



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 313 OF 2019

CHRISTOPHER KAGEMA GICHUHL.....PLAINTIFF

-VERSUS-

ESSEN HOLDINGS LIMITED.....1ST DEFENDANT

STEPHEN NG'ANG'A MUIGAI.....2ND DEFENDANT

RULING

What is before the court is the Plaintiff's Notice of Motion application dated 27th September 2019 seeking the following orders;

1. Spent;
2. That the Honourable Court be pleased to issue a temporary injunction restraining the Defendants, their servants, agents, creditors or otherwise howsoever from dealing with the title of the suit property by purporting to charge it, sell it, mortgage it or doing anything that will tend to further prejudice Plaintiff's interest and/or right in it pending the payment of the balance of the purchase price to the Plaintiff herein plus interest thereon.
3. That the Defendants pay the balance of the purchase price to the Plaintiff forthwith.
4. That the Plaintiff be allowed to collect rent from the tenants on the suit property until the balance of the purchase price is paid to him with interest thereon and/or until this suit is heard and determined.
5. Any other or further or better relief the Honourable Court may deem fit and just to grant;
6. That the costs of the application be provided for.

The Plaintiff's case:

The grounds upon which the application was brought are set out in the supporting affidavit, supplementary affidavit and further affidavit sworn by Christopher Kagema Gichuhi on 27th September 2019, 23rd November 2020 and 17th September 2021 respectively. The Plaintiff averred that he was at all material times the registered owner of all that parcel of land known as L.R No. 209/136/104(hereinafter referred to as "the suit property"). The Plaintiff averred that through a sale agreement dated 26th February 2019, he sold the suit property to the 1st Defendant at a consideration of Kshs. 82,500,000/=. The Plaintiff averred that upon being paid a deposit of Kshs. 8,250,000/=: he transferred the suit property to the 1st Defendant which charged the same to Equity Bank Limited to secure a loan that he sought from the said bank to enable it pay the balance of the purchase price.

The Plaintiff averred that despite having the property registered in its name, charging it and taking possession thereof, the 1st Defendant had failed to pay the balance of the purchase price in the sum of Kshs. 74,250,000/=. The Plaintiff averred that he issued a notice to his former tenants on the suit property advising them of the change in the ownership of the suit property and asking them to pay rent to the 1st Defendant with effect from 1st October 2019. The Plaintiff averred that the 1st Defendant was to pay the balance of the purchase price as soon as it took possession of the suit property which it did on 13th September, 2019. The Plaintiff averred that the 1st Defendant had taken possession of the suit property from which it was entitled to receive rent as the owner thereof and was also keeping the balance of the purchase thereby causing him great anxiety and frustrating his intention to plan his future and that of his dependants.

The Plaintiff averred that the 1st Defendant's refusal to pay the balance of the purchase price amounted to a breach of the terms of the agreement of sale between the parties. The Plaintiff averred that the clause in the agreement that provided that the balance of the purchase price would only be paid upon the Plaintiff granting the 1st Defendant vacant possession was varied and the requirement omitted when he agreed to allow the 1st Defendant to execute the agreement for sale before paying the 10% deposit. The Plaintiff averred that his attempts to resolve the dispute amicably failed because the 1st Defendant's advocates refused to co-operate and kept changing their demands.

The Defendants' case:

The Application was opposed by the Defendants through a replying affidavit and further affidavit sworn by the 2nd Defendant, Stephen Ng'ang'a Muigai who was also the 1st Defendant's Managing Director, on 5th November 2019 and 17th December 2020 respectively.

The Defendants averred that the 2nd Defendant was not a party to the agreement of sale between the Plaintiff and the 1st Defendant hence he should be removed from the proceedings. The Defendants admitted that the 1st Defendant and the Plaintiff entered into an agreement for sale of the suit property and that the property was transferred and registered in the name of the 1st Defendant and charged to Equity Bank Limited (hereinafter referred to only as "the Bank") to finance the balance of the purchase price. The Defendants averred that the balance of the purchase price was to be paid by the Bank in accordance with the terms of a professional undertaking dated 22nd May 2019 that was given by the Bank's advocates to the Plaintiff. The Defendants averred that it was a term of the said professional undertaking that the balance of the purchase price would be paid by the Bank to the Plaintiff within fourteen (14) days of; simultaneous registration of the transfer in favour of the 1st Defendant and the charge in favour of the Financier, and the issuance of a written confirmation by the Plaintiff that the property was vacant.

The Defendants averred that the Plaintiff had not delivered vacant possession of the suit property to the 1st Defendant which was a condition precedent to the payment of the balance of the purchase price. The Defendants averred that the Plaintiff's tenants were still in occupation of the suit property and that the Defendants had not collected any rent from the said tenants as claimed by the Plaintiff.

The Defendants averred that the Plaintiff failed to give notice to the tenants on the suit property to vacate immediately after entering into the sale agreement. The Defendants averred that the Plaintiff instead gave halfhearted notices on 12th September 2019 that did not require the tenants to vacate but to call on the new owner's agent for negotiations. The Defendants averred that the Plaintiff was still receiving rent from the tenants on the suit property as of November 2020 and had even issued long term leases to some of the tenants after executing the agreement for sale. The Defendants denied that they had waived the term of the agreement for sale on vacant possession.

Submissions:

The Plaintiff filed his submissions dated 20th September 2021 and the Defendants filed its submissions and reply to Plaintiff's submissions dated 11th June 2021 and 24th September 2021 respectively.

In his submissions, the Plaintiff reiterated the contents of his affidavits in support of the application and argued that he was entitled to the orders sought in the application. On their part, the Defendants also reiterated the contents of their affidavits in opposition to the application. The Defendants submitted further that it was a term of the agreement of sale that the Plaintiff would give vacant possession of the suit property before payment of the balance of the purchase price. The Defendants submitted that having breached the said term of the agreement by failing to give the 1st Defendant vacant possession of the suit property, the Plaintiff could not call upon the court to come to his aid. In support of this submission, the Defendants relied on Tom Otieno Odongo v Cabinet Secretary Ministry of Labour Social Services & another [2013] eKLR, Samuel Chege Gitau & another v Joseph Gicheru Muthiora [2014] eKLR and Deliah Kerubo Otiso v Ramesh Chander Ndingra [2018] eKLR on the sacred duty of court to uphold contracts.

The Defendants submitted that the Plaintiff was not serious in prosecuting the application before the court. The Defendants submitted that instead of making submissions on the application, the Plaintiff's advocate resorted to giving evidence on behalf of the Plaintiff on contested matters of fact. The Defendants submitted further that the Plaintiff has sought final orders on his application that cannot be granted in an interlocutory application. The Defendants submitted that the orders sought by the plaintiff in the application are similar to those sought in the plaint. In support of their submission that the court cannot grant final orders in an interlocutory application, the Defendants relied on Nairobi Civil Appeal Nos. 3 and 11 of 2016-Olive Mugenda & Another v Omkiya Omtata Okoiti.

Determination:

The Plaintiff sought three main orders in his application which I will consider one after the other in the sequence in which they are set out in the application. The first order sought by the Plaintiff is a temporary injunction restraining the Defendants, their servants, agents, creditors or otherwise howsoever from dealing with the title of the suit property by purporting to charge it, sell it, mortgage it or doing anything that will tend to further prejudice the Plaintiff's interest and/or right in the property pending the payment of the balance of the purchase price to the Plaintiff together with interest. The principles upon which the court exercises its discretion in applications for interlocutory injunction are well settled.

In Giella v Cassman Brown & Co. Ltd. [1973] E.A 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”

I am not satisfied that the Plaintiff has established the conditions for granting a temporary injunction. The Plaintiff has not persuaded me that he has a prima facie case with a probability of success against the Defendants and that he is likely to suffer irreparable injury that cannot be compensated in damages if the order of injunction sought is not granted. The Plaintiff has not established that the 1st Defendant is in breach of the agreement for sale dated 26th February 2019. The said agreement provided that the purchase price was Kshs. 82,500,000/- of which a sum of Kshs. 8,250,000/- was to be paid on or before the execution of the agreement while the balance thereof in the sum of Kshs. 74,250,000/- was to be financed by Equity Bank of Kenya Limited (the Bank) and was to be secured by an irrevocable undertaking on terms acceptable to the Plaintiff. It is common ground that a sum of Kshs. 8,250,000/- was paid to the Plaintiff’s advocates to hold as stakeholder and that the Bank gave to the Plaintiff through its advocates an irrevocable undertaking that it would pay to the Plaintiff a sum of Kshs. 74,250,000/- within 14 days of receipt of a duly registered transfer of the property in favour of the 1st Defendant and a charge in favour of the Bank. The Bank gave a further undertaking that in the event that payment of the said sum of Kshs. 74,250,000/- was not made to the Plaintiff within 14 days of receipt of a duly registered transfer of the property in favour of the 1st Defendant and a charge in favour of the Bank for any reason whatsoever, then the Bank would upon demand immediately return the completion documents to the Plaintiff in the same condition in which the same were delivered to the Bank and would cause to be cancelled any entries made on the title of the suit property.

It is also common ground that the suit property was registered in the name of the 1st Defendant and charged to the Bank. The Plaintiff has however not been paid the balance of the purchase price in the sum of Kshs. 74,250,000/- by the Bank in terms of the undertaking referred to above. The Plaintiff has not explained why he has not sought payment from the Bank under the irrevocable undertaking that was given to him and if he has made a demand which has not been honoured, why he has not taken steps to enforce the said undertaking which was a separate and distinct agreement. With the said irrevocable undertaking still in place, I can see no chances of success of the present suit. The Bank had also undertaken not to release the title of the suit property together with the other completion documents to any person without the consent of the Plaintiff. As I stated earlier, the Bank had undertaken to cancel the charge over the suit property and to return the title to the Plaintiff in the event that it failed to pay the balance of the purchase price to the Plaintiff in accordance with the terms of its undertaking. With the existence of these terms in the undertaking that was given to the Plaintiff to protect his interest in the suit property, I am unable to see the purpose that would be served by granting the temporary injunction sought.

The second order sought by the Plaintiff is for the Defendants to be compelled to pay the balance of the purchase price to the Plaintiff. On this prayer, I am in agreement with the Defendants that the order sought is a final order that the court cannot grant at an interlocutory stage. In any event, the Plaintiff has an irrevocable undertaking from the Bank’s advocates for the payment of the said balance of the purchase price. It is not clear to the court why the Plaintiff is seeking payment from the Defendants instead of enforcing the undertaking aforesaid.

The final prayer is for the Plaintiff to be allowed by the court to collect rent from the tenants on the suit property until the balance of the purchase price is paid to him together with interest and until the suit is heard and determined. Clause 4 of the agreement for sale between the Plaintiff and the 1st Defendant provided that the 1st Defendant was not entitled to vacant possession of the suit property until the full purchase price was paid to the Plaintiff. The Defendants have denied that they have taken possession of the suit property. They have also denied receiving rent from the tenants on the suit property. The Defendants have contended that it is the Plaintiff who is collecting rent from the tenants on the suit property. The Plaintiff has not denied this allegation. The Plaintiff does not require an order from the court to continue collecting rent from the suit property. Since vacant possession has not been given to the 2nd Defendant, the tenants in possession must pay rent to someone. Whether that someone should be the Plaintiff or the 2nd Defendant is a contentious issue that the court would only be able to determine at the trial of the Plaintiff’s claim and the Defendant’s Counter-claim. There is however no way in which the 2nd Defendant would be able to collect rent from the suit property while it has not obtained possession and does not require the current tenants on the property. The prevailing status quo will have to be maintained pending the determination of the parties’ rights at the trial.

The upshot of the foregoing is that the Notice of Motion application dated 27th September 2019 has no merit. The same is dismissed with costs to be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2022

S. OKONG’O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Nabutete for the Plaintiff

Mr. Kamau for the Defendants

Ms. C.Nyokabi-Court Assistant