



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 64 OF 2018

CHANIA FRONTIERS LIMITED..... PLAINTIFF

VERSUS

BIBIANA MBATHA NGOTHO.....DEFENDANT

RULING

1. In the Application dated 9th March, 2018, the Plaintiff is seeking for the following orders:

a. That pending the hearing and determination of the suit an injunction do issue restraining the Respondent whether by herself, her agents and/or her servants from selling, dealing with, interfering, alienating or disposing of all those parcels of land known as Mavoko Town Block 2/4072, 4073, 4074, 4075, 4090, 4091, 4094, 4095, 4096, 4097, 4098, 4099, 4100, 4101, 4102, 4117, 4126, 4127, 4128, 4129, 4130, 4131, 4132, 4133, 4134, 4135, 4136, 4137, 4138, 4141, 4142, 4143, 4144, 4145, 4146, 4147, 4148, 4149, 4154, 4160, 4164, 4165, 4166, 4167, 4168, 4169, 4170, 4171, 4175, 4178, 4179, 4180, 4181, 4227, 4228, 4229, 4230, 4231, 4232, 4233, 4234, 4285, 4286 and 4287, all in the name of the Defendant/Respondent.

b. That pending hearing and determination of the suit, an injunction do issue restraining the Defendant, her servants and or agents from transferring, disposing, withdrawing or parting with possession of any of her movable or immovable properties located in the Republic of Kenya as well as restraining her from accession any money held in A/C No. 050109426100 at Standard Chartered Bank or any other bank account held in the name of the Defendant.

c. That an order for specific performance do issue compelling the Defendant to complete the sale and to hand over to the Plaintiff the duly executed documents as are or would be necessary to transfer the suit property as per the terms of the Sale Agreement, failing which the Deputy Registrar of this Honorable Court be authorized to execute all requisite documents, including transfers and applications for consent of the Land Control Board, in place of the Defendant.

d. That the costs of this Application be borne by the Defendant/Respondent.

2. According to the Plaintiff's Chief Executive Officer, the Plaintiff entered into a Sale Agreement with the Defendant in respect of 129 plots being portions of land in parcel of land originally known as Mavoko Town Block 11/3705; that the completion date was 120 days; that a deposit of Kshs.35, 475,000 being 20% of the purchase price was paid to the Defendant and that 25 Title Deeds were released to the Plaintiff's advocate.

3. According to the Plaintiff, a further payment of Kshs. 10,000,000 was made to the Defendant on 17th October, 2016; that the completion period was extended to 15th January, 2017 and that on 7th December, 2016, the Land Control Board granted its consent to transfer the 121 plots that were available to the Plaintiff.

4. The Plaintiff's Chief Executive Officer deponed that by 7th March, 2017, the Defendant had received a total of Kshs. 137,275,000 being the paid up amount of 105 plots and that before the parties could sign an Addendum extending the completion period, the Defendant served on the Plaintiff a notice of intention to rescind the Agreement.

5. It is the Plaintiff's case that on 27th March, 2017, the Plaintiff paid to the Defendant the entire balance of the purchase price of Kshs. 87,000,000; that the Defendant has only released to the Plaintiff 61 titles out of the 121 titles and that the Defendant's intention is to frustrate the sale or blackmail the Plaintiff to pay a higher price for the suit land than what is contained in the Sale Agreement. It is the deposition of the Plaintiff's Chief Executive Officer that the Plaintiff has always been willing and able to complete the sale transaction.

6. In response, the Respondent deponed that she agreed to sell to the Plaintiff 129 plots for a total of Kshs. 117,375,000; that the completion date was to be on 26th June, 2016; that in the Addendum of 5th October 2016, the number of plots that were available for sale reduced from 129 plots to 121 plots and that the purchase price was revised to Kshs. 166,375,000.

