



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 336 OF 2018

LUKAS NJERU &

CAROLINE WACHUKA KARIMI1ST PLAINTIFF/APPLICANT

MICHAEL KARIUKI2ND PLAINTIFF/APPLICANT

WILLIS MURIU & ROSE WAIRIMU MWAURA3RD PLAINTIFF/APPLICANT

VERSUS

TIARA VILLAS LIMITED1ST DEFENDANT/RESPONDENT

SPIRE BANK LIMITED2ND DEFENDANT/RESPONDENT

GARAM INVESTMENTS AUCTIONEERS3RD DEFENDANT/RESPONDENT

RULING

1. On 17th August 2018, the Plaintiffs (herein “the Applicants”) filed a notice of motion application seeking for a temporary injunction order to restrain the Defendants (herein “the Respondents”), their servants and/or agents from selling, transferring or otherwise disposing off properties described as Villas Numbers SPG/24/TV/003 and SPG/24/TV/006, owned by the Applicants respectively. The Villas are situated on Land Reference Number 3734/531 (Original number 3734/5/326) (herein “the suit property”). The order is sought for pending the hearing of the application and subsequent hearing and determination of the suit.

2. The Applicants in the alternative sought for a refund of the sums of money paid to the 1st Respondent in respect of the said Villas at the current market value.

3. On 28th August 2018, the notice of motion application was amended whereby the 3rd Plaintiffs (herein “the 3rd Applicants”) were included in the matter as owners of Villa Number SPG/24/TV/005. On the first day of hearing the application, the matter was certified as urgent as the sale of the suit property was scheduled for 21st August 2018. The matter was then fixed for mention for directions inter parties.

4. By that date on 18th September 2018, the Respondents had entered appearance and the court having heard the parties, directed the parties to explore negotiation of the matter out of court with a view to record a consent settlement. The process continued until the 22nd November 2018 when the court was informed that, the parties had not been able to reach a consent. The court then ordered the main suit be fixed for hearing and in that regard, referred the matter for Case Management Conference before the Hon. Deputy Registrar.

5. On 1st March 2019, the Applicants filed yet another notice of motion application seeking for the same orders as in the amended motion. The court directed the application be served for directions on 6th March 2019. On that date, the court was informed that, the property had been advertised for sale on 12th March 2019. The Applicants indicated that they were ready and willing to pay the 2nd Respondent the outstanding purchase price of Kenya shillings sixty three million (Kshs. 63,000,000) in respect of the Villas. The Applicants indicated that they had already made a total payment of Kenya shillings seventy eight million (Kshs. 78,000,000).

6. The 1st Respondent on its part, invited the court to consider the Replying affidavit filed resisting the sale. While the 2nd Respondent informed the court that, they were relying on the Replying affidavit filed and invited the court to consider the same. After hearing the parties, it became clear that, all the Applicants and the 2nd Respondent are claiming a legal and/or equitable right in the suit property as bona fide purchasers and chargees respectively.

7. Having observed that, the rights of the parties can only be determined upon hearing the main suit, the court directed the parties to address it on the way to maintain the status quo as the hearing of the main suit proceeds. The matter was stood over to 11th March 2019.

8. On that date, each party addressed the court on their proposals as per the court record. Taking into account the limited period the court has before the sale on 12th March 2019 by mid-day, and having considered the documents filed by the respective parties, I first find that, the notice of motion application filed on 1st March 2019, is an abuse of the court process taking into account that, the same was filed when there is another active amended notice of motion dated 28th August 2018, seeking for the same orders and which is still to be heard and determined. Therefore I order the same be and is hereby expunged or struck out of the record.

9. Be that as it were, I note that, the 2nd Respondent advertised this property for sale on 12th March 2019, while aware that the matter is active in court and the court is seized of the same. Although there were no interim orders restraining the sale, but the parties were engaged in negotiations with a view to settle the matter, the 2nd Respondent should have waited for the outcome of the settlement. If the court is to allow the sale to proceed, then the substratum of the suit will be destroyed and there may be no need to hear the matter.

10. The 1st Respondent pleads in the Replying affidavit inter alia that, the suit property has grossly been undervalued. That there is a suit HCCC No. 299 of 2018, in which it has sought for orders restraining the 2nd Respondent herein from selling the suit property. The status of that suit was not brought to the knowledge of the court.

11. Be that as it may, the 1st Applicants informed the court that they have cheques worth Kenya shillings ten million (Kshs. 10,000,000). The 2nd Applicant requested to be allowed to pay the balance of the purchase price of Kenya shillings fifteen million (Kshs. 15,000,000) within four (4) months. Whereas the 3rd Applicants are offering a commitment from Stanbic Bank Limited to pay Kenya shillings thirty eight million (Kshs. 38,700,000) within three (3) months upon the completion of the property being developed and discharge process. The 1st Respondents have offered the 2nd Respondent a total of eight (8) apartments which are not a subject of the suit for sale. However, the 2nd Respondent has declined all these offers and argues that the eight (8) apartments are incomplete.

12. The main prayer herein is an order for a temporary injunction. The law is now settled on the legal principles that govern the grant thereof. The case of; *Giella vs Cassman Brown (1973) EA 358eKLR* requires that the Applicant do prove that there exists a prima facie case (See; *Mrao Limited vs First American Bank Limited & 2 Others (2003) KLR 125*) with high chances of success and that compensation for damages is not adequate. Finally, the balance of convenience tilts in favour of the Applicants. Villas. Taking into account the issues raised by the Applicants, it will be in the interest of justice to determine who among the Applicants and the 2nd Respondents has a prior right over the suit property.

13. Balancing the scales of justice, I shall stop the sale of the suit properties and in particular the Applicants Villas on the following conditions:-

(a) *The 1st Applicants to pay within five (5) days, the sum of Kenya shillings ten million offered the completion of the Villas. The same to be held in a joint interest earning account between its lawyers and the firm representing the 2nd Respondents;*

(b) *The 2nd Applicant to pay a sum of Kenya shillings five million (Kshs. 5,000,000) within fourteen (14) days of the date of this order, to be equally held in a joint account as aforesaid; and thereafter to pay the balance in three equal installments, pending completion of the Villas;*

(c) *The 3rd Applicants to provide a firm commitment and/or professional undertaking of the payment of Kenya shillings thirty eight million seven hundred (Kshs. 38,700,000) within seven (7) days of this order, to reserve their respective apartment;*

(d) *All the other apartments which are not a subject of this suit, can be disposed of as the 1st Respondent has no objection to the same, however, if the apartments have to be disposed of, an independent valuation report be provided before the sale (as the issue of valuation is in dispute);*

(e) *Similarly, if, the 2nd Respondent is inclined to proceed with the sale, it shall give an undertaking as to damages to protect the 1st Respondent if upon hearing the suit, the property is established was sold at an undervalue;*

(f) *If the parties do not adhere to the orders given within the time lines set, the orders shall stand discharged automatically;*

(g) *All the costs associated with the stopped sale (If it does not proceed) will abide the outcome of the main suit.*

14. Those then are the orders of the court.

Dated, delivered and signed in an open court this 12th day of March 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Ms.. Munyasia for the Applicants

Mr. Kipro for 1st Defendant/Respondent

Ms. Karanu for the Defendant/2nd Respondent

DennisCourt Assistant