



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 284 OF 2013

KAREN BYPASS ESTATE LIMITED..... PLAINTIFF

• **VERSUS -**

PRINT AVENUE AND COMPANY LIMITED DEFENDANT

RULING

1. The plaintiff prays for injunction to restrain the defendant from selling, charging, transferring or dealing with the property known as L.R. Nairobi 23218, Grant Number I.R. 118025. The grant is registered in the name of the City Council of Nairobi. By an unregistered instrument of transfer dated 14th October 2009, the City Council of Nairobi leased the property to the defendant for a term of 99 years from 1st July 2007.
2. The genesis of the dispute is an agreement for sale dated 2nd October 2012. Under that agreement, the defendant agreed to sell all its beneficial interest in the suit land to the plaintiff for the consideration of Kshs 180,000,000. The parties later executed a supplementary agreement dated 4th January 2013 extending the completion date to 28th February 2013. The plaintiff's case is that it paid the 10% deposit of Kshs 18,000,000. A sum of Kshs 62,000,000 was to be paid into an escrow account to be released to the vendor's nominated advocates upon successful registration of the transfer to the plaintiff. The balance of Kshs 100,000,000 was also to be paid into a similar account but to be released to the vendor's advocates upon successful transfer to the plaintiff.
3. The plaintiff contends that the defendant experienced difficulties in procuring a title to the property. The defendant then intimated to the plaintiff that it was terminating the contract. The pith of the plaintiff's suit is a prayer for specific performance. As a corollary, the plaintiff craves a permanent injunction to restrain the defendant from transferring the suit land to any other party. There are two depositions of Daniel Kairu Kiaraho sworn on 4th July 2013 and 8th August 2013 in support of the application. It is averred that in breach of the agreement, the defendant has introduced new purchasers to the property. The plaintiff avers that the defendant is concealing the fact that it has a registrable transfer from the City Council. In addition, the plaintiff states it has invested in the suit land and entered into agreements to subdivide and sell it. In a synopsis, the plaintiff's case is that it stands to suffer irreparable harm.
4. The motion is contested by the defendant. The defendant acknowledges the terms of the two sale agreements. The heart of its defence is that the contract has been *frustrated* by failure to obtain a title. At paragraphs 6 to 13 of the replying affidavit of Johnson Mwai, the defendant avers that it is unable to obtain a registrable transfer or valid title from the City Council of Nairobi. It blames the City Council and the Ministry of Local Government. Since the completion period has lapsed, it pleads that the contract is *incapable* of performance.
5. Furthermore, the defendant avers that the plaintiff only paid a deposit of Kshs 12,000,000 and not

- the 10% deposit of Kshs 18,000,000. The defendant pleads that the plaintiff has failed to demonstrate capacity to pay the balance of the purchase price. In particular, it points to the fact (which is uncontested) that the balance was not deposited into the escrow accounts. The defendant denies that the plaintiff has invested in the land, incurred expenses or suffered other loss. It also denies the allegations that it intends to sell the land to third parties.
6. I have considered the pleadings, depositions and rival submissions. I take the following view of the matter. The principles governing the grant of prohibitive injunctions are well settled. A litigant must rise to the threshold laid in Giella Vs Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has acted in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR 80, Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012] e KLR, George Munge Vs Sanjeev Sharma & 3 others HCCC ELC 677 of 2011 [2012] e KLR.
 7. The conditions outlined in Giella's case (supra) are sequential “so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed” Kenya Commercial Finance Company Ltd Vs Afraha Education Society [2001] 1 E.A. 86.
 8. In Mrao Limited Vs First American Bank of Kenya Ltd and others [2003] KLR 125, the Court of Appeal stated that a *prima facie* case is one –

