



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 376 OF 2018

PETER S MUTURI KARANJA.....PLAINTIFF

= VERSUS=

WILSON MAINA WANJIKU.....DEFENDANT

RULING

1. Through a plaint dated 30/8/2018, the plaintiff brought a claim for, *inter alia*, an order of specific performance in relation to a sale agreement dated 19/3/2018 in respect of Land Title Number **Nairobi Block 110/962**. Together with the plaint, he filed a Notice of Motion dated 30/8/ 2018 in which he sought a temporary injunction restraining the respondent against issuing and/or enforcing a rescission notice or any other notice in regard to the said sale agreement, pending the hearing and determination of this suit. He also sought an injunction against the respondent and or his agents against purporting to effect any dealings in the nature of sale, transfer, charge, gift, lease, mortgage, pledge or in any other way dealing with the interest in the suit property and an order that the Chief Land Registrar does register an inhibition over the suit property.
2. The applicant's case was that he entered into a sale agreement with the respondent for the sale of the suit property at a purchase price of Kshs. 28,000,000/-. The applicant paid a deposit of Kshs. 5,000,000/- upon execution of the agreement and it was agreed that the balance would be paid within 90 days. The applicant further contended that he wrote a letter to the respondent through his advocate seeking extension of time to enable him pay the balance of the purchase price. He undertook to have the sale financed by Equity Bank and the bank wrote to the respondent requesting him to release the completion documents to the land to enable the bank to release the balance of the purchase price to him. On 23/8/2018, the respondent wrote to the applicant purporting to rescind the agreement alleging breach of contract and offered to refund the deposit of the purchase price less a sum equivalent to 10% which was to be retained as damages. The applicant contended that his efforts to settle the balance of the purchase price had been frustrated by the respondent on the ground of breach of contract. The applicant contended that his claim against the defendant was for an order of specific performance and that he had a *prima facie* case with high chances of success.
3. Further, the applicant contended that if an injunctive order was not granted, he stood to suffer irreparably because damages would not adequately compensate him as he had entered on the suit property and obtained a permit from Nairobi City Council to clear bushes. He also contended that he may not get similar property for the same value. The applicant added that the balance of convenience was in his favour because the defendant is holding his money and title documents and was in possession of the suit properties. The plaintiff denied being in breach of the agreement. He also denied that he accepted an alternative property in place of the suit property.
4. The respondent opposed the application through his replying affidavit sworn on 5/9/2018. The respondent deposed that the applicant had approached the court with unclean hands and had failed to disclose a letter from the respondent to the applicant stating that the completion documents were ready. According to the respondent, the plaintiff paid a deposit of Kshs.5,000,000/- for the suit property and was unable to complete the transaction within the agreed period, leading to a termination of the contract as evidenced by a termination letter dated 24/8/ 2018. It was the respondent's case that the applicant was given several chances to complete the purchase but he failed to do so.
5. The applicant filed submissions dated 11/10/ 2018 in which he argued that he was ready to complete the purchase. He further argued that the matter was before this honourable court because an arbitrator would not grant an interim measure of protection. The applicant further submitted that he had satisfied the requirements for grant of a temporary injunction as set out in **Giella v Cassman Brown (1973)EA 358**.
6. The applicant contended that he wrote to the respondent admitting the completion period had lapsed and requested for more time. The extension was granted by the respondent but the respondent subsequently wrote back rescinding the agreement. He argued that he had demonstrated willingness and readiness to complete the agreement as he had sourced funding from the bank but the respondent frustrated the entire agreement by failing to release the completion documents to the bank. It was also the applicant's submission that there existed a right which had been infringed by the respondent that needed to be protected. He relied on the case of **Mrao v First American Bank of Kenya & 2 others (2003)eKLR**.

7. The respondent filed his submissions on 29/11/2018. He argued that the respondent frustrated the agreement by not paying the full purchase price within 90 days. He further submitted that he gave the applicant 30 days after the lapse of 90 days and a further 21 days but the applicant failed to make payments. He added that the applicant had not met the requirements of **Giella v Cassman Brown**.

8. Two issues fall for determination in the present application. The first issue relates to the jurisdiction of this court to entertain this suit in the face of an arbitration agreement. The second issue is whether the applicant has satisfied the criteria for grant of a temporary injunction as established in **Giella v Cassman Brown (1973) EA 358**.

9. The respondent contends that the proper forum for adjudication of this dispute is arbitration. While I agree with the respondent that Clause 18 of the sale agreement provides for arbitration as the dispute resolution forum, I am unable to down my tools at this point in the absence of an application within the framework of Section 6 of the Arbitration Act or any formal objection to the jurisdiction of the court. As and when the court is moved and it is demonstrated that the statutory criteria in Section 6 of the Arbitration Act has been met, an appropriate order will be made. Until that happens, the court will not down its tools.

10. The second issue relates to satisfaction of the criteria in **Giella v Cassman Brown (1973) EA 358**. In this regard, the applicant was required to show that he has a prima facie case with a probability of success; that he will suffer irreparable loss which cannot be indemnified by an award of damages; and where the court is in doubt, the application is to be determined on a balance of convenience.

11. It is not in contest that the material agreement was dated 19/3/2018 and provided for a completion period of ninety (90) days from that day. Clause 10 of the agreement expressly provided that time was to be of essence. Clause 8 contained the following contractual framework on completion:

Completion

8.1. Completion shall take place at the offices of the Vendor's Advocates.

8.2 The Vendor through his advocates shall provide the following completion documents to the advocates of the purchaser upon receipt of a suitable professional undertaking as to payment of the balance of the purchase price amounting to Kshs 23,000,000/-

8.2.1 A duly executed transfer in respect to the property in favour of the purchasers.

8.2.2 The original title document relation to the property

8.2.3 A copy of the Vendor's PIN certificate and copy of the national identity card.

8.2.4 Valid and relevant land control board consent to transfer

8.2.5 Three (2) coloured passport size photographs of the Vendor

8.2.6 Rates clearance

8.2.7 Duly executed spousal consent.

12. From the materials presented to the court at this point, it is not contested that at the expiry of the completion period, the applicant had not provided any professional undertaking in relation to the outstanding balance of the purchase price (Kshs 23,000,000). What is not clear is whether the 21 days notice was issued in tandem with Clause 9.3 of the agreement for sale which provides as follows:

If the purchaser shall fail to complete the sale due to no default on the part of the vendor, the vendor may give to the purchase twenty one (21) days' notice in writing confirming the vendor's willingness and readiness to complete the transaction and such notice shall specify the default and require the purchaser to make it good within 21 calendar days and if the purchaser then fails to comply with the notice, the vendor shall be entitled to:

(10.3.1) to extend the time for completion or;

10.3.2 to rescind this agreement by notice in writing to the Purchaser.

13. The respondent contends at paragraph 7 of his replying affidavit that on 16/7/2018, his advocates wrote to the applicant's lawyer notifying them of the lapse of the completion period and gave them a 21 days' notice to complete the transaction. The said letter dated 16/7/2018 reads as follows:

4105/CKG/CONV/2015

16/7/2018

Karanja Kangiri & Co. Advocates

Thika Arcade

4th floor, Room 405

THIKA.

Dear Sirs,

RE: PROPOSED SALE & PURCHASE OF TITLE

NO. NAIROBI BLOCK 110/963 WILSON MAINA

WANJAU TO PETER S. MUTURI KARANJA

The above matter and Sale Agreement dated 19th March 2018 refers.

We note that the completion period has lapsed and we are yet to hear from you.

We notify you that our client is ready with all completion documents and is ready to complete the transaction.

Our client expected confirmation of funds prior to expiry of the 90 days.

Consequently and in terms of Clause 9.3. We give you a Twenty One (21) notice to indicate your readiness to complete failure to which Clause 9.4 will automatically come into operation.

Yours faithfully,

GATUMUTA & CO. ADVOCATES

CC. Client

14. Without saying much at this point, I am not satisfied that the said letter of 16/7/2018 met the requirements of the completion notice contemplated under Clause 9.3 of the agreement for sale. A completion notice under clause 9.3 ought to contain certain essential elements: (a) confirmation of the Vendor's willingness and readiness to complete the transaction; (b) a specification of the purchaser's default; (c) a requirement (demand) that the purchaser makes good the default within 21 calendar days; and (d) an indication that if the default is not made good within 21 days, the vendor will rescind the agreement.

15. On its face, the letter dated 16/7/2018 does not contain the above essential elements. Instructively, what it essentially contains is a 21 days' notice inviting the purchaser to indicate his readiness to complete the purchase. Regrettably, that is not what clause 9.3 required of the completion notice. Clause 9.3 required the notice to contain certain essential elements which appear to be missing in the letter of 16/7/2018.

16. It is therefore probable that although there appears to be breach on party of the applicant, the respondent has not yet issued a proper completion notice under clause 9.3. My *prima facie* view at this point is that, until that is done, the defendant is not entitled to rescind the agreement for sale.

17. My finding therefore is that the applicant has satisfied the first two limbs of **Giella v Cassman Brown (1973) EA 358**. I will however not grant the orders sought by the plaintiff as prayed. I will instead issue interim restraining orders in the following terms:

a) An interim order is hereby issued restraining the defendant against rescinding the sale agreement dated 19/3/2018 or disposing Land Title Number Nairobi Block 110/963 without serving the plaintiff with a proper completion notice under clause 9.3 of the sale agreement.

b) In the absence of a professional undertaking under clause 8.2 of the agreement for sale, the defendant is at liberty to issue a proper completion notice and proceed to rescind the agreement.

c) Each party shall bear their respective costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF FEBRUARY 2019

B M EBOSO

JUDGE

In the presence of:-

June Nafula - Court Clerk