REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 208 OF 2019

URITHI HOUSING CO-OPERATIVE SOCIETY LTD.....PLAINTIFF

VERSUS

NDIMA TEA FACTORY LIMITED.....DEFENDANT

RULING

What I have before me is an application brought by the plaintiff by way of a Notice of Motion dated 20th June, 2019 seeking a temporary injunction restraining the defendant from rescinding, terminating and/or in any other manner interfering with the sale agreement dated 14th February, 2019 and from selling, offering for sale or in any other manner alienating all those parcels of land known as L.R No. 7405/13, L.R 7405/15 and L.R No. 7405/18 (hereinafter referred to as "the suit properties").

The application that was supported by the affidavit and supplementary affidavit sworn by Samuel Ngundo Maina on 20th April, 2019 and 24th June, 2020 respectively was brought on the following grounds: The plaintiff and the defendant entered into an agreement of sale dated 14th February, 2019 under which the plaintiff agreed to purchase and the defendant agreed to sell the suit properties to the plaintiff at a consideration of Kshs.84,000,000/= on terms and conditions that were set out in the said agreement. The plaintiff averred that the completion date was 90 days from the date of the agreement. The plaintiff averred that although the agreement was dated 14th February, 2019 and was executed by the plaintiff in good time, the counterpart thereof executed by the defendant was not received by the plaintiff until 13th March, 2019. The plaintiff averred that the delay in forwarding to the plaintiff the counterpart of the said agreement left the plaintiff with only sixty (60) days to complete the agreement.

The plaintiff averred that due to hard economic situation that was prevailing in the country, the housing industry was seriously affected and as such the plaintiff was unable to raise the balance of the purchase price that it had intended to raise by offering the suit properties for sale to its members. The plaintiff averred that it communicated the difficulties it was facing in raising the balance of the purchase price to the defendant and approached the defendant for extension of the completion date to enable it raise the said balance of the purchase price.

The plaintiff averred that despite its best efforts to raise the balance of the purchase price with a view to completing the agreement of sale, the defendant served it with a notice of intention to rescind the sale agreement. The plaintiff averred that it was necessary for the court to intervene to restrain the defendant from rescinding the agreement of sale since the said agreement had a clause for extension of the completion date that it had invoked. The plaintiff averred that it stood to suffer loss of the suit properties as well as the deposit it had paid to the defendant if the orders sought were not granted.

The plaintiff averred that the completion period stated running from 13th March, 2019 when the plaintiff received the counterpart of the agreement of sale and as such the completion and rescission notices that were served upon the plaintiff by the defendant were premature, invalid, null and void.

The application was opposed by the defendant through a replying affidavit sworn on 4th September, 2019 by the defendant's Factory Unit Manager, Daniel G. Kanja. The defendant admitted selling to the plaintiff the suit properties at Kshs. 84,000,000/= through an agreement of sale dated 14th February, 2019. The defendant also admitted receiving a deposit of Kshs. 8,400,000/= from the plaintiff. The defendant averred that the completion date was 90 days from 14th February, 2019 which was to be on or before 13th May, 2019. The defendant averred that on 9th May, 2019, its advocates wrote to the plaintiff's advocates informing them that the defendant was ready and willing to complete the agreement. The defendant averred that on 10th May, 2019, the plaintiffs wrote a letter requesting for the variation of the agreement of sale by extending the completion date which request was rejected by the defendant through a letter dated 15th May, 2019.

The defendant averred that since the plaintiff was not ready to complete the agreement of sale on the completion date, the defendant served upon the plaintiff 21 days completion notice in accordance with clause 9.1 of the agreement. The defendant averred that the plaintiff failed to complete the agreement even after being served with the said completion notice necessitating the issuance by the defendant of a 7 days

rescission notice on 11th June, 2019 in which the defendant notified the plaintiff that the contract between the parties stood rescinded and that the defendant would exercise its right of forfeiture of the deposit at the expiry of the said notice.

The defendant averred that the plaintiff did not remedy its breach of the agreement of sale even after the said rescission notice was served upon it and that it instead chose to file the present suit. The defendant averred that the plaintiff had amble time to raise the balance of the purchase price. The defendant averred that the orders sought by the plaintiff had been overtaken events since the agreement of sale stood rescinded and the defendant had exercised its right of forfeiture of the deposit. The defendant averred that the parties were bound by the terms of the agreement of sale and that the plaintiff had approached the court with unclean hands having failed to complete the agreement. The defendant averred that the suit by the plaintiff raised no reasonable cause of action against the defendant and as such the application before the court did not meet the threshold for granting an injunction. The defendant termed the application an abuse of the process of the court.

