



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 25 OF 2020

BRADLEY HORIZONS LIMITED.....PLAINTIFF/APPLICANT

VS

SANLAM GENERAL INSURANCE LIMITED...DEFENDANT/RESPONDENT

RULING

1. The application before me is dated the 13/10/2020 brought under Order 40 rules 1 and 2 of the Civil Procedure Rules, Section 1A and 1B and 3A of the Civil Procedure Act and Section 68 of the Land Registration Act, 2012 seeking the following orders;

a. That this Honourable Court be pleased to certify this application as extremely urgent and the same be heard ex-parte in the first instance.

b. That this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendant/Respondent through its agents, servants, employees or anybody acting under it from transferring of sale, disposing off and/or alienating to third parties land parcel numbers LOC.11/MARAGI/3026,3027,3028,3029,3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041,3042, and 3043 pending the hearing and determination of this application interparties.

c. That this Honourable Court be pleased to issue a temporary order of inhibition on Land Parcels numbers LOC.11/MARAGI/3026,3027,3028,3029,3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041,3042, and 3043 prohibiting any further dealings pending the hearing and determination of this application or until further Court orders.

d. That the Honourable Court be pleased to issue and orders of injunction restraining the Defendant/Respondent through its agents from selling disposing or transferring and/or alienating to third parties land parcel numbers LOC.11/MARAGI/3026,3027,3028,3029,3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041,3042, and 3043 pending the hearing and determination of this suit.

e. That the costs of this application be provided for.

2. The application is premised on the grounds on the face of it and the Supporting Affidavit of John Kamau Githinji and Geoffrey Njuguna Kabugu who have deponed that they are the Chairman and Secretary of the Applicant respectively. That the Applicant entered into an agreement of sale with the Respondent on the 24/10/19 in respect to the sale and purchase of the suit lands at the consideration of Kshs. 70 million out of which Kshs 7 million was paid and acknowledged as deposit by the Respondent. That it was a term of the agreement that the completion shall be 120 days from the date of the sale.

3. That the Applicant sought a financing facility with Equity Bank Limited to finance the completion of the purchase price in the sum of Kshs 63 million. That the loan was declined because the suit lands under purchase and intended to be offered to the bank as security were not owned by the Respondent but registered in the name of Gateway Insurance Company Limited. They termed this misrepresentation by the Vendor/Respondent.

4. It is their averment that the agreement of sale was frustrated and breached by the Respondent and that the Respondent has embarked on disposing the suit lands to third parties without complying with the agreement dated the 24/10/19 and in particular failing to serve the notice of completion as per clause 11.1 of the said agreement. That their attempts to lodge a caution on the said titles was declined by the Registrar of Lands, Murang'a on the grounds that the Respondent does not have a registrable interest in the suit lands and that no proof of change of name had been registered on the titles.

5. The application is opposed. The Respondent filed grounds of opposition and a replying affidavit all dated the 23/10/2020. The replying affidavit is deponed by Ms Gladys Muema, in house legal counsel for the Respondent. She stated that the letter of offer addressed to the

Applicant and dated the 13/5/2019 discloses the vendor of the suit lands as Gateway Insurance Co Limited (now known as Sanlam General Insurance Limited). A copy of the change of name dated 9/8/2016 was annexed in support. That the Plaintiff signed the said letter of offer without any protest on the basis of which the parties executed an agreement of sale dated the 24/10/19.

6. That the Applicant failed to complete the sale forcing the Respondent to issue a completion notice in accordance with clause 11 of the agreement of sale stipulating the breach and giving 21 days' notice to remedy the breach failure to which the agreement would be rescinded. That on 11/12/19 the Applicant sought for extension of completion to pay the balance of the purchase price, a request that was acceded by the Respondent. That the Applicant failed to pay the balance of the purchase price and on the 4/2/2020 the Respondent notified the Applicant in writing of the rescission of the agreement and the forfeiture of the deposit of Kshs 7 million in accordance with clause 11 of the agreement of sale.

7. She contended that the agreement has been terminated by rescission and the Respondent sold the suit lands to a third party who has paid Kshs 54 million out of the purchase price of Kshs 72 million. That attempts by the Applicant to oppose the issuance of the land control board consent in respect to the new transaction was declined by the land control board on grounds that there were no valid reasons to stop the process. Equally the Applicant's attempt to register cautions were declined on grounds inter alia that the completion date for its agreement with the Respondent was long passed.