“Which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.
 9. When I juxtapose those principles against the affidavit evidence, I find further as follows. By executing the original sale agreement and supplementary agreement for sale, the defendant *covenanted* to provide to the plaintiff the completion documents set out at clause 4.2 of the original agreement. At clause 5.1, the vendor nevertheless acknowledged that the property was registered in the name of the City Council of Nairobi but that it was being sold in vacant possession. By accepting the 10% deposit, *consideration* passed.
 10. Although the defendant states that only Kshs 12,000,000 was paid, the available evidence shows a contrary picture. Annexure “DKK8” to the further affidavit of Daniel Kiaraho exhibits a receipt of Kshs 5,000,000 and an RTGS transfer of Kshs 13,000,000. But those are matters best left to the trial court. On the face of it, the 10% deposit of Kshs 18,000,000 seems to have been paid. I say so because there is no supplementary deposition *rebutting* those averments. I thus readily find that the parties intended to create legally binding relations.
 11. Parties are bound by commercial agreements and must keep their part of the bargain. It is not the true province of the courts to rewrite contracts for parties. See Morris & Company Vs Kenya Commercial Bank [2003] 2 E A 605 and National Bank of Kenya Limited Vs Pipeplastic Samkolit and another [2001] KLR 112. See also Balbir Singh Sadhu and another Vs Rose Detho and others Nairobi, High Court case 259 of 2003 [2012] e KLR, Isaac Gathungu Wanjohi Vs Samson Njoroge and another Nairobi, High Court case 615 of 2010 [2013] e KLR, Prime Bank Limited Vs Mulji Devraj & Brothers Limited and 2 others Nairobi, High Court case 318 of 2007 (unreported), Consolidated Bank of Kenya Limited Vs Securicor Security Services Kenya Ltd Nairobi, High Court case 594 of 2003 [2013] e KLR, Michael Njenga Vs Rajmuk Investments Limited & three others Nairobi, High Court case 261 of 2013.
 12. The plaintiff has not presented any cogent evidence of investments or developments on the suit land. True, there is exhibited an agreement for planning and survey of the land marked “DKK 7”. But there is no evidence of the alleged sale of subplots to third parties. I would also venture to say that there is no concrete evidence of a threat of sale of the land by the defendant to other parties. What the plaintiff has are apprehensions of such sale. What is however clear is that by a letter dated 3rd June 2013 marked “DKK 6” the defendant’s legal counsel wrote to the plaintiff’s lawyers with instructions to *terminate* the agreement.

13. Although the plaintiff contends that the defendant has now obtained a registrable transfer from the City Council, no evidence is forthcoming. I am thus minded to find that the beneficial interest of the defendant is in the unregistered transfer dated 14th October 2009 (annexture “DKK 2 B”). What is not in doubt is that the defendant subsequently executed an undated transfer in favour of the plaintiff. The parties had lengthy correspondence in which they both committed to consummate the sale. In all this, the defendant warranted by express promises that it was in a position to complete the transaction. It will be the true province of the trial court on tested evidence to determine whether the contract can be specifically performed. The defendants have obviously experienced difficulties in getting a title. But there is little doubt that they have a beneficial interest that was capable of sale to the plaintiff. It will be for the trial court to find whether the contract has been frustrated and is completely incapable of performance.
14. The defendant has correctly submitted that the plaintiff did not make a deposit of the balance of Kshs 162,000,000 into the escrow accounts. That would have signaled the plaintiff’s capacity to conclude the transaction. But as deposed at paragraph 3(iv) of the further affidavit, the balance of Kshs 162,000,000 was deposited into Court on 18th July 2013. A court receipt was issued on 23rd July 2013. That was pursuant to the conditional interim order of the Court granted on 5th July 2013. I am then unable to say that the plaintiff is not in a position to complete. I would be burying my head in the sand. I cannot also say that the plaintiff has acted in bad faith.
15. Granted all those facts I find that the plaintiff has established a strong prima facie case with a probability of success. The plaintiff has met the threshold of *Giella’s* case (supra) for grant of interlocutory injunction. Having so found, I need not deal with whether damages would be an adequate remedy or to weigh the balance of convenience. I will accordingly exercise my discretion in fairness to the plaintiff. In the result, the plaintiff’s notice of motion dated 4th July 2013 is allowed in the following terms:-
- a. **THAT** the defendant whether by itself, its servants, agents, assigns or howsoever be and is hereby restrained by injunction from charging, offering for sale, selling or leasing to any other party other than the plaintiff, or in any other manner dealing with its beneficial interest in the property known as L.R. No. Nairobi 23218, Grant Number I.R. 118025 until the hearing and final determination of this suit.
 - b. **THAT** as a condition for the injunction in (a) above, the deposit of Kshs 162,000,000 paid into Court shall continue to be held in Court or in an interest earning account in a reputable bank in the joint names of both advocates for the parties until the hearing and final determination of this suit.
 - c. **THAT** the plaintiff shall file and serve a suitable undertaking under its seal for damages.
 - d. **THAT** the main suit shall be heard and determined within one year of today’s date. In default, the order of injunction shall lapse automatically.
 - e. **THAT** the plaintiff shall have costs of this motion.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 11th day of February 2014

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Mr. P. Lutta & Ms M. Kanyara for the plaintiff instructed by Lutta & Company Advocates.

Mr. Ogola T. for the defendant instructed by Onsando, Ogonji & Tiego Advocates.

Mr. C. Odhiambo, Court clerk.

