



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO. 390 OF 2018

HAFSA KASSIM SHEIKH.....PLAINTIFF

=VERSUS=

ESTHER GLORIA MWIHAKI BELL.....1ST DEFENDANT

ZAMZAM A ABIB.....2ND DEFENDANT

COBBS INVESTMENTS LIMITED.....3RD DEFENDANT

APPLE CREEK VILLAS LIMITED.....4TH DEFENDANT

RULING

Background

1. The dispute in this suit arose from a land sale agreement executed on 15/1/2016 between Esther Gloria Mwihaki Bell (the 1st defendant) and Hafsa Kassim Sheikh (the plaintiff). Under the agreement, the 1st defendant agreed to sell and the plaintiff agreed to purchase Land Reference Number 209/7153/29 at Kshs 201,000,000. A sum of Kshs 30,000,000 was to be paid on execution of the agreement. A further sum of Kshs 30,000,000 was to be paid on before 14/2/2016. The balance of Kshs 141,000,000 was to be paid to the vendor's advocate on or before completion date to hold it pending registration of the transfer in favour of the plaintiff. Completion period was 120 days from 15/2/2016.

2. It is contended by the 1st and 2nd defendants that the plaintiff was unable to pay purchase price as agreed and this led to a rescission of the agreement by the 1st defendant. At the time of the alleged rescission, the plaintiff had paid a total of Kshs 164,000,000 out of the sum of Kshs 201,000,000. The property was subsequently sold to the 3rd defendant on 31/10/2016 at the same price of Kshs 201,000,000 and a sum of Kshs 131,506,100 was refunded to the plaintiff in November 2016. A sum of Kshs 20,100,000 was retained as liquidated damages under clause 10.2 of the sale agreement.

3. In November 2017, the property was transferred to the 4th defendant. The 4th defendant has developed nine (9) villas on the property and it is contended that most of the villas have been sold to third parties who are not parties to the present suit.

4. On 13/9/2018, more than 21 months from the date of receipt of completion notice and refund of the purchase price, the plaintiff brought the present suit against the defendants, alleging fraud, illegality and breach of contract. She sought the following verbatim orders against the defendants:-

(a) A declaration that the purported rescission of the agreement for sale dated between the plaintiff and the 1st defendant as the vendor dated 1st November 2016 was fraudulent, null and void (sic).

(b) A declaration that the purported forfeiture of the 10% of the purchase price was fraudulent, null and void (sic).

(c) A declaration that registration of the transfer of the suit property LR NO 209/7153/29 to the 3rd defendant on 9th November 2016 be declared null and void (sic).

(d) A declaration that the transfer from the 3rd defendant to the 4th defendant registered on 11th September 2017 be declared null and void (sic).

(e) An order do issue revoking and cancelling the transfer of the suit property to the 4th defendant.

(f) An order do issue directing and compelling the Chief Land Registrar to transfer and register the property LR NO 209/7153/ in the name of the plaintiff on payment of the sum of Kshs 201,000,000 to be deposited in court (sic).

(g) An order of permanent injunction restraining the 4th defendant from selling, transferring, charging, mortgaging, subdividing, constructing, developing or in any way parting with or alienating the property LR 209/7153/29 until further orders of the court.

(h) IN THE ALTERNATIVE AND WITHOUT PREJUDICE judgment against the defendants jointly and severally in the sum of Kshs 309,000,000 being the loss of bargain and anticipated profits on the development of the property.

(i) General damages on the footing of aggravated and punitive damages for fraud against the defendants jointly and severally.

(j) Interest on (h) above from 1st November 2016 at court rates until payment in full.

(k) The defendants to pay the costs of the suit in any event.

(l) Any such further relief as this honourable court appear fit and just to grant

5. Together with the plaint, the plaintiff brought a notice of motion application dated 13/9/2018 which is the subject of this ruling. Through the application, the plaintiff sought the following verbatim interlocutory orders:-

(a) That this application be certified as urgent and be heard ex-parte in the first instance.

(b) That this honourable court do issue a temporary injunction restraining the 3rd and 4th defendants, whether by themselves, their agents, servants and/or employees from selling, transferring, charging, mortgaging, leasing, alienating, constructing or in any way dealing with the property known as LR NO. 209/7153/29 pending the interparties hearing of this application.

(c) That an order of inhibition to issue to restrain and inhibit the Chief Land Registrar from registering any transfer, subdivision, charge, mortgage or any other transaction by the 4th defendant on the property known as LR NO 209/7153/29.

(d) That this honourable court do issue a temporary injunction restraining the 3rd and 4th defendants, whether by themselves, their agents, servants and/or employees from selling, transferring, charging, mortgaging, leasing, alienating, constructing or in any way dealing with the property known as LR NO. 209/7153/29 pending the hearing and determination of this suit and pending further orders of this honourable court.

(e) That costs of this application be provided for.

The Plaintiff's Case

6. The application was supported by the plaintiff's affidavit sworn on 13/9/2018 and her further affidavit sworn on 1/10/2018. She deponed that the completion notice dated 5/10/2016 was premature because the 1st and 2nd defendants had not confirmed to her that they had all the completion documents and that they were ready, able and willing to complete the sale. She further deponed that by a letter dated 21/11/2016, addressed to her by the 1st defendant, the latter informed her that she did not instruct the 2nd defendant to issue the completion notice, and contended that the suit property was sold by the 2nd defendant without the 1st defendant's consent. Consequently, she contended that the sale to the 3rd defendant was unlawfully, illegally and unprofessionally contrived by the 2nd defendant without instructions from the 1st defendant.

7. The plaintiff further deponed that the 2nd defendant had rescinded the agreement in order to fraudulently sell and transfer the suit property to the 3rd defendant and that the 2nd defendant had specifically incorporated the 3rd defendant for the purpose of the impugned transaction.

8. The plaintiff further deponed that the 2nd defendant had deliberately misrepresented that the sale transaction had been rescinded and unlawfully withheld 10% of the purchase price, besides charging legal fees on a transaction she had intentionally frustrated. She added that the 2nd defendant was actuated by fraud as she was interested in obtaining three percent commission in respect of the subsequent sale to the 3rd defendant.

1st Defendant's Case

9. The 1st defendant opposed the application through a replying affidavit sworn on 26/9/2018. She conceded that she entered into a sale agreement with the plaintiff. She further deponed that the plaintiff breached the said agreement from the onset in that she did not adhere to the agreed mode of payment. The 1st defendant further deponed that the material transaction aborted because the plaintiff failed to pay the outstanding balance of the purchase price in the sum of Kshs 37,000,000.

10. She added that due to the plaintiff's failure to pay full purchase price, she instructed the parties' mutual advocates to take necessary steps to cancel the agreement to enable her source another buyer. She further deponed that the plaintiff did not respond to the completion notice served on her and the sale agreement was consequently rescinded.

11. The 1st defendant further deponed that the letters dated 21/11/16 and 23/11/16 which the plaintiff had attributed to her were not authored by her and the signature appended thereon purporting to be her signature were forgeries. She added that by 21/11/2016 and 23/11/2016, she

had already entered into the agreement with the 3rd defendant, the property had already been transferred to the 3rd defendant, and she had already been paid the sale proceeds.

2nd Defendant's Case

12. The 2nd defendant opposed the application through a replying affidavit sworn on 24/9/2018. She stated that she practised law under the name Abib & Associates Advocates. She confirmed that she acted for both parties to the sale agreement and that the sale agreement had clear timelines within which parties were to discharge their respective contractual obligations. She further deponed that the plaintiff grossly violated the timelines and it is her violation which triggered the rescission.

13. The 2nd defendant added that time was of the essence, and due to the inordinate delay by the plaintiff, she issued a completion notice on behalf of the 1st defendant on 5/10/2016 after confirming that the 1st defendant had all the completion documents. She further deponed that upon expiry of the 21 days notice, the property became available to the open market and it was sold to the 3rd defendant on 31/10/2016.

14. The 2nd defendant added that upon rescission of the agreement, the plaintiff had no interest in the property other than a refund of her monies less the 10% forfeited deposit. She added that her law firm did not favour any of the parties in the agreement and only gave effect to the true meaning and construction of the agreement between the parties. She stated that the rights of the plaintiff were protected until it became apparent that she was in violation of the agreement by reasons of being unable to pay the full purchase price of the property, a fact which grossly breached the 1st defendant's rights under the agreement.

15. The 2nd defendant further deponed that the rescission was duly authorized by the 1st defendant who felt aggrieved and prejudiced by the plaintiff's breach. She added that upon rescission, the 1st defendant proceeded to execute a fresh sale agreement with the 3rd defendant, a clear indication that she had rescinded the agreement with the plaintiff. She further deponed that the deposit forfeited was duly remitted to the 1st defendant.

16. The 2nd defendant added that there was nothing sinister in the sale and transfer of the suit property to the 3rd defendant after the rescission. She further deponed that the two letters which the plaintiff was relying on were forgeries, contending that it was inconceivable that the 1st defendant would spell her name as "Glory" instead of "Gloria".

17. The 2nd defendant maintained that it was the plaintiff who frustrated the sale transaction through her failure to complete it. She added that through an unequivocal discharge dated 25/1/2017, the plaintiff had fully exonerated her from any wrong doing and was therefore estopped from insinuating impropriety on her part or on part of her firm.

3rd and 4th Defendants' Case

18. The 3rd and 4th defendants opposed the application through a replying affidavit sworn on 24/9/2018 by Isaac Izat Wani. He deponed that he was a director of both the 3rd and 4th defendants. He was an investor in Kenya and the 1st defendant was his advocate. Together with his co-directors, they incorporated the 3rd defendant for the purpose of harnessing various investment opportunities in Kenya. Upon incorporation, the 3rd defendant sought to purchase a property within Lavington Area of Nairobi and upon inquiry from various agents, the 3rd defendant received information that the 1st defendant was in the process of rescinding a sale transaction of the suit property. This fact was confirmed by the 2nd defendant. Subsequently, the 3rd defendant contacted the 1st defendant who confirmed that the property was available for sale following the rescission of the previous agreement. By coincidence, it turned out that the 2nd defendant also acted for the 1st defendant. Both parties retained the 2nd defendant to act for them in the ensuing transaction.

19. He further deponed that the 1st and 3rd defendants subsequently executed an agreement for sale of the suit property to the 3rd defendant at Kshs 201,000,000 on 31/10/2016. The agreement was stamped by the Collector of Stamp Duty on 2/11/2016. He exhibited a copy of the agreement. He added that the 3rd defendant purchased the suit property fully aware that there were no existing rights or interests.

20. Mr. Wani further deponed that upon purchase, the 3rd defendant entered into a joint venture agreement with M/s Pyramid Builders Limited, real property developers, for the purpose of developing the suit property. On the basis of the joint venture agreement, the 4th defendant was created as a special purpose vehicle to undertake the development on the suit property. A copy of the joint venture agreement was exhibited.

21. Upon incorporation of the 4th defendant as a joint venture special purpose vehicle, the suit property was conveyed to it, licences and approvals were obtained, and development involving construction of several housing units commenced, and have been going on for the last thirteen months, a fact which has been within the knowledge of the plaintiff. He exhibited photographs of the housing units.

22. He added that to a large extent, the housing units have been sold to third parties who are not parties to this suit and any adverse order will prejudice them. He exhibited copies of accepted letters of offer and sale agreements. He contended that the injunctive orders sought will occasion the 3rd and 4th defendants colossal losses in terms of idle equipment on site, idle labour on site and loss of construction materials.

23. He deponed that the fact that the suit property has been under development over the last 13 months with the full knowledge of the plaintiff is a material fact which the court should take into account. He emphasized that there was no explanation tendered by the plaintiff as to why she did not approach the court for the entire period of 13 months.

24. The application was canvassed through written and oral submissions. The plaintiff's legal team consisted of Mr. Fred Ngatia and Mr. Issa Mansour. The 1st defendant was represented by Mrs Judy Thongori. Prof Tom Ojienda Sc together with Mr. Wangila represented the 2nd, 3rd and 4th defendants.

Plaintiff's Submissions

25. Mr. Ngatia submitted that the purchase price paid within the completion period of 120 days was Kshs 60,000,000 and the amount paid in after the completion period was Kshs 104,000,000. He argued that in the absence of evidence of extension of time, it is deemed that time was at large. Secondly, counsel submitted that there was no evidence of service of completion notice in tandem with clause 10.1 of the agreement and in the absence of evidence of service it should be deemed that the agreement was never rescinded. Thirdly, counsel submitted that before a vendor is entitled to issue a completion notice, he must be ready and able to complete the agreement. He contended that there was no evidence that the completion documents itemized in clause 8.1 had been procured at the time of the alleged completion notice.

26. Mr Ngatia submitted further that the letter dated 29/11/2016 from Paul Anderson addressed to M/s Abib & Associates Advocates confirmed that the 2nd defendant is the one who procured the 3rd defendant as a purchaser and subsequently became its lawyer. In light of that, the 3rd defendant is deemed to have known the ongoings and is therefore not an innocent purchaser. The same applies to the 4th defendant for whom the 2nd defendant similarly acted.

27. On whether or not the equitable remedy of specific performance would be available in the circumstances of this case, Mr Ngatia submitted that it matters not that some structures are being erected on the suit property, contending that the construction does not confer title. He urged the court to halt further development and fast-track the trial.

1st Defendant's Submissions

28. Mrs Judy Thongori, counsel for the 1st defendant, submitted that the material agreement set out the purchaser's obligations in relation to purchase price. Clause 12 declared time to be of essence for all purposes of the agreement and no delay or failure was to be construed to constitute a waiver. Consequently, failure to pay purchase price on due date did not take away the 1st defendant's right to issue a completion notice. She added that the plaintiff was in default and was not in a position to complete the purchase on 24/10/2016 when her daughter wrote an email seeking indulgence on her behalf.

29. Mrs Thongori added that service of completion notice had never been contested by the plaintiff, and indeed the plaintiff had conceded in her papers that completion notice was duly served. Similarly, rescission was never contested. She further submitted that between the date of the agreement and September 2018, there was never any allegation of the 1st defendant's inability to complete the sale, and indeed, no completion notice was served upon the 1st defendant by the plaintiff.

30. Counsel added that the 1st defendant had categorically deponed that the letters dated 21/11/2016 and 23/11/2016 were forgeries because she did not author them. She added that by that time, the 1st defendant had already sold and transferred the suit property to the 3rd defendant. She further argued that injunctive orders are equitable relief and the plaintiff having failed to pay purchase price, she is not entitled to an injunctive order. Counsel added that the suit herein is subjudice because the plaintiff had filed a preceding originating summons raising the same issues. She further submitted that the plaintiff has never had possession of the suit property. Lastly she submitted that the plaintiff had not satisfied the criteria in *Giella vs Cassman Brown*.

2nd, 3rd & 4th Defendants' Submissions

31. Prof Ojienda SC, counsel for the 2nd, 3rd, and 4th defendants submitted that in dealing with the application, the court should be guided by Section 24 and 25 of the Land Registration Act which conferred absolute privileges to the registered proprietor of land. He added that a title is impeccable only when fraud or misrepresentation which the title holder is a party to, is proved or when a title has been acquired irregularly. Counsel added that construction of the 9 units is almost complete, having commenced 13 months ago. He contended that it is because of the pain caused by the ex-parte orders issued herein, the applicant moved the court to set them aside. Counsel submitted that the applicant had failed to disclose to the court the actual status of the suit property; the fact of rescission of the material agreement; the fact of refund of purchase price, the fact of delivery of accounts, and the fact of discharge of the 2nd defendant by the plaintiff from any liability.

32. Counsel further submitted that the 2nd defendant's evidence disclosed constant breach by the plaintiff, service and receipt of completion notice, rescission, and subsequent sale to the 3rd defendant. He contended that there being a proper notice, the 3rd defendant got a clean title. He argued that the plaintiff had come to court with dirty hands and sought to re-open a matter in which she had rendered a duly executed discharge.

33. Lastly, counsel made reference to photographs annexed to the affidavit of Mr Wani depicting the units in their current state of construction. He further referred the court to the contracts involving the 4th defendant and third parties who have purchased units erected on the suit property. He urged the court to decline the application.

Determination

34. I have considered the application together with the plaintiff's evidence and submissions. I have also considered the defendants' evidence and submissions. Similarly, I have considered the authorities cited by the parties and the jurisprudential principles that relate to equitable relief of interim injunction and specific performance on which the present application revolves.

35. The single issue which fall for determination in this application is whether the applicant has satisfied the criteria upon which our courts exercise jurisdiction to grant the equitable remedy of interlocutory injunction. The criteria was laid down in *Giella v Cassman Brown & Co. Ltd (1973) EA 358*. First, the applicant was required to demonstrate a prima facie case with a probability of success. Second, she was required to demonstrate that she stood to suffer injury that cannot be identified through an award of damages if the interim injunctive relief is not granted. Lastly, if the court were to be in doubt, the application would be determined on a balance of convenience.

36. At this point the court does not make definitive findings and/or pronouncements on the key issues in the dispute. The focus of the court is

on whether the applicant has placed before the court sufficient evidence that constitute a prima facie case and demonstrate the probability of irreparable injury that cannot be adequately indemnified through an award of damages.

37. A prima facie case was defined in the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** as:

“ 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.”

38. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR**, the court outlined the key ingredients of a prima facie case 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. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. 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 or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. 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.”

39. The injunctive orders sought in the present application target the 3rd and 4th defendants. The 3rd defendant bought the suit property from the 1st defendant. It then entered into a joint venture agreement with M/s Pyramid Builders Ltd pursuant to which they incorporated the 4th defendant as a special purpose vehicle for the purpose of developing housing units on the suit property. The suit property was subsequently transferred to the 4th defendant in November 2016. Since then, the 4th defendant has had possession of the suit property. In the last 13 months, the suit property has been under development of housing units with the full knowledge of the plaintiff. Most of the units are nearing completion. It was contended and evidence was exhibited to support the contention, that most of the housing units have been purchased by third parties who are not parties to this suit. The contracts exhibited indicate that a unit was sold at an average of over Kshs 70,000,000.

40. The plaintiff’s key grievance appears to be against the 2nd defendant who acted for her and the 1st defendant in the sale agreement giving rise to this suit. She subsequently acted for the parties in the subsequent transactions.

41. It is not in dispute that the character of the suit property drastically changed between October 2016 when the plaintiff was served with the completion notice and September 2018 when she brought the present suit. The suit property has been subsequently developed and is no longer available to be conveyed to the plaintiff in the state in which it was in October or November 2016. Any injunctive or preservative order issued at this point will without doubt adversely affect not only the 3rd and 4th defendants, but also the third parties who have already purchased the units which have been built on the suit property.

42. What is most intriguing in this suit is the plaintiff’s indolence in the 21 months preceding this suit. If the plaintiff was truly desirous of the equitable relief of an injunctive order, she ought to have moved the court immediately she received a refund of the purchase price. She received the refund in November 2016 and elected not to bring court action. She allowed the property to be transferred and developed to its current state. She has come to court almost two years later seeking to halt the developments and further dealings in the suit property.

43. Informed by the evidence presented to the court at this point, I doubt that the equitable remedy of specific performance would be available to the plaintiff in the circumstances of this case where the suit property has been sold, developed and the housing units developed thereon have similarly been sold to third parties who are not parties to this suit.

44. Besides the forgoing, it is noted that the plaintiff has prayed for the alternative remedy of damages which she has quantified at Kshs 309,000,000. In my view, given the circumstances of this case, were the plaintiff’s suit to succeed, the appropriate remedy would be damages as contemplated by the plaintiff in her alternative plea.

Disposal Orders

45. In light of the forgoing, I am not satisfied the plaintiff has satisfied the first two limbs of **Giella vs Cassman Brown & Co. Led (1973) EA 358**. Consequently, the plaintiff’s notice of motion dated 13/9/2018 fails. It follows that the interim orders which subsisted during the hearing and determination of the present application automatically lapse. The defendants shall have costs of the application. The case will be given a mention date for pretrial before the Deputy Registrar.

46. Because I will be away on Monday 5th November, 2018, I have requested my Brother, Justice Obaga, to read this ruling on my behalf on 5th November, 2018 at 2.30 pm in Court Room No. 34.

DATED AND SIGNED AT NAIROBI ON THIS 2ND DAY OF NOVEMBER 2018.

B M EBOSO

JUDGE

DELIVERED BY HON JUSTICE OBAGA AT NAIROBI ON THIS 5TH DAY OF NOVEMBER 2018.

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court clerk