REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE 58 OF 2008

NYWERI DEVELOPMENT GROUP ……..…… 1ST PLAINTIFF

GERALD KIJOGI RUKARIA …….. 2ND PLAINTIFF

GERALD KIMATHI MAINGI …….. 3RD PLAINTIFF

NAMAN MUTUMA ……. 4TH PLAINTIFF

MICA ONYWERA …… 5TH PLAINTIFF

NANCY C. KAPSOOT …… 6TH PLAINTIFF

EVERLYN CHEBET SANG ……. 7TH PLAINTIFF

BENEDICT KIAMBI RUURI ……... 8TH PLAINTIFF

FRANCIS KIGUNDA IKIARA ……. 9TH PLAINTIFF

GIDEON MIRITI MUGUNA …….. 10TH PLAINTIFF

JAMES NTEERE KUNGANIA ……. 11TH PLAINTIFF

FREDRICK BUNDI RARIA …….. 12TH PLAINTIFF

PATRICK OCHIENG NYAOKE …… 13TH PLAINTIFF

EPHANTUS KITHINJI MUTHOMI …… 14TH PLAINTIFF

SMITH MUTURI …….. 15TH PLAINTIFF

CHARLES MAINA MBURU …….. 16TH PLAINTIFF

REUBEN NJUGUNA WAWERU …….. 17TH PLAINTIFF

VERSUS

MATUMAINI VENTURES LIMITED …… 1ST DEFENDANT

KENYA COMMERCIAL BANK LTD. …… 2ND DEFENDANT

RULING

Introduction

1. The Application before me is dated 14/5/2008 and is brought under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules and the specific prayer sought is that of a temporary injunction **"to restrain the 1st and 2nd defendants by themselves, their servants and or agents from selling, charging, mortgaging and or any way encumbering, disposing and or alienating L.R. No. 15324 and or in any way interfering with the Plaintiff's possession of the property pending the hearing and determination of this suit".**

2. The Application is supported by the following Affidavits;

a. that of Gerald Kijogi Rukaria sworn on 14/5/2008;

b. that of Smith Muturi sworn on 14/5/2008;

c. that of Charles Maina Mburu sworn on 14/5/2008;

d. that of Reuben Njuguna Waweru sworn on 14/5/2008;

e. a further affidavit sworn by Gerald Kijogi Rukaria on 2/7/2008;

f. a further affidavit sworn by Gerald Kijogi Rukaria on 24.11.2008.

3. I note that in the Plaint dated 14/5/2008 and filed on 15/5/2008, the Plaintiffs at paragraph 1 of the Plaint refer to the 1st Plaintiff as **"a self help group registered under the relevant laws of Kenya and carrying on business in Kenya while the 2nd Plaintiff is the Chairman thereof while the 3rd – 14th Plaintiffs are members of the said self-help group".** Apparently the 15th – 17th Plaintiffs are not members of the group.

4. The land in dispute is L.R. No. 12867/26 (Now L.R. No. 15324) comprising 10 acres or thereabouts situated within Mavoko Municipality of Machakos District. It is not contested by any party that the registered leasehold holder and proprietor of the premises is Kenya Commercial Bank Ltd, the 2nd Defendant herein.

Case for the Plaintiffs/Applicants

5. In the Plaint and in the affidavits referred to above, and in submissions by the learned advocate for the Plaintiffs/Applicants, their case is as follows:-

That by an agreement in writing dated 31/5/2004, the 2nd Defendant agreed to sell to the 1st Defendant a number of properties including L.R. No. 12867/26 (Now L.R. No.15324) and that the 1st Defendant was in turn to sell it to third parties and the 2nd Defendant allegedly agreed to transfer the property to the said

third parties upon expiry of the completion period and upon completion thereof.

Further by an agreement dated 12/11/2004 the 1st Plaintiff agreed to buy 5 acres to be excised out of L.R. No. 12867/26 aforesaid for the purchase price of Kshs.2,287,500/=. That by a further agreement orally made and later **"evidenced in writing",** in or around March 2007, the 1st Plaintiff and the 1st Defendant agreed to increase the total purchase price to kshs.2,887,500/= which the 1st Plaintiff agreed to pay and indeed fully paid by bankers cheques. By dint thereof, each of the Plaintiffs from the 2nd – 14th are entitled to portions of the said 5 acres of the disputed parcel of land.

6. As regards the 15th Plaintiff, it is alleged that by an agreement dated 15/9/2004, he agreed to buy 2 acres to be excised from the disputed parcel of land at the agreed purchase price of Kshs.840,000/= which he duly paid to the 1st Defendant.

7. Similarly, the 16th Plaintiff agreed to pay Kshs.420,000/= for one acre to be excised out of the disputed parcel and signed an agreement dated 21/9/2004 to that end. The purchase price was later changed to Kshs.520,000/= which he duly paid.

8. As for the 17th Plaintiff, he allegedly entered into a sale agreement of one acre of land to be excised from the disputed parcel of land. The purchase price was Kshs.900,000/= which he duly paid.

