REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 83 of 2006

KENNEDY KEANGO MAENCHA ……..……….……...1ST PLAINTIFF

LUCY KABURA WAICHARI ……………………..…….2ND PLAINTIFF

VERSUS

DOROTHY SAYANOI MOSCHION ……………...….1ST DEFENDANT

CO-OPERATIVE BANK OF KENYA LTD. ……....….2ND DEFENDANT

RULING

On 2nd March 2006, the plaintiffs instituted these proceedings, by way of a Plaint. The claim by the plaintiff is for specific performance of an Agreement for the sale of the suit property, L. R. NO. 5892/12/B, KAREN, NAIROBI.

Simultaneously with the Plaint, the plaintiffs brought an application, through which they are seeking an injunction to restrain the defendants from selling the suit property or in any way dealing with it until the suit is heard and determined.

The uncontroverted facts are that the 1st Defendant is the registered owner of a piece of land L.R. NO. 5892/12, which is situated within the Karen area of Nairobi. She had charged that property to the 2nd defendant, as security for a loan facility which the 2nd defendant had accorded to the 1st defendant.

Whilst, that charge continued to subsist, the plaintiffs say that they entered into an Agreement dated 6th December 2004, pursuant to which the 1st defendant was to sell to the plaintiffs, about an acre of land, which was to be excised from the suit property.

It is asserted by the plaintiff's that the purchase price was Kshs.1,500,000/-, and that they did pay to the advocates of the 1st defendant, the deposit sum of Kshs.150,000/-, as per the Sale Agreement. It is also the plaintiffs' case that the completion date for the sale transaction was sixty (60) days from the date when the Deed Plan for L. R. NO. 5892/12 had been registered.

The plaintiffs also state that the 2nd defendant did consent to the Sale Agreement.

In an endeavour to finalise the sale transaction, the plaintiffs say that they not only paid the deposit of Kshs.150,000/- but also remitted further payments totaling Kshs.650,000/-. In effect, the plaintiffs case

was that they had already remitted Kshs.800,000/- to the 1st defendant.

Therefore, when the plaintiffs learnt that the defendants had decided to discontinue the sale transaction, they moved to court, in the hope that they could persuade the court to order specific performance. And whilst they await the trial, the plaintiffs have asked the court to safeguard the subject matter of the suit, by granting an interlocutory injunction against the defendants.

In response to the application, the 1st defendant denies entering into any Sale Agreement with the plaintiffs. If anything the 1st defendant asserts that there was a clear case of fraud or criminal conspiracy by the plaintiffs to defraud her of her property.

On its part, the 2nd defendant denies ever consenting to the alleged Sale Agreement between the plaintiffs, on the one hand, and the 1st defendant on the other hand.

Both defendants also make the point that the suit property does not exist, and that therefore specific performance could not be ordered.

As the 2nd plaintiff had, at one point in time acted as the advocate for the 1st defendant herein, it is the contention of the 2nd defendant that the plaintiffs conduct was unethical.

If I begin with that last contention, I do first note that the 1st defendant did not make any assertions of any unethical conduct against the plaintiffs. However, it is true that they did assert fraud and criminal conspiracy. Those assertions were made in the 1st defendant's replying affidavit. But no such assertion is to be found in her defence.

Secondly, I hold the considered view that provided that a vendor was represented by an independent legal adviser, there is no absolute bar from him selling his property to his former advocate. In other words, the mere fact that the 2nd plaintiff did at one time act as the advocate for the 1st defendant herein, did not, by itself, render it unethical for the said plaintiff to purchase a portion of the 1st defendant's property.

And in this case, the 1st defendant appears to have had independent legal representation in the sale transaction. Therefore, the person who alleges that the 2nd plaintiff had acted unethically would have to satisfy the court that the transaction was still not at an arms-length.

After giving due consideration to the evidence so far available, I have formed the opinion that, on a prima facie basis, the plaintiffs and the 1st defendant did enter into a written Agreement for the sale of the suit property. The said agreement is dated 6th December 2004.

It does also appear that the 2nd defendant was not only aware of the said transaction, but also gave its tacit approval for the same. I say so because, for now, I have not found any other explanation for the 2nd defendant asking for and receiving copies of the sale agreement relating to the suit property. The said request from Co-operative Bank of Kenya Limited is dated 30th November 2004; and the firm of Hayanga & Company Advocates sent the sale agreement to the bank on 14th December 2004.

In the face of that evidence, I am satisfied, on a prima facie basis, that the plaintiffs have made out of case. As to whether or not the case will succeed will depend on such questions as to whether the delay in completion could be deemed to have frustrated the sale agreement; and also does the fact that the suit property was yet to be excised from L. R. No. 5892/12 imply that the contract was incapable of being specifically performed.

Had matters stopped at that juncture, I would have no hesitation in granting an interim injunction. However, the plaintiffs have also revealed that subsequent to the sale agreement dated 6th December 2004, they negotiated with the 1st defendant the possibility of buying the whole property known as L. R.

5892/12. The purchase price for the said property was negotiated in the sum of Kshs.5,000,000/-.

However, even though the said parties appear to have agreed on the purchase price, the 1st defendant did not execute a sale agreement.

In my understanding, the fact that plaintiffs were able to pay Kshs.5,000,000/- for the whole plot (L.R. No. 5892/12), whilst the 1st defendant appears to have agreed to sell one-half of that plot for Kshs.1,500,000/- implies that if the sale agreement dated 6th December 2004 was not specifically performed, the plaintiffs would have lost a substantial bargain. Therein lies the real loss which the plaintiffs would suffer.

In effect, it does appear that the losses have been quantified or are quantifiable. It is for that reason that I believe the plaintiffs did make the alternative prayer, in the Plaint, for;

"a full refund of the moneys paid to the 1st Defendant and to the stakeholders thereof plus a sum equal to the current value of an acre in Karen to enable the plaintiffs purchase similar land."

In the circumstances, I hold that the plaintiff's losses can be quantified, and I also find that there is absolutely nothing before me to suggest that if the plaintiffs claim herein did succeed, the defendants could not afford to compensate them. In arriving at that conclusion, I have taken note of the fact that the 2nd defendant is a well established banking institution in Kenya.

Therefore, even though the plaintiffs may have established a prima facie case with a probability of success, I have found that the losses which they might suffer were both quantifiable as well as capable of being compensated in damages.

As regards the consideration on the balance of convenience, if the same needed to be taken into account, I would hold that it favours a denial of the interim injunction. I say so basically because the progress of the sale transaction appears to be practically outside the control of the defendants. This is because it is not clear why there have been delays in the completion of the process for the issuance of the Deed Plan. It would therefore be wrong of me to make any assumptions in the regard.

Accordingly, I decline to grant the orders sought. The defendants are free to proceed in such manner as they deem most appropriate in dealing with the suit property, provided that they bear in mind the fact that if the plaintiffs' claim herein were to finally succeed, the defendants or either of them would have to face up to the repercussions of their actions. Although, the defendants are successful in this application, I order that the costs thereof shall be in the cause. I so order because I believe that it is in the best interests of justice that the party or parties who ultimately succeed in the suit should also be awarded the costs of the application. To award the defendants costs now, yet the plaintiffs did at least establish a prima facie case with a probability of success, would be inequitable, in my view.

Dated and Delivered at Nairobi, this 22nd day of January 2007.

FRED A. OCHIENG

JUDGE