REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENTAL & LAND DIVISION

ELC SUIT NO. 1245 OF 2014

SAMUEL CHEGE GITAU

JACINTA WANJIKU NGUGI.....PLAINTIFFS/APPLICANTS

-VERSUS-

JOSEPH GICHERU MUTHIORA..... DEFENDANT/RESPONDENT

RULING

1. The Plaintiffs commenced this suit by way of an Originating Summons dated 23rd September, 2014. The Plaintiffs asked the Court to determine whether they were entitled to an order of specific performance directed at the Defendant to cause a subdivision of the suit property and a transfer of any consequent subplot to the Plaintiffs.

2. In support of the Originating Summons, the Plaintiffs also filed an affidavit sworn by the 1st Plaintiff on his own behalf and on behalf of the 2nd Plaintiff. Alongside the Originating Summons the Plaintiffs also filed a Notice of Motion seeking to restrain the Defendant from inter alia, transferring, disposing of, or alienating the suit property being Dagoretti/Riruta/6188 or in any other manner interfering with the Plaintiffs' quiet possession of the same.

3. On 3rd October 2014 I directed, following a Preliminary Objection by the Defendant, that the Originating Summons be deemed a Plaint and that all further pleadings to be filed in this suit be filed as if the suit had been commenced by way of a Plaint. On the same day the Plaintiffs also sought and obtained the Court's leave to file a Supplementary Affidavit. The Supplementary Affidavit was filed on 7th October, 2014 once again duly sworn by the 1st Plaintiff.
4. The Defendant on his part filed a Replying Affidavit on 28th October, 2014 in response to the Notice of Motion dated 23rd September, 2014, the subject of this Ruling.

5. The genesis of this dispute is a Sale Contract dated 1st April, 2008. The Defendant as proprietor of all that parcel of land known as Title No. Dagoretti/Riruta/3102, agreed to sell to the Plaintiffs a portion of his property. The portion as described in the Sale Contract measured 33.3 meters by 29.5 meters. The portion was to be hived off the Defendant's property. The purchase price agreed upon was KShs.2,100,000/=. The subject portion was indeed excised and a new title number given.It became Title Number Dagoretti/Riruta/6187 (hereinafter "the suit property'') The

subdivision was finalized only in September, 2011. The Plaintiffs thereupon took possession of the suit property with the consent of the Defendant. That is all common ground.

6. It is also common ground that of the purchase price amount of KShs.2,100,000/=, the Plaintiffs duly paid KShs.1,900,000/=. Further and from the express terms of the Sale Contract, it was not just the duty of the Defendant to cause and obtain the subdivision of his original property but also, as the Vendor, obtain the Consent to Transfer.

7. Controversy emerges when the Plaintiffs accuse the Defendant of breach and non-completion whilst the Defendant also does the same of the Plaintiffs. The Defendant holds the view that he has not failed or neglected to complete the transaction and that he has obtained all the requisite Completion Documents save the original Title Deed for the suit property (see paragraph 7 of the Replying Affidavit). The Defendant further denies any unlawful intrusion unto the suit property now occupied by the Plaintiffs. Instead the Defendant accuses the Plaintiffs of attempting to excise by force part of the Defendant's property. The Defendant also further accuses the Plaintiffs of refusing to accord the Defendant the chance and opportunity to replace a boundary fence which had been destroyed by the County authorities as they dug up a road.

8. The Plaintiffs on the other hand accuse the Defendant of breach of contract in declining to transfer the suit property to the Plaintiffs despite having obtained the Consent to Transfer in the year 2012. The Plaintiffs further accuse the Defendant of unlawful intrusion and threats to eject the Plaintiffs from the suit property notwithstanding attempts by the local administration to intercede. The Plaintiffs insist they are ready and able to pay the outstanding balance of KShs.130,000/= once the Defendant successfully subdivides and transfers the suit property (see paragraph 14 of the Supplementary Affidavit). The Plaintiffs consequently ask that the suit property be secured by way of an interlocutory injunction and likewise the Plaintiffs possessory interest be secured too.