9. That inspite of the Plaintiffs paying a further kshs.234,500/= jointly to a surveyor to enable the sub-division of the land, the Defendants have refused, failed and or neglected to effect transfer of the nine acres of land due to them.

Case for the 1st Defendant/Respondent

10. The 1st Respondent's response to the Application is contained in a Replying Affidavit sworn by one Gladys Wanjiku Nderitu sworn on 1/7/2008. Its case is as follows:

That the agreements relied on by the Plaintiffs are admitted but that as a Director of the 1st Defendant company she was aware that the contracts were for a period of six months and there were clear default clauses in each of them. That the Plaintiffs all knew that the 1st Defendant was assigning a benefit to them which assignment was dependant upon the 2nd Defendant's contract with it being honoured. That in any event, the agreements relied upon all lapsed by effluxion of time and were never extended because of breach on the part of the Plaintiffs.

It is the 1st Respondent's case that the Plaintiffs purported to extend the contract period by sending cheques to the 1st Defendant after the contract had lapsed which cheques the 1st Defendant is still holding and is willing to hand back to the Plaintiffs. That therefore the Plaintiffs cannot seek to validate an invalidity through the orders they now seek.

Case for the 2nd Respondent

11. The 2nd Respondent on its part relies on a Replying Affidavit sworn on 24/6/2008 by one George S Kenga, Head of its Facilities Management Department. The case for the bank is as follows;

That in fact no contract exists between it and any of the Plaintiffs for sale of the disputed land although it is the registered owner of that land. Further, since the 2nd Defendant is a complete stranger to the Plaintiffs, no cause of action can lie against it and the only known remedy to the Plaintiffs is a refund of their monies and a claim for damages against the 1st Defendant. An injunction, it is added cannot therefore be granted in the circumstances. Lastly, that therefore, if the Plaintiffs are in occupation the same is unlawful and the suit and Application are an abuse of the court process.

Issues for Determination

12. I see no need to reproduce the submissions by advocates for the parties but I am grateful for their industry and may refer to some of the authorities cited, if need be.

13. To my mind the following questions require answers before I can finally determine the Application;

i. what is the relationship between the Applicants and the 1st Defendant?

ii. what is the relationship between the 1st Defendant and 2nd Defendant?

iii. what is the relationship between the Applicants and the 2nd Defendant?

iv. Prima facie, is there a case for grant of an injunction as prayed?

14. In answer to questions (i), (ii) and (iii), there is no doubt that the Applicants and the 1st Defendant entered into sale agreements over portions of the suit land and of interest is the fact that in each of those agreements, it is stated in the preamble that **"Kenya Commercial Bank is the registered proprietor of all that piece of land known as L.R. No. 12867/26 measuring Ten (10) acres".** As to the place of the 1st Defendant in the transaction, in the preamble it is also stated as follows;

"Matumaini Ventures Ltd has been offered for purchase by the registered owner for purchase of the aforesaid plot either by itself, nominee or assignee". *(emphasis added)*

15. Further that;

"Matumaini Ventures Ltd is desirous of assigning and/or nominating …a part of the aforesaid plot measuring…acres to be excised from the aforesaid parcel of land and the purchasers are desirous of buying the same." *(empasis added)*

16. Pausing here for a moment, it is clear that the registered proprietor was not made a party to the sale agreements and there is therefore in law no privity of contract between it and any of the Applicants. In **Kanyenje Kagombe vs The Automobile Association of Kenya H.C.C.C 1785/2000 (Milimani)** that general principle of law was reiterated although the court in the end determined that the relationship between the parties had to be determined at a full trial. In this case, I see no need to hold the same because that position is uncontested. Nowhere in the Plaint or in all the affidavits on record, has any of the Applicants claimed any privity of contract with the 2nd Defendant.

17. Having so said, I must go back to the relationship between the 1st and 2nd Defendants. I have touched on the issue slightly but I have been pointed to an agreement for sale dated 31/5/2004 between the two Defendants. The agreement refers to the 1st Defendant as **"the purchaser and or nominee which expression shall where the context so admits include its successor in title assigns and/or nominees".** *(emphasis added)* The properties being sold and/or purchased are 16 parcels of land including the disputed parcel of land. The total acreage is given as 275.67 acres for a consideration of kshs.110,268,000/= and completion was 90 days after the date of the agreement.

18. The 1st and 2nd Defendants have argued that the Applicants had no part in the sale agreement aforesaid but it has been strenuously argued by the advocate for the Applicants that they were the entities referred to as **"assignees and/or nominees"** of the 1st Defendant in view of the clause in their sale agreements with the 1st Defendant (reproduced above) where the rights to purchase by the 1st Defendant were purportedly assigned to the Applicants. It has also been argued that the two agreements were collateral to each other and had to be implemented jointly. Is this true?

19. I have read both agreements carefully and there is absolutely no connection between the two save for

the suit property (one amongst many in the earlier sale agreement) and the presence of the 1st Defendant in both – in one as a purchaser and in the other as a purported vendor.