8. That the Applicant stands to suffer no irreparable loss considering that its quantified claim is Kshs 7 million and further that the Respondent is an insurance company with assets over Kshs 3.2 billion and would be able to pay out the Applicant should the Court hold in its favour.

9. The Applicant filed written submissions pursuant to the directions of the Court given on the 28/10/2020 while the Respondent filed none.

10. The Applicant submitted that the sale was frustrated by the Respondent purporting to sell to the Applicant suit lands registered in the name of Gateway Insurance Co Limited without having first effected transfers of the suit lands to the Respondent's name. It contends that a mere change of name does not confer ownership of the suit lands to the Respondent. That the Respondent had no capacity to sell the suit lands to it. That the Respondent was motivated by the second sale of the lands to a third party for the sum of Kshs 72 million thus making a profit of Kshs 9 million at the expense of the Applicant and which it termed as unreasonable enrichment.

11. The Applicant reiterated that it had established a prima facie case with a probability of success and that it stands to suffer irreparable harm in the sum of Kshs 7 million paid to the Respondent as deposit.

12. I have considered the substantive motion, the rival affidavits, all the materials placed before the Court, the written submissions (as filed) and the relevant authorities and the question for determination remains whether the Applicant is deserving of the equitable remedy of injunctive relief.

13. The principles on which Courts will grant an injunction are well known. This Court restated those principles in **Giella v. Cassman Brown and Co. Ltd (1973) EA 358**, together with the mode of their application as follows:

“An Applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience”.

14. In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to;

- a. establish a prima facie case,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. show that the balance of convenience is in his favour”.

15. Prima facie case was defined by the Court of appeal in the case of **Mrao Vs First American Bank (K) Limited** as where an Applicant establishes that his legal right has been infringed by a Defendant thereby calling for a rebuttal by the latter.

16. In the present case the Applicant contends that the agreement of sale was breached and or frustrated by the Respondent. It cites a number of reasons; that the Respondent misrepresented itself by selling land that was not registered in its name. that the change of name from Gateway Insurance Co Limited to Sanlam did not confer it the legal title in the lands; that because of the misrepresentation the Applicant was unable to obtain the loan from Equity Bank to finance the completion of the purchase price; that the Respondent did not issue any notice in accordance with the agreement of sale.

17. The Respondent states that the agreement was rescinded in accordance with the terms and conditions of the agreement before the suit was filed. That the deposit was forfeited in accordance with the agreement. That thereafter the Respondent retained its ownership and was free to contract with another interested party.

18. I have perused the agreement of sale which shows that the timelines for completion of the agreement were not met by the Applicant even with extension of the completion date. The notice of rescission was issued pursuant to clause 11 of the agreement of the parties. I do not wish to go into the merits of the dispute between the parties so that the issues in controversy may be heard by the trial Court on merit. The Applicant has not demonstrated the presence of a right that requires protection by this Court. I say so because the sale agreement was not subject to obtaining a loan facility from the bank; the letter of offer indicated the vendor as Gateway insurance Co Limited; prima facie the

agreement has been rescinded; the land has been sold to a third-party evidence of agreement and payment of part purchase price has not been challenged.

19. On the second limb of **Giella Vs Cassman Brown** that the Applicant must demonstrate that damages will not be an adequate remedy the Applicant submitted it will suffer loss of Kshs 7 million paid as deposit. The Respondent argued that the Applicant stands to suffer no loss and if any it is compensable by an award of damages which in this case is adequate remedy.

20. It is not in dispute that the Applicant did pay the sum of Kshs 7 million as deposit of the purchase price. I find that the Applicant's loss if any is quantifiable and can be compensated by an award of damages.

21. On which side does the balance of convenience lie? Having held that the Applicant has established no prima facie case and the Court not being in doubt, the balance of convenience tilts in declining the application for injunctive relief.

22. The issues of misrepresentation and breach of contract are best left for the trial Court to hear and determine.

23. The Court is therefore unable to grant the orders sought by the Applicant.

24. The application is dismissed with costs to the Respondent.

25. It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 3RD DAY OF DECEMBER 2020.

J.G. KEMEI

JUDGE

Delivered online in the presence of:

Kirubi for the Plaintiff/Applicant

Defendant/Absent: Absent

Njeri and Kuyiki, Court Assistants