REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 240 OF 2009

DANIEL KARURU MWAURA & 12 OTHERS.....PLAINTIFFS

VERSUS

EDWARD KANJABI

SAMUEL B. MBUGUA T/A MEMBLEY HOUSING SCHEME.....DEFENDANTS

RULING

The full facts of this case are set out in the judgment that was delivered by this court on 30th April, 2019 part of which I reproduce herein for the purposes of the present application. The plaintiffs instituted this suit by a plaint dated 25th May, 2009 claiming that on diverse dates between 11th December, 2002 and 15th April 2003, they applied for and were allocated by the defendants 20 plots each measuring 1/8 of an acre comprised in all that parcel of land known as L.R No. 10901/46 situated behind Kenyatta University namely, Plot Numbers 319, 320, 321, 341, 339, 322, 314, 315, 324, 338, 331, 337, 313, 334, 340, 327, 316, 323, 328 and 325 (hereinafter referred to as "the suit properties"). The plaintiffs averred that each plot was allocated to them at a consideration was Kshs. 100,000/-. The plaintiffs averred that between 11 th December, 2002 and 15th April,2003 they paid to the defendants various amounts towards the purchase price of the suit properties. The plaintiffs averred that on 30th July, 2003, they visited the suit properties in the company of the defendants' surveyor and were shown the properties.

The plaintiffs averred that the defendants with intent to defraud them, and without any just cause unilaterally altered the measurements of the suit properties downwards from 1/8 of an acre to 10m by 18m and also increased the purchase price from Kshs. 100,000/- to Kshs. 130,000/- per plot which alterations the plaintiffs rejected and proceeded to take possession of the suit properties. The plaintiffs averred that the defendants informed them that the defendants wanted to refund the payments which they had made towards the purchase price and to take possession of the suit properties. The plaintiffs averred that, that action amounted to a breach of the agreements for sale which they entered into with the defendants. The plaintiffs sought the following reliefs against the defendants:

a) An order of specific performance compelling the defendants to complete the sale agreements which they entered into with the plaintiffs in respect of the suit properties;

b) In the alternative and without prejudice, an order for a refund all the monies received by the defendants with interest at 30% p.a from the time of receipt until payment in full;

c) General damages;

d) Costs of the suit;

e) Interest on (c) and (d) above.

The 1st defendant filed a statement of defence dated 17th March, 2010 in which he denied that he was trading as a partner in the firm of Membley Housing Scheme. The 1st defendant averred that he was a partner in the firm of Membley Housing along with others none of whom was known as Samuel B. Mbugua. The 1st defendant admitted that the plaintiffs applied to be allocated the suit properties. The 1st defendant averred that at all material times, Membley Housing (hereinafter referred to as "Membley") dealt with the 1st plaintiff on behalf of the other plaintiffs and that at no time did it deal with the 2nd to 13th plaintiffs. The 1st plaintiff averred that Membley invited applications for the purchase of residential plots measuring 10m by 18m initially at a price of Kshs. 100,000/- which was later on revised to Kshs. 130,000/- on the terms and conditions that were set out in the application forms. The 1st plaintiff contended that the said application forms that were signed by the plaintiffs did not constitute contracts for the disposition of land.

The 1st defendant averred that during a site visit on 11th December, 2002, the 1st defendant pointed out to the plaintiffs the suit properties each of which had already been demarcated and was measuring 10m by 18m. The 1st defendant denied that Membley had at any time authorised the plaintiffs to take possession of the suit properties. The 1st defendant averred that the payments that were due to Membley for the allocation of the suit properties to the plaintiffs were received subject to the conditions set out in the application forms and that none of the plaintiffs paid the purchase price in full or satisfied the conditions under which the suit properties were allocated to them.

The 1st defendant averred that at all material times, the 1st plaintiff was aware of the sizes of the suit properties which he had inspected on several occasions including when the same were pointed out to him by the 1st defendant on 11th December, 2002. The 1st defendant denied that there was a reduction or variation of the plot sizes. The 1st defendant averred that on 31st March, 2009, Membley notified the plaintiffs that the parties had not reached a consensus on the terms of the agreements for sale of the suit properties and as such it was necessary that the monies that the plaintiffs had paid as deposit be refunded to them. The 1st defendant denied that Membley had breached the agreements for sale it had entered into with plaintiffs and contended that there were no agreements for sale capable of being breached. The 1st defendant averred in the alternative that if there were agreements for sale, the enforcement thereof was time barred. The 1st defendant denied that the plaintiffs were entitled to the reliefs sought in the plaint.

The suit was heard and the court delivered its judgment in the matter on 30th April, 2019. In the said judgment, the court was called upon to determine two main issues namely; whether the defendants had breached the contracts for sale that they entered into with the plaintiffs and if so, whether the plaintiffs were entitled to specific performance of the said contracts or in the alternative a refund of the monies that they had paid to the defendants together with interest at the rate of 30% per annum from the time of receipt until payment in full. After considering those issues, the court entered judgment for the plaintiffs against the defendants as follows;

1. Judgment is entered for the plaintiffs against the defendants in the sum of Kshs. 670,000/- being a refund of the purchase price paid by the plaintiffs to the defendants.

2. The plaintiffs' prayers for specific performance and general damages are dismissed.

3. Each party shall bear its own costs of the suit.

What is now before this court is a Notice of Motion application by the plaintiffs dated 7th May, 2019 in which they have sought the following orders;

1. That pending the hearing and determination of the intended appeal there be a stay of execution of the judgment delivered on 30th April, 2019.