9. Urging the Motion on behalf of the Plaintiffs, Mr. Githinji submitted that the Plaintiffs had established a prima facie case with a probability of success. Counsel submitted that there was an enforceable Sale Contract between the parties and the purchase price had been paid. The Plaintiffs were already in possession. The Defendant had also expressed the willingness to complete. Consequently and to avoid a situation where the remedy of specific performance, as sought by the Plaintiffs is defeated it was important to secure the property.

10. In reply, the Defendant's Counsel Mr. Mwangombe opposed the Application. Counsel stated that the Plaintiffs could not establish a prima facie case with any probability of success as the Plaintiffs were seeking the equitable remedy of specific performance, yet the contract they seek to explore has been frustrated. The frustration, it is submitted by Learned Counsel, took the form of a portion of the area ear-marked for the Plaintiffs and already occupied by the Plaintiffs being appropriated by the County authority.

11. Further the Defendant submitted that the contract was void as the Land Control Board was not obtained in time. It was not obtained until 45 months following the date of the Sale Contract. This, Counsel submitted, was contrary to the express provisions of the Land Control Act (Cap 302) which dictates that Consents for controlled transactions be applied from within six (6) months of the date of the transaction. Finally, the Defendant submitted that the Plaintiffs had not shown that in the absence of an injunction the Plaintiffs would suffer irreparably.

12. The law on interlocutory injunctions as laid out in the case of **Giella –vs- Cassman Brown Co. Ltd [1973] E A 368** is relatively clear. The three principles to be appreciated and taken into consideration by the Court are rather too obvious to be repeated again and again. I will do so however for the avoidance of doubts. The Plaintiffs need establish at this stage a *prima facie* case with a chance of success. The Plaintiff also needs to convince the Court that in the absence of an injunction, the Plaintiffs are likely to suffer irreparably. Finally where in doubt the Court is to decide the application on a balance of convenience. I must however add that the *Giella* principles are not exhaustive. As the Court in determining an application for interlocutory injunction is

faced with a prayer in equity and discretionary for that matter, the Court must consider all relevant factors including but not limited to the conduct of the parties: see **Bonde –vs- Steyn [2013] 2 EA 8**. The very foundation of granting an interlocutory injuction is the preservation of the subject matter to avoid irreparable damage: see also Order 40 Rule 1 of the Civil Procedure Rules.

13. In the instant cause, without purporting to lay claim to a firm and distinct impression that may pre-empt the trial of this cause that the Plaintiffs have established a *prima facie* case. The Plaintiffs demonstrated that there was an unchallenged Sale Contract between the parties. The Plaintiffs also demonstrated that there was part performance of the said contract.This part performance was through the Plaintiffs paying over 90% of the purchase price and the Defendant granting the Plaintiffs possession of the subject premises. This part performance was also demonstrated in the Defendant having undertaken the survey process of the property as was dictated by the Sale contract and further by the Defendant obtaining the Consent to Transfer from the local Land Control Board albeit after the prescribed statutory period. The Plaintiffs have in such demonstration shown a clear and unmistakable right to be protected and it is such right they claim the Defendant has threatened: see **Mrao –vs- First American Bank of Kenya Ltd & 2 Others 2003 KLR 125** and **American Cyanamid Co. Ltd –vs- Ethicon Ltd [1975] A. C. 396.**
14. The Defendant however resists the orders sought by the Plaintiffs on basically three levels.

15. Firstly that the Plaintiffs are not before the Court with clean hands and have not yet paid over KShs.200,000/=. Of course the Plaintiffs contest this. The Plaintiffs contend that only an amount of KShs.130,000/= is still outstanding. As between the two parallel views and contentions it will be for the trial Court to determine which one holds sway. Suffice to say and note that the final balance of the purchase price was to be paid on the completion date when the Defendant was to hand over the various completion documents. Suffice to add too that the completion seems to have been stretched beyond the original 90 days and on the Defendants own admission at least one final completion document - the Title Deed for the Plot is yet to be availed. The Plaintiffs in my view appear to stand in good stead and the maxim ”he who resorts to equity must come with clean hands” cannot be applied to deny them any relief for the moment and at this interlocutory stage.

