



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

BONFACE KEVIN OMONDI 1ST PLAINTIFF

STEPHEN ANTHONY FOSTER 2ND PLAINTIFF

VERSUS

.....DEFENDANT

RULING

Application dated 12.11.2008 brought under Order XXXIX Rules 1, 2 and 3 of Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of law, seeking for orders that:-

- 1. That an injunction do issue restraining the defendant by itself, its agents, servant or any person acting under his direction or behest or any of them whatsoever from alienating, disposing, charging, mortgaging or creating a lien on the three bed-roomed apartment in Lavington, Valley Road L.R. No.330/375 Block D, unit D1 pending the determination of this application;***
- 2. That the costs of this application be borne by the defendants.***

The application is supported by the affidavit of Boniface Kevin

Omondi on the grounds that:-

- 1. "The parties herein had entered into an agreement for sale of a three bed-roomed apartment in Lavington Valley, Naivasha Road L.R.330/375 Block D/Unit D1;***
- 2. The plaintiffs have at all material times endeavored to comply with the agreement but the defendant even after failing to tender completion documents as agreed, has purported to unilaterally and unlawfully pull out of the Agreement;***
- 3. The defendant has breached the terms of the Agreement by failing to complete the transaction;***
- 4. The plaintiff's rights and interests on the said property are threatened by the unlawful activities of the defendant, his agents and servants and an interim injunction will be an effective means of preserving the subject of the dispute;***
- 5. The grant of the orders sought will advance the cause of justice.***

The parties have filed written submissions. The plaintiff's stand is that the agreement to sell the property

L.R. 330/375 Block D, Unit D1, suit property to the applicant is still existing and the delay is the fault of the defendant.

In his replying affidavit through the affidavit sworn by one Nicholas Stock, described as Managing Director of defendant company. He admits that there was an offer to purchase the said suit property and that an agreement of sale was entered into between the parties. In paragraph 8 of replying affidavit he agrees that the contract was terminated because the contractor of the suit property failed and went to court and obtained an injunction which remained in place till September 2007.

By this time plaintiffs had not paid further money in contract agreement. Then the work continued by new contractor and the defendant was anxious to complete the project and instructed the advocates to call in for balance of purchase price. Thereafter they asked plaintiffs to terminate the purchase contract.

Certificate of occupation was eventually granted. The defendant states he has sold the suit property and considers that the transaction as overtaken by events. What is clear about this transaction is that the larger sum of the purchase price (Kshs.3,000,000/=) has been paid and the same has been in custody of defendants. Only a sum of Kshs.2,000,000/= is outstanding.

There was a time when the defendant was sued by his builder and there was injunction against the defendant. It is only towards the end when the building was completed. Therefore the contract of the purchase between the parties was delayed because of the defendant. It is not true that delay was caused by the plaintiffs. The defendant was to complete constructions on 30/4/2007 which he failed to do. The construction did not complete until 30/4/08, a year later.

In the meantime the plaintiff's financier pulled out due to the delay. The defendant now threatens to sell the property to third parties so as to profit by his wrongful act, obtaining Kshs.2,500,000/= from the proposed purchase and purporting to forfeit Kshs.500,000/= to the applicants.

A party to litigation must not be permitted to benefit from his wrongdoing. In the circumstances, considering the prayer for injunction, the plaintiff is entitled to protection against the defendant's continued breach of the contract.

It is clear the defendant acted mala fide in causing the delay of construction. In the case of **Belle Maison Ltd. vs. Yaya Towers Ltd. – HCCC No. 2225 of 1992**, the court observed:-

“Nor must a wrongdoer be permitted to benefit however remotely from his wrongdoing, more so when the wrong is blatant or where the act of wrongdoer is contrary to law.

In cases where the conduct of wrongdoer is contrary to law the court has no discretion. By shutting its eyes to the act the court will in effect indirectly sanctify it.”

The further affidavit of the applicant is clear. I believe what is stated therein. He paid Kshs.3,000,000/= initially, which must have helped the defendant to finance his constructions. I have considered that the main prayer is for specific performance, damages and permanent injunction and in order to protect the plaintiff's interest, I allow the application in terms of prayer 4 in the application pending the hearing and determination of this suit.

The defendant shall pay costs of this suit.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 28th day of July, 2009.

JOYCE N. KHAMINWA

JUDGE