20. A collateral contract is defined in **Black's Law Dictionary, 8th edition** as;

"a side agreement that relates to a contract which, if unintergrated, can be supplemented by evidence of the side agreement; an agreement made before **or at the** same time **as, but separately from another contract"** *(empasis mine).*

21. In this case, there is no evidence before me at this stage that the contracts were in any way collateral to each other and the 1st Defendant who put the Applicants in their present difficulty has denied that it had such intentions in any event. Further, an agreement made after the primary contract cannot qualify as a collateral contract.

22. But more crucially, can the Applicants property qualify to be nominees or assignees in a contract for sale of land?

A **"nominee"** is defined as;

"a person who is designated to act for another person usually in a very limited way."

An **"assignee"** is defined as;

"one to whom property rights or powers are transferred by another".

(All in Black's Law Dictionary)

23. In the present case, the 1st Defendant had not yet acquired any property rights under its contract with the 2nd Defendant. It had therefore no power to transfer anything and had no rights to assign anything to anyone including the Applicants. To purport to do so was clearly unlawful and this court cannot sanction such an attempt.

24. It is therefore my considered view that there was no assignment of the contract in this case and further from the correspondences exchanged between the 1st Defendant and the Applicants, the 1st Defendant started raising funds from the Applicants, used it to pay the 2nd Defendant, hoped for a transfer in its name and then make a profit as it does so, then hoped to transfer to the Applicants their respective parcels of land. What happened from the correspondence exhibited by Gerald Kijogi Rukangi in his Affidavit of 14/5/2008 was that bankers cheques were then issued by the Applicants in the names of the 2nd Defendant but forwarded to it as if they were in fact being issued and paid for by the 1st Defendant pursuant to its agreement with the 2nd Defendant. The clear fact was that the payments were being made by the Applicants and there is no evidence of disclosure to the 2nd Defendant. I say so because although the cheques were being sent to the 1st Defendant and in the names of the 2nd Defendant, there is no record of any contact or communication with the 2nd Defendant directly or indirectly by the Applicants. The only such communication that I have seen is the letter dated 29/2/2008 where notice of an intended suit is given to the 1st Defendant and the notice is copied and is also given to the 2nd Defendant.

25. I should hasten to add that I am aware that some of the alleged payments in purchase of parts of the suit property were made to an entity called Rank Global Management Ltd **"the duly recognized agents of the"** 1st Defendant but the position, in my view, remains the same as above.

26. Having so said therefore, it is clear to me that as regards the agreement between the 1st and 2nd Defendants, the matter is moot because the 1st Defendant admits breach and the same is in any event not the subject of the present proceedings. As regards the agreements between the 1st Defendant and the

Applicants, I have said that prima facie, I see no legal basis for it. The 1st Defendant had no capacity to purport to sell land that did not, as yet, belong to it. Its own interests, if at all, had lapsed when the 2nd Defendant by its advocate's letter dated 7/3/2007 gave a completion notice and once there was default thereof, there was no agreement to be enforced and I have said that there was no collateral agreement which could be enforced by the Applicants.

27. Having established the relationship between the parties (or lack of it in some instances), have the Applicants made out a case for grant of an interlocutory injunction?

28. The Law on the subject is now beyond conjecture. In **Giella vs Cassman Brown (1973) E.A. 358,** it was held inter – alia as follows:-

a. "an applicant must show a prima facie case with a probability of success;

b. an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which could not be compensated in damages;

c. if the court is in doubt, then it will determine the Application on a balance of convenience.

29. In this case, I have shown that the Applicants entered into a contract with a party that had no interest in the suit land. They may be victims of a land speculator but it matters not; there was nothing prima facie, which they were purporting to buy and for reasons expressed above, I do not see any prima facie case with a probability of success.

30. Their remedy lies in a refund of their money and in damages. They may well have made intensive developments on the land but sadly, that is not a consideration at all. Once they had no lawful reason to enter the land, they are trespassers with no enforceable interest. I note further, that in fact some of the cheques they issued to the 1st Defendant were returned to them or are held by the 1st Defendant. They should pursue the return of their money and an injunction at this stage is no solution to the bigger problem that is facing them; what to do with their developments and money paid in a legal vacuum.

31. I have said that the remedy lies in damages. In their Plaint, prayer (f) thereof is a claim for general and exemplary damages and I agree that the said claim can be pursued at the trial and determined on its merits. Once there is such a claim then it is admitted that damages can be an adequate remedy.

32. Lastly, I have carefully weighed the issues before me; between the Applicants who may have been misled into an illegality and the interests of the registered owner who had no part in the illegality, the balance of convenience, reasonably, must tilt in favour of the latter. There is nothing to be said about any balance of convenience in favour of the 1st Defendant who created the kerfufle that is glaring in my sight.

33. With considerable sympathy to the Applicants and for reasons articulated above, the Application dated 14/5/2008 has no merit and is dismissed with costs to the 2nd Defendant only. I see no reason to award costs to the 1st Defendant whose conduct in the whole saga is questionable and it cannot benefit twice to the detriment of the Applicants.

34. Orders accordingly.

Dated and delivered at Machakos this **12th** day of **May** 200**9**.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Kiugu for Applicants**

N/A for Respondents

ISAAC LENAOLA

JUDGE