REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE 375 OF 2005

MARTIN NJAU MBURU……...…….PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LTD…….....……...……..1ST DEFENDANT

GARAM AUCTIONEERS……...……...……..2ND DEFENDANT

R U L I N G

This is an application pursuant to the provisions of Order 39 Rules 1, 2, 2A, 3 and 9 of the Civil Procedure Rules, as read together with the provisions of Section 3A of the Civil Procedure Act. By the said application, the Plaintiff/Applicant is seeking an injunction to restrain the Defendants from alienating, selling advertising for sale, transferring, disposing of or in any other way or manner whatsoever dealing with the property Title Number NAIROBI/BLOCK 90/169, (hereinafter cited as the "**suit property**"), pending the hearing and determination of the suit herein.

It is the Plaintiff's case that on 10th June 2004 he participated in an auction sale, which had been carried out by the 1st Defendant, in the cause of exercising its statutory powers of sale. At that auction, the Plaintiff was declared the highest bidder, and he then signed a Memorandum of Sale. The purchase price was Kshs.7,800,000/=, and the deposit was Kshs. 1,950,000/=. Immediately after being declared the highest bidder, the Plaintiff paid the deposit.

It was a term of the contract of sale that the balance of the purchase price was to be paid within thirty days.

However, the Plaintiff did not comply with that condition, as he was being financed by Standard Chartered Bank. As security for the loan being advanced to him, the Plaintiff offered the suit property as security. The bank was to register a charge against the title to the suit property.

It is the Plaintiff's case that he notified the 1st Defendant about the arrangements for financing the balance of the purchase price, and that the 1st Defendant agreed that it would complete the transaction after it obtained an undertaking from the advocates for Standard Chartered Bank.

As a follow-up to that arrangement, the advocates for Standard Chartered Bank wrote to the 1st Defendant on 29th July 2004, giving their professional undertaking to the 1st Defendant to pay the balance of the purchase price, upon the registration of the transfer to the Plaintiff, and also upon the registration of

a charge in favour of Standard Chartered Bank.

By the date of the professional undertaking, the period of 30 days, which had been stipulated in the Memorandum of Sale had lapsed. Notwithstanding that fact the 1st Defendant's advocates acknowledged the undertaking from Standard Chartered Bank, on 4th August, 2004, and sent the title documents to them. The 1st Defendant also informed the Standard Chartered Bank that they were pursuing the issue of vacant possession.

It is the Plaintiff's contention that the only inference to be drawn from the two letters (dated 29th July 2004 and 4th August 2004) was that the period of thirty days, which was stipulated in the Memorandum of Sale had ceased to have any effect. In other words, the agreement was mutually extended, says the Plaintiff.

Secondly, the Plaintiff submits that even though the Memorandum of Sale provided that the suit property was being sold without vacant possession, the 1st Defendant later "**admitted that it would ensure that vacant possession was obtained**."

The reason for that argument is that if the 1st Defendant did not intend to give vacant possession, they would simply have told the Plaintiff's financiers, messrs Standard Chartered Bank, that the issue of vacant possession was not their concern.

On his part, the Plaintiff submits that he was an innocent purchaser of the suit property who well knew that he was buying the said property without vacant possession. However, following the representations made by the 1st Defendant to his financiers, the Plaintiff now wishes to have the 1st Defendant compelled to keep its word.

At this point in time I find it prudent to deal with the issue of vacant possession. The Plaintiff readily conceded that the issue of vacant possession was not embodied in the Memorandum of Sale, which as I understand the case, is the sole contract between the Plaintiff and the 1st Defendant. If anything, the Plaintiff says that he knew that he was buying the property without vacant possession. In the circumstances, I cannot see how the Plaintiff could possibly seek to have orders compelling the 1st Defendant to do that which was not provided for in the contract.

Assuming that the 1st Defendant did promise Standard Chartered Bank that the suit property would be given over to the Plaintiff with vacant possession, the only person who could enforce that obligation would be the Standard Chartered Bank. Yet, that person is not a party to these proceedings. I therefore hold that the Plaintiff is not entitled to seek to enforce the issue of vacant possession of the suit property, as that was not a term of the contract between him and the 1st Defendant.

Furthermore, from my reading of the letter dated 29th July 2004, I do not understand it to be making it a pre-condition to the contract between the Plaintiff and the 1st Defendant. In any event, the letter was written by Standard Chartered Bank, which was not a party to that contract, and could not therefore impose any conditions to the said contract. Secondly, the letter was written one-and-a-half months after the contract in issue had been executed. Therefore, it was too late in the day to be adding new terms to that contract. And, finally, the wording of the letter does not purport to make the issue of vacant possession a term of the contract. It states as follows, in relation to the issue of vacant possession:-

"**Also let us know the position regarding vacant possession**."