2. That in the alternative, pending the hearing and determination of the intended appeal, the court be pleased to issue an interim injunction restraining the defendants from entering into, taking possession , evicting the applicants and/or interfering with Applicant's quiet and/or peaceful possession, selling, charging, transferring, letting plot numbers 313, 314, 315, 316, 319, 320, 321, 322, 323, 324, 325, 327, 328, 331, 334, 337, 338, 339, 340 and 341 ("the suit properties") in all that parcel of land known as L.R No. 10901/46.

3. That in the alternative, the Honourable court do grant an order of status quo.

4. That the costs of the application be provided for.

The application that was supported by the affidavit and supplementary affidavit of the 1st plaintiff, Daniel Karuru Mwaura sworn on 7th May, 2019 and 10th March, 2020 respectively was brought on the following grounds;

1. The plaintiffs have filed a Notice of Appeal against the judgment of this court delivered on 30th April, 2019.

2. The subject matter of the intended appeal is land.

3. The plaintiffs are in occupation of the suit properties and as such they will suffer substantial loss if the orders sought are not granted to protect the properties.

4. The suit properties may change hands before the hearing and determination of the intended appeal.

5. The plaintiffs are exercising their statutory right of appeal.

6. It is proper and just for the application to be allowed as prayed so that the appeal is not rendered nugatory.

The application was opposed by the defendants through a replying affidavit sworn by Edward Rurii Kanjabi on 28th October, 2019. The defendants have averred that none of the plaintiffs are in occupation of the suit properties. The defendants have averred that both at the trial and in the present application, the plaintiffs did not and have not stated as to which of them are in occupation of the suit properties and which plots are in their occupation. The defendants have averred that although the plaintiffs have claimed that there are development activities on the suit properties, they have not specified such activities and where they are taking place. The defendants have averred that the orders sought by the plaintiffs if granted would enable them to once again trespass on the suit properties and interfere with the other members of the

public who have purchased plots within the suit properties.

The defendants have contended that this court became *functus officio* when it delivered its judgment on 30th April, 2019 and cannot be called upon to determine whether the plaintiffs' intended appeal has any chances of success. The application was heard on 15th March, 2021 when Mr. Manyara appeared for the plaintiffs while there was no appearance for the defendants. In his submission in support of the application, Mr. Manyara reiterated the grounds on the body of the application and the two affidavits filed in support thereof. He submitted that the plaintiffs were prepared to comply with any order that the court may make with respect to security.

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 defendants in opposition to the application. The plaintiffs' application was brought under Order 42 Rule 6 of the Civil Procedure Rules. I have set out earlier in this ruling the orders that were given by the court in its judgment of 30th April, 2019. In my view, the said orders are not capable of being executed against the plaintiffs. In the first order, the court granted judgment in favour of the plaintiffs against the defendants for a sum of KShs. 670,000/-. In the second order, the court declined to grant the plaintiffs an order for specific performance and general damages. The final order was on costs and the court ordered that each party should bear its own costs. All these orders in my view were negative orders as far as the plaintiffs are concerned. The plaintiffs were not directed to do or abstain from doing anything. Negative orders are not capable of being stayed. In Kanwal Sarjit Singh Dhiman *v* Keshavji Jivraj Shah [20008] eKLR, the Court of Appeal stated as follows:

> **"The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only."**

The same reasoning was applied by Makhandia J. (as he then was) in Raymond M. Omboga *v* Austine Pyan Maranga Kisii HCCA No 15 of 2010, where he stated as follows:

> **"The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order."**

It follows from the foregoing that the plaintiffs' prayer for stay of execution pending appeal is not for granting. The plaintiffs had an alternative prayer for injunction pending appeal. As I mentioned earlier, the plaintiffs moved the court under Order 42 Rule 6 of the Civil Procedure Rules which deals with stay and injunction pending appeal. As I have already found, the plaintiffs are not entitled to an order of stay. As far as injunction pending appeal is concerned, the relevant rule dealing with that is Order 42 Rule 6(6) of the Civil Procedure Rules. This provision of the Civil Procedure Rules gives the court power when sitting as an appellate court to grant an order of injunction pending the hearing of an appeal before it. This is not the situation before me. This court is not seized of the plaintiffs' intended appeal. It cannot therefore grant an injunction to the plaintiffs pending the hearing of their intended appeal.

I am of the view that the plaintiffs' application for injunction pending appeal should have been made in the Court of Appeal. The Court of Appeal Rules have express provisions for injunction pending appeal to that court. I am in agreement with the defendants that this court having rendered a final judgement in the matter, it cannot be called upon to determine whether the plaintiffs' intended appeal has any prospects of success. That is an issue that can only be interrogated by the Court of Appeal.

The plaintiffs had prayed further in the alternative for an order of status quo. For the reasons that I have given, I am unable to grant this prayer. The prayer for status quo is not anchored on any proceedings. This court having delivered a final judgement in this matter, there is nothing pending before it on the basis of which it can grant an order for status quo.

The upshot of the foregoing is that there is no merit in the Notice of Motion dated 7th May, 2019. The application is dismissed with costs to the defendants.

DELIVERED AND DATED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2021

S. OKONG'O

JUDGE

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

Mr. Nyakundi for the Plaintiffs

Mr. Githuka for the Defendants

Ms. C. Nyokabi-Court Assistant