



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. PETITION NO. 19 OF 2018

REUBEN KIOKO MUTYAENE.....PETITIONER

VERSUS

ERDEMANN PROPERTY LIMITED.....RESPONDENT

AND

KENYA COMMERCIAL BANK LIMITED.....THIRD PARTY

JUDGMENT

1. In the Petition dated 2nd October, 2018, the Petitioner has averred that on 13th June, 2017, he visited the Respondent's ongoing housing project located on L.R. Mavoko/27317/2 which is within Machakos County; that he identified a house on Block 21, Apartment number 03 (House number 2103) at a price of Kshs. 3,000,000 payable by 30th June, 2017 and that on 15th June, 2017, he paid to the Defendant booking fees of Kshs. 10,000 for the house.
2. According to the Petitioner, on 29th June, 2017, a day before the expiry of the agreed deadline, he explained to the Respondent the cause of the delay in completing the transaction; that on 5th July, 2017, he paid to the Respondent a deposit of Kshs. 500,000 and that a new deadline of 15th September, 2017 for the payment of the purchase price was approved by the Respondent.
3. The Petitioner has deponed that he was unable to secure finances from the Third Party in good time; that on 19th January, 2018, the Respondent granted him another extension upto 30th April, 2018 whereby the new purchase price was revised to Kshs. 3,900,000 and that on 1st June, 2018, the Third Party informed him that his loan application had been approved.
4. According to the Petitioner, he requested for an extension of time for the payment of the purchase price after receiving the Respondent's letter of 18th July, 2018, upto 31st July, 2018, by which date, the Third Party had not finalized processing his loan. However, on 20th August, 2018, the Respondent informed the Petitioner that the transaction had been cancelled.
5. The Petitioner has accused the Respondent of failing to give him sufficient notice and an opportunity to be heard on the payment of the balance of the purchase price; holding on his deposit while purporting to have cancelled the sale and disregarding the Petitioner's legitimate expectations and acting contrary to the rules of natural justice.
6. The Petitioner has further averred that the Respondent has trampled on his constitutional rights and fundamental freedoms and that a mandatory order should issue directing the Respondent to accept the balance of the purchase price which is being held by the Third Party.
7. In his Replying Affidavit, the Respondent's Legal Counsel deponed that the dispute between the Petitioner and the Respondent is founded on a Vendor and Purchaser of a housing unit; that the dispute is best addressed through the proper forum and that the prayers being sought have in any event overtaken by events because the subject matter does not exist.
8. The Respondent's Legal Officer deponed that on 15th June, 2017 the Petitioner visited the Respondent's offices and paid the requisite booking fees of Kshs. 10,000 for an existing 3 bedroom apartment which the Respondent was selling at Kshs. 3,900,000; that the Petitioner proceeded to commit himself to the transaction by making a payment of Kshs. 500,000 being the deposit for the purchase price and that the deposit of the purchase price was received by the Respondent on condition that the Petitioner pays the balance of the purchase price on or before 15th September, 2017.
9. The Respondent's Legal Officer deponed that the Petitioner occasionally pleaded with the Respondent to grant him time to sought out his financial issues, which extensions were granted; that the Respondent accorded the Petitioner more than one (1) year and half to pay up the balance of the purchase price and that the Petitioner expressed interest in another of the Respondent's upcoming units vide the email of 29th

August, 2018.

10. The Respondent's Legal Officer finally deponed that there exists no contractual relationship between the Petitioner and the Respondent; that having repudiated the sale, the Respondent drew a cheque of Kshs. 450,000 in favour of the Petitioner being the deposit paid and that the Petitioner is a vexatious person.

11. On her part, the Third Party's Branch Manager deponed that the Petitioner, together with his wife, approached the Third Party seeking for a mortgage facility of Kshs. 3,400,000 which was approved; that the Petitioner requested the Third Party for the extension of the offer period by one (1) month since the purpose of the facility had been cancelled and that to date, the Petitioner has not cancelled the offer to necessitate either a reversal or unlocking of the funds.

