



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 388 OF 2017

MIGUI MACHARIA MUNGAL.....1ST PLAINTIFF

FLAVIA SUSAN KALANDE.....2ND PLAINTIFF

=VERSUS=

CHESKA AGENCIES LIMITED.....DEFENDANT

RULING

1. The dispute in this suit relates to **Land Title Number Nairobi Block 129/289** situated in **Komorock Phase II Estate**, Nairobi City County (**the suit property**). The property is developed and is registered in the name of the defendant. It is charged to Kenya Commercial Bank, but from the record before court, the mortgage facility has been fully repaid. There is common ground that on 8/9/2016, the plaintiffs (as purchasers) and the defendant (as vendor) entered into an agreement for sale of the suit property to the plaintiffs at a purchase price of Kshs 7,500,000. The plaintiffs paid a deposit which was received by the defendant.

2. On 12/6/2017, the plaintiffs initiated this suit through a plaint dated 10/6/2017. The plaint was subsequently amended on 4/12/2018. Their case was that they had paid the agreed deposit of Kshs 2,500,000 and they were at all material times ready and willing to complete the contract but the defendant had, in breach of the contract, failed/refused and or neglected to procure and furnish them with the requisite completion documents, thereby frustrating completion of the contract. They sought, among other prayers, orders of specific performance and *mesne profits*.

3. Together with the plaint, the plaintiffs brought an interlocutory application dated 10/6/2017, seeking interim injunctive orders restraining the defendant against disposing the suit property pending the hearing and determination of the suit. At the *ex-parte* stage of the application, the court directed the plaintiffs to deposit the balance of the purchase price [Ksh 5,000,000] in court. The court record shows that the money was deposited by the plaintiff on 27/6/2017.

4. The application dated 10/6/2017 was subsequently heard and a ruling thereon rendered on 23/2/2018. The court allowed the application to the extent that it restrained the defendant against disposing the suit property to a third party pending the hearing and determination of the suit.

5. Pre-trial was subsequently conducted before the Deputy Registrars and the suit was listed for substantive hearing on 13/5/2020. Hearing did not, however, take off on 13/5/2020 because the defendant's advocates, Mwangi Chege and Co Advocates, filed an application dated 6/12/2019 seeking leave to cease acting for the defendant. Similarly, the plaintiffs filed an application dated 11/11/2019 [*the said application dated 11/11/2019 is the subject of this ruling*]. On 30/6/2020, the application by the defendant's advocates was marked as overtaken by events (*spent*) because the defendant had appointed another firm of advocates and a notice of change of advocates had been filed. What therefore falls for determination in this ruling is the plaintiff's application dated 11/11/2019.

6. Through the said application, the plaintiffs seek the following orders:

(1) Spent.

(2) That a temporary injunction do issue restraining the defendant, its directors, servants and/or agents from collecting any further rental income from the suit premises known as Nairobi/ Block 129/289, Komarock Estate, Nairobi pending the hearing and determination of this suit.

(3) That in the alternative the sum of Kenya Shillings 5,000,000 deposited into court be released to Kenya Commercial Bank towards redemption of the outstanding loan account in the name of the defendant and in exchange for the deposit into court of the certificate of lease and discharge of charge in respect of that property premises known as Nairobi/ Block 129/289, Komarock

Estate, Nairobi.

(4) The defendant do bear the costs of this application.

7. The application was supported by an affidavit sworn on 11/11/2019 by Migui Macharia Mungai and was canvassed through written submissions dated 23/6/2020. The plaintiffs contended that the suit property was a residential property having four apartments which were let out to tenants who were paying monthly rent to the defendant despite them having sold the suit property to the plaintiffs. They added that at the time of executing the sale agreement, it was agreed by the parties that the plaintiffs would collect the monthly rent in respect of the suit premises but the defendant had resisted handing over possession of the suit property and had continued to collect rental income from the suit property. They further contended that they were suffering great loss and damage by being denied possession of the suit premises yet they had purchased it from the defendant and they had deposited the balance of purchase price in court as directed by the court. They urged the court to grant the prayers sought in the plaintiff.

8. The defendant filed an amended statement of defence dated 21/12/2018; a replying affidavit sworn by Munira Wairimu Mwinyi on 30/6/2020; and written submissions dated 30/6/2020. They denied that the plaintiffs paid them the deposit of Kshs 2,500,000. They added that the plaintiffs only paid Kshs 1,800,000. They contended that the plaintiffs failed to pay both the full deposit of Kshs 2,500,000 and the balance of the purchase price in the sum of Kshs 5,000,000 as provided in the sale agreement, hence they committed a fundamental breach of contract. They further contended that it would be unfair to bar them from collecting rent yet the plaintiffs were the ones who breached the contract. Through submissions, they argued that the plaintiffs had failed to satisfy the requirements in **Giella v Cassman Brown (1973) EA 358**. They contended that an order barring the defendant from collecting rent would be a kin to a final order and should not be granted at this stage.