In effect, the Standard Chartered Bank was only making an inquiry.

In response to that inquiry, the 1st Defendant wrote back on 4th August 2004, saying:-

"**Regarding vacant possession of the property, we have instructed Messrs Kangethe and Company Advocates to pursue the same. Kindly get in touch with them and find out whether there has been any developments**."

In the light of that response, the Plaintiff took the position that the 1st Defendant was now under an obligation to hand over the suit property to him, with vacant possession.

On the one hand, it appears that the Plaintiff may have an arguable point. I say so because if his financiers were only going to pay the balance of the purchase price, on condition that the property was handed over with vacant possession, that would mean that for as long as the 1st Defendant did not hand over the property with vacant possession, the Plaintiff's financiers would not pay the balance. So, in a manner of speaking, the delay or failure by the 1st Defendant to provide vacant possession may be said to be the reason for failure to complete the sale.

But, then again, it must be clearly understood that at no time did Standard Chartered Bank expressly state that it would only advance the loan to the Plaintiff if the suit property was handed over to the Plaintiff with vacant possession. Had that been a pre-condition to the lending by Standard Chartered Bank, to the Plaintiff, it would have been inconsistent with the provisions of the Memorandum of Sale dated 10th June 2004. In that event, the Plaintiff may well be deemed to be saying that he was not going to fulfil his obligations under the Memorandum of Sale, as his financier was insisting on a condition which was at variance with the terms of the Memorandum of Sale already executed by the Plaintiff. To that extent, it may be that the insistence by the Standard Chartered Bank for vacant possession, as a prelude to their advancing financing to the Plaintiff, would imply that the contract signed by the Plaintiff was not capable of being performed. He was ready and happy to buy the suit property without vacant possession, but his financier insists on vacant possession. If the Plaintiff wishes to have the contract specifically performed, that would imply that he would have to accept it without vacant possession. In that event, he would not have met his financiers pre-condition, and thus would be unable to access the finances for the balance of the purchase price. If that were to happen, the Plaintiff may well be unable to meet his obligations.

Moving on from the issue of vacant possession, I now take a look at the question of extension of time, for the performance of the contract. The Plaintiff points out that the contract between him and the 1st Defendant was mutually extended. The said extension is said to be discernable from the conduct of the parties .

First, the parties are in agreement that the Agreement between them is dated 10th June 2004. The said Agreement is embodied in the Memorandum of Sale, which provides, inter alia that the Plaintiff was to pay the balance of the purchase price within thirty (30) days from 10th June 2004. Therefore, it is agreed, by the parties, that the Plaintiff should have paid the balance of the purchase price by 10th July 2004.

However, the Plaintiff did not make that payment within the time stipulated. Instead, he went around shopping for a financier. The said financier is the Standard Chartered Bank, who offered to the Plaintiff a loan facility of Kshs. 5,850,000/=. The offer was dated 21st June 2004, and a copy thereof was dispatched by the Plaintiff to the 1st Defendant on 14th July 2004.

Thereafter, on 29th July 2004, the advocates for the financier gave their professional undertaking to pay the sum of Kshs. 5,850,000/= to the 1st Defendant, within ten days of registration of the transfer and a charge in favour of the financier. The advocates for the financier also called for the title documents as well as the completion documents.

In response, the 1st Defendant sent the title documents to the financier's advocates.

It is the Plaintiff's case that having corresponded outside the period stipulated in the contract, the

parties must be deemed to have mutually extended the period of the contract.

At this point in time, the court must remind itself that this is an interlocutory application. I must therefore not pass final judgement on the issues before me, or even make such comments as may make it cumbersome for the trial judge to handle the issues in the manner he deems most appropriate. The reason for that reminder is that in my considered view the issue as to whether or not the contract was extended is central to the case herein. Therefore, if I were to decide that point, I would have already usurped the role of the trial judge.

I therefore am obliged to leave that issue for determination by the trial court. I have done so because it is only that court which will be in position to receive evidence from the parties and their witnesses, who will have to explain their conduct. For instance, the 1st Defendant would be expected to explain the reasons why it accepted the undertaking from the financier's advocates almost twenty days after the date when the Plaintiff was supposed to have paid the balance of the purchase price. Why did they send the title documents to the financier's advocates, if the contract had ceased to exist? Can an exchange of correspondence after the lapse of the contract period extend the contract?