7. It was the deposition of the Defendant that prior to the signing of the Addendum of 5th October, 2016, the Plaintiff had failed to honour the terms of the Agreement of Sale in terms of paying the purchase price as and when it fell due; that the revised purchase price was not paid on due dates and that as at 15th January, 2017, the Plaintiff had failed to complete the transaction as per the terms of the Agreement of Sale and the Addendum.
8. Due to the late payment, the Defendant has deponed that she was entitled to interest as per the Law Society Conditions of Sale and that she rescinded the Agreement of Sale with respect to 61 plots only for failure by the Plaintiff to pay the revised purchase price and interest on late payments.
9. The Plaintiff's advocate submitted that the Plaintiff has proved that there was a valid Sale Agreement; that the Plaintiff has satisfied its obligation under the said Sale Agreement by paying the full purchase price and that the Defendant should be enjoined from selling the 60 plots.
10. The Defendant's advocate submitted that it is self-evident from the facts that there was failure on the part of the Plaintiff to complete the Sale Agreement by paying the full purchase price; that the Defendant acted within her mandate by rescinding the Agreement and that the Plaintiff has not established a prima facie case with chances of success.
11. It is not in dispute that the Plaintiff entered into an Agreement for Sale of 129 plots, which are a sub-division of parcel of land known as Mavoko Town Block 11/3705 (*Mitaboni, Katani*). According to the said Agreement, each plot was for Kshs. 1,375,000, with the total purchase price being Kshs. 177,375,000.
12. The initial Agreement, which is undated, was revised by an Addendum dated 25th March, 2016. In the said Addendum, it was agreed that the number of plots reduced from 129 to 121, with the purchase price reducing to Kshs. 166,375,000.
13. The Addendum further provided that the balance of the purchase price of Kshs.120, 900,000 was to be paid on or before the 15th January, 2017. Other than the purchase price and the completion date, all the terms that were in existence in the initial Agreement were retained.
14. The initial Agreement provided that the payments of the purchase price were to be made by the Plaintiff after the Defendant had provided the purchaser with verification that the proportionate number of plots has been duly registered and Titles issued in the name of the Defendant.
15. The Agreement further provided that in exchange with the purchase price, or a suitable undertaking to pay the balance of the purchase price, the Defendant was to deliver to the purchaser's advocate the original Title documents for the plots paid for.
16. Clause 7.1 provided as follows:
- “If the Purchaser shall fail to comply with any provisions of this Agreement including the provisions as to payment of the purchase price the Vendor shall be entitled to serve a Notice in writing upon the Purchaser requiring the Purchaser to remedy the same within twenty one (21) days from the date on which such notice is served on the Purchaser. If the Purchaser shall fail to remedy the breach before the expiry of the said Notice, then the Vendor shall be entitled at the Vendor's absolute discretion either:***
- a. To extend the time for completion; or***
- b. To rescind this Agreement by notice on that behalf to the Purchasers; and***
- c. To retain ten per centum (10%) of the purchase price as liquidated damages.”***
17. The Law Society Conditions of Sale so far as they are not varied by or inconsistent with the Agreement were incorporated in the Agreement.
18. As I have indicated above, the Addendum provided that the balance of the purchase price, which was Ksh. 120,900,000, was to be paid on or before 15th January, 2017. According to the Plaintiff, it had only paid for 105 plots by 7th March, 2017, contrary to the terms of the Addendum. This failure to abide by the completion date of 15th January, 2017 led the Defendant's advocate to issue a notice dated 7th March, 2017.
19. In the Notice of 7th March, 2017, the Defendant's advocate informed the Plaintiff that he was formally giving him “*twenty one (21) days' Notice for termination of sale of the remaining sixty (60) plots due to your failure to pay for the same by 28th February, 2017 as agreed by the parties to the Agreement.*” In the same letter, the Defendant's advocate informed the Plaintiff that his client was refunding the money paid in excess of the sixty one (61) plots already paid for.
20. Despite the Defendant refunding the Plaintiffs Kshs. 57,900,000 being the excess amount of the 61 plots, the Plaintiff deposited in the Defendant's account the balance of the purchase price on 27th March, 2017. This was inclusive of the Kshs. 57,900,000 that had been wired back to the Plaintiff.
21. The first Notice that the Defendant's advocate was supposed to serve on the Plaintiff was a notice of completion and not a notice to rescind. Indeed, according to Clause 7.1, the Defendant could only rescind the Agreement after serving on the Plaintiff a twenty one (21)

