



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 45 OF 2020

(FORMERLY COMMERCIAL SUIT NO. E448 OF 2019)

MOTORMAX LIMITED.....PLAINTIFF

VERSUS

CHRISTINE JEPCHUMBA KEITANY.....DEFENDANT

RULING

The Plaintiff filed the application dated 9/12/2019 seeking an order directing that the Defendant or her agents be forcefully evicted from apartment number C8 situated on land reference number (L.R. No.) 330/274 (original number 330/42/18) otherwise known as Crystal Springs Apartments (“the Suit Property”) pending hearing and determination of this suit. Additionally, it sought an order of injunction to restrain the Defendant or her agents from possessing, occupying, utilising or in any manner dealing with or interfering with the Suit Property.

The application was made on the ground that the Plaintiff is the lawful owner of the Suit Property and that it entered into agreement of sale dated 22/5/2018 vide which it agreed to sell the Suit Property to the Defendant for the consideration of Kshs. 20,000,000/=. The completion date under the agreement was six months of the date of the agreement, by which time the Defendant was required to have paid the full purchase price. Clause 8 of the sale agreement allowed the Defendant to take possession of the Suit Property upon payment of the deposit of Kshs. 2,000,000/= and she was to pay monthly rent of Kshs. 70,000/= from 5/6/2018 until the completion date.

The Plaintiff averred that at the time of filing this application the Defendant had paid Kshs. 4,000,000 towards the purchase price leaving a balance of Kshs. 16,000,000/= and that she was in breach of the terms of the sale agreement. The Plaintiff contended that the Defendant was in arrears of rent amounting to Kshs. 840,000/= which accrued from January 2019 to December 2019. That it served a completion notice on the Defendant on 14/12/2018 which expired without the Defendant regularising the default. The Plaintiff maintained that the sale agreement was legally terminated and that the Defendant had no colour of right to remain in occupation of the Suit Property. The Plaintiff expressed concern that the Defendant had kept the Suit Property in a state of disrepair and its fear that the value of Suit Property may reduce substantially unless the Defendant was evicted from the apartment immediately. The Plaintiff contended that it continued to suffer substantial loss and damage as a result of the Defendant’s illegal occupation of the Suit Property.

The application was supported by the affidavit of Dominic Chelal, a director of the Plaintiff. Mr. Chelal produced copies of various documents including the sale agreement dated 22/5/2018; letter dated 14/12/2018 being the completion notice; letter dated 25/1/2019 from the Defendant’s advocate requesting the Plaintiff to withhold any precipitate action on rescission of the sale; letter dated 28/1/2019 from the Plaintiff’s advocates to the Defendant’s advocate informing them that the rescission notice stood; letter dated 4/10/2019 to the Defendant; bank statements and a copy of sale agreement dated 12/2/2018 between Grandrift Properties Limited and Smart Cars Limited.

Mr. Chelal deponed that the Plaintiff had paid the total sum of Kshs. 6,000,000 towards the purchase price and defaulted in paying the balance of Kshs. 14,000,000/=. He averred that upon service of the completion notice, the Defendant only paid the outstanding rent arrears of Kshs. 490,000/= on 25/1/2019 which had accrued up to December 2018 but failed to pay the balance of the purchase price amounting to Kshs. 14,000,000/=. He added that the Defendant had refused to vacate the Suit Property despite several demands from the Plaintiff.

Mr. Chelal deponed that the Plaintiff agreed to assist its sister company Smart Cars Limited in February 2019 by offering the Suit Property to Grandrift Properties Limited as part payment for town house number 5 erected on L.R. No. 3734/1446 (original number 3734/221) but the Defendant frustrated that arrangement by refusing to vacate the Suit Property. He averred that the Defendant’s continued occupation of the Suit Property was illegal and urged that the orders sought in this application ought to be granted immediately in order to restore the Suit Property to the Plaintiff who is its lawful owner. He concluded that the Plaintiff was ready and willing to refund to the Defendant or deposit in court any credit balance due to the Defendant after deducting the accrued rent arrears and cost of repairs for the Suit Property.

The Defendant swore the affidavit dated 21/1/2020 in opposition to the application. She averred that the application was frivolous, vexatious

and not merited. She deponed that she had spent more than Kshs. 1,000,000/= renovating the Suit Property and that it was not true that she had kept the Suit Property in a state of disrepair. She deponed that there had been ongoing negotiations between her and the Plaintiff regarding the purchase of the Suit Property where it was agreed that the Plaintiff would give her time until end of January 2020 to enable her raise the balance of the purchase price. She deponed that she had initiated the process of obtaining financing for the balance of the purchase price with HFC Limited. She contended that the court ought to decline to grant the eviction orders since they would result in final orders being issued at the interim stage of the suit. She urged that the Plaintiff had not demonstrated the damage it stood to suffer if the orders were denied. She added that she had already paid the Plaintiff Kshs. 6,000,000 which would compensate the Plaintiff if the court were to rule against her and therefore the Plaintiff should not be granted the orders it seeks. She attached documents showing monies presumably spent on repairs of the house including a proforma invoice dated 23/11/2017 for US Dollars 1,643. She also attached an illegible cash deposit slip for the Diamond Trust Bank and some receipts from hardware shops.

Parties filed submissions which the court considered. The Plaintiff submitted that having issued the completion notice in accordance with the sale agreement which expired, the agreement for sale stood rescinded and the Defendant's continued occupation of the Suit Property was illegal. The Plaintiff relied on the terms and conditions of the sale agreement regarding the purchase price and the completion date as well as the clause on the purchaser taking possession upon payment of the deposit. The Plaintiff cited clause 15 of the agreement on what was to happen in the event of breach or default by any party. The clause required issuance of 21 days' notice to the party in breach. The Plaintiff submitted that the Defendant had expressly admitted in her pleadings that she paid Kshs. 6,000,000/= towards the purchase of the Suit Property leaving a balance of Kshs. 14,000,000/=. The Plaintiff argued that since the full purchase price was not paid in full within 180 days as stipulated in clause 1.1 of the sale agreement then the Defendant was in breach of the agreement.

The Plaintiff averred that parties are bound by the terms of the contracts they enter into and must be ready and willing to perform them. The Plaintiff pointed out that the Defendant was given vacant possession of the Suit Property upon payment of the deposit and that she was to pay the agreed monthly rent of Kshs. 70,000/= which fact the Defendant does not dispute. It submitted that indeed the Defendant paid the rent arrears of Kshs. 490,000/= up to December 2018. The Plaintiff contended that the Defendant was in rent arrears up to Kshs. 840,000/= up to December 2019 when this suit was filed and that by February 2020 the arrears had escalated to Kshs. 980,000/=. The Plaintiff urged the court to find that the Defendant had breached the terms of sale agreement.

The Plaintiff submitted that the Plaintiff had not produced any evidence to support her allegation that she was in the process of borrowing money to enable her pay the balance of the purchase price. The Plaintiff argued that the sale agreement stood terminated on expiry of the period given in the completion notice. It argued that it was entitled to regain possession of the Suit Property and urged the court to direct the Defendant to hand over vacant possession of the Suit Property failing which she should be evicted as sought in the application. The Plaintiff cited various court decisions.

The Defendant submitted that it was not in dispute that the Plaintiff's authorised agent, Mr. Dominic Chelal entered into negotiations with her for extension of the completion period and that the Defendant notified the Plaintiff that she was seeking financial assistance from the Housing Finance Corporation. The Defendant contended that the negotiations were a concluded bargain, mutually agreed upon and that the Defendant could not be said to be in default since the extension period had not lapsed. She argued that the Plaintiff should be estopped from claiming a breach of contract because the negotiations were mutually agreed upon.

The Defendant contended that the Plaintiff had not met the conditions for the grant of an injunction. Further, that the Plaintiff had not demonstrated special circumstances warranting the grant of orders in the interlocutory application. She relied on Volume 24 Halsbury's Laws of England 4th Edition paragraph 948. The Defendant urged the court to dismiss the application and award her costs.

This suit was filed in the Commercial and Tax Division of the High Court and was transferred by consent of the parties to the Environment and Land Court on 27/2/2020. The court notes that a substantial part of the Defendant's submissions addressed the issue of the jurisdiction of the High Court to deal with the application. Those contentions were superseded by the consent which transferred the dispute to the Environment and Land Court.

The issue for determination is whether the court should grant the orders sought by the Plaintiff. It is not in dispute that the parties in this suit entered into an agreement dated 22/5/2018 for the sale of the Suit Property to the Defendant for Kshs. 20,000,000/=. It is also not contested that the completion date under the agreement was six months of the date of the agreement and that the Defendant was required to have paid the full purchase price by the completion date. The Defendant is in occupation of the Suit Property because the sale agreement allowed her to take possession upon payment of the deposit of Kshs. 2,000,000/= and was to pay monthly rent of Kshs. 70,000/= from 5/6/2018 until the completion date which would have been 22/11/2018. When this application was filed, the Defendant had paid Kshs. 6,000,000/= leaving a balance of Kshs. 14,000,000/= as well as rent arrears. The Defendant did not provide any evidence of the negotiations she claimed to have entered into with the Plaintiff on the claim that there was an agreement for the extension of the completion period. Had the Defendant succeeded in obtaining financial assistance from the Housing Finance Corporation as she argued, then she would have paid the balance of the purchase price before this application was argued.

The Defendant failed to pay rent as agreed and at some point settled some of the outstanding rent arrears. It is not clear how much she currently owes the Plaintiff in rent arrears. The Defendant did not pay the balance of the purchase price by the completion date and is therefore in breach of the terms of the contract.

The court finds merit in the application dated 9/12/2019. The Defendant is directed to vacate Apartment number C8 in Crystal Springs Apartments situated on L.R. No. 330/274 (Original number 330/42/18) within 30 days of the date of this ruling failing which she will be evicted from the apartment at her cost. Pending hearing and determination of this suit, a temporary injunction is issued to restrain the Defendant from occupying, utilising, or in any manner dealing with Apartment number C8 in Crystal Springs Apartments. The Plaintiff is awarded the costs of the application.

DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF MAY 2021

K. BOR

JUDGE

In the presence of: -

..... for the Plaintiff

..... for the Defendant

Mr. V. Owuor- Court Assistant