9. I have considered the application together with the response thereto

and the parties' respective pleadings in the suit and submissions on the application. I have also considered the relevant law. The application was brought under **Order 40 rule 1** of the **Civil Procedure Rules**, among other provisions of the law. The single question falling for determination in the application is whether the applicants have satisfied the criteria upon which our trial courts exercise jurisdiction to grant an interlocutory injunctive relief under **Order 40 rule 1** of the **Civil Procedure Rules**.

10. The criteria for grant of an interlocutory injunctive relief is well settled. First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless it is demonstrated that the applicant might suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt on both or either of the first two limbs, the application should be determined on the balance of convenience [see **Giella v Cassman Brown (1973) EA 358**].

11. In a preceding ruling rendered on 23/2/2018, this court made interlocutory findings (not conclusive findings) and held that the plaintiffs had demonstrated that they had a contractual right which was at that point threatened by the defendant and which deserved protection. The court was at that point satisfied that the plaintiffs had demonstrated that they had a *prima facie* case with a probability of success.

12. In the application under consideration, the plaintiffs seek to restrain the defendant from collecting rental income from the suit property. They have not, however, expressly stated how the accruing rent is to be handled. They contend that they paid a deposit of Kshs 2,500,000 to the defendant and deposited the balance in court. They add that they were entitled to vacant possession upon paying the deposit. They further contend that it is inequitable for the defendant to continue collecting and appropriating rental income from the suit property in the circumstances. They maintain that they did not breach the contract and that it is the defendant who breached the contract.

13. On their part, the defendant contends that the relief sought by the plaintiffs is akin to a final order. They maintain that they did not breach the contract and contend that the plaintiffs are the ones who breached the contract.

14. Clause 4 of the sale agreement executed by parties to this suit provided as follows in relation to possession of the suit property:

“ 4. The vendor shall hand over possession to the purchasers upon payment of the deposit herein and shall immediately inform the four(4) tenants in possession of the same in writing.”

15. **Order 40 rule 1** grants this court jurisdiction to preserve any suit property which is in danger of being wasted, damaged or alienated by a party to a suit. The suit property in contention in the present application is the rental income accruing from the property subject matter of the sale contract between the parties to this suit. The plaintiff received a substantial sum as deposit of purchase price. Further, the sum of Kshs 5,000,000 is held in court having been deposited by the plaintiffs.

16. Taking into account the above circumstances together with all the interlocutory evidence placed before the court, the court is satisfied that there is a proper basis for exercising jurisdiction under **Order 40 rule 1** of the **Civil Procedure Rules** to preserve the rental income accruing from the suit property. Preservation of the rental income will entail depositing the rental income in a joint interest earning account to be opened in the joint names of the parties' advocates.

17. The plaintiffs sought the alternative relief of remitting the sum of Kshs 5,000,000 to Kenya Commercial Bank and calling for the Title together with the discharge of charge to be held by the court. I will not grant that order because on 15/2/2020 Ms Mwangi, counsel for Kenya Commercial Bank, informed the court that no money was owed to the Bank and the Bank would abide by orders of the court. The court cannot, in the circumstances order release of the sum of Kshs 5,000,000 to Kenya Commercial Bank. The court will instead order transfer and preservation of the said sum in a joint interest earning account to be operated by advocates of the parties to this suit, pending disposal of the suit. The title will remain with the Bank pending disposal of the suit.

18. Lastly, the court directs that parties' should focus on disposal of the main suit at the next hearing.

Disposal Orders

19. In the end, the plaintiffs' notice of motion dated 11/11/2019 is disposed in the following terms:

a) Parties to this suit, through their respective advocates shall within 15 days from today agree on and appoint an estate agent to manage and collect rent relating to the suit property, Land Title Number Nairobi Block 129/289 situated in Komarock Estate, Phase II, Nairobi

b) The net rental income collected from the suit property, Land Title Number Nairobi Block 129/289 situated in Komarock Estate, Phase II, Nairobi, shall be deposited in a joint interest earning account to be opened in the joint names of the Advocates acting for the parties herein, namely: (i) Kinyua Muriithi & Co Advocates – for the Defendant; and (ii) Mungai Kalande & Co Advocates - for the Plaintiffs, pending final disposal of this suit.

c) Kenya Commercial Bank Limited shall safely keep the Title relating to the suit property pending the final disposal of this suit but shall not advance any facility to any party on the basis of the said Title.

d) Once the said joint interest earning account is opened, the Deputy Registrar of this court shall cause the sum of Kshs 5,000,000 deposited in this court by the plaintiffs on 27/6/2017 to be transferred to the said joint interest earning account and to remain therein pending the final disposal of this suit.

e) Costs of the application shall be in the Cause

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF JUNE 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Masinde and Mr Mungai for the Plaintiffs

Mr Muriithi for the Defendant

Court Assistant: June Nafula