide purchaser without notice Transfer of the suit property was effected and Title issued to him. No fraud or collusion has been shown on his part. He holds a good title which the court cannot interfere with as in any event there is no such prayer to interfere with it.

I find and hold that the orders sought are not obtainable as the Applicants have failed to prove their being entitled to them. There cannot be an injunction to restrain what has already been done, and I dare say, done legally. There cannot be specific performance of a contract that has been breached by the very person who asks for its performance. Their remedy lies elsewhere. Equity cannot aid persons such as the Applicants herein. The upshot is that the Application fails and it is dismissed with costs and the interim injunction granted on 3/03/2008 lifted.

Those are my orders.

DATED AT ELDORET THIS 27TH DAY OF JANUARY 2009

P.M.MWILU

JUDGE

27/01/2009

DELIVERED IN OPEN COURT IN NAIROBI THIS 13TH DAY OF FEBRUARY, 2009.

J. KHAMINWA

JUDGE

IN THE PRESENCE OF:

.....Advocate for the Applicants

.....Advocate for the 1st and 2nd Respondents

.....Advocate for the 3rd Respondent.