



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 111 OF 2018

1. NAGIEB OMAR ALI

2. SHUKRI OMAR ALI..... PLAINTIFFS

-VERSUS-

APA HOMES (K) LIMITED..... DEFENDANT

RULING

1. By a Notice of Motion dated 15th May, 2018 and brought under Order 40 Rule 1, 2 and 4 of the Civil Procedure Rules, Section 3A and 63 of the Civil Procedure Act, the Plaintiffs/Applicants seek orders that pending the hearing and determination of this suit, the defendant their servants and/or agents be restrained by way of injunction from alienating, transferring, charging, selling or in any other manner whatsoever dealing with the plaintiffs' Apartment Numbers E5 built on Plot No. MN/I/2911; Sahel Apartments.
2. The Application is based on the following grounds:
 - a. That the plaintiffs have an arguable case on the merits with a good chance of success.
 - b. That on 17th April, 2013, the Defendant offered to sell to the plaintiffs' apartment Number E5, Sahel Apartments located on Plot No. MN/I/2911 and the Plaintiffs agreed to buy the same.
 - c. That the said agreement which provided inter alia the purchase price of the apartment and the mode of payment of the same was ratified on behalf of the Defendant company by the Directors, Hussein Shariff Alwy and Khalid Shariff Alwy and the 1st Plaintiff on behalf of the 2nd plaintiff.
 - d. That the plaintiffs proceeded to pay the purchase price of Kshs.16,000,000.00 continued to make regular payments and was always handed my (sic) acknowledgement of payment by the defendant company.
 - e. That the defendant company, via their advocates confirmed the payments made by the plaintiffs and undertook to release the draft lease for the apartment and vacant possession of the apartment to the plaintiffs upon completion of payments for the purchase price.
 - f. That the plaintiffs via their advocates completed the payment of the purchase price balance on 27th of September 2017.
 - g. That the defendant had a contractual duty to register the lease over the apartment E5 in favour of the plaintiffs and release vacant possession of the said apartment to the plaintiffs which they have failed, refused and/or neglected to perform.
 - h. That the plaintiffs/Applicants suit herein is competent and with a high probability of success.
 - i. That the plaintiffs stand to suffer irreparable loss should the injunction be not be granted as the defendant company intends to sell off the said apartment to third parties.
 - j. That on a balance of probability it is only just and fair that the injunction be granted as the 1st defendant will continue to hold the said property (Apartment) pending the hearing and determination of the suit and will not stand to lose much.

k. That there will be no prejudice occasioned to the defendants.

3. The application is supported by the affidavit and supplementary affidavit of Nagieb Omar Ali, the 1st plaintiff in which he has deposed that sometime in 2013, the plaintiffs were approached by one of the Directors of the Defendant Company, Mr. Hussein Sharrif Alwy, who offered to sale them an apartment in a development on plot no. mn.i.2911 known as Sahel Apartments that the defendant company was developing and were vendors. That after being taken to the project site which was on going, negotiations ensued between the plaintiffs and Mr. Hussein Sharrif Alwy on behalf of the defendant company and they agreed on the purchase price of Kshs.16,000,000.00. That the 2nd plaintiff worked for gain in Dubai, parties agreed that the 1st Plaintiff would represent him as the purchaser of Apartment No.E5. the agreement culminated into an offer letter by the Defendant dated 17th April 2013 where the Defendant offered to sell to the plaintiffs and who agreed to buy apartment E5. The plaintiffs have exhibited the sale agreement which provided inter alia, the purchase price of the apartment and the mode of payment. The 1st plaintiff avers that he continued making regular payments which was acknowledged by the defendant and by 12th December 2015, the outstanding balance was kshs.1,000,000.00 only which was paid by the plaintiffs on 27th September, 2017. It is plaintiffs contention that when they asked for the sublease to be registered in the name of the 2nd plaintiff, the defendant refused to hand over the sub lease and claimed it never received any amount for the purchase price, and that it had never agreed to sell the apartment to the plaintiffs.

