



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 8 OF 2018

BENJAMIN IMALINGAT.....1ST PLAINTIFF

ANNE WAIRIMU IMALINGAT.....2ND PLAINTIFF

VERSUS

JOLLY ELOIT BUDDS.....1ST DEFENDANT

KYUNA LIMITED.....2ND DEFENDANT

RULING

What is before me is the plaintiffs' Notice of Motion application dated 22nd December, 2017 in which the plaintiffs have sought among others, the following orders:

1. A temporary injunction restraining the defendants, either by themselves and/or their agents/employees/servants or any other person whomsoever from constructing, erecting selling, transferring or interfering in any way whatsoever with all those parcels of land known as L.R No 7158/616 and L.R No 7158/617 (herein referred to jointly as "the suit properties" and individually as "Plot No. 7158/616" and "Plot No. 7158/617") respectively pending the hearing and determination of this suit.
2. A declaration that the plaintiffs are the rightful owners of Plot No. 7158/616 and that the said plot measures 0.4117ha. and not 0.3840ha. as indicated in the title of the said property.
3. An order compelling the defendants to transfer Plot No.7158/616 with the correct acreage of 0.4117ha. to the plaintiffs in accordance with the agreement for sale dated 16th August, 2004.
4. An order compelling the defendants to transfer to the plaintiffs a further portion of land measuring one acre which was to be hived from the mother parcel of land in respect of which the plaintiffs had already paid a deposit.

The application is supported by the affidavit and supplementary affidavit sworn by the 1st plaintiff on 22nd December, 2017 and 13th February, 2018 respectively and the same is opposed by the defendants through a replying affidavit and further affidavit sworn by the 1st defendant on 24th January, 2018 and 28th February, 2018 respectively.

The plaintiffs' case:

The plaintiffs have contended that they entered into a sale agreement dated 16th August, 2004 with one, John Edward Budds (deceased) and the 1st defendant in respect of a portion of a parcel of land known as L.R No. 7158/48 Spring Valley Nairobi(hereinafter referred to as "the original parcel"). The plaintiffs have contended that the portion of the original parcel that was purchased by them comprised of Plot A measuring 0.180ha. and Plot B measuring 0.2317ha. making a total of 0.4117ha. The plaintiffs have contended that after the death of John Edwards Budds who was the 1st defendant's father sometimes in 2015, the 1st defendant resurveyed the original parcel and came up with two subdivisions namely, Plot No. 7158/616 and Plot No. 7158/617. The plaintiffs have contended that Plot No. 7158/616 resulted from the merger of Plot No. A and Plot B which were sold to them by the 1st defendant and John Edwards Budds save that Plot No. 7158/616 measured 0.3840ha. instead of 0.4117ha. The plaintiffs have contended that Plot No. 7158/616 that has been offered to them by the 1st defendant is less in size compared to the land that was sold to them by the 1st defendant and John Edwards Budds under the agreement for sale aforesaid.

The plaintiffs have contended that in addition to the parcel of land that was sold to them by the 1st defendant and John Edwards Budds (hereinafter referred to as only as "the deceased"), the deceased approached them on 5th October, 2013 and asked for Kshs. 430,000 as a

deposit for another portion of the original parcel measuring one(1) acre. The plaintiffs have contended that this additional one (1) acre was to be curved out of what is now Plot No. L.R No. 7158/617. The plaintiffs have contended that in addition to the said sum of Kshs.430,000/- that was paid to the deceased for the additional portion of the original parcel, the 1st defendant also received Kshs. 450,000/- from the rent that was due to the plaintiffs which was to be treated as part of the deposit for the said additional portion of land.

The plaintiffs have contended that sometimes in 2016, the 1st defendant and one, Viju Patel incorporated the 2nd defendant and commenced construction on Plot No. 7158/617 notwithstanding that there was a dispute in respect thereof. The plaintiffs have contended that through a letter dated 10th October, 2017, the 1st defendant purported to rescind the agreement for sale dated 16th August, 2004 between the plaintiffs and, the 1st defendant and the deceased on the grounds that the plaintiffs had breached the same by failing to pay the balance of the purchase price by the completion date. The plaintiffs have contended that they paid the purchase price in full to the 1st defendant and the deceased. The plaintiffs have contended that the 1st defendant and the deceased could not have allowed them to collect rent from the buildings on Plot No. 7158/616 without paying the full purchase price neither could they have entered into a subsequent agreement with the deceased in respect of the additional portion of land if they had not completed the payment for the first parcel of land. The plaintiffs have contended that the 1st defendant and the deceased waived their right to rescission if any by accepting further payments from them after the completion date.

The plaintiffs have averred that if the orders sought are not granted, the defendants are likely to deprive them of the suit properties which they acquired lawfully from the 1st defendant and the deceased and the loss they are likely to suffer cannot be compensated in damages.

The defendants' case:

In his opposition to the application, the 1st defendant has contended that the original parcel of land was owned jointly by him and the deceased. He has admitted that on 16th August, 2004, they sold a portion of the original parcel of land measuring 0.4117ha. to the plaintiffs. The 1st defendant has admitted further that the original parcel of land was resurveyed and that the second survey gave rise to Plot No. 7158/616 and Plot No. 7158/617. The 1st defendant has also admitted that Plot No. 7158/616 comprises of Plot A and Plot B that they sold to the plaintiffs and that it measures 0.3840ha. rather than 0.4117ha. that was originally sold. The 1st defendant has contended that the size of the parcel of land that was sold to the plaintiffs was reduced following a demand by the Nairobi City Council that a portion thereof next to the road be surrendered as a road reserve. The 1st defendant has contended that the original subdivision plan was not approved by the Nairobi City Council because it did not provide for adequate road reserve.

The 1st defendant has contended that he has not transferred to the plaintiffs Plot No. 7158/616 as a result of the plaintiffs' failure to complete the payment of the purchase price. The 1st defendant has averred that Plot No 7158/617 is registered in the name of the 2nd defendant and that there was no agreement for sale to the plaintiffs of additional parcel of land measuring one (1) acre to be curved from the original parcel or Plot No 7158/617. The 1st defendant has contended that the original parcel was owned by him jointly with the deceased and as such the deceased alone could not have disposed of any portion of the same to the plaintiffs without his involvement. The 1st defendant has averred that he is willing to refund to the plaintiffs the sum of Kshs. 430,000/- which the plaintiffs claim to have paid to the deceased if the plaintiffs furnish proof of such payment. The 1st defendant has averred that he was entitled to rescind the agreement for sale dated 16th August, 2004 due to the plaintiffs' default in the payment of the balance of the purchase price.

The 1st defendant has averred that the plaintiffs have been collecting rent of Kshs. 240,000 per month from the buildings on Plot No. 7158/616 which has been a loss to them as they are the ones who have been paying the land rates for the property. The 1st defendant has denied receiving rent of Kshs. 450,000/- on behalf of the plaintiffs. The 1st defendant has contended that the plaintiffs have admitted that they are the ones collecting rent from Plot No. 7158/616 and as such there is no way the 1st defendant can be said to have collected rent from the same premises.

The 1st defendant has averred that the plaintiffs have never demanded for the transfer of Plot No. 7158/616 into their names because of their failure to complete the payment of the purchase price for the property. The 1st defendant has averred that the deceased and he are not to blame for the reduction in the size of Plot No. 7158/616 a portion of which was hived off for a road reserve. The 1st defendant has contended that the orders sought if granted would prejudice them and has urged the court to dismiss the application with cost.

Submissions:

The plaintiffs filed their submissions on 14th February, 2018. The plaintiffs submitted that they had satisfied the conditions for grant of interlocutory injunction that were enunciated in the cases of Giella v Cassman Brown & Company Ltd. (1973) E.A 358, Mrao Ltd. v First American Bank of Kenya Ltd. & others and Bulk Medicals Ltd. v Paramount Universal Bank Ltd. & 2 Others (2003) eKLR. The plaintiffs submitted that the agreement for sale that they entered into with the 1st defendant and the deceased was uncontroverted and that the acknowledgment dated 16th October, 2009 proves that they paid the purchase price in full.

The plaintiffs submitted further that the contract between them and, the 1st defendant and the deceased did not provide that time was to be of essence and as such the 1st defendant and the deceased had a duty to serve upon them notice making time of essence of the agreement before purporting to rescind the same. In support of this submission, the plaintiffs relied on the cases of Bir Singh v Parmar E.A 212, Hassan Zubeidi v Patrick Mwangangi Kibaiya & Another[2014]eKLR, Aida Nunes v JMN Njonjo & C. Kigwe (1962) E.A 89 and Sagoo v Dourado (1983) KLR 365.

The plaintiffs submitted that since the 1st defendant and the deceased accepted payments of the purchase price after the completion date, they were estopped from rescinding the contract. In support of this submission, the plaintiffs relied on the cases of Paradise Properties Ltd. v Steve Wambua Musyimi & Mercy Mbula Ndambuki[2014]eKLR and Rajnikant khetsi Shah v Habib Bank A.G Zurich [2016]eKLR. The

plaintiffs submitted that they would suffer irreparable harm if the orders sought are not granted. The plaintiffs submitted that the respondents were excavating the suit properties and if they were not stopped, they would erect permanent structures thereon. The plaintiffs submitted further that the defendants would only suffer loss of income for which they could be compensated by way of damages if the construction was stopped.

In support of this submission, the applicants cited the cases of Olympic Sport House Ltd. v School Equipment Center Ltd. [2012] eKLR and Hassan Zubeidi v Patrick Mwangangi Kibaiya & Anor (supra). The plaintiffs submitted that even if the application was considered on a balance of convenience, the same would tilt in their favour.

The defendants filed their submissions on 28th February, 2018. The defendants cited the cases of Giella v Cassman Brown & Company Ltd. (supra) and Mrao Ltd. v First American Bank of Kenya Ltd & others (supra) and submitted that the plaintiff's application did not meet the threshold for grant of the orders sought. The defendants submitted that the conduct of the plaintiffs disentitled them to the equitable reliefs they had sought. The defendants reiterated that the plaintiffs did not complete the payment of the purchase price for Plot No. 7158/616. The defendants submitted that out of the purchase price of Kshs.15,500,000/-, the plaintiffs were to pay to the 1st defendant a sum of Kshs. 6,000,000/- of which a sum of Kshs. 1,500,000/- remains unpaid. With regard to the document dated 16th October, 2009 through which the deceased was alleged to have acknowledged receipt of Kshs. 700,000/- as the balance of the purchase price, the defendants submitted that the document ought to have been signed by all the parties to the agreement for sale and since it was allegedly signed by the deceased only, it was not binding on the 1st defendant.

The defendants submitted that the plaintiffs failed to meet the deadline for completing the agreement for sale of Plot No. 7158/616 and the court could not extend the time for them. The defendants submitted that the 1st defendant and the deceased were ready and willing to complete the said agreement for sale and that time was of the essence in respect of the parties' obligations under the agreement. The defendants submitted further that the reduction in the size of Plot No. 7158/616 was as a result of the acts of the Nairobi City Council which was beyond the control of the 1st defendant and the deceased.

The defendants reiterated that they were strangers to the existence of any sale agreement in respect of Plot No. 7158/617 and contended that if there was any such agreement, the same was not valid as it did not comply with provisions of section 3(3) of the Law of Contract Act that requires any agreement for sale of land to be in writing and signed by all parties. The defendants reiterated that Plot No. 7158/617 was jointly owned by 1st defendant and the deceased and as such the deceased did not have the capacity to sell the same without involving the 1st defendant. The defendants submitted that the alleged agreement for sale in respect of Plot No. 7158/617 was invalid and as such could be a basis for an order of specific performance. In support of this submission, the defendants cited the case of Nabro Properties Ltd. v Sky structures Ltd. & 2 Others [2002] 2 KLR.

On whether an award of damages would be an adequate remedy for the plaintiffs, the defendants submitted that the plaintiffs had not demonstrated to the court that damages would not be an adequate remedy and that the defendants would not be in a position to satisfy an award of damages. On the balance of convenience, the defendants referred to the case of E.A Industries v Trufoods [1972]E.A 420 and submitted that the balance of convenience tilts in their favour as the plaintiffs failed to complete the payment of the purchase price for Plot No. 7158/616. The defendants submitted further that the plaintiffs were not entitled to an equitable remedy. In support of this submission, the defendants relied on the case of Purple Trading Company Ltd v Bhnanoo Shashikant Jai [2014] eKLR.

Determination:

I have considered the plaintiffs' application together with the affidavits that were filed in support thereof. I have also considered the defendants' affidavits in reply to the application. Finally, I have considered the written submissions by the parties' respective advocates and the various authorities that were cited in support thereof. The plaintiffs have sought prohibitory and mandatory injunction pending the hearing of the suit. There is also a prayer for a declaration which I think cannot be granted at this stage the same being a final order. The principles upon which this court exercises its discretion in applications for temporary injunctions are now well settled.

As was stated in the case of Giella v Cassman Brown & Company Ltd (supra), an applicant for interlocutory injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others (2014) eKLR the Court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited v First American Bank of Kenya Limited & 2 Others (supra) and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

With regard to interlocutory mandatory injunctions, the general principles were set out in the case of Locabail International Finance Limited v Agro-Export (1988) 1 All ER 901, where the court stated that:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction”.

In the case of Shepherd Homes Ltd. v Shandahu [1971] 1 Ch.34, Meggery J. stated as follows;

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

On the material before me, I am satisfied that the plaintiffs have satisfied the conditions for grant of a temporary prohibitory injunction pending the hearing of the suit in relation to Plot No. 7158/616. It is not disputed that the plaintiffs entered into an agreement for sale with the 1st defendant and the deceased in respect of the said property. The terms of that agreement are not disputed. What is in dispute is whether the plaintiffs completed the payment of the purchase price for the property and whether the 1st defendant was entitled to rescind the said agreement for sale on account of the plaintiffs’ alleged failure to complete the agreement. The purchase price for Plot No. 7158/616 was Kshs. 15,500,000/- of which the payment of Kshs. 14,000,000/- is not disputed. The dispute revolves around a sum of Kshs. 1,500,000/- which the plaintiffs claim to have paid which claim is denied by the 1st defendant. The plaintiffs have placed before the court a copy of an acknowledgment of payment dated 16th October, 2009 in which the deceased is said to have acknowledged payment of a sum of Kshs.700,000/- as the final instalment of the purchase price. The 1st defendant has contested the validity of this document. The effect and purport of this document can only be determined at the trial. For now, I am satisfied that the plaintiffs have established on a prima facie basis that they have paid the purchase price for Plot No. 7158/616 in full and as such they have an interest in the said parcel of land that deserves protection pending the hearing of the suit.

I am also satisfied that the plaintiffs would suffer irreparable harm which cannot be compensated with an award of damages if the injunction sought is not granted. The plaintiffs are in possession of Plot No. 7158/616 and if the injunction sought is not granted they do not only stand the risk of being dispossessed of the property but also of losing an investment worth over Kshs. 15,000,000/-. With regard to Plot No. 7158/617, I am in agreement with the defendants that the plaintiffs have not established that they entered into a binding agreement for sale with the 1st defendant and the deceased in respect thereof. In the circumstances, the plaintiffs have not established a prima facie case against the defendants in respect of this parcel of land.

The plaintiffs had also sought a mandatory injunction to compel the 1st defendant to transfer Plot No. 7158/616 and a portion of Plot No. 7158/617 measuring one (1) acre to them. This is the main relief that the plaintiffs have sought in the plaint. I am not satisfied that the plaintiffs have established a strong case and special circumstances that would warrant the grant of this relief before the hearing of the suit. The plaintiffs have not convinced me that they deserve an interlocutory mandatory injunction. The same applies to the prayer for a declaration that the plaintiffs are the rightful owners of Plot No. 7158/616. As I have mentioned earlier, this is a final order that cannot be granted at this stage.

Conclusion:

In conclusion, the plaintiffs’ application succeeds in part. The application dated 22nd December, 2017 is allowed in terms of prayer 3 but limited only to L.R No. 7158/616. Since the application has failed in respect of the other prayers, the costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 29th day of November 2018

S. OKONG’O

JUDGE

Ruling read in open court in the presence of:

Mr. Abdirazak h/b for Mr. Kithi for the Plaintiffs

Ms. Nyabenge for the Defendants

Catherine Court Assistant