12. The Third Party's Branch Manager deponed that the Third Party is not privy to the dealings between the Petitioner and the Respondent in regards to Flat No. 2103 on L.R. No. 27317/2 Great Wall Gardens.

13. In his submissions, the Petitioner submitted that no Sale Agreement was executed between him and the Respondent; that the only document that both parties signed was the "Project Application Form" and that the said Form is not a legally binding document.

14. The Petitioner submitted that the correspondences, together with the booking fees and deposit payments constituted an implied contract, and that the same constitutes a consumer transaction contemplated under Section 2(1) (d) of the Consumer Protection Act. According to the Petitioner, his claim is based on the breach of the Consumer Protection Act; the Administrative Law; the doctrine of Legitimate Expectation and infringement of his fundamental rights guaranteed by the Constitution.

15. It was the submission of the Petitioner that by dint of the promise by the Respondent to provide the suit property to him, he went ahead to commit himself in terms of time, finances, expenses and family resources. It was submitted that by cancelling the offer, the Respondent broke a valid promise and failed to recognize and respect the Petitioner's legitimate expectations.

16. The Petitioner submitted that the Respondent, led by its Managing Director, was in breach of the Fair Administrative Action Act when they failed to give him a hearing before cancellation of the sale and that the actions of the Respondents have infringed on his constitutional rights and fundamental freedoms, which the Petitioner has listed in the submissions.

17. The Petitioner finally submitted that there is no wrong without a remedy; that the court should find that the Respondent's actions were harsh, inconsiderate, unfair, oppressive, discriminative and unconscionable. The Petitioner relied on numerous authorities and Statutes which I have considered.

18. The Respondent's advocate submitted that the arrangement between the Petitioner and the Respondent was premised on a Project Application Form; that the offer letter of 19th March, 2018 for the purchase of Flat No. 2103 was "subject to contract" and that the Petitioner has admitted that indeed there was no contract between himself and the Respondent.

19. The Respondent's counsel submitted that the Petitioner did not tender the balance of the agreed purchase price; that he failed to raise the balance of the purchase price on or before the agreed times; that he was granted numerous extensions notwithstanding and that the breach of the arrangement was on the Petitioner's side.

20. The Respondent's counsel finally submitted that it is improper for the Petitioner to seek to declare a right over someone else's property; that the Petitioner has been offered an alternative housing in close proximity to the apartment but has turned down the offer and that the Petitioner's claim is hopeless.

21. The Third Party's advocate submitted that there is no provision under the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules, 2013 (*the Mutunga Rules*) for Third Party proceedings; that it is not clear what the Petitioner's complaint against the Third Party is and that the Third Party is not privy to the contractual arrangement between the Petitioner and the Respondent.

22. The undisputed facts in this matter are that in June, 2017, the Respondent, through a newspaper advertisement, informed the public about its upcoming project known as Athi River Great Wall Phase 3 located on L.R. No. 27317/2, within Athi River, Machakos County.

23. According to the "Project Application Form" annexed on the Petition, the Petitioner jointly with his wife Winfred Nthuka Kioko identified a 3 Bedroom Apartment, number 2103, owned by the Respondent, for purchase. The Form shows that the mode of payment for the house by the Petitioner and his wife was by way of cash of Kshs. 3,000,000. The Form shows that the said purchase price was to be paid by 30th June, 2017.

24. The Form provided that Kshs. 10,000, being booking fees, was non-refundable and further provided that "failure to honour the agreed payment terms as stipulated above will lead to forfeiture of 10% of the total amount paid". The "Form" was duly signed by the Petitioner and his wife on 13th June, 2017. The Respondent's representative signed the Form on 15th June, 2017.

25. From the email correspondences annexed on the Petition and the Respondent's Affidavit, the Petitioner was unable to pay the Kshs. 3,000,000 by 30th June, 2017. However, in addition to the non-refundable booking fees of Kshs. 10,000, the Petitioner paid to the Respondent a deposit of Kshs. 500,000 on 29th June, 2017.

