



1. Land and Environment Law Division
2. Main suit;- sale of Land (1989 Law Society of Kenya of sale agreement)
 - i) Specific performance
 - ii) Injunction restraining defendants from selling, transferring and parting with possession of LR 12581/14 Athi river
3. Application chamber summons 20.12.06
 - i) Injunction restraining defendant from selling, transferring and parting with possession of LR12581/14 Athi River
 - ii) Defendants repudiated/rescinded contract of sale
 - iii) Reasons: Time being of the essence
4. In opposition
 - i) Time was of the essence to the contract
5. Held:
 - i) That plaintiffs/applicant contravened the Law Society of Kenya 1989 sale conditions by failing to complete contract within a stipulated time
 - ii) That plaintiff/applicant failed to disclose material facts to court
 - iii) Application for injunction rejected
6. Case law
Hudson v temple
29 BEAV 534
7. Advocates:
Kangethe & Co. Advocates for the plaintiff/applicant
M.A Khan & Co. Advocates for the defendant/respondent

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

Civil Case 1350 of 2006

NOSKCID (AFRICA) ASSET MANAGEMENT LTD PLAINTIFF

VERSUS

COM-TRADE LIMITED.....DEFENDANT

RULING

I: BACKGROUND OF APPLICATION

Chamber Summons 20 December 2006

1. The application of 20.12.06 prays that this court issue orders for an injunction to be issued against the defendant/respondent M/s Com-Trade Ltd restraining the said defendants, its servants and or agents from selling disposing of, offering for sale transferring parting with possession and or in any other manner interfering with the plaintiffs rights over land reference No.12581/14/Athi River pending the hearing and determination of this suit.”
2. The plaintiffs, M/s Noskcid (Africa) Asset Management Ltd had entered into a sale agreement contract with the defendants to purchase Land Ref. Number 12858/14 Athi River for a sum of Ksh.3,800,000/-.
3. An agreement based on the Law Society of Kenya 1989 condition of sale was executed between the parties. The plaintiff paid 10% deposit being Ksh.380,000/-. The balance of Ksh.2.780.000/- was to be paid on or before the 5 July 2006. The documents for the said transaction were not ready even after the completion date. The defendants breached the contract but the plaintiff did not exercise their rights to repudiate contract. The defendants indicated time was not of the essence and extended this time to 9 October 2006. The plaintiffs paid Ksh. 1 million on 25 October 2006. Ksh.2 million on 14 November 2006. A balance of Ksh.420,000/- was to be paid. The sum was accordingly paid but on 5 December 2006 the defendant advocate repudiated the contract and the sum of Ksh.3 million was returned less 10% deposit as per the agreement.
4. The applicants stated that there was indeed a prima facie case with a probability of success. The applicant would suffer irreparable loss if an order of injunction is not granted as the balance of convenience till in favour of the plaintiffs. That the orders sort be granted in the interest of justice.

II Should an injunction be granted?

5. In reply the respondent original defendant stated that according to the sale agreement of 11 May 2006 the completion date was 5 July 2006. The sale was subject to the Law Society conditions of sale (1989 Edition). That part of the said special conditions being:-

“4. Time shall be of easements of the contract for all the purposes of this agreement

5. In the event that any of the parties shall default in completion of obligations requiring to be done by any of the respective parties, then the defaulting party shall pay to other compensation equivalent to the (10%) per cent of the purchase price.”

6. It was the defendants argument that the plaintiffs/applicant appeared to have difficulties in making payments Ksh. 1 million was paid on 25 October 2006 that was accepted without prejudice and on account. The plaintiffs/applicant own advocate wrote to the respondents advocate stating how

“embarrassed” he was by the client failing to pay the balance of the purchase price. A balance of Ksh.2 million was paid on 14 November 2006. The advocate stated the remaining portion would be paid by 17 November 2006. This was the sum of Ksh.420,000/-. No sum due was received. A grace period to complete the sale had been given to 30 November 2006. The plaintiff/applicant failed to so complete the argument.

7. The issue therefore is that according to the 1989 conditions of sale agreement by the Law society of Kenya time was stated as the essence of the contract as such the defendant/respondent were not under any obligations to give a notice to rescind the said agreement.

8. The case law of:-

Hudson v Temple

29 BEAV 534

Was relied on in which it relied on the concept that in a sale of some leaseholds, that it was stipulated

“ . . . if from any case or circumstances whatever, the purchase should not be completed on the day named, the vendor should be at liberty to annul the contract.’ This is where time was made the essence of a contract by a special condition. The Hudson Case (supra) envisage a situation where everything was complete save “the registration of a deed and the sufficiency of a stamp.” The vendor failed to pay on the due date. The purchaser annulled the contract.

The court held that he was justified to so annul the contract.

9. In this case the plaintiff/applicant cancelled documents that reflected the plaintiff/applicant failed to tender the full purchase price on the required due date nor on the 17 November 2006 as agreed.

10. The letters show that on 17 October 2006 that the plaintiff/applicant failed to make payment on time.

III Finding

11. The plaintiff/applicant had entered into an agreement but most certainly had no funds to pay for land offered for sale by the defendant/respondent. Instead from a letter of 17 October 2006 the plaintiff/applicant had drawn a sketch plan for the property and were selling off the plots and instructed developers. The plaintiffs/applicant did not disclose that they sort clients to buy the plot at Ksh.300,000/- for 1/8 of an acre. The property was known as Falcon Crest Estate. The said letter of sale being dated 20 September 2006 long before the sale agreement had been completed.

12. This is non-disclosure of material fact; that the plaintiff/applicant was selling off portion of the land before the sale agreement had been finalized.

13. The defendant/respondent were relying on the clause time being of essence for completion. Though they did not strictly stop in July 2006 they did notify the plaintiff/applicant by their letter of 17 October 2006 that the balance ought to be received failure to the agreement would be rescinded on 19.10.06 and the deposit forfeited.

14. The plaintiff/applicant reacted by paying 2 million on 14 November 2006 and by 5 December 2006 the balance had been paid but this was long after 17 November 2006 when the plaintiff/applicant stated he would pay the same.

15. I did ask the parties whether they would wish to reconsider to proceed with the sale but the defendant/respondent declined.

IV) Finding conclusion

16. I find herein that the terms of the contract entered into for the sale of land as contained in the 1989 Law Society Condition of sale was not adduced to and or thereby being no prima facie case herein. Made out to grant the said injunction.

17. The non disclosure of material facts just within the pleadings alone where the plaintiff/applicants failed to disclose that the last balance of the purchase price was not paid by 17 November 2006 as promised is non discloser within the application/applicant.

18. I decline to grant the injunction and accordingly dismiss this application with costs to the respondent.

Dated his 14th day of March 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

Kangethe & Co. Advocate for the applicant

M.A. Khan & Co. Advocates for the respondent