



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 291 of 2012

JAMES CHEPKOIYWA CHEBET.....1ST PLAINTIFF/APPLICANT

ARNOLD MASWAI.....2ND PLAINTIFF/APPLICANT

-VERSUS-

JANE TOO.....DEFENDANT/RESPONDENT

RULING

The Plaintiff's Notice of Motion dated 24th May 2012 is expressed to 3A of the civil Procedure Act Order 40 Rule 11, 2 and 5 of the Civil Procedure Rules 2010 and all other enabling provisions of the law and seeks the following orders:-

1. That a temporary injunction be granted prohibiting the Defendant/Respondent by herself, here agents, servants or employees from offering for sale, selling, transferring, leasing on in anyway dealing with all that parcel of land known as Nairobi L.R.No.21984/52, or interfering with the plaintiff's peaceful possession pending the hearing and determination of this suit.
2. That there be a temporary injunction restraining the Defendant by herself her agents, servants or employees from breaching or committing any further breach of agreement for sale to the 1st Plaintiff over the lower half acre portion of land known as Nairobi L.R. No. 21984/52 or in any way cancelling purporting to counsel, terminating retracting or in any way withdrawing from the agreement for sale of the said property to the plaintiff pending the hearing and determination of this suit.
3. That the costs of the application be provided for.

The Plaintiffs application is premised on grounds 1-8 on the face of the application as well as the affidavit sworn in Support by JAMES CHEPKOIYWA CHEBET and a further supplementary affidavit sworn on 8th October 2012. It is the case of the plaintiff that on the 17th August 1999 the 1st Plaintiff entered into an agreement for sale with the defendant for the purchase of half acre parcel of land which was to be excised from the 1st Defendant's L.R.No. 21984/52 at a purchase price of Kshs. 1,300,000/= as per the copy of the sale agreement annexed to the 1st Plaintiffs supporting affidavit as JCCI. The sale agreement dated 17th August 1999 was revoked and superseded by another agreement for sale dated 24th January, 2005 made between the 1st Plaintiff and the Defendant. In the subsequent agreement for sale the Defendant acknowledges having been paid the full purchase price of Kshs. 1,300,000/=.

The Plaintiffs further aver that they took possession of the lower half acre of L.R No. 21984/52 and put

up some permanent residential units and continued being in quiet possession up to 28th April 2012 when there was a violent attempt to evict their servants and/or agents who were occupying the same permanent residential units of the attempted forceful eviction to Hardy Police Station who thwarted the unlawful eviction. Subsequently the Plaintiffs on 25th May 2012 filed the instant suit and on 12th June 2012 Hon. Justice Kimondo ordered that the parties maintain the status quo pending the hearing of the injunction application.

The Defendant has opposed the application for injunction and has filed a replying affidavit sworn on 26th September 2012 and a further affidavit sworn by Daniel Mwangi Kibicho on 21st November 2012. The Defendant acknowledges the agreement for sale between herself and the 1st Plaintiff but avers that the agreement could not be completed because the city council of Nairobi could not approve the subdivision for a portion of less than 1 acre in the locality where the suit property is situated. It is the Defendant's contention that the Agreement for sale was void abinitio for being in contravention of the City Council Bye Laws of Subdivision. The further affidavit by DANIEL MWNAGI KIBICHO has annexed communication from the City Council to the effect that in 1998 the City Council Bye Laws did not permit subdivisions of less than 1 acre in the Karen area where the suit property is situated. The Defendant avers that she had expressed reservations to the 1st Plaintiff at the time of entering into the agreement for sale that the City Council might not approve the subdivision of half acre.

The 1st Plaintiff in his supplementary affidavit sworn on 8th October 2012 and filed in court on 22nd October 2012 denies that there is prohibition by the City Council of Nairobi in regard to subdivision of half portions and maintains that no evidence was adduced to support the claim.

The 1st Plaintiff claims that the Defendant wants to avoid a valid contract which is irrefutable. The 1st Plaintiff states that he would be entitled to an order for specific performance and the Defendant's assertion to refund the purchase money 13 years after the contract was entered into would be a gross injustice and would occasion the 1st Plaintiff loss of opportunity.

Other issues are canvassed in the parties affidavits as to what caused the delay completing the transaction ranging from delays on the part of the Advocates handling the transaction, loss of original title documents and the question of double transfers that required to be effected from the original seller to the Defendant and from the Defendant to the 1st Plaintiff. However, I do not consider that the decision on this application will turn on the handling of the transaction.

In her opposition to the Plaintiff's application the Defendant on 12th June 2012 filed grounds on opposition as hereunder:-

(a)The Plaintiff's application for injunctive relief does not meet the threshold established by **Giella Vs. Cassman Broun Ltd (1993) EA 358**.