26. The Petitioner has averred that he requested for the extension of time within which he should pay the balance of the purchase price,

which request was acceded to by the Respondent. In an email dated 19th January, 2018, the Respondent informed the Petitioner that the time granted to him to clear his “cash offer purchase price” had lapsed and that should he wish to continue with the purchase, then he was required to pay a total of Kshs. 3,900,000.

27. The letter dated 19th March, 2018 shows that for the first time, the Respondent forwarded to the Petitioner a “Draft Offer Letter”. In the said Offer Letter, the Respondent informed the Petitioner that it had accepted his offer to buy Apartment Flat No. 2103 “subject to contract by way of a formal Sale Agreement” on terms and conditions.

28. The Offer Letter showed the deposit of Kshs. 500,000 that the Petitioner had already paid to the Respondent and the balance of Kshs. 3,400,000 that was to be paid by 30th April, 2018. It would appear that the Petitioner neither signed the Offer Letter nor accepted its terms.

29. The Petitioner has narrated how it took long for him to secure financing from the Third Party. According to the Petitioner, it was not until 11th August, 2018 when the Third Party emailed him a letter dated 8th August, 2018 advising him of the terms of the approved facility. When the Petitioner informed the Respondent about the approved financial facility, the Respondent responded via an email dated 22nd August, 2018 as follows:

“With all things considered, we are unable to proceed with sale due to past due deadlines towards payments of the unit. We will notify you as soon as the refund cheque is ready for your collection.”

30. The Petitioner has admitted that he never met the deadlines that were set, firstly in the Project Application Form signed on 13th June, 2017 and secondly, the unsigned Draft Offer Letter dated 19th March, 2018. Indeed, the evidence before this court shows that the Respondent extended the deadlines that it had set for the Petitioner to pay the balance of the purchase price on several occasions. That being the case, the Respondent cannot be accused of having breached any of the Petitioner’s rights and fundamental freedoms alluded to in the Petition and the submissions.

31. Indeed, the delay, if at all, for the approval of the financial facility by the Third Party cannot be attributed to the Respondent. In fact, the sale of the suit property was not subject to the approval of the said financial facility.

32. In conclusion, it is my findings that the arrangement between the Petitioner and the Respondent was premised on a Project Application Form, in which he was to forfeit 10% of the paid deposit if he failed to meet the deadline. The Petitioner failed to meet the set terms and conditions in the Project Application Form.

33. Furthermore, the Draft Letter of Offer that was never signed by the parties was a preliminary agreement which was subject to contract by way of a formal Sale Agreement. In the absence of a formal agreement which complies with the provisions of Section 38 of the Land Act and Section 3(3) of the Law of Contract Act, this court cannot compel the Respondent to transfer the suit property to the Petitioner.

34. Indeed, as was held by the Court of Appeal in the case of *Kenya Institute of Management vs. Kenya Reinsurance Corporation (2008) eKLR*, the contract having not been completed within the period fixed for completion, it would be oppressive, unjust and financially injurious to require the Respondent, who has not been guilty of laches, and who has not been paid, to part with its property.

35. As I have stated above, none of the Petitioner’s rights and fundamental freedoms have been breached by the Respondent. In fact, it is the Petitioner who has breached the terms contained in the Project Application Form, and would suffer the consequences of the said breach, by forfeiting 10% of the paid deposit. That being the case, the Petitioner is neither entitled to an order of specific performance or to damages.

36. The inclusion of a Third Party in these proceedings was not only unprocedural but also unwarranted. Indeed, the only parties recognized under the “Mutunga Rules” are a Petitioner, a Respondent and an Interested Party. However, if the Petitioner’s intention was to include his financier in these proceedings as an “Interested Party”, he has not shown any cause of action as against the said financier.

37. Indeed, the Petitioner has not pleaded violation of his constitutional rights by the so called Third Party. The Petition against the Third Party is therefore a non-starter.

38. For the reasons I have given above, I find the Petition dated 2nd October, 2018 to be unmeritorious. The Petition is therefore dismissed with no order as to costs, save for a refund to the Petitioner by the Respondent of the deposit paid less 10%.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF FEBRUARY, 2020.

O.A. ANGOTE

JUDGE