REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 165 of 2009

TOM WAHOME MUTEITHIA……...….....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD……...DEFENDANT

e deponed that the issues raised in the dnot an authoritative document which could result in

RULING

The plaintiff filed an application pursuant to the provisions of Order XXXIX Rules 1, 2, 3 & 9 on the Civil Procedure Rules seeking orders of the court to restrain the defendant by means of a temporary injunction from alienating, charging, disposing off and/or dealing with in whatever way either by itself or through its agents, employees or servants with the property known as LR. No. 9509/29, Nairobi (hereinafter referred to as the suit property) pending the hearing and determination of the suit. The grounds in support of the application are on the face of the application. The plaintiff states that on 14th November 2007, the defendant in its capacity as the chargee agreed to sell the suit property to the plaintiff by private treaty for a consideration of Kshs.6.5 million. The plaintiff paid a deposit of Kshs.650,000 /= being 10 % of the purchase consideration at the time the agreement was executed. The plaintiff states that the balance of the purchase consideration was to be paid by the plaintiff's financiers who gave an undertaking to that effect. It is the plaintiff's case that the defendant, having executed transfer of the suit property in favour of the plaintiff, had unilaterally purported to increase the purchase consideration to Kshs.9 million. This was after the defendant had rescinded the contract and forfeited the 10 % deposit paid by the plaintiff on the ground that the plaintiff was in breach of the terms and conditions of the sale agreement. The plaintiff was therefore seeking orders of the court to preserve the suit property pending the hearing and determination of the suit. The application is supported by the annexed affidavit of the plaintiff.

The application is opposed. Nereah Okanga, a legal counsel in the corporate recovery department of the defendant swore a replying affidavit in opposition to the application. In the said affidavit, he corroborated the facts deponed to in the affidavit of the plaintiff in support of the application in so far as it related to the agreement for the purchase of the suit property. He however disagreed with the plaintiff's assertion that the defendant had unilaterally rescinded the sale agreement without any justification. He deponed that it was a term of the agreement that the completion date of the agreement would be sixty (60) days from the date of execution of the agreement unless such a completion date was varied in writing by the agreement of the parties. He deponed that the plaintiff had failed to abide by the terms of the sale agreement as regard the completion date.

He swore that although the defendant had indulged the plaintiff by giving extension of time to enable the

plaintiff complete the agreement by paying the balance of the purchase consideration, 258 days after the execution of the agreement, the plaintiff had not completed the same. In particular, the defendant took issues with the fact that the plaintiff had breached the contract in that by 13th January 2008 failed to forward the duly executed transfer (in triplicate) and had further failed to provide within the stipulated period the land rent clearance certificate, consent transfer and consent charge. He deponed that the defendant was therefore entitled to rescind the agreement, which it did on 29th July, 2008. He deponed that the plaintiff was in clear breach of the agreement in view of the fact that it was essential for the agreement to be completed within the stipulated period. He swore that, after the agreement was rescinded, the plaintiff again approached the defendant with a view to purchasing the same property. A new offer was made for the purchase of the suit property for a consideration of Kshs.9 million, which offer was rejected by the plaintiff. In the premises therefore, he deponed that the plaintiff had no case that would entitle this court grant the order of injunction sought.

At the hearing of the application, I heard rival argument made by Mr. Ngunjiri on behalf of the plaintiff and by Mr. Wetangula on behalf of the defendant. I have carefully considered the pleadings filed by the parties herein in support of their respective opposing positions. I have also considered the submissions made by the respective counsel for the parties. The issue for determination by this court is whether the plaintiff established a case to entitle this court grant him the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant an order of injunction are well settled. In Giella vs Cassman Brown [1973] EA 358 at page 360 Spry VP held that:

"*The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods,* ***[1972] E.A. 420****.)"*

In the present application, certain facts are not in dispute. It is not disputed that the plaintiff and the defendant entered into an agreement for the sale of the suit property. The agreement was executed on 14th November 2007. The purchase consideration for the suit property was Kshs.6.5 million. Upon executing the agreement, the plaintiff paid to the defendant the agreed 10 % deposit of Kshs.650,000 /=. According to the agreement, the balance of the purchase price of Kshs.5,850,000 /= was to be paid by the plaintiff to the defendant on the completion date. The completion date, according to clause 7 of the agreement was:

"*…sixty (60) days from the date of execution of this agreement or such other date as the parties hereto may agree in writing."*

It was therefore clear from the way clause 7 was framed that time was not strictly of essence when the issue of completion date was considered. Although clause 19 of the agreement provided that time was of essence, it was evident that the parties anticipated that the period in which the said transaction would be completed was liable to be extended. Clause 4 of the agreement provided as follows:

"*Where the balance of purchase price is being financed through a third party (hereinafter "the Financier") then the said finance arrangement must be confirmed in writing by the financier to the Vendor's Advocates within Thirty (30) days of the date of this agreement failing which the purchaser will be deemed to be purchasing the property from his own resources."*

The plaintiff had notified the defendant that he would be seeking financial accommodation from a financial institution to pay the balance of the purchase consideration. On 14th March 2008, the advocates for Stanbic Bank Kenya Ltd, the financiers of the plaintiff, M/s Njoroge Regeru & Co. Advocates wrote the advocates of the defendant notifying them that they would pay to the defendant the sum of kshs.5.9 million upon the successful registration of the transfer in respect of the suit property in favour of the plaintiff and also upon registration of a charge over the suit property in favour of the defendant. In the said letter, the said firm of advocates gave the following undertaking to the advocates of the defendant:

"*That we will hold the documents to your order, returnable on demand and will not release the documents to any advocate or person whatsoever for any purpose without first obtaining your written consent which will only be granted on such other advocate giving a professional undertaking in terms similar to the present one and on the understanding that whether such advocate complies with the undertaking or not, you will continue to hold us liable on our undertaking as herein provided."*

Although the agreement provided that any extension of the completion date ought to be in writing, from the correspondence exchanged between the advocates of the plaintiff, the defendant and of Stanbic Bank Kenya Ltd, it was clear that the defendant had acquiesced to the extension of time as regard the extension of time without necessarily there being an agreement in writing between the plaintiff and the defendant as regards the completion date. The manner in which the defendant purported to rescind the contract was contrary to clause 16 of the agreement which provided that before the defendant exercised the option of rescinding the contract, and thereby forfeiting the 10 % deposit of the purchase consideration paid by the plaintiff, the defendant was required to issue a seven (7) days notice requiring the plaintiff to remedy the breach or in default the defendant would be at liberty to exercise the option to rescind the contract. The defendant's advocate wrote to the advocate of the plaintiff on 22nd July 2008 requiring the said advocates to forward the duly executed transfer, the land clearance certificate, consent to transfer together with consent to charge by the close of business on the following day, 23rd July 2008 failure of which the defendant would rescind the sale agreement.

The defendant gave no formal notice as envisaged by clause 16 of the agreement for the plaintiff to remedy the breach within seven (7) days or in default the defendant would exercise the option available to it. The purported rescission of the agreement by the defendant vide its letter dated 25th July 2008 and 29th July 2008 (although the letter is actually dated 29th June 2008) was therefore unlawful. The events that subsequently occurred clearly showed that the defendant was not sincere on it insistence that the agreement be concluded within specific period of its choice. This was in view of the subsequent offer made by the defendant to the plaintiff to sell the same property for an increased purchase consideration of kshs.9 million. It was apparent that the defendant all along had the intention of renegotiating the purchase consideration of the suit property under the guise that the plaintiff had failed to abide by the agreed completion date.

Taking into consideration the entire facts of this case, it was evident that the plaintiff has all along had the intention of completing the agreement. He has secured a financier to fund the balance of the purchase consideration. A professional undertaking has been given to the defendant's advocate by the advocate of the bank financing the purchase. The plaintiff had all but fulfilled the legal requirements in respect of the transfer of the suit property to his name and subsequently thereafter the charging of the said property to his financiers. I therefore hold that the defendant had no justification in law to rescind the contract. The sale agreement between the plaintiff and the defendant in regard of the suit property still subsists.

In the premises therefore, I hold that the plaintiff has established a prima facie case entitling him to the order of the injunction sought. The plaintiff has established that he would suffer irreparable damage that will not likely be compensated by an award of damages. Although the defendant has financial muscle and would be able to pay any damages that may be awarded by this court, the balance of convenience tilts in favour of the plaintiff who stands to lose the deposit of Kshs.650,000 /= already paid to the defendant, apart from other payments that he had made with a view to securing the transfer of the suit property to his name.

I will conditionally grant temporary injunction in terms of prayer 3 of the application. The defendant is restrained from alienating, charging, disposing off or otherwise dealing with the suit property i.e. LR. No. 9509/29, Nairobi, in a manner adverse to the interest of the plaintiff. The plaintiff is ordered (with the cooperation of the defendant) to complete the sale of the suit property within ninety (90) days of today's date in terms of the agreement of the 14th November 2007 by paying the balance of the purchase consideration or in default thereof the order above issued in his favour restraining the defendant from adversely dealing with the suit property shall stand automatically vacated.

The costs of this application shall be in the cause.

DATED AT NAIROBI THIS 12TH DAY OF JUNE 2009.

L. KIMARU

JUDGE