(b)The Plaintiffs application and indeed the entire action for specific performance is fatally defective as the same is based on a illegal and null sale agreement and this Honourable Court cannot perpetuate an illegality.

(c)That the sale Agreement is in contravention of City Council of Nairobi byelaws that barred the subdivision and sale of half an acre of properly in Karen.

(d) That the Plaintiffs are guilty of laches and acquiescence and have disentitled themselves of the equitable relief sought.

The primary issue for determination by the court is whether or not the plaintiffs have established a prima facie case with a probability of success.

The 1st Plaintiff has placed before the court evidence that demonstrates a legal interest in the suit property

through the Sale Agreement entered into and the payments made with respect to the same. Indeed it is admitted by the Defendant that the full purchase price of Kshs. 1,300,000/= was paid and that the 1st Plaintiff was put into possession of the portion of the half acre he was purchasing wherein he effected some developments.

The Defendant has averred that the agreement was illegal for being in contravention to the City Council of Nairobi By Laws. It is appropriate to note that the communication from the City Council of Nairobi annexed the further affidavit of DANIEL MWANGI KIBICHO made reference to a 1998 by elaw whereas the Sale Agreement between the parties was in 2005, the agreement of 24th August 1999 having been revoked and superseded by the 2005 agreement. It is unclear whether the 1998 bye laws on subdivision still held good in 2005.

It is instructive also that the specific bye law was not exhibited by the Defendant to enable the court to review the same to ascertain its applicability.

The Defendant's allegation of illegality of contract cannot in the premises be sufficiently dealt with at this interlocutory stage and will need to be determined with finality at the trial of the suit upon presentation of further evidence. Whereas for instance the Defendant obtained a certificate of title in respect of 21984/52 on 1st July 2012 there is no evidence that a subdivision approval for the portion of half acre was submitted to the City Council of Nairobi and was rejected for any reasonable time.

The counsel for the Defendant has referred the court to several authorities on the effect of the illegality of contract. The court agrees that a contract that is shown to be illegal cannot be specifically performed and that the same is void ab initio and is incapable of passing any benefit. However, in the instant case the Defendant has not discharged the burden of establishing the contract of 2005 between the 1st Plaintiff and the Defendant was illegal and therefore null and void and perhaps that remains a burden that the Defendant has to discharge at the trial. Until that happens, the position remains that if the contract is alive and as the Plaintiff has performed his part he has at this stage established he was a prima facie case against the Defendant with a probability of success. As Hon. Justice Ringera (as he then was) observed in the case of Mugo & another vs. Kiragu & 5 others (2002) KLR 543 while commenting on the nature of interlocutory reliefs when he stated thus:-

“... at the interlocutory stage, the court is not called upon to determine with finality the rights and obligations of the parties. All the applicant needs to show is that there is a prima facie case with a probability of success at trial” I am satisfied that the Plaintiffs have discharged this burden.

As regards whether or not the Plaintiffs will suffer irreparable damage if the injunction is not granted the court observes that the parties commenced this transaction in 1999 now 13 years ago. The Plaintiff as the Defendant has admitted paid the full purchase price by 2005 when he took vacant possession. In my view the exact monetary value of the suit premises having regard to the conduct of the parties may be unquantifiable. The Defendant has made an offer to refund the 1st Plaintiff the purchase price but having regard to the nature land the value of the land the subject of the sale may have escalated many times over from 1999. In the circumstances of this case it is my view that damages may not be an adequate remedy. The Plaintiff seeks an order for specific performance and it is necessary that the subject matter be maintained until the suit is finally determined.

The Plaintiffs have been in possession of the suit premises at least for the last 8 years since the agreement for sale and I would in the premises resolve the issue of balance of convenience in favour of the Plaintiff if there is need to do so. However as I have held the Plaintiffs have established there is a prima facie case with a probability of success and that damages would not be an adequate remedy I need not consider the balance of convenience in the determination of this application.

Before I conclude this ruling the Defendant in her grounds of opposition indicated that the Plaintiffs are guilty of laches and acquiescence and have disintitiled themselves of the equitable relief sought.

I will only observe that the Defendant contracted to sell one half acre portion to be excised out of L.R. No. 21984/52 to the Plaintiff but on the availed material and information there is no evidence that any subdivision scheme was submitted for approval by the city Council of Nairobi. The Defendant as per the certificate of Title became registered as owner of the suit premises on 1st July 2010. It therefore does appear to me that the parties entered into a contract that had ill defined timelines and indeed the Agreement dated 24th January 2005 left the completion party can blame the other of laches.

In the end result and for the reasons set out above I grant an injunction in terms of prayer No. 4 of the Plaintiff's Notice of Motion dated 24th May 2012.

I order that the costs of the application be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the 1st Plaintiff

..... for the 2nd Plaintiff

..... for the Defendant