4. In opposing the application, the defendant filed a replying affidavit and further affidavit sworn by Alina Waseem, a director of the defendant company on 19th July 2018, and 25th October, 2018 respectively. It is the defendant's contention that at no time did it offer to sell to the plaintiffs the suit property and has denied knowledge of the sale agreement exhibited by the plaintiffs. The defendant further denied knowledge of the directors who transacted with the plaintiffs and has annexed a copy of the defendant's CR 12 on status of the defendant's shareholding and directorship for the years 2013 and 2015, adding that Hussein Sharrif Alwy and Khalid Sharrif Alwy had no permission and/or consent from the Defendant Company to deal with the plaintiffs. The defendant states that the sale agreement dated 17th April 2013 is improper, irregular, illegal and fraudulent and is not subject of investigations by the Directorate of Investigations. The defendant has denied receiving any payment from the plaintiffs. The defendant states that it has already sold the apartment E5 and has annexed a copy of the Sale Agreement. It is the defendant's contention that the plaintiffs have not satisfied the conditions for granting orders of injunction.

5. The application was canvassed by way of written submissions which were duly filed by the advocates for both parties. I have considered the application, the affidavits in support and against as well as the rival submissions. The application seeks temporary injunction restraining the defendant from alienating, transferring, charging, selling or in any other manner dealing with the plaintiffs' Apartment Numbers E5 built on PLOT NO.MN/I/2911, Sahel Apartments. The principles for grant of temporary injunction are well settled. In the case of Giella –v- Cassman Brown Co. Ltd (1973) EA 358, it was held that the Applicants 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 damage that cannot be compensated by an award of damages; and thirdly, if the court is in doubt, it will decide the application on the balance of convenience.

6. In this case, the plaintiffs aver that they bought the suit property from the defendant. In the plaint, the plaintiffs are seeking orders for specific performance and mesne profits. On the other hand, the defendant has denied offering to sell to the plaintiffs the suit property and has stated that it is a stranger to the sale agreement relied on by the plaintiffs. The defendants further state that the persons who allegedly negotiated with and subsequently executed an agreement and received monies from the plaintiffs were not directors of the defendant company. The defendant has further stated that it has since sold the suit property to a third party and a copy of the sale agreement dated 12th March 2016 has been exhibited. The defendant avers that it has since reported the agreement entered into between the plaintiffs and Hussein Sharrif Alwy and Khalid Sharrif Alwy and for investigations by the Directorate of Criminal investigations.

7. The court has perused the Sale Agreement relied on by the plaintiffs. The same appears to be a letter of offer written by Hussein Shariff Alwy on behalf of the defendant company. Paragraph 11 of that letter stipulated that a formal agreement shall be drafted by their lawyers incorporating those terms. It is not clear whether such formal agreement to lease/sale agreement was ever drafted and executed. Moreover, most of the payments made by the plaintiffs seem to have been made to Hussein Shariff Alwy on behalf of APA Homes Limited. It is not clear whether any payment was made to the Defendant Company. However, those are issues for determination at the main trial. The issue for determination at this stage is whether the plaintiffs are entitled to the prayers sought. If it is true that the suit property has been sold to a third party as alleged by the defendant, then the issuance of the orders sought herein may be in vain. The said third party is not party to this suit. The court cannot issue orders in vain. As already noted, the plaintiffs, besides the prayer for specific performance, are also asking for mesne profits from October 2017 to the date the defendant hands over vacant possession of the suit property to the plaintiffs.

8. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits and the annexures thereto, it is the view of this court that the plaintiffs have not established a prima facie case with a probability of success against the defendant. As regards, irreparable damage, I take the view that the plaintiffs may adequately be compensated by way of damages in the event they succeed in the case. This is because the payments made by the plaintiffs is ascertainable and the mesne profits claimed is known.

9. In the result, I find that the Notice of Motion dated 15th May, 2018 is not merited and the same is hereby dismissed. Considering the circumstances of this case, I order that each party to bear own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 27th day of November 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Said for Plaintiff/Applicant

Ratemo for Defendant/Respondent

Yumna Court Assistant

C.K. YANO

JUDGE