



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 65 OF 2012

1. JOSEPH MBUGUA KIMANI
2. DAVID S. MAMBO
3. PRISCAH M. GACHIE
4. ASHFORD M. GITAU
5. FREDRICK MUITA
6. JENNIFER WAMBUI
7. ROSEMARY WANJIRU KIHARA
8. LUCY M. MITHOMBI
9. PETER W. WACHIRA
10. BEATRICE J.N. KAGOTHO
11. SIMON MUTHIORA KANYI
12. MARY WARUGURU MUNGAI
13. PETER NDUNGU NGIGE
14. DICKENS OCHIEL
15. CHARLES KIHICO CHEGE
16. PATRICK GATHOGO KOORO
17. PETER NJUGUNA NJOROGE PLAINTIFFS/APPLICANTS

VERSUS

KENYA COMMERCIAL BANK LTD. DEFENDANT/RESPONDENT

(Being an appeal from the Ruling of the Senior Resident Magistrate Hon Richard Odenyo (S.R.M) in Senior Resident Magistrate Civil Case No. 164 of 2005)

(Before B. Thurania Jaden J)

RULING

1. The application dated 29/2/12 seeks orders that:-

1. **“(Spent).**
2. **That the defendants be ordered to furnish all the agreements and particulars of the Plaintiffs’ sub-division (charged) plots.**
3. **A mandatory injunction do issue compelling the Defendants jointly and severally to commence construction of the residential houses as a matter of extreme urgency in favour of the Plaintiffs as agreed in 2007 and to give a detailed account of the construction program.**
4. **An order directing the 2nd Defendant to honour its bank-client rights in terms of the agreements done in 2007 or thereabouts for the implementation of the construction program.**
5. **The costs of this application be provided for.”**

2. It is deponed in the affidavit in support and further affidavit that the Plaintiffs are **Kenyan**s in the Diaspora living and working in the **USA**. That around the year 2007, the Plaintiffs purchased land parcel **LR No. 12715/55** measuring **2.028 Hectares** from the **Kwa Ndege Ltd** through a mortgage facility through the Defendant, **KCB**. Each of the Plaintiffs signed the agreement. The Defendant then opened bank accounts for each of the Plaintiffs. Each of the Plaintiffs deposited **Kshs.500,000/=** in their account. It is further averred that the Defendant was to oversee the construction of the houses on the sub-divisions of the said land and make payments to the **Kwa Ndeke Ltd** in instalments of **Kshs.500,000/=**. The construction of the houses was to take twelve months. The Applicants’ complaint is that no construction had taken place by the date of the filing of this case. That the Defendant is still holding the Applicants title deeds.

3. The application is opposed. The Defendant filed the grounds of opposition dated 8/5/2012 and opposed the application on the following grounds:-

1. **“The application seeks orders of specific performance which cannot be granted at an interlocutory stage. The grant of such orders must await full hearing of the case on its merits. Such an order would be permanent in nature.**
2. **The disputes relates to a commercial contract with terms and obligations binding on both parties. The Plaintiffs/Applicants have not demonstrated that they have complied with their part of the bargain in order to compel performance on the part of the Bank.**
3. **The application is founded on false allegations of fraud on the part of the second Defendant. The fraud has not been proved, and it has not been particularized.**
4. **In order to obtain an order of specific performance or mandatory injunction, the Applicants must show that they are ready and willing to perform their part of the bargain. The Applicants have failed to do so.**
5. **In the Deeds of Assignment signed by the Applicants, the Applicants have**

committed themselves to pay interest on the loan. The clause on interest is independent of and is not conditional on any progress in the project.

6. The deed of Variation was signed specifically to cater for the escalation in costs. It is unlawful, therefore, for the Applicants to refuse to pay interest and demand that the 2nd Defendant the burden of the escalated costs. He who comes to equity must do equity.

7. The availability of the mortgage finance was conditional upon each of the Plaintiffs/Applicants as loan applicants complying with all the conditions set out in Annexure A to the Agreement. The disbursement of the loans was particularly to be against an architect's certificate and subject to the 2nd Defendant's satisfaction.

8. The second Defendant did not commit itself to unconditionally complete the construction of the housing units. No evidence has been presented to show such a commitment. In fact, the second Defendant as a banking institution cannot make such an open-ended commitment as it would go against every notion of a viable commercial enterprise.”

4. The Defendant also filed a replying affidavit and a further affidavit sworn by the company's head of mortgages. It is stated that the agreement for sale was entered into between **Kwa Ndege Ltd** (the developer), the individual Plaintiffs and **KCB**. It is stated that the Developer was to effect the subdivision and transfer the land to the Plaintiff's and have a three bedroomed maisonnette constructed on each of the plots at a price of Kshs.2.5 M. Each of the Plaintiffs was to pay a deposit of Kshs.500,000/=. That the bank agreed to finance the Plaintiffs subject to compliance with the terms and conditions set out by the bank. That the Plaintiffs authorized the bank to release the deposit and the mortgage proceeds to the Developer as per the agreement.

5. It is the bank's contention that it did not commit itself to unconditionally complete the construction of the housing units. That the bank disbursed part of the mortgage proceeds amounting to Kshs.13,000/= to the Developer to commence the constructions. However, due to the delay in the construction works, the cost of construction escalated to Kshs.4.25 M. The Plaintiffs were asked to sign a deed of variation of the agreement for sale to reflect the increased costs if they required further financing. Those requiring additional finance were to be appraised afresh. Those who did not require additional financing were to deposit Kshs.1.75 M in their accounts with the bank. The bank blames the impasse on failure by the Plaintiffs to agree on the way forward on the question of the escalated costs and accrued interest.

6. The application was canvassed by way of written submissions which I have duly considered. Although submissions have been filed by the Applicants herein in respect of the application dated 29/2/12 and the application dated 29/7/13, it is apparent that the directions given on 3/3/2014 were silent on whether the two applications were to be heard simultaneously. Now that the parties are not in agreement on the issue, this ruling is in respect of the application dated 29/2/12 only.

7. It is not in dispute that an agreement was entered into by the parties herein for the purpose of purchase of the land and the construction of the housing units in question. The main issue is who is to blame for the stalled project. Whereas the Applicants have blamed the bank for illegal and unconscionable commercial conduct, the Plaintiffs have not exhibited evidence of the terms and conditions of the agreement. No other payments made have been alluded to by the Applicants except the deposit of the Kshs.500,000/= by each Plaintiff.

8. The bank on the other hand blames the Plaintiffs of failure to agree on the way forward on the issue of escalated costs and interests. This is not a clear and straight forward matter that can be dealt with in a summary manner by grant of orders of mandatory injunction. (See **Kenya Breweries Limited & Another –vs- Washington O. Okeyo Civil Appeal No. 332 of 2000 [2002] 1 EA 109.**

9. With the foregoing, I allow prayer **No. 2** of the application. The Applicants to be furnished with copies of the documents stated therein. The application has been partially successful. Each party to bear own costs.

.....

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **11th** day of **March** 2015.

B. THURANIRA JADEN

JUDGE