



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO 388 OF 2017**

**MIGUI MACHARIA MUNGAI..... 1ST PLAINTIFF**

**FLAVIA SUSAN KALANDE..... 2ND PLAINTIFF**

**=VERSUS=**

**CHESKA AGENCIES LIMITED.....1ST DEFENDANT**

**RULING**

1. The dispute in this suit relates to Land Title Number Nairobi/Block 129/289 situated in Komorock Phase II Estate, Nairobi City County (the suit property). The suit property is registered in the name of the defendant and it is charged to Kenya Commercial Bank Ltd.
2. By a sale agreement dated 8/9/2016, the defendant agreed to sell the suit property to the plaintiffs at a consideration of Ksh 7,500,000. The plaintiffs contend that upon execution of the sale agreement, they paid to the defendant a sum of Ksh 2,500,000 as deposit. Clause 3 of the agreement provided that the balance of the purchase price (Ksh 5,000,000) would be paid to the Vendor by the financiers of the purchasers on or before completion date, which was 90 days from the date of the agreement of sale.
3. Clause 10 of the agreement for sale provided that completion documents would be furnished to the purchasers by the vendor on or before the completion date. The plaintiffs contend that the defendant is in breach of the agreement in the sense that it has failed, refused and or neglected to furnish the plaintiffs with the completion documents, thereby frustrating completion of the sale.
4. Consequently, the plaintiffs brought this suit through a plaint dated 10/6/2017 seeking, *inter -alia*, the equitable order of specific performance. Together with the plaint, the plaintiffs presented a Notice of Motion dated 10/6/2017 seeking, *inter -alia*, an interim order restraining the defendant against selling, transferring or dealing in the suit property.
5. The defendant has opposed the application through a replying affidavit sworn by Munira Wairimu Mwinyi on 27/9/2017. The respondent contends that the plaintiffs breached the sale agreement by failing to pay the deposit of Ksh 2,500,000. The defendant further contends that the plaintiffs only paid Ksh 1,800,000. The defendant further contends that the plaintiffs further breached the agreement for sale by not paying balance of the purchase price on 7/1/2016 when the completion period lapsed.
6. At the ex-parte hearing of the application, the court issued a conditional preservative order restraining the defendant against selling, transferring or dealing in the suit property, and at the same time requiring the plaintiff to deposit the sum of Ksh 5,000,000 in court.
7. The single issue to be determined in this ruling is whether the plaintiffs have satisfied the criteria for grant of an interim injunction as laid down in **Giella v Cassman Brown & Co. Limited (1973)**. In summary, the plaintiffs must demonstrate that they have a prima facie case with a probability of success and that they will suffer irreparable injury that cannot be compensated by an award of damages if the injunction is not granted. If the court is in doubt, the application is to be determined on a balance of convenience.
8. In **Mrao Limited v First American Bank of Kenya Limited & 2 others (2003)** a prima facie case was defined as one which, on the materials presented to a court or a tribunal properly directing itself, it is demonstrated that there is a right which has been infringed by the opposing party, hence calling for an explanation or rebuttal.
9. In the present suit, it is not disputed that the material agreement for sale was executed by the parties. The defendant contends that the plaintiffs breached the agreement in the sense that, firstly, they did not pay the deposit of Ksh 2,500,000. Secondly, the defendant contends that the plaintiffs failed to pay balance of the purchase price.
10. Clause 2 of the Agreement for Sale provides as follows;

The Purchase price for the property is Kenya Shillings seven million five hundred thousand (Ksh 7,500,000) which sum shall be paid by the

Purchasers to the Vendor as follows;

A deposit of Kenya Shillings two million five hundred thousand (Ksh 2,500,000) to be paid as follows;

i. Kenya Shillings Seven Hundred Thousand (Ksh 700,000) has been paid in cash to Munira Wairimu Mwinyi, a Director of the Vendor, for and on behalf of the Vendor (receipt whereof the Vendor hereby acknowledges)

ii. A further sum of Kenya shillings one million eight hundred thousand (Ksh 1,800,000) has been paid by RTGS to the Vendors' bank account held with ABC Bank, Westlands Branch, Account No. 00121000000450 upon execution of this agreement (receipt whereof the Vendor hereby acknowledges).

11. Without saying much at this point, I understand the defendant to be acknowledging receipt of a sum of Ksh 700,000 paid to its director Munira Wairimu Muniyi in cash. Secondly, the plaintiffs have annexed a bank remittance slip for Ksh 1,800,000 remitted to Account Number 00121000000450 held in the name of the defendant at the Westlands Branch of ABC Bank. The two payments make a total of Ksh 2,500,000.

12. The defendant further contends that the plaintiffs breached the agreement by failing to pay the Chargee Ksh 1,600,000 to redeem the title. Clause 7 of the agreement for sale which relates to the element of redemption provides as follows;

The property is currently charged in favour of Kenya Commercial Bank to secure a loan facility of Kenya Shillings four million (Ksh 4,000,000) and is currently having an outstanding loan amount of approximately Kenya Shillings one million six hundred thousand (Ksh 1,600,000) which loan will be redeemed by the Financier of the purchasers at the completion date and then the difference of the purchase price will be paid to the Vendor.

13. It is noted that Clause 3 of the agreement for sale provided that balance of the purchase price (Kshs 5,000,000) would be paid to the Vendor by the purchasers' financiers. It also provided that the **Law Society Conditions of Sale (1989 Edition)** would govern the agreement.

14. Under **Condition 4 of the Law Society of Kenya Conditions of Sale (1989 Edition)** the vendor was required to avail the completion documents for inspection to facilitate release of balance of the purchase price. At this point, I have not been presented with evidence of any breach on part of the plaintiffs. If the plaintiffs were to be in breach, the defendant would be expected to issue a notice of completion in tandem with the LSK Conditions. This is not the case in the present suit. The only completion notice exhibited is the one dated 7/2/2017 issued by the plaintiffs advocates to the defendant's advocates. Also exhibited is a letter dated 27/1/2017 in which M/s Mwangi Chege & Advocates are pleading for time to obtain completion documents.

15. In light of the foregoing, I am satisfied that the plaintiffs have demonstrated that they have a contractual right which is threatened by the defendant and which deserves protection. Put differently, they have demonstrated that they have a prima facie case with a probability of success.

16. On the adequacy or otherwise of damages, I note that the dispute in this suit relates to real property. In my view, monetary damages are not necessarily an adequate equivalent to real property. The net result is that I am satisfied that the plaintiffs have satisfied the criteria for grant of an interim injunction in terms of prayer 1(b) of the Notice of Motion dated 10/6/2017

17. The other prayers in the Notice of Motion dated 10/6/2017 are, in essence, mandatory injunctive orders. I would refrain against granting them at this interlocutory stage.

#### **Disposal**

18. I make the following orders in disposing the Notice of Motion dated 10/6/2017.

**a) The Notice of Motion dated 10/6/2017 is allowed in terms of prayers 1(b) and 1 (e )**

**b) The plaintiff shall file and serve a single bound, paginated and indexed bundle containing pleadings, witness statements and evidentiary documents within 30 days.**

**c) The defendant shall file and serve a similar bundle within 60 days.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2018.**

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**B M EBOSO**

**JUDGE**

**In the presence of:-**

Wambugu advocate for the Plaintiffs

Mr. Chege advocate for the Defendant

Halima Court clerk