16. Secondly, the Defendant contends that the entire transaction is void for want of a proper consent. For that reason, further contended the Defendant, the Plaintiffs cannot be entitled to an order for specific performance. The consent bespoken is the Land Control Board’s Consent. There is no doubt that the transaction sought to be protected and enforced by the Plaintiffs is a controlled transaction. Section 6 of the Land Control Act (Cap 302) states that where the consent of the Land Control Board for a controlled area is not given for a controlled transaction laid in the area, such transaction is void for all purposes.
17. An application for the consent must also be made within six (6) months of the making of the agreement for the controlled transaction by either party. The Defendant has submitted that this was not the case. Neither the Defendant nor the Plaintiffs applied for the Consent to Transfer within the statutory period and for that reason the transaction was void. The Courts have been quick to point out that in the absence of Consent or an application for Consent, an order for specific performance will not issue.

18. The litany of cases starting perhaps with **Patterson –vs- Badrudin Mohammed [1956] 23 EACA 106** through **Kariuki –vs- Kariuki [1983] KRL 225** and ending with **Southern Shield Holdings Limited –vs- Estate Building Society [2013] 2 E A 340** all seem to point to the statement that absent consent,absent an enforceable agreement. The entire contract is rendered void and not even special or general damages could be paid on the basis of such a contract. But yet there is the recent authoritative Court of Appeal decision in **Macharia Mwangi Maina & 87 Others –vs- Davidson Mwangi Kagiri [2014] eKLR, CACA No. 6 of 2011 [Nyeri]**. The Court of Appeal rendered itself so firmly that the mere lack of a consent or failure to obtain one did not automatically render void and unenforceable any controlled transaction but rather the court should always evaluate the evidence before it to determine the case of the missing consent and also if any constructive trust by virtue of part performance by one party had been created.

19. In one way or another the bench in *Macharia Mwangi Maina* case ensured that the sanctity of contract was not undermined. In my view, when a contract is executed in accordance with the law it remains the duty of the parties to the contract to ensure that each party fulfills his obligations under the contract. The obligation to give vacant possession if present must be fulfilled. The obligation to pay the purchase price too. The obligation to obtain and surrender all relevant documents and to finally complete must also be met. That is what performance is all about. In the instant case the parties appear ready to fulfill their obligations. The Defendant says he is ready and only awaits the Title Deed to be issued by the Lands Registry. The Plaintiffs are already in possession. The requisite Land Control Board's Consent has been obtained albeit belatedly.

20. I would hold once again that at this interlocutory stage the Plaintiffs appear to be in good stead. Perhaps the trial Court will have to interrogate the issue of absent consents further and in more detail. The court then will decide whether to safe guard and favour statutory provisions and apply the decisions of **Githu –v- Katibu [1990]KLR 634, Githire -v- Munge [1979] KLR 50, Simiyu –v- Watambalala [1985] KLR 852** amongst others to find that the transaction was null and void. Or the trial Court will have to settle for the more pragmatic decision in **Mwangi & 87 others -v- Mwangi [2014] eKLR** and perhaps also follow the reasoning in the Tanzanian case of **Aziz –vs- Bhatia Brothers Limited, [2000] 1 E. A** which was distinguished in **Southern Shield Holdings Limited –vs- Estate Building Society** (supra) and then safeguard the sanctity of contracts. I leave that to the trial Court but for now point out that equity appears to favour the Plaintiffs as even the consent has been obtained by none other than the Defendant himself.

21. Thirdly, the Defendant has sought to resist the application by the Plaintiffs on the basis of the doctrine of frustration. As has emerged from case law, the basis and principles of that doctrine can be summarized in the following words:-

> "The *doctrine* of *frustration* was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises … The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances … (2) Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended … (3) Frustration brings the contract to an end forthwith, without more and automatically. (4) The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it … A frustrating event must be some outside event or extraneous change of situation … (5) A frustrating event must take place without blame or fault on the side of the party seeking to rely on it …"

22. Those were the words of Lord Bingham MR in the case of **J. Lauritzen AS v Wijsmuller BV (The Super Servant Two) [1990] 1 Lloyd's Rep 1,8** the case of a drilling rig transportation contract which was claimed to having been frustrated by the sinking of the agreed transportation vessel, which vessel was the one the transporter had designated for performance of the contract. Those words and the set principles were recently applied in the case of **Blankley v Central Manchester and Manchester Children's University Hospital NHS Trust [2014] 1 W.L R 2683.** The principles are relatively clear.
23. The application of the doctrine since the mid Seventeenth Century (see **Paradise –vs- Jane [1558-1774] All ER 172** and also ***Chitty on Contracts* , 31st ed (2012), vol 1, para 23**) has seen several instances developed and appreciated by Courts as instances which lead to the termination of contracts or agreements by reason of supervening events beyond the control of either party. Examples of such instances have been given in the case of **Gimalu Estates Ltd & 4 others v International Finance Corp & Another [2006]eKLR** to include, but not limited to, the destruction of subject matter, death or incapacity of a party in personal service contracts and change in the law. For the supervening event, however to be held to frustrate a contract, it must not be due to the act or elector or at the behest of the party seeking to reply upon it but rather it ought to be due to some outside event or extraneous change in situation: see **Charles Miriti –vs**

Thananga Tea Growers Sacco Ltd [2014] eKLR where sudden lack of finances due to crop failure and drought was deemed a supervening event. But as Lord Bingham MR warned in the case of the ***The Super Servant Two*** (supra) the doctrine is not to be invoked lightly and must be kept within narrow limits otherwise there will be a frequent termination of contracts.

24. In the instant case the supervening event is an alleged excision by a third party of part of the Defendant's property which was sold to the Plaintiffs. The Third Party is said to be the Nairobi County Government. It is not particularly clear how the third party has excised or caused to be excised a portion of the land. Indeed it is not even clear whether it did truly happen. At this initial stage, it would not be in order to so find that a portion of the land has been excised and hence the contract has been frustrated. The supervening event is not so obvious, in other words.
25. Also, the evidence seems to point otherwise. The Defendant is awaiting the issuance of a Title Deed. Presumably the Title Deed will comprise land measuring the equivalent acreage sold to the Plaintiff as that is what the Mutation Forms exhibited by both parties state. Secondly, there is no evidence by way of affidavit before the court that the Defendant has attempted to obtain explanation from the third party on the alleged excision. At this stage, I would not in the circumstances hold that the contract has been frustrated. Indeed, if one was to go by the Sale Contract the Defendant was duty bound to avail to the Plaintiff a portion of land measuring 33.3 x 25.4 meters. Even if the third party was to acquire the land then it will have to be the Defendant to be compensated so long as no transfer has been effected in favor of the Plaintiffs.

26. I would also state that following the Defendant's averments under paragraph 7 of the Replying Affidavit, there is prima facie evidence that this is not a transaction which is commercially impossible to fulfill.

27. Finally the Defendant has stated that the Plaintiffs cannot show that they will suffer irreparably. I must state that land has a rather interesting inherent and natural value ordinarily beyond the calculation of everyday commerce. It cannot be likened to a chattel which can be easily purchased. When therefore the dispute is over a transaction, the Court ought to treat land more than an ordinary chattel than can be easily found on any commercial street. If it is lost tracing the same may not be possible.

28. For the foregoing reasons, I am satisfied that the subject property and the staus quo ought to be preserved and that Plaintiffs are deserving of an injunction as sought in the Notice of Motion dated 23rd September 2014. I allow the application in terms of the prayer number 3.

29. I also award costs to the Plaintiffs.

30. Orders accordingly.

Dated, signed and delivered at Nairobi this 5th day of December 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiffs

..... for the Defendant