Assuming for a moment that the parties did extend the contract period, the Plaintiff would also need to explain to the trial court the contents of his letter dated 2nd November 2004, by which their advocates said, inter alia, that:-

"**the said land parcel cannot legally be transferred to our client."**

Indeed, the Plaintiff's advocate did categorically state as follows:-

"**That our clients have opted to withdraw from the aforesaid sale transaction……"**

Thus, even assuming that the contract had been extended, by mutual conduct, it does appear that the Plaintiff thereafter chose to withdraw from it on 2nd November 2004. And, the financier's advocates wrote thereafter, on 5th November 2004, returning the title documents, and seeking to be released from their professional undertaking. That action is, to my mind, consistent with the financier having no further obligation to the Plaintiff and 1st Defendant. If that be the case, then the Plaintiff would not have access to the finances from Standard Chartered Bank, to pay the balance of the purchase price.

However, it would be open to the Plaintiff, to lead evidence at the trial, to show whether or not Standard Chartered Bank was still ready and willing to finance him in paying the balance of the purchase price. But, at the moment, there is no material before me from which I can positively state that the Plaintiff would be able to pay the balance of the purchase price, if specific performance were to be ordered by the court.

Also, the Plaintiff did expressly acknowledge that the ability or otherwise of the 1st Defendant to comply with its obligations under the Memorandum of Sale, was not dependent on the 1st Defendant alone. As he said in his letter dated 2nd November 2004:-

"**The said land parcel is entangled in a web at Civil Litigations between yourselves and the *Chargor Erick Kiplangat Ngetich* as evidenced by a letter to yourselves from the chargor's lawyers dated 13th July, 2004 and copied to our clients, a copy of which is annexed hereto for ease of reference."**

In other words, there exists other impediments to the actualisation of the contract, even if it were still in existence. Those impediments are recognised by the Plaintiff. He would therefore have to satisfy the trial court that notwithstanding such impediments, an order for specific performance was still feasible.

In the meantime, I note that in the Plaint, the substantive prayers are as follows:-

"(a) **An Order of permanent injunction prohibiting and restraining the 1st and 2nd Defendants by themselves or their directors officers, servants or agents or otherwise howsoever from alienating, selling, transferring disposing of or advertising for purpose of such sale, alienation, transfer or disposition the suit property namely title Number Nairobi/block 90/169 to any other person other than the Plaintiff.**

(b) **Specific Performance of the Sale Agreement to sell and transfer to the Plaintiff the suit property or damages in lieu of specific performance.**

(c) **Costs and interest of the suit.**

(d) **Such other relief as this court deems just and fit**

(e) **Any other or further orders."**

In my understanding, prayers (a) and (b) above, actually say the same thing. The first prayer is to stop the sale or disposal of the suit property to anybody other than the Plaintiff. Then, the second prayer, expressly, states that the suit property should be transferred to the Plaintiff, by way of specific performance.

To my mind, it is instructive to note that in prayer (b), the Plaintiff seeks "**damages in lieu of Specific performance."**

I believe that that must be taken as an acknowledgement, by the Plaintiff, that he could be awarded damages instead of the suit property. The said acknowledgement is significant for two reasons:-

(i) the fact that the Plaintiff appreciates that damages are an available alternative to the order for specific performance;

and (ii) the fact that there is still a "**web of civil litigation**"

between the 1st Defendant and the chargor, which may well make it impossible for the 1st Defendant to specifically perform the contract, if the court was to hold that the 1st Defendant had acted irregularly or unlawfully, in realising the security.

For those two reasons, I find that if an injunction were to issue now, the 1st Defendant would be placed between a rock and a hard place. It would be in a position in which it had to await judgement in the case between it and the chargor, not knowing whether or not the sale would be upheld; at the same time, this court would have told the 1st Defendant that it was bound to the Plaintiff, by the Memorandum of Sale. During that state of limbo, the 1st Defendant would continue to face a growing debt.

In these circumstances, as I find doubt about whether or not the Plaintiff's suit is likely to succeed, I hold that the balance of convenience militates against the award of an injunction. I say so because, if the Plaintiff ultimately succeeds in proving his claim, he has already recognised that damages are an alternative remedy, in lieu of specific performance.

By arriving at this conclusion, I am not merely saying that because the 1st Defendant is a bank, it is entitled to breach contracts, simply because it would thereafter be able to pay damages. That would be the wrong way of going about justice. Indeed, such an attitude would negate the essence of justice, as banks would always be able to plead their financial ability as an adequate answer to claims for interlocutory injunctions. I recognise the fact that the test in applications for interlocutory injunctions remains the same as was laid down in **Giella V Cassman Brown [1973] E.A. 358.**

It is upon that basis that I found that the Plaintiff had not satisfied me that he has a clear prima facie case with a probability of success. His case was nonetheless, arguable. But because I have some doubt as

to its efficacy, I have determined this application on a balance of convenience.

In the final analysis, the application dated 25th April 2005 is dismissed with costs.

Dated and Delivered at Nairobi this 4th day of October 2005.

FRED A. OCHIENG

JUDGE