



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 283 OF 2017

RUTH WAVINYA MUNYAO.....PLAINTIFF

VERSUS

ILULUWE DEVELOPMENT LIMITED.....1ST DEFENDANT

THE NAIROBI LAND REGISTRAR.....2ND DEFENDANT

RULING

1. In the Notice of Motion dated 19th June, 2017, the Plaintiff is seeking for an injunctive order in the following terms:

a. That an interlocutory injunction pending the hearing and determination of this case do issue restraining the 1st Defendant and its agents and servants from selling, transferring, sub-dividing or otherwise dealing in Land Reference No. 13208/2, Mavoko.

b. That an interlocutory injunction pending the hearing and determination of this case do issue restraining the 2nd Defendant from consenting to or registering any sale, subdivision, transfer or any other dealings in Land Reference No. 13208/2, Mavoko.

c. That the costs of this Application be awarded to the Plaintiff.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that vide an Agreement dated 4th October, 2012, she purchased land known as L.R. No. 13208/2 Mavoko; that she was to purchase two(2) adjacent parcels of land to be excised from the suit land each measuring 0.25 acres and known as Plot No. A007 and A008; that the 1st Defendant was to carry out a development project on the land and that the 1st Defendant was to issue her with completion documents including but not limited to sub-lease Agreements.

3. The Plaintiff deponed that in the year 2016, the 1st Defendant unilaterally increased the purchase price of the land from Kshs. 2,300,000 to Kshs. 4,000,000; that during the four (4) years period of silence, the 1st Defendant was untraceable and that when the 1st Defendant asked her to sign the Deed of Novation/Settlement, she declined to do so.

4. According to the Plaintiff, she discovered that the 1st Defendant had entered into an Agreement with M/S Cylton Investment Limited to develop L.R. No. 13208/2 without consulting her; that the entire project could be sold to the public without any regard to her interests and that she holds overriding interests over the suit land.

5. In response, the 1st Defendant's Director deponed that the Plaintiff has no reasonable cause of action as against the 1st Defendant; that the registered proprietors of the suit land have not been joined in the suit and that the 1st Defendant has never been registered as the proprietor of the suit land.

6. It is the Defendants' case that it accepted payment of Kshs. 700,000 as deposit of the purchase price for the two parcels of land from the Plaintiff with the balance to be paid within six (6) months; that the Plaintiff failed to pay up the balance of the purchase price and that the proposed joint venture between the 1st Defendant and the registered proprietor fell through thus frustrating the Agreement.

7. The 1st Defendant's Director deponed that the proprietors of the suit land got into a joint venture with another developer; that the Plaintiff was advised on her options and that the Plaintiff accepted to receive the deposit paid of Kshs. 700,000.

8. In his submissions, the Plaintiff's advocate submitted that the Plaintiff acquired beneficial interest in the suit land; that it is the 1st

Defendant's Director who exerted pressure on her to accept a refund of the deposit and that granting of the orders in the Application will facilitate the protection of the subject matter.

9. The 1st Defendant's advocate submitted that the Letter of Offer upon which the Plaintiff is basing her claim for specific performance does not comply with the statutes; that the signature of the 1st Defendant's Director has not been duly attested; that in any event, the Plaintiff does not have an Agreement with the registered proprietor of the suit land and that an injunction or inhibition cannot be granted in the circumstances of this case. Both the Plaintiff's and the 1st Defendant's advocate relied on numerous authorities which I have considered.

10. The principles for the grant of an order of injunction are now settled. The Applicant must show that he has a prima facie case with a probability of success and that he stands to suffer irreparable injury that cannot be compensated by an award of damages. Where the court is in doubt, it must decide the Application on a balance of convenience (*See Giella vs. Cassman Brown (1973) EA 358*).

11. The Plaintiff's case is that she entered into an Agreement with the 1st Defendant dated 4th October, 2012 for the purchase of part of L.R. No. 13208/2 Mavoko; that she paid to the 1st Defendant a deposit of Kshs. 700,000 and that although she was to pay the balance of the purchase price within six (6) months, she never did so because the 1st Defendant's Director(s) declined to update her on the progress of the project she was buying into.

12. The Agreement that the Plaintiff is relying upon is actually a Letter of Offer for sale of parcel number A007 and A008 of Land Reference number 13208/2 Mavoko. According to the said Letter of Offer, the purchase price of the suit land was Kshs. 2,300,000. The Plaintiff was required to pay a deposit of 30% of the purchase price with the balance of the purchase price to be "*spread to six (6) months*". Although the 1st Defendant's Director signed the Letter of Offer, her signature was never witnessed.

13. Section 3(3) of the Law of Contract Act provides as follows:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

14. The above provision has been repeated, word for word, in Section 38 of the Land Act. The Letter of Offer upon which the Plaintiff's claim for specific performance is hinged on does not conform with the provisions of Section 3(3) of the Law of Contract Act and Section 38 of the Land Act.

15. In any event, the evidence before this court shows that the 1st Defendant has never been registered as the proprietor of the suit land. Indeed, according to the copy of the Grant No. 132563, L.R. No. 13208/2, which is the suit property, the land is registered in the names of nine (9) people as tenants in common. The Letter of Offer that was signed between the Plaintiff and the 1st Defendant did not refer to these individuals at all.

16. The Plaintiff did not enjoin the registered proprietors of the suit land in this matter, neither did she attempt to show the relationship of the said proprietors with the 1st Defendant.

17. Considering that the ultimate prayer in the Plaint is for an order of specific performance, it would be futile, nay, illegal to allow such a prayer in a situation where the registered owner of the land that should be transferred to the Plaintiff has not been sued. In the same breath, an order of injunction cannot issue in the circumstances of this case restraining any dealings in a property whose owner has neither been sued nor heard. Such an order will be against the well-known and cherished principles of natural justice.

18. Furthermore, the Plaintiff has admitted that although she was required to pay up the balance of the purchase price within six (6) months, she never did so. It is trite that an order of specific performance can only issue in favour of a party who has complied with his obligations and not otherwise. Having not complied with the terms of the Letter of Offer, the Plaintiff cannot in the same breath seek for an order compelling the 1st Defendant to comply with the terms of offer.

19. The reasons I have given above shows that the Plaintiff has not established a prima facie case with chances of success. Indeed, the circumstances of this case shows that the Plaintiff can be adequately compensated by way of damages if she succeeds in her claim.

20. Consequently, the Plaintiff's Application dated 19th June, 2017 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE