



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 1190 OF 2016

JOSEPH VINCENT OYILE MAGOHA & ANOTHER.....PLAINTIFFS

VERSUS

RINGS VIEW APARTMENTS LIMITED.....DEFENDANT

I & M BANKINTERESTED PARTY

RULING

Introduction

1. This is a ruling in respect of two separate applications filed by the plaintiffs. The first application is dated 9th November 2017. It seeks injunctive orders restraining the defendant from selling, disposing or alienating the suit properties being apartments B4 and C2 situated on LR No.4858/11 at Kileleshwa in Nairobi pending determination of arbitration proceedings.

2. The second application is dated 1st December 2017. The application seeks orders compelling the interested party to execute a partial discharge within 7 days in respect of the two aforesaid apartments in favour of the plaintiffs. The application also seeks orders compelling the defendant to prepare execute and register leases in favour of the plaintiffs in respect of the two apartments.

Application dated 9th November 2017.

3. The Plaintiffs contend that they purchased the two apartments from the defendant vide an agreement entered into in the year 2012. The defendant has since failed to give possession to the plaintiffs. There were attempts to settle the dispute in an amicable way but that has not worked out. The agreement contained an arbitration clause and this is what has informed this application.

4. The defendant in a replying affidavit in response to the second application has stated that it is not opposed to the first application. It states that it had in fact filed an application dated 3rd November 2016 in which it sought stay of proceedings herein pending determination of arbitral proceedings. The plaintiffs moved to court before the defendant's application could be heard and filed the present application.

5. There is no party opposing the plaintiffs application. In the submissions filed by the plaintiff, they seem to be going against their request for the matter to be referred to arbitration. They are arguing that there is nothing to be referred to arbitration. I find no merit in the plaintiff's arguments. The agreement which the parties signed provided for an arbitration clause. The plaintiffs themselves have applied that the matter be taken for arbitration. They cannot again turn around and say that there is nothing to be taken for arbitration. I therefore allow the application dated 9th November 2017 in terms of prayer (3) and (4).

Application dated 1st December 2017

6. The plaintiffs contend that they paid full purchase price in respect of the two apartments but that the defendant is not willing to transfer the two apartments to them. The title in respect of LR No.4858/11 where the two apartments are comprised is charged to the interested party. The loan is yet to be fully repaid.

7. The interested party has opposed the application through a replying affidavit sworn by Nick Otieno Osoro on 20th December 2017. The interested party contends that it cannot be compelled to execute a partial discharge in respect of the two apartments as there is no evidence that the plaintiffs cleared the purchase price to warrant it to execute a partial discharge. The interested party states that it has been granting partial discharge to those who have cleared payment and that the plaintiffs have not provided evidence that the amount they claim was paid to the defendant was actually paid to the bank for it to be called upon to execute a partial discharge.

8. The defendant on its part has opposed the plaintiff's application based on a replying affidavit sworn by Dr Mbira Gikonyo on 4th April 2018. The defendant contends that the plaintiff's application is premature and that if it were to be allowed, there will be nothing remaining; that the matter is set to be taken to arbitration and that the application cannot therefore, be allowed.

9. I have considered the plaintiff's application and the opposition thereto by the defendant and the interested party. I have also considered the submissions by the parties herein. The plaintiff is seeking mandatory orders. The law is clear that mandatory orders ought to be given in the clearest of cases. There is no dispute that the title to the property where the apartments in issue are erected was charged to the interested party. Whereas there is no doubt that the plaintiff cleared the purchase price, there is no evidence that the money was paid to the bank by the defendant. The interested party cannot execute a partial discharge unless it is paid money due on account of the two apartments. A court cannot compel the interested party to execute partial discharge unless it is shown that the bank has been paid money but it is refusing to execute a partial discharge.

11. The interested party has gone ahead to demonstrate that it has given partial discharges to those who have paid their money to the bank. The plaintiff herein have not demonstrated that their lawyer paid money to the bank. They cannot therefore insist on an order compelling the interested party to execute partial discharge in their favour.

12. This matter is going to arbitration. It is the intention of both the defendant and the plaintiff that this matter be subjected to arbitration. It will defeat the purpose of arbitration if the court were to grant the orders sought herein. I therefore find that the plaintiff's application lacks merit. The same is hereby dismissed with costs to the defendant and the interested party.

It is so ordered.

Dated, signed and delivered at *Nairobi* on this *11th* day of *October 2018*.

E.OBAGA

JUDGE

In the presence of :-

M/s Marienga for Plaintiff

Hilda : Court Assistant

E.OBAGA

JUDGE