



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 102 OF 2016

THE MATTER OF: UNIT 16 ON TITLE 60648 BARAKA PARK KERARAPON

IN THE MATTER OF: SALE AGREEMENT DATED ON 19TH MARCH, 2015

BETWEEN

LEVIUS KOYIO MATSESHE.....1ST PLAINTIFF

LUCIANA NYANJAMA KOYIO.....2ND PLAINTIFF

VERSUS

MARTIN MAKOOSIO.....1ST DEFENDANT

HIMS HOMES LIMITED.....2ND DEFENDANT

RULING

What is before me is the Application by the Plaintiffs dated 7th September, 2016 in which they are seeking for the following orders:-

- (1) That conservatory orders be issued restraining the Registrar of Lands at the Ngong Registry from transferring ALL THAT property known as UNIT 16 on L.R. Ngong/Ngong/60648 pending the hearing of this suit.**
- (2) That this Honourable Court should be pleased to order that this matter be referred to arbitration pursuant to Clause 11 of the sale Agreement dated the 19th day of March 2015.**
- (3) That costs of this application be provided for.**

The Application is premised on the grounds that the Applicants are aggrieved by the cancellation of the sale agreement after notification of a dispute and that they will suffer irredeemable loss unless the orders are granted.

The Application is supported by the Affidavit of the 1st Plaintiff who has deponed that the 2nd Plaintiff is his wife; that they instructed their advocates to negotiate with the Defendant's advocates on an "Agreement for Extension of perfection of consideration" at the end of the Inspection tour and that

although the Extension Agreement introduced a surcharge of Kshs.4,500,000/= it is the Plaintiff's case that the said surcharge is contrary to the last paragraph of page 7 of the sale Agreement.

It is the Plaintiffs case that the 2nd Defendant having implemented the Plaintiffs project at its pleasure, it is estopped from imposing on the Plaintiff's an unconscionable surcharge.

The 1st Plaintiff deponed that it is in the interest of justice that the matter be referred to arbitration.

In response (without the leave of the court) the 2nd Defendant's director deponed that the Application is defective because there is no corresponding prayer in the Plaint for a permanent injunction; that the balance of the purchase price was to be paid as per clause 1.1 of the agreement of 19th March, 2015 and that the Plaintiffs have failed to pay the balance of the purchase price of Kshs.15,500,000/= despite demands to do so.

It is the 2nd Defendant's case that despite issuing the completion notice, the Plaintiffs failed to issue on undertaking on or before 28th June, 2016 as requested and that even after giving a proposal on how they will finance the payment of the balance of the purchase price, the Plaintiffs have not done so.

According to the 2nd Defendant, the parties to the agreement were bound by its terms and that there was no extension of the agreement as alleged; that the Plaintiffs' assessor was a stranger to the agreement and that there is nothing to arbitrate about given that the extension of the agreement is unsigned.

The 2nd Defendants director finally deponed that the 2nd Defendant has since offered the property to a third party; that there has been inordinate delay not only in paying the final installments but also in filing this suit.

The 1st Plaintiff filed a Further Affidavit in which he deponed that he instructed his advocates on 2nd August, 2016 to notify the Defendant's Advocates of a dispute on the contents of the extension agreement; that the delay of service of the notification was out of the sheer determination by Ms Angela Mulwa to lay ground for rescinding the sale agreement and that the substantive issue before the court is that the matter be referred for arbitration.

The parties advocates filed written submissions which I have considered.

In the Plaint dated 7th September, 2016, the Plaintiffs are seeking for an order that this matter be referred to arbitration pursuant to clause 11 of the Sale Agreement. In the meantime, the Plaintiffs are seeking for conservatory orders.

Although the current Application has been filed pursuant to the provisions of Order 40 and Section 1 of the Civil Procedure Rules, the proper provisions under which the Application should have been filed in view of the Plaint is Section 7 (i) of the Arbitration Act. The said section provides as follows:

“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitrate proceedings, an interim measure of protection and for the High Court to grant that measure”.

It is not in dispute that on 19th March, 2015, the Plaintiffs entered into an agreement with the Defendants in respect to the suit property.

According to the Agreement, the Developer, the 2nd Defendant was to commence construction of the property upon execution of the Sale Agreement and the property was to be transferred to the Plaintiffs by the 1st Defendant upon completion. The agreed purchase price was Kshs. 24,000,000. The Agreement was subject to the Law Society Conditions of Sale (1989 Edition).

According to Clause 1.1