



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 54 OF 2018

KOKONYA ROSELYN.....PLAINTIFF

=VERSUS=

TOFINA ROM BULDERS & ANOTHER.....DEFENDANTS

RULING

1. This is a ruling in respect of two separate applications which are interrelated. The first application is dated 8th February, 2018 which seeks the following orders:-

1. Spent

2. Spent

3. That this honourable court be pleased to issue an order of injunction restraining the defendant/respondents by themselves, their servants, agents and/or employees from evicting or interfering in any manner whatsoever with the plaintiff/applicant's right to peaceful and quiet possession, occupation and use of the apartment situated on the property known as LR No.330/289 (Original number 330/289/2) along Hatheru Road, Kilimani area in Nairobi (hereinafter referred to as the (suit property) pending the hearing and determination of the Arbitration proceedings between the parties.

4. Spent.

5. That this Honourable court be pleased to issue an order of injunction restraining the defendant/respondents by themselves, their servants, agents and/or employees from evicting or interfering in any manner whatsoever with the plaintiff/applicant's right to peaceful and quiet possession, occupation and use of the apartment situated on the property known as LR No.330/289(original number 330/289/2) along Hatheru Road, Kilimani area in Nairobi pending the hearing and determination of the Arbitration Proceedings between the parties.

6. Spent

7. That this Honourable court be pleased to issue an order of injunction restraining the defendant/respondents by themselves, their servants, agents and/or employees from evicting or interfering in any manner whatsoever with the plaintiff/applicant's right to peaceful and quiet possession, occupation and use of the apartment situated on the property known as LR No.330/289(original number 330/289/2) along Hatheru Road, Kilimani area in Nairobi pending the hearing and determination of the Arbitration Proceedings between the parties.

8. That the costs of occasioned by this application be borne by the Respondents.

9. That this Honourable Court be pleased to grant any further orders as it may deem fit to meet the ends of justice.

2. The second application is dated 19th February, 2018 and it seeks the following orders:

1. Spent

2. That this Honourable Court be pleased to issue a mandatory injunction for the reconnection of the water and electricity utilities in the suit property situated on the property known as LR No.330/289(Original number 330/289/2) along Hatheru Road,

Kilimani area in Nairobi pending the hearing and determination of the Chamber Summons Application dated 8th February 2018 and this Application.

3. That this Honourable Court be pleased to issue a mandatory order of injunction restraining the defendant/respondents by themselves, their servants, agents and or employees from interfering with water and electricity utilities in the suit property situated on the property known as LR No.330/289 (Original number 330/289/2) along Hatheru Road, Kilimani area in Nairobi pending the hearing and determination of the Chamber Summons Application dated 8th February 2018 and this Application.

4. That the costs occasioned by this application be borne by the Respondents.

3. The applicant entered into an agreement with the first respondent which was putting up apartments along Hatheru Road in Kilimani area of Nairobi. The apartments were being put up on LR No. 330/289 (Original Number 330/289/2) owned by the second respondent. It was a term of the agreement between the applicant and the first respondent that the applicant was to contribute Kshs. 8,700,000/- towards the development. It was a further term that if costs of the project increased, the first respondent was to notify the applicant to pay up the additional cost.

4. The applicant paid up the Kshs. 8,700,000/- and when she was notified of the increase of the price which was Kshs. 2,000,000/-. She paid up and was issued with a clearance letter and handed over keys to her house. She proceeded to enter into a tenancy agreement with a tenant whom she put in the house.

5. There arose a dispute as to whether she had completed paying for the house. The applicant contends that the agreement between her and the first respondent provided for arbitration in case of a dispute which could not be amicably resolved; that the first respondent has gone ahead to disconnect water and electricity to her house and that the tenant in the house has threatened to move out as the house is not habitable without water and electricity. It is on this basis that the applicant seeks protection as the matter is referred to arbitration.

6. The applicant's applications have been opposed by the respondents through a replying affidavit sworn on 2nd March, 2018 by Lucy M. Ringera who is a Director of both respondents and a further replying affidavit sworn on 7th March, 2018 as well as one sworn by Millicent Adhiambo Owino on 2nd March, 2018. The respondents contend that the applicant has not been truthful as to the position pertaining to the apartment which she claims to be entitled to. The applicant was to be entitled to the apartment upon meeting all her obligations under the agreement; that she has not met all the obligations as she owes the respondents Kshs. 2,062, 199.90

7. The respondents contend that the applicant forced her way into the apartment on the basis of a letter which was issued to her erroneously by a person who had no authority to do so. The applicant's tenant knew that there was a dispute regarding the house he was set to occupy as he could not be let in at the gate. The respondents contend that the applicant and her tenant colluded with personnel of Kenya Power and Lighting who changed the electricity metre into the tenant's name without authority from the respondents; that the house had not been connected with water as those who had completed their payment and had been given possession were utilizing water connected to their house from a borehole put up by the respondents; that if the court was to grant the order of re-connection of water, it would amount to giving the applicant an undue advantage without meeting all her obligations.

8. I have considered the applicant's application as well as the opposition thereto by the respondents. I have also considered the submissions by counsel for the parties during the hearing of the two applications. I have now to decide whether the orders sought should be granted. It is clear from the documents annexed to the applicant's application that she cleared the initial amount of Kshs. 8,700,000/- as well as the additional Kshs. 2,000,000/-. It is however important to note that these payments were made on various dates. There was an element of interest charged on the outstanding balance and a statement has been given to that effect. According to the statement given, the applicant has a balance of over two million. The applicant does not seem to contest this interest.

9. The applicant seems to argue that since she was given a letter of clearance on 3rd January, 2017, the respondents have no business of bothering her. The respondents have clearly indicated that the letter of clearance was given erroneously by a person who did not have authority to give the same. During the hearing of the applications, counsel for the applicant submitted that the respondents are the authors of their own misfortune in that they are the ones who gave the applicant a clearance letter.

10. It is clear that the applicant has not cleared the interest element of the deal. She cannot therefore seek protection when she is not contesting the same. A party cannot be allowed to benefit from her own non-performance of an agreement. It is not clear how electricity bill was changed from the second respondent's name into that of the applicant. From the materials presented before the court, there is no evidence that water had been disconnected as alleged by the applicant. To this extent, I find that the applicant may have not been candid on this fact. In the circumstances I find that the applicant's two applications lack merit. The same are hereby dismissed with costs to the respondents. Any interim orders which were granted on 12th March, 2018 are hereby discharged.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 4th day of April, 2018.

E.O .OBAGA

JUDGE

In the presence of;-

Mr Shivachi for applicant

Court Assistant: Kevin

E.O .OBAGA

JUDGE