The application was argued by way of written submissions. The plaintiff filed submissions and supplementary submissions on 21st August, 2020 and 11th November, 2020 respectively while the defendant filed its submissions on 11th November, 2020. The plaintiff submitted that it had established a prima facie case that the completion notice and the subsequent rescission notice that were served upon the plaintiff were premature, invalid, null and void. The plaintiff submitted that it had also established that it stood to suffer irreparable harm unless the orders sought were granted. The plaintiff urged the court to allow the application as prayed. In its submissions in reply, the defendant submitted that the plaintiff had failed to satisfy the conditions for granting a temporary injunction and urged the court to dismiss the application.

I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the defendant in opposition to the application. Finally, I have considered the submissions by the parties and the authorities cited. The plaintiff is seeking a temporary injunction pending the hearing and determination of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in Giella *v.* Cassman Brown & Co. Ltd. [1973] EA 358, an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not 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."**

The plaintiff has put forward one main ground as a basis for its claim herein against the defendant. The plaintiff has contended that the completion date for the agreement of sale that it entered into with the defendant was 90 days from 13th March, 2019 which was the date when a duly signed counterpart of the agreement was forwarded and received by the defendant and not from 14th February, 2019 which was the date of the agreement. The plaintiff contended therefore that the completion date was on or before 14th June, 2019 and not on or before 14th May, 2019 as was contended by the defendant. The plaintiff contended that since the completion date was on or before 14th June, 2019, the defendant's completion notices that were served upon the plaintiff on 15th May, 2019 and 16th May, 2019 were premature, invalid, null and void. The plaintiff averred that the notice of rescission that was also served upon the plaintiff by the defendant on 11th June, 2019 was similarly premature, invalid, null and void.

I am not satisfied that the plaintiff has established on a prima facie basis that the notices that were served upon it by the defendant were premature. The plaintiff and the defendant entered into a written agreement of sale. Clause 23 of the said agreement provided that the agreement contained the whole agreement and understanding between the parties relating to the transaction and that the same superseded all previous agreements if any between the parties in respect of the transaction. The agreement provided that the completion date was 90 days from the date of the agreement. The agreement was dated 14th February, 2019. The completion date was therefore on or before 13th May, 2019. The agreement did not provide that the completion date was to be reckoned from the date when the counterpart of the agreement was returned to the plaintiff. Before 13th May, 2019, the defendant notified the plaintiff of its readiness and willingness to complete the agreement. The plaintiff was not ready to complete and requested for extension of the completion date. The defendant refused the request. The agreement between the parties provided for extension of the completion date but at the defendant's sole discretion. There was no obligation or duty imposed upon the defendant under the agreement to extend the completion period.

The plaintiff did not complete the agreement within the completion notice period. Under clause 9.3 of the agreement, the defendant was entitled to rescind the agreement and to forfeit the deposit that was paid by the plaintiff as liquidated damages. Upon the expiry of the completion notice, the defendant notified the plaintiff that it would rescind the agreement of sale and forfeit the deposit at the expiry of 7 days. The plaintiff did not pay the balance of the purchase price within the further 7 days period that was given to it that was not even necessary. Instead, the plaintiff instituted these proceedings. I am satisfied that the defendant acted strictly in accordance with the terms of the agreement of sale between the parties. I am not convinced that the defendant was in breach of the said agreement. I am not satisfied therefore that a prima facie case with a probability of success has been established by the plaintiff.

Having reached the conclusion that the plaintiff has not established a prima facie case, it is not necessary for me to consider whether or not the plaintiff would suffer irreparable injury which cannot be compensated by an award of damages. If I was to determine the issue, I would have determined it against the plaintiff. The evidence on record shows that the plaintiff was purchasing the suit property not for itself but for

resale to its members. No evidence was placed before the court showing that the plaintiff had resold any portion of the suit property or that it could not get alternative properties for its members. The plaintiff did not also demonstrate that the defendant would be unable to refund its deposit and also to pay damages in the event that it proves at the trial that the defendant was in breach of the agreement of sale between the parties. I am not satisfied therefore that the plaintiff would suffer irreparable injury that cannot be compensated in damages if the orders sought are not granted.

The upshot of the foregoing is that the plaintiff's application dated 20th June, 2019 is not for granting. The application is dismissed with costs to the defendant. The interim orders granted on 4th July, 2019 and extended on 2nd December, 2019, 3rd June, 2020 and 12th November, 2020 are discharged.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2021

S. OKONG'O

JUDGE

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

Ms. Cheruiyot for for the Plaintiff

Ms. Gitau for the Defendant

Ms. C. Nyokabi - Court Assistant