REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

ENVIRONMENTAL & LAND CASE 64 OF 2012

VIRGINIA SUSAN NJERI…….…..……...…….....PLAINTIFF

- VERSUS -

AYDEN GROUP KENYA LIMITED …….....1ST DEFENDANT

ERDEMANN PROPERTY LIMITED ……..…....2ND DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 8th February 2012. It is expressed to be brought under order 40 of the Civil Procedure Rules 2010. The plaintiff prays for an injunction to restrain the defendants from selling, transferring or dealing with a flat numbered 7 on LR 209/12108. There are two affidavits in support of the motion sworn by the plaintiff on 8th February 2012 and a supplementary affidavit sworn on 20th February 2012. In a synopsis, the plaintiff avers that she was offered by the defendants, and accepted to purchase the flat for Kshs 2,800,000. She paid a 10% deposit of Kshs 280,000 in terms of a sale contract dated 15th November 2011. She alleges that in breach of that agreement, and without issuing a valid 21 days' notice, the defendants have purported to rescind the sale and to offer the flat for sale to third parties. As the plaintiff desires to complete the sale, she thus prays for injunctive relief.

2. The motion is contested. In a replying affidavit sworn by James Ojwang on 13th February 2012, the 1st defendant avers that the plaintiff failed to complete the sale within prescribed time in the agreement. In particular, the plaintiff or her financiers failed to render the requisite professional undertaking by 16th December 2011. The sale was thus rescinded, the deposit refunded and the unit sold to a third party. The third party has paid the purchase price in full and is in possession. The 1st defendant also avers that it incurred interest on its development loans due to delays by the plaintiff. By 1st February 2012, interest accrued was Kshs 6,181,048.20. The 1st defendant avers that time was of the essence under the contract of sale. Accordingly, it prays for dismissal of the motion. The plaintiff has sought to rebut most of those averments in the supplementary affidavit sworn on 20th February 2012.

3. The 2nd defendant, in turn, has filed grounds of opposition dated 14th May 2012. The application is attacked for want of merit. In particular, the 2nd defendant submitted that the plaintiff has not laid any basis of liability of the 2nd defendant. To that extent, the plaintiff has not established a *prima facie* case for grant of interlocutory relief.

4. I have heard the rival submissions. I take the following view of the matter. When the plaintiff approaches the court for injunction, she must rise to the threshold for grant of interlocutory relief set clearly 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 she 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 misconducted herself 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.

5. I would then juxtapose the facts of this case against the law. I have studied the deed of assignment of agreement for sale dated 15th November 2011. It was a supplemental deed to an earlier agreement for sale made between the plaintiff and the 2nd defendant. The 2nd defendant was the vendor. It is common ground that the 1st defendant offered the plaintiff the flat at the purchase price of Kshs 2,937,490. The above sum comprised the principal purchase price of Kshs 2,800,000; legal fees of Kshs 47,450; and, stamp duty and stand premium of Kshs 90,937,490. The plaintiff paid 10% deposit under the terms of the original agreement for sale. Completion date was 30th November 2011.

6. Under clause 3 (b) of the deed, the plaintiff's financiers, Ecobank, were to provide a suitable undertaking for the balance of the purchase price of Kshs 2,520,000. The vendor would then surrender the completion documents set out at clause 2 of the deed. Clause 6 (a) provided;

"6. (a) It is expressly agreed by the Assignee that in the event that the Assignee is unable to pay the balance of the purchase price in accordance with the terms of this Assignment and if the Assignor is otherwise ready and willing to complete the transaction then upon the expiry of a Twenty-One (21) day Completion Notice sent to the Assignee on or after the Completion Date, the Assignee (if still unable to complete) shall forfeit ten percent (10 %) of the Purchase Price in favour of the Assignor as liquidated damages and shall have no interest or claim in the property whatsoever and the Assignor shall be entitled to re-sell the property AND any refund due to the Assignor shall be made after the successful conclusion of such re-sale without any interest".

7. I am left in no doubt that time became of the essence. There may have been no express wording saying time would be of essence. But it is clear as day and night in the totality of the agreement. In *Sagoo Vs Dourado* [1983] KLR 365 the court cited with approval *Halsbury's Laws of England*, 4th Edition, paragraph 481 as follows;

"The modern law in the case of contracts of all types, may be summarized as follows. Time will not be considered to be of essence unless:

(1) The parties expressly stipulate that conditions as to time must be strictly complied with;

(2) The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence, or;

(3) A party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence".

See also *Kazungu Karisa Vs Cosmus Angore Chanzeva* [2006] e KLR.

8. From the evidence before me, the plaintiff or her financiers had not provided a suitable undertaking for the balance as late as 16th December 2011. The completion date of 30th November 2011 had long passed. True, the deed provided at clause 6 (a) for a 21 days completion notice. The plaintiff says none was served. Clause 6 (b) of the deed also provided as follows;

"6. (b) In the event of failure by the Assignor to complete the Assignment on the Completion Date, then the Assignee shall be entitled to serve a notice in writing to the Assignor requiring the Assignor to

remedy the breach within a period of Twenty-One (21) days from the date of the notice and in default the Assignee shall, without prejudice to its other rights in law be entitled to rescind the contract in which case the full amount of all payments made by the Assignee to the Assignor shall be refunded to the Assignee forthwith without any interest and deductions and the Assignee shall have no other claim or remedy against the Assignor".

9. The plaintiff's further answer for the delayed completion is found at paragraphs 6, 8, 9, 11 and 12 of the supplementary affidavit as follows;

*6. **THAT** the Defendants and/or their Advocates for reasons beyond*

Knowledge, delayed the delivery of sale Agreement and my Advocates on record had to literally beg and cajole the Defendant's Advocates to furnish them with this (sic) documents.

*[Annexed hereto and marked **VSN 7** are letters from my Advocates to the Defendants dated 29th August 2011, 21st September 2011, 12th October 2011 which are self explanatory].*

*8. **THAT** in the circumstances, I only received the Agreement for sale and Deed of Assignment of the Agreement for sale on the 25th October 2011, more than 60 days had lapsed from the time of accepting the offer and which affected the 90 days within which I needed to arrange the finance.*

*9. **THAT** being aware that the bank requires time to carry out due diligence on any proposed collateral for finance, I requested my Advocates on record to request the Defendants to provide the envisaged 90 days to complete from the date of execution, taking into account the delay occasioned by the Defendant in providing the documents after their acceptance of my deposit, and my Advocates did write on the 1st November 2011. [Annexed hereto and marked **VSN 8** is a copy of the duly received letter].*

*11. **THAT** faced with the limited time to effect the Agreement and meet the deadline of the completion, unreasonably fixed for 30thNovember 2011 by the Defendant, I executed the same and had them forwarded to the Defendants, pointing out to them to deal expeditiously in light of the effluxion of time. [Annexed hereto and marked **VSN 10** is a copy of my Advocates letter dated 15th November 2011].*

*12. **THAT** the Defendants furnished my Advocates with the Deed of Assignment for Sale on the 30th November 2011, the very date, the Defendant was insisting that the transaction be completed. [Annexed hereto and marked VSN 11 is a true copy of the Defendant's Advocates letter dated 29th November 2011 and received by my Advocates on 30th November 2011].*

10. I have formed the opinion that the plaintiff had not made sufficient arrangements to meet the balance of the purchase price. To that extent she cannot escape the blame. She largely authored her misfortune. The failure to serve 21 days notice to complete was obviously in breach of the deed. But it cannot by itself ground a strong *prima facie* case. That claim is largely defanged by the plaintiff's failure to pay the balance of the purchase price inside the completion period or to provide a suitable undertaking by her financiers. The defendants may not have acted entirely in good faith. They might even have contributed to the delays. The trial court will disentangle the truth upon tested evidence. My take is that from the evidence before me and particularly the deed of assignment of agreement for sale, the plaintiff has failed to establish a strong *prima facie* case with a probability of success.

11. There is also another reason to deny the injunction. The matter would seem to have been overtaken by events. Annextures **"J10 7"** to the replying affidavit of James Ojwang sworn on 13th February 2012 is material. It is a new and stamped deed of assignment of agreement dated 31st December 2011 for sale of the flat to Susan Muthoni Geturo, a third party. It is deponed that the latter has paid the full purchase price and is in possession. The application for injunction against sale to any other party was only presented to court on 8th February 2012 long after the sale. The third party is not a party to this suit.

12. Finally, it is not lost on me that the value of the subject matter is ascertainable. If the plaintiff prevails at the trial, damages would be available. It is not pleaded and I have no evidence that the defendants would be unable to pay. Granted all of those circumstances, even the balance of convenience does not tilt in favour of the plaintiff. In the result, I have come to the conclusion that the plaintiff's notice of motion has not met the threshold for grant of interlocutory prohibitive injunction. I dismiss it with costs to the defendants.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 12th day of July 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Sekwe for the Plaintiff.

Mr. Maliti for Mr. Mugalo for the 1st Defendant.

Mr. Maruti for the 2nd Defendant.