



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 88 of 2009

MITCHELL COTTS FREIGHT KENYA PLAINTIFF

VERSUS

SWALEH HASSAN ALI DEFENDANT

RULING

By its Chamber Summons dated 26.3.2009 and brought under the provisions of Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure Rules and Sections 3A and 63 (c) and (e) of the Civil Procedure Act, the plaintiff seeks one main, order namely: -

That the defendant by himself, agents, servants, representatives or otherwise howsoever be restrained from entering into any agreement for sale transferring, subletting, leasing, charging, alienating or making any disposition over subdivision number MN/V/2397 and subdivision number MN/V/2398 (hereinafter “the suit properties”) to any person other than the plaintiff pending the hearing and disposal of this suit.

The application is based mainly on the ground that the plaintiff bought from the defendant the suit properties at the purchase price of Kshs.120,000,000/= and paid deposit of Kshs.12,000,000/= but the defendant has wrongfully purported to rescind the transaction. In support of the application Daniel K. Tanui, the plaintiff’s Managing Director has sworn two affidavits in which he has sworn, among other things, that as on the completion date, the defendant was not in a position to complete the transaction and could not therefore purport to rescind the agreement. On its part, the plaintiff contends that it was and is ready and willing to complete the transaction and is therefore entitled specific performance of the contract of sale. Hence the application for an interim injunction in the interim. Regarding irreparable damage, the plaintiff contends that it had obtained financing to develop and expand its business and operations using the suit properties which will be lost if the sale of the suit properties is not completed.

The application is strongly opposed by the defendant. In his two affidavits sworn in opposition to the application, he has deponed, *inter alia*, that the plaintiff failed to pay balance of purchase price on or before the completion date and he lawfully rescinded the contract of sale and the deposit of Kshs.12,000,000/= stands forfeited. In the premises, the defendant is of the view that specific performance is not available to the plaintiff. According to him as the plaintiff is not entitled to specific performance, he has failed to show a prima facie case.

When the application came up for hearing before Njagi J, on 8.5.2009, counsel agreed to file written submissions which were in place by 15.7.2009 and as Njagi J had been transferred it fell upon me to prepare a ruling on the plaintiff’s application.

I have considered the application, the affidavits filed and the annexures thereto. I have also given due consideration to the submissions of counsel. Having done so I take the following view of the matter. The plaintiff seeks a prohibitory injunction at this stage. The necessary conditions for the grant of an interlocutory prohibitory injunction were crystallized in the case of **Giella – v -Cassman Brown & Co. Ltd. [1973] EA 358**. They are that: First an applicant must show a prima facie case with a probability of success at the trial. 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 the application on the balance of convenience. Those are the conditions that I bear in mind as I consider this application.

There are facts in this dispute which are really not in controversy. There is no dispute that the defendant agreed to sell the suit properties to the plaintiff at Kshs.120,000,000/=. There is further no dispute that the agreement was reduced into writing and executed by the defendant and representatives of the plaintiff. There is also no dispute that pursuant to the said agreement the plaintiff paid Kshs.12,000,000/= as deposit towards the said purchase price. What has emerged from the affidavit evidence placed before the court is that most of the terms of the agreement are agreed. What seem to be in contention are the following: 1) The date of the agreement, (2) The completion date (3) The obligations of the parties on the completion date (4) Whether time was made of the essence and (5) Whether it is the plaintiff or the defendant who is in breach of the contract of sale.

I take cognizance of the fact that at this interlocutory stage, the court is not required to determine with conclusiveness the rights of and duties of the parties. The court is also not required to make definitive findings of fact or law. With regard to the date of the agreement the parties are not unanimous. The defendant contends that on 1st December, 2008, his advocate forwarded the agreement to his counterparts who delayed with the same and made unilateral alterations thereon. The copy of the agreement exhibited by the plaintiff is dated 12th January, 2009 with the figure 9 inserted by hand. On the affidavit evidence, it is not certain when the agreement was dated.

With regard to the completion date the defendant contends that the same was agreed to be 30th December, 2008 but was unilaterally amended by counsel for the plaintiff to 15th January 2009. There can be no dispute that the printed date of completion was expressed to be 30th December, 2008. The same is altered by hand to 15th January, 2009 and the alteration is endorsed by counsel for the plaintiff. The defendant has however, exhibited a copy of a letter dated 7th January, 2009 from the plaintiff's advocates to his advocate under cover of which an agreement duly executed by the plaintiff was forwarded to the defendant's advocates. In that letter the said advocates requested the return of the agreement duly executed by the defendant. They further sought assurance that the defendant had all the completion documents to enable them call for balance of purchase price. The defendant's advocates responded by their letter dated 14th January, 2009. That is the letter in which the agreement duly executed by the defendant was enclosed together with title documents of the suit properties. The defendant's advocates even requested for transfers for execution by the defendant and completion documents to facilitate registration of the transfers.

These two letters suggest, prima facie at least, that the agreement of sale was in fact executed by the defendant after the 30.12.2008 and further that as on 14.1.2009, the defendant was still expecting completion to take place. The logical conclusion from the correspondence must therefore be that the completion date was no longer the 30.12.2008 because by then the agreement had not been executed by the defendant. The letter dated 14.1.2009 was written on the defendant's instructions. The defendant cannot have expected completion the next day i.e the 15.1.2009. I say so because the same letter called for the transfer and completion documents. The defendant cannot have expected the plaintiff's representatives to have camped at their advocates' office ready to execute the transfer, let alone be armed with the completion documents which in any event were to be obtained by his own advocate. Prima facie therefore, the amended completion date of 15.1.2009 would appear to have been further amended by the said correspondence. With all due respect to the defendant his argument cannot be that he executed the agreement long after the completion date with a view of not complying with the same but to enable him enforce its terms with respect to forfeiture of the deposit. I say no more.

In the premises, I am of the prima facie view that the completion date was neither 30.12.2008 nor 15.1.2009. The plaintiff paid the deposit of Kshs. 12,000,000/- even before the agreement of sale had been executed by the defendant. It then remitted the balance of Kshs. 108,000,000/- three weeks after execution of the agreement by the defendant. At the trial, in my view, the plaintiff will probably succeed in showing that it is entitled to specific performance. On the premises I am persuaded that the plaintiff has shown a prima facie case with a probability of success at the trial.

On the second condition for the grant of an interim prohibitory injunction, I am persuaded that the plaintiff will suffer irreparable injury which cannot be compensated in damages unless the injunction is granted. Without the injunction, the defendant may dispose of the suit properties elsewhere and even if the plaintiff eventually succeeds, an order of specific performance will not be available against the defendant.

With regard to the balance of convenience, I am of the view that the same tilts in favour of granting the injunction. The injunction will preserve the suit properties and as the defendant states that he can no longer transfer the same elsewhere, he stands to suffer no prejudice with the injunction in place. The injunction will also avail the parties an opportunity to fully present their respective stand points before the court finally pronounces its judgment upon their dispute.

The upshot is that the plaintiff's application dated 26th March, 2009 is allowed in terms of paragraph three (3) thereof. The injunction is granted on the condition that the plaintiff shall, within five (5) days from the date hereof, file an undertaking under its seal, to pay damages if any to the defendant in the event that it is found at the trial that the injunction ought not to have been issued. The said undertaking to be fortified by a separate and similar undertaking under oath by Daniel K. Tanui the plaintiff's Managing Director. The same to be filed within the same period.

The costs of this application shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 2ND DAY OF SEPTEMBER, 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Omondi for the plaintiff and Mr. Munyao for the Respondent.

F. AZANGALALA

JUDGE

2.9.2009