



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 829 OF 2017

LIKIZO HOMES HOUSING COOPERATIVE

SOCIETY LIMITED.....1ST PLAINTIFF

ISMAEL MUCHIRI GACHAU.....2ND PLAINTIFF

VERSUS

ADAN MAALIM IBRAHIM.....DEFENDANT

RULING

What is before me for determination is the Plaintiffs' Notice of Motion Application dated the 27th July, 2017 brought pursuant to sections 1A, 1B & 3A of the Civil Procedure Act, Order 40 & 50 of the Civil Procedure Rules, Article 159 of the Constitution and all the other enabling provisions of the law. The Plaintiffs seek injunctive orders against the Defendant in respect of land parcels numbers A3, A4 & A5 SAINA ESTATE hereinafter referred to as the 'suit properties'. The application is premised on the following grounds which in summary is that the Defendant is the registered owner of the suit properties. The 1st Plaintiff is rightfully constructing and in possession of the suit properties. That pursuant to an agreement for sale executed by the parties herein on the 4th October, 2016, the 1st Plaintiff bought the suit properties from the Defendant and paid a deposit of Kshs. 1.6 million. The 1st Plaintiff made further payments to the Defendant as expressly admitted by him vide his replying affidavit which he swore and filed in court in respect to KAJIADO ELC CASE NO. 519 of 2017. Further, that upon securing approval plans from the County Government of Kajiado, the 1st Plaintiff commenced developing the suit properties by constructing houses thereon which are near completion, with potential buyers already expressing interest to buy them. On 4th July, 2017 the Defendant through his advocates threatened to evict the 1st Plaintiff and the contractor messrs Tyrades Enterprises Ltd from the suit properties. The 1st Plaintiff initially spent considerable amount in funding litigation on behalf of the Defendant, to evict persons who had encroached on the suit properties. The Plaintiffs are highly apprehensive the Defendant may use force to evict them from the suit properties while destroying their investment. The Plaintiffs are apprehensive that the Defendants will enter the suit properties, halt the developments that are currently underway thereby occasioning them loss and damage that cannot be compensated by way of damages. Further, that unless the application is heard and determined as a matter of urgency, the Defendant will breach the terms of the agreement existing with the Plaintiffs. The application has been brought in good faith and the 1st Plaintiff will suffer loss, damage as well as irreparable loss if the orders sought are not granted.

The application is supported by the affidavit of ISMAEL MUCHIRI GACHAU, the 2nd Plaintiff herein who deposes that he is the current chairman to the 1st Plaintiff. He avers that the Defendant is the allottee of the suit properties and that the 1st Plaintiff is in current possession of the same with concurrence from him. He explains that pursuant to an agreement for sale executed on 4th October, 2016 between the 1st Plaintiff and the Defendant, the Defendant sold the said suit properties for a sum of Kshs. 18 million to the 1st Plaintiff whereby the 1st Plaintiff paid an initial deposit of Kshs. 1.6 million. Further, that pursuant to the said agreement, the sum of Kshs. 2 million was waived by the Defendant as his consideration for the 1st Plaintiff's board membership. He contends that the 1st Plaintiff upon receipt of the necessary approvals of the building plan from the County Government of Kajiado, began developing the suit properties by building houses for sale. Further, that the site was handed over to the Defendant who has further admitted the ongoing construction on the suit properties in his affidavit in court in the KAJIADO ELC CASE NO. 519 of 2017. He confirms that the 1st Plaintiff engaged messrs Tyrades Enterprises Limited pursuant to a construction agreement dated the 17th February, 2017 that was witnessed by the Defendant, to build houses on the suit properties. He states that the Defendant through his Advocate has issued notices dated the 4th July, 2017 and 10th July, 2017 respectively purporting to revoke the sale agreement and threatened to evict the contractor and the 1st Plaintiff from the suit properties, yet the completion date was in January 2016 and the contractor has been on site since March, 2017. Further, that the construction of the suit premises is near completion and the Sale Agreement is still valid. He reiterates that they have engaged in a costly as well as aggressive marketing of the houses being constructed and if the Defendant was to succeed in terminating the contract including evicting them from site, they would be faced with myriad suits from the suppliers of building materials. Further, that they have opened offices in Kajiado and retained employees and the conduct of the Respondent is illegal as it is not backed by any law or principle in law.

The application is opposed by the Defendant ADAN MAALIM IBRAHIM who filed a replying affidavit where he deposed that he is the registered owner of the suit properties. He avers that vide a Sale Agreement dated the 4th October, 2016 between himself and the 1st Plaintiff, he sold the suit properties at a purchase price of Kshs. 18 million. Further, that within the said agreement, he was to waive Kshs. 2 million as a consideration for nomination into the Board Membership of the purchaser but unfortunately the said Agreement was revoked by his letter dated the 4th July, 2017 for non payment of the purchase price as stipulated in the said Sale Agreement, hence he is not a member of the 1st Plaintiff whatsoever. He denies signing any forms or Agreement of any kind with the Applicants to be members of the 1st Plaintiff, and that the 1st Plaintiff has not paid him any money towards the purchase price. He explains that by the terms and conditions of the Sale Agreement at paragraph 3, the Purchaser purported to state that it had paid a deposit of 10% of the purchase price being Kshs. 1.6 million by way of two post dated cheques which he denies receiving and that is the reason he revoked the said Sale Agreement. Further, that the 1st Plaintiff promised to give him the post dated cheques but never did, and he will challenge the Applicants to provide evidenced to prove they paid him. He contends that as per paragraph 4 of the Sale Agreement, the Applicants were to pay Kshs. 14.4 million on or before expiry of the ninety (90) days from the date of execution of the said Agreement, which lapsed on 4th January, 2017, but he was not paid. He insists it is the Applicants who dishonoured, breached and violated the stipulated terms including conditions of the Sale Agreement dated the 4th October, 2016 which became null as well as void for all purposes touching on the suit properties as no purchase price was paid. He states that he made every effort to be paid by the Applicants but they ignored him and despite demands, they never sought an extension or amendment of the Sale Agreement to warrant the survival of the Sale Agreement which was revoked due to lapse of time as stipulated therein. He refers to the Plaintiffs as mere conmen who want to reap where they did not sow, as they want to obtain Court Orders yet they have not paid him a single cent for the suit properties. Further, that the Applicants commenced constructing on the suit properties without his permission or consent as he thought in good faith, they would pay him the purchase price as stipulated in the Sale Agreement. He further contends that sometime in May, 2017, he received a call from the County Government of Kajiado that demanded he goes to the Department of Lands. When he went to the said offices, he was informed of his intention to transfer the suit properties to the Applicants, which was not true, he realized the Applicants through false information as well as misrepresentation were attempting to transfer the said suit properties to their names, without his permission or consent while he was sick in hospital. He further avers that he subsequently advised his advocates messrs Kivuva Omuga & Co. to revoke the Sale Agreement vide a letter dated the 4th July, 2017 because the Plaintiffs failed to pay the purchase price and were attempting to transfer the suit properties to their names.

He insists the Plaintiffs contracted their contractor without his consent to construct houses on the suit properties without payment of the full purchase price and kept on promising to pay the same. He confirms instructing his advocate to send a letter to the contractor messrs Tyrades Enterprises Company Limited to stop construction since he had revoked the Sale Agreement. He denies receiving any payments, terms the exhibits irrelevant and not binding to warrant the orders sought as he had revoked the Sale Agreement. He stated that he shall seek the Court to expunge or ignore the exhibit marked 'IMG 5' by the Applicants which is an affidavit he swore in respect to ELC 519 of 2017 as it is inaccurate, irrelevant and the Applicants are not a party to that suit nor is the affidavit sworn by them, hence they do not have a right to rely on it. He disputes the payment receipts which the applicants paid to the firm of messrs Onyancha Nyakundi & Company Advocates and contends that the legal fees was not supposed to offset the purchase price. He claims he is not privy to the sketch maps, drawings and photos that the Applicants have attached, and insist he is only interested in the payments. He reiterates that the construction on the suit properties are illegal, unlawful structures and he shall seek an order for demolition. Further, that the Applicants have not produced any evidence of payment for the suit properties and the application lacks merit as they have not established a prima facie case to warrant the granting of the orders sought.

The 2nd Plaintiff ISMAEL MUCHIRI GACHAU filed a supplementary affidavit in rejoinder to the Defendant's replying affidavit and deposed that the Respondent had sold him land parcel number A5/ SAINA ESTATE for Kshs. 3.5 million vide an agreement dated the 20th January, 2015, and he paid the Respondent Kshs. 1.5 million that he acknowledged. He confirms that they entered into a new agreement for sale executed on 4th October, 2016 and they verbally agreed that the said Kshs. 2.5 million that he had paid, pursuant to the agreement dated 20th January, 2015 would be treated as part payment under the new agreement where he was purchasing the suit properties. He insists that the Defendant remains a board member of the 1st Plaintiff having waived the Kshs. 2 million as his consideration for board membership as he was not required to execute any other documents to become one. He contends that they paid the Respondent Kshs. 1.6 million by way of post dated cheques, and that he made further statements as evidenced by the annexed Bank as well as MPESA statements. He reiterates that pursuant to a letter dated the 12th July, 2017 from messrs Onyancha Nyakundi & Company Advocates and his letter dated the 19th July, 2017, that went unanswered, the Respondent is not justified to revoke the Sale Agreement as alleged. He contends that the suit properties were encroached upon and the Respondent's ownership was being challenged, at the time of executing the Sale Agreement, hence lapse of time could not be invoked as a ground for seeking to revoke the Agreement. He denies being conmen and explains that the Respondent was party to the building contract dated the 17th February, 2017 that varied the entire arrangement and modified the same to be in the nature of a joint venture agreement. He further denies that they intended to deprive the Respondent of the suit land and confirms it is true the Respondent served the Contractor with a letter dated the 10th July, 2017 and this was irregular as well as void ab initio since the Respondent was a party to the aforementioned building contract. He contends that the replying affidavit sworn by the Respondent in relation to KAJIADO ELC CASE No. 519 of 2017 is relevant to this case. Further, that the attached receipts from messrs Onyancha Nyakundi & Co Advocates attached as 'IMG 4' are relevant to this case as evidence of expenditure incurred on behalf of the Respondent. Further, that they had agreed legal fees paid and other expenses incurred would be deducted from the purchase price since the Respondent did not have money at the material time. He claims the Respondent was a party to the Architectural drawings, photographs and aggressive marketing they did regarding the project on the suit properties. He reiterates that the Respondent should not be allowed to carry out threat of demolition of the structures on the suit properties which were constructed with his full concurrence. He refers to affidavits of Messrs Tyrade Enterprises Limited as well as Jane Nyambura who confirm what transpired between them. Further that the Defendant is currently being investigated by the Directorate of Criminal Investigations (DCI) for case of molestation contrary to section 238 (3) of the Penal Code concerning the suit properties and the DCI has requested for placement of a RESTRICTION prohibiting dealing with the said properties until the investigations are complete. He reaffirms that it would be imperative if status quo was preserved pending the hearing and determination of this suit.

Both parties have their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the application, the supporting, replying as well as supplementary affidavits including the submissions, the only issue for

determination is whether the Plaintiffs are entitled to orders of interim injunction pending the outcome of the suit.

It is not in dispute that the 1st Plaintiff and the Defendant entered into an Agreement of Sale dated the 4th October, 2016 for the sale/purchase of the suit properties owned by the Defendant. It is also not in dispute that the 1st Plaintiff has commenced constructing on the suit land. What is in dispute is that the Plaintiffs' seek orders of interim injunction against the Defendant as he is threatening to evict the contractor from the suit properties. The Defendant insists that the 1st Plaintiff failed to pay him the purchase price and this culminated in his rescinding the contract. The Plaintiffs aver that they paid the Defendant Kshs. 1.6 million via post dated cheques, and that the Defendant waived Kshs. 2 million to enable him be included in the Board of the 1st Plaintiff. The Plaintiffs further aver that they have paid the Defendant a substantial amount of money which the Defendant admitted in a related suit KAJIADO ELC 519 of 2017.

The principles for granting injunction is well established in the celebrated case of **Giella Vs Cassman Brown**. In line with the said principles, I wish to interrogate whether the Plaintiffs have established a prima facie case with a probability of success it is at this juncture that I will undertake a critique of the Sale Agreement that formed the basis of the contract between the Plaintiffs and the Defendant. Clause 2, 3, 4, 5, 6, of the Sale Agreement dated the 4th October, 2016 reads: ' **2) the vendor has agreed to waive Kshs 2 million as a consideration for his nomination into the board membership of the purchaser. 3) The purchaser has paid a deposit of Kshs. 1.6 million by way of post dated cheques. 4) The balance of the purchase price (Kshs. 14,400,000) will be paid to the vendor on or before the expiry of Ninety days from the date of this agreement. 5) the vendor will execute transfer of title and give all documents necessary for registration of the transfer in favour of the purchaser upon clearance of the cheques for deposit to common advocates. 6) The purchaser has been given vacant possession of the plots immediately after execution of this sale agreement.** '

From a reading from the excerpt of the sale agreement, the terms were very clear in terms of the payment and the obligations from the respective parties. The Plaintiffs have relied on the case of **Giella Vs Cassman Brown and Panari Enterprises Limited v Lijoodi & 2 Others (2014) eKLR** to support their arguments. They insist they have established a prima facie case to warrant the granting of orders of injunction. I however note that the Plaintiffs have not indicated whether they finalized paying the balance of the purchase price within the ninety (90) days as had been agreed upon. They contend that the Defendant confirmed in the ELC 519 of 2017 that he was paid a substantial amount but they do not inform Court on how much they have so far paid to the Defendant. Except for the two post dated cheques, and the MPESA statements, it is not clear how much has been paid in fulfilment of the purchase price. The Plaintiffs insist the Defendant gave them possession of the suit land and commenced construction thereon and was even aware of the contract with messrs Tyrades Limited but all these are a pointer that they commenced constructing on the suit land but this does not invalidate clause (4) of the Sale Agreement. The Plaintiffs have not furnished court with any further addendum to the Sale Agreement that was varying the terms therein. It seems the Defendant handled his part of the bargain but the Plaintiffs were slow to handle their part. The law of contract is very clear and the Plaintiffs cannot expect the Court to rewrite a contract for them. The role of the Court is simply to interpret it but not to rewrite it.

As per clause (10) of the said agreement, it reads: ' **None of the parties herein will retract from the terms of this agreement and in case of default, the defaulting party will pay a penalty fee of ten percent of the purchase price to other party and place that party in its original position before the agreement.** '

These terms were very clear as I have alluded to above and at this juncture I find that it is actually the Plaintiffs who are the defaulting parties as they failed to pay the full purchase price in ninety (90) days as had been agreed upon. It is the Plaintiffs' contention that the Defendant cannot revoke the contract because he is now a board member to the 1st Plaintiff, but has not shown the court any memorandum or articles of association to the 1st Plaintiff to confirm the Defendant was a board member. Further, that there was a previous agreement where the 2nd plaintiff agreed verbally with the second Defendant that the monies paid therein would be added to the purchase price. What is interesting is that this important condition and the monies already paid did not form part of the Sale Agreement with the 1st Plaintiff which was executed much later. The Defendant on the other hand insists that he is not a board member as he has revoked the Sale Agreement. The Defendant relied on the case of **Wagichiengo Vs Gerald in Nairobi Civil Appeal No. 72 of 1984** where JJA Nyarangi, Masime and Appaloo held as follows: ' **On the evidence, there was a condition precedent to the contract between the parties that the Appellant would deposit a sum of money £ 20,000 in the Respondent's Foreign Bank Account, and this condition was not fulfilled by the Appellant. The High Court Judge was right in his holding that there was a valid contract but that contract had become unenforceable by the Appellant because of his own failure to comply with an essential term thereof namely the condition precedent.** '

In relying on the facts as presented above including the Judicial authorities referred to I find that the Plaintiffs have not established a prima facie case to warrant the grant of orders of injunction pending the outcome of the suit as they did not comply with the condition precedent in the date agreed to pay the full purchase price in ninety (90) days. I note the Plaintiffs are not even registered proprietors of the suit properties and commenced building thereon, despite not having paid the full purchase price. It seems this was a risk they opted to take which they cannot now expect the court to assist them remove by blocking the Defendant from revoking the contract.

It is in the circumstances that I find the application dated the 27th July, 2017 unmerited and dismiss it with costs.

Dated signed and delivered in open court at Ngong this 23rd day of July, 2018.

CHRISTINE OCHIENG

JUDGE