



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC SUIT NO. 558 OF 2016

STEPHEN NJOROGE NDUNGU.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY

FUND BOARD OF TRUSTEES.....DEFENDANT

RULING

The plaintiff brought this suit against the defendant on 26th May, 2016 seeking the following relief:

1. An order directing the defendant to render true and accurate accounts in favour of the plaintiff in respect of the apartments known as Hazina – B30/F1 to F9 and L.R No. Kitisuru 101/C233.
2. An order directing the defendant to refund monies paid in excess in each account.
3. An order for specific performance compelling the defendant to transfer apartments known as Hazina – B30/F1 – F9 and L.R No. Kitisuru 101/C233 to the plaintiff.

In his plaint, the plaintiff averred that on various dates between 1st June, 2002 and 1st August 2002, he purchased apartments known as Hazina – B30/F1- F9 (“the apartments”) from the defendant at various amounts through tenant – purchase scheme. The plaintiff averred that he was supposed to pay for the apartments within a period of 180 months at various monthly installments. The plaintiff averred that on or about 1st June, 2002, he entered into another tenant-purchase agreement with the defendant in respect of L.R No. Kitisuru101/C233 (“the Kitisuru Plot”). The plaintiff averred that the purchase price for the Kitisuru Plot was Kshs.9,000,000/- which was payable in 180 monthly installments with effect from 1st June, 2002 after the initial payment of a deposit of Kshs.900,000/-. The plaintiff averred that between 1st June, 2002 and 6th December, 2013 he made various payments to the defendant in settlement of the monthly installments due on account of the apartments and the Kitisuru Plot. The plaintiff averred that on or about 20th April, 2016, the defendant served him with notices of rescission of the agreements in respect of some of the apartments namely, Hazina – B30/F4, F5, F6, F7 and F8. In the said notices, the defendant demanded payment of Kshs.1,143,070/= within 37 days. The plaintiff averred that he had fully paid all the installments that were due to the defendant as at 6th December, 2013 in respect of the said apartments and there was no payment outstanding due to the defendant. The plaintiff averred that in response to that demand, he wrote to the defendant demanding among others statements of account in respect of the nine (9) apartments that he purchased from the defendant. The plaintiff averred that the defendant instead of providing the information requested wrote back reiterating its rescission notices. The plaintiff averred that he had paid all the monies due to the defendant for the apartments and the Kitisuru plot and had in fact overpaid on each account.

What is now before me is the plaintiff’s application brought by way of Notice of Motion dated 26th May, 2016 in which the plaintiff has sought a temporary injunction restraining the defendant from rescinding and/or breaching the tenant purchase agreements entered into between the defendant and the plaintiff in respect of the apartments known as Hazina B30/F4, F5, F6, F7 and F8 (hereinafter referred to as “disputed apartments”) and/or repossessing the said apartments. The application was brought on the same grounds set out in the plaint which I have highlighted above. The plaintiff averred that pursuant to the said tenant-purchase agreements which he entered into with the defendant, he paid the final installments for all the apartments on 6th December, 2013. The plaintiff averred that on 20th April, 2016 the defendant served him with rescission notices in respect of the disputed apartments in which the defendant demanded the payment of a sum of Kshs.1,143,070/= within 37 days. The plaintiff averred that on 26th April, 2016 he wrote to the defendant disputing the demand and called upon the defendant to supply him with the statements of accounts, certificate of completion of payments and documents of title in respect of the said apartments. The plaintiff averred that the defendant failed to respond to the said letter. The plaintiff averred that with the defendant’s failure to respond to his demand he was apprehensive that his lifetime investment in the said apartments was in jeopardy. The plaintiff averred that he did not owe the defendant any money in respect of the said apartments and that the only option available for the

defendant to resolve the stalemate was to render true and accurate accounts relating to the said apartments. The plaintiff averred that he stood to suffer substantial loss if the defendant was not restrained from rescinding and/or breaching the said tenant-purchase agreements.

The plaintiff's application was opposed by the defendant through a replying affidavit sworn by its Tenant-Purchase Scheme Accountant, Richard Kasiva on 17th October, 2018. In the affidavit, the defendant contended that it had never refused to provide the plaintiff with statements of accounts relating to the apartments and the Kitisuru plot. The defendant contended that it had furnished the plaintiff with the said statements of accounts and that the plaintiff was dissatisfied with the same. The defendant denied that it had falsified the accounts and maintained that the statements that it supplied to the plaintiff were the only statements that it had in relation to the apartments and the Kitisuru Plot.

I have considered the plaintiff's application together with the supporting affidavit. I have also considered the defendant's affidavit filed in opposition to the application. The plaintiff has sought a temporary injunction. In the case of Giella v Cassman Brown & Co. Limited (1973) E. A 358, it was held that an applicant for a temporary injunction must establish that he has a prima facie case with a probability of success against the respondent and must also demonstrate that he stands to suffer irreparable harm which cannot be compensated in damages if the order is not granted. In the event that the court is in doubt as to the above the application would be determined on a balance of convenience. From the material before the court, I am satisfied that the plaintiff has established a prima facie case against the defendant with a probability of success. The plaintiff has placed before the court evidence showing that he has paid the full purchase price for the disputed apartments. The disagreement between the parties revolves around the interest and penalties for late payments which accrued on the plaintiff's accounts. The defendant has contended that the plaintiff's debt is not fully discharged on account of these charges. The parties cannot agree on the accounts relating to these charges and as such the issue will have to go to trial. It is arguable whether or not the plaintiff is liable to the defendant for the alleged interest and late payment penalties and if he is the quantum thereof.

As to whether the plaintiff would suffer irreparable harm which cannot be compensated in damages if the injunction sought is not granted I am doubtful that that would be the case. I am of the view however that in the circumstances of this case, the balance of convenience tilts in favour of the plaintiff. The defendant would not suffer any prejudice in my view if the status quo is maintained pending the determination of the dispute over the accounts relating to the apartments in question.

The upshot of the foregoing is that I find merit in the plaintiff's Notice of Motion application dated 26th May, 2016. The application is allowed in terms of prayer 4 thereof. The costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 14th day of February 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Manyara for the Plaintiff

Mr. Mapesa h/b for Mr. Odongo for the Defendant

Mr. Waweru-Court Assistant