



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 25 OF 2016

BROOK VILLAS ESTATE LIMITED.....PLAINTIFF/APPLICANT

VERSUS

DUNCAN MACHARIA GATU.....1ST DEFENDANT/RESPONDENT

URITHI HOUSING CO-OPERATIVE LTD.....2ND DEFENDANT/RESPONDENT

AND

ERIC MUGO & 15 OTHERS.....INTERESTED PARTIES

RULING

What is before me is the plaintiff's application brought by way of Amended Notice of Motion dated 7th October, 2016 in which the plaintiff has sought a temporary injunction restraining the defendants whether by themselves or through their agents, servants and/or workers from further breaching the sale agreement dated 14th May, 2015 by entering into any other contracts with any third parties, offering for sale, leasing, mortgaging, charging, disposing, transferring, assigning, developing and/or otherwise dealing with all that parcel of land known as Juja/Komo/Block 1/3452 (hereinafter referred to as the "suit property") pending the hearing and determination of the suit. The application is supported by an affidavit sworn by MUTHOGA KANIARU. The application is opposed by the 1st defendant through his replying affidavit sworn on 14th October, 2016 and by the 2nd defendant through a replying affidavit sworn by KELVIN MUTHURI on 24th December, 2016.

The Plaintiff/ Applicant's case

The plaintiff has contended that the 1st defendant was at all material times the registered owner of a parcel of land known as JUJA/KOMO BLOCK1/25 measuring approximately 12.0 hectares (29.7 acres)(hereinafter referred to as "the original parcel"). The plaintiff has contended that it purchased from the 1st defendant a portion of the original parcel measuring 12 acres which was abutting the main road at a consideration of Kshs. 84,000,000/=. The plaintiff has averred that it paid to the 1st defendant a deposit of Kshs. 10,000,000 on the understanding that, the 1st defendant would retrieve the title deed for the original parcel that was being held at Family Bank, subdivide the original parcel and excise the plaintiff's portion therefrom. The plaintiff has contended that contrary to the express provisions of the agreement for sale between the plaintiff and the 1st defendant, the 1st defendant caused the original parcel to be subdivided into two portions namely, JUJA/KOMO BLOCK 1/3451 and JUJA /KOMO BLOCK 1/3452(hereinafter referred to as "the suit property"). The plaintiff has averred that the suit property which measures 18 acres is abutting the main road. The plaintiff has contended that 1st defendant acted with malice in carrying out the said subdivision and that it was unable to register an order of inhibition that was granted in its favour herein earlier because the title for the original parcel was closed and a new title created. The plaintiff has contended that the 1st defendant has offered the suit property for sale to the 2nd defendant which is aware of its interest in the property and that the 2nd defendant has put up banners all over the property advertising the plots arising from the subdivision of the suit property for sale. The plaintiff has contended that the defendants have conspired to defeat this suit by bringing in third parties onto the suit property and alleging that the property is no longer available for sale to it. The plaintiff has urged the court to grant the orders sought in order to preserve the suit property and prevent the irreparable harm that is likely to ensue if the property is disposed of.

1st Defendant/Respondent's case:

In its opposition to the application, the 1st defendant has contended that the plaintiff had brought an application dated 5th September, 2016 seeking to amend the reference number for the land in dispute from JUJA/KOMO/BLOCK 1/25 to JUJA/KOMO/BLOCK 1/3452 which application was rejected by the court. The 1st defendant has contended that the present application by the plaintiff is an abuse of court

process. The 1st defendant has contended that the agreement for sale that he entered into with the plaintiff speaks for itself. The 1st defendant has contended that there was no condition attached to the requirement that the plaintiff would pay 40% of the purchase price within 60 days from the date of the execution of the agreement for sale between the parties. The 1st defendant has contended that the plaintiff failed to meet the terms of clause 2(b) of the agreement for sale which left him with no alternative but to rescind the said agreement. The 1st defendant has contended that the plaintiff has not furnished any proof of the existence of JUJA/KOMO/BLOCK1/25(the original parcel) hence the application before the court has been actuated by malice and is meant to interfere with his right to sell the suit property. The 1st defendant has contended that the plaintiff has not demonstrated that it performed its part of the contract during the subsistence of the rescinded agreement for sale. The 1st defendant has contended further that the plaintiff has come to court with dirty hands and that the plaintiff has not established that it will suffer irreparable loss if the orders sought are not granted. The 1st defendant has urged court to dismiss the application for want of merit.

2nd Defendant/Respondent's Case:

The 2nd defendant has contended that the orders sought by the plaintiff are not tenable as the same were overtaken by events after the plaintiff breached the terms of the agreement for sale between it and the 1st defendant. The 2nd defendant has contended that the plaintiff failed to honour its obligation under the said agreement for sale that required it to pay to the 1st defendant a further deposit of Kshs. 33,600,000/-, sixty (60) days upon execution of the said agreement as a result of which the said agreement was rescinded. The 2nd defendant has contended that the advocates for the 1st defendant wrote to the plaintiff informing it of the said breach but the plaintiff failed to remedy the same. The 2nd defendant has contended that the suit property was subdivided long before the plaintiff rushed to court and that the 1st defendant was at liberty to source for other buyers after the plaintiff breached the contract between them. The 2nd defendant has contended that the plaintiff is the author of its own misfortune and urged court to dismiss the application since it is an abuse of the court process.

The Submissions:

The plaintiff filed its submissions on 4th October, 2017. The plaintiff has submitted that the object of a temporary injunction is to maintain status quo. The plaintiff has submitted that although the court had ordered that the status quo be maintained, there is a real danger that the suit property may be transferred to third parties. The plaintiff has submitted that it has established a prima facie case against the 1st defendant in that the 1st defendant breached the agreement for sale between them by subdividing the suit property and selling the same to the 2nd defendant thereby defeating its interest. The plaintiff has submitted that it had sought an assurance from the 1st defendant's advocates that the subdivision had been done and the title discharged to enable it pay the additional 40% deposit but no assurance came forth. The plaintiff has submitted further that the 1st defendant has also purported to withhold the 10% deposit it had paid in the sum of Kshs. 8,400,000/- and that no measure of damages can adequately compensate for the loss that it is likely to incur. The plaintiff has submitted that even if the application is to be determined on a balance of convenience, the balance of convenience tilts in its favour as it has already paid Kshs.15,000,000/- towards the purchase price for the suit property and it is willing to clear the balance thereof. The plaintiff has submitted further that the interested parties have shown an interest on the suit property and as such it stands to suffer loss if the orders of injunction sought are not issued. The plaintiff has submitted that its right as a bona fide purchaser which came first in time must override the 2nd defendant's claim over the suit property. In support of this submission, the plaintiff has cited the case of Daniel Kipkenda Rono v James Kariuki Nganga & 4 Others (2013) eKLR.

The 1st defendant filed its submission on 9th October, 2017. The 1st defendant has submitted that the plaintiff failed to raise the required deposit of the purchase price for the suit property as consequence of which the sale of the property to the plaintiff was rescinded. The 1st defendant has submitted that it is not bound to meet the plaintiff's demands the plaintiff having failed to meet its part of the bargain. The 1st defendant has submitted that the plaintiff has no case to warrant the grant of the injunctive reliefs sought. The 1st defendant has referred to Clause 10 Special Condition E of the agreement for sale that made time of essence and has submitted that the plaintiff was bound to observe the time lines on the payments that were to be made under the agreement for sale. In support of his submission, the 1st defendant has relied on the cases of Maureen Muthua v Nathan Kahara & Anor (2013) eKLR and Gatere Njamunyu v Joseck Njue Nyaga (1983) eKLR.

The 2nd defendant filed its submissions on 31st May, 2017. The 2nd defendant has submitted that the plaintiff's application has been overtaken by events and that the orders sought cannot be enforced since it has legally acquired the suit property. The 2nd defendant has submitted that the plaintiff has come to court with dirty hands. The 2nd defendant has submitted that the plaintiff is seeking a remedy for a purported breach of the agreement for sale and has failed to disclose to the court that the said agreement has an arbitration clause for settlement of disputes. In support of its submission, the 2nd defendant has cited the cases of Kalya Soi Farmers Cooperative Society v Paul Kirui & Another and Anita Chelegat O'donovan & 2 others v Fredrick Kwame Kumah & 2 Others (2015) eKLR. The 2nd defendant has submitted that the application does not meet the threshold in the case of Giella v Cassman Brown & Co. Ltd. [1973] E.A.358. The 2nd defendant has submitted that the sale and transfer of the suit property to it was legal and urged the court to dismiss the plaintiff's application.

Analysis and determination:

I have considered the plaintiff's application together with the affidavits filed in support of and in opposition thereto. I have also considered the submissions by the respective advocates for the parties. What is before the court is an application for a temporary injunction and the issue for determination is whether the plaintiff has met the threshold for grant of such order. The principles upon which the court exercises its discretion in applications for a temporary injunction were spelt out in the case of Giella v Cassman Brown & Co. Ltd. (supra). The applicant must establish a prima facie case with a probability of success and must demonstrate that it might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages if the order is not granted. If the court is in doubt, the application is to be determined on a balance of convenience.

What constitutes a prima facie case was defined by the Court of Appeal in the case of Mrao Limited v First American Bank of Kenya

Limited & 2 Others (2003) KLR 125 as follows;

“...a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

The plaintiff has not persuaded me that it has a prima facie case against the defendants with a probability of success. I have noted that under the terms of the agreement for sale that the plaintiff entered into with the 1st defendant, time was of essence in respect of both parties’ obligations. The agreement for sale provided that the plaintiff would pay to the 1st defendant a further deposit equivalent to 40% of the purchase price 60 days from the date of the execution of the agreement. I am in agreement with the 1st defendant that the said payment was not subject to the 1st defendant fulfilling any condition. There is no evidence that the plaintiff paid the said further deposit. The 1st defendant’s contention that the plaintiff is in breach of the agreement for sale it is seeking to enforce is therefore not far-fetched. Where a contract is breached, the innocent party has among other rights, a right of rescission. The plaintiff has not satisfied me that the 1st defendant exercised the right of rescission wrongfully. The plaintiff having failed to establish a prima facie case, it is not necessary to determine whether the plaintiff would suffer irreparable loss if the order of injunction sought is not granted.

The upshot of the foregoing is that I find no merit in the plaintiff’s Amended Notice of Motion application dated 7th October, 2016. The application is dismissed with costs to the defendants.

Delivered and Dated at Nairobi this 27th day of September 2018

S. OKONG’O

JUDGE.

Ruling read in open court in the presence of:

N/A for the Plaintiff

Ms. Chege for 1st Defendant

N/A for the 2nd Defendant

N/A for the Interested Party

Catherine Court Assistant