days' notice requiring the Plaintiff to remedy any breach. It is only upon the expiry of twenty one (21) days that the Defendant was entitled to rescind the Agreement by notice and retain 10% of the purchase price as liquidated damages. The Notice of 7th March, 2017 cannot, prima facie, amount to a Notice to rescind the Agreement between the parties.

22. The Defendant's advocate seems to have been aware that the letter of 7th March, 2017 could not be taken as a rescission notice. That is why in the letter of 25th April, 2017, the Defendant's advocate issued a rescission notice in which they indicated as follows:

“As at 15th January, 2017 Chania had failed to complete the transaction and had admittedly not paid the full purchase price. Consequently, Bibiana's advocates issued a twenty one (21) days completion notice dated 7th March, 2017.”

23. The Defendant has not denied that by the time it was issued the Notice of 7th March, 2017, it had not delivered all the titles for the paid up plots to the Plaintiff.

24. In the letter of rescission of 25th April, 2017, the Defendant introduced the issue of non-payment of accrued interest as per the Law Society Conditions, and on that ground proceeded to rescind the Agreement with respect to the 61 plots.

25. The issue that the trial court will have to determine is whether indeed the Plaintiff was required to pay accrued interest, and if so, whether that issue should have been raised in the notice to complete, before the rescission notice of 25th April, 2017. My preliminary view is that the Defendant was under an obligation to state in the “notice to complete” all the breaches that the Plaintiff had committed, including late payment of the purchase price and payment of accrued interest. It is only after the failure by the Plaintiff to remedy the said breaches that a valid notice to rescind the Sale Agreement could issue.

26. Having paid up the balance of the purchase price upon being served with the notice of 7th March, 2017, and the notice of 7th March, 2017 having not been clear on the breaches that the Plaintiff was required to remedy within twenty one (21) days, I find that the Plaintiff has established a prima facie case with chances of success.

27. Indeed, the Defendant will not suffer any irreparable loss if the injunctive orders are granted considering that he has not only quantified her claim in the Counter-claim, but is also still holding Title Deeds in respect of the sixty (60) plots. To the contrary, the Plaintiff will suffer irreparable injury that cannot be compensated in damages. This is because it has paid the full purchase price of the suit properties, which properties will be out of reach of the Plaintiff if the same are sold by the Defendant to unsuspecting third parties.

28. In the circumstances, I shall grant to the Plaintiff an order of prohibitive injunction restraining the Defendant from dealing with the sixty (60) parcels of land, whose titles she is holding. I shall however not grant an order of specific performance. The order of specific performance can only be granted after hearing the suit.

29. For those reasons, I allow the Application dated 9th March, 2018 as follows:

a. That pending the hearing and determination of the suit an injunction do issue restraining the Respondent whether by herself, her agents and/or her servants from selling, dealing with, interfering, alienating or disposing of all those parcels of land known as Mavoko Town Block 2/4072, 4073, 4074, 4075, 4090, 4091, 4094, 4095, 4096, 4097, 4098, 4099, 4100, 4101, 4102, 4117, 4126, 4127, 4128, 4129, 4130, 4131, 4132, 4133, 4134, 4135, 4136, 4137, 4138, 4141, 4142, 4143, 4144, 4145, 4146, 4147, 4148, 4149, 4154, 4160, 4164, 4165, 4166, 4167, 4168, 4169, 4170, 4171, 4175, 4178, 4179, 4180, 4181, 4227, 4228, 4229, 4230, 4231, 4232, 4233, 4234, 4285, 4286 and 4287, all in the name of the Defendant/Respondent.

b. That the costs of this Application be borne by the Defendant/Respondent.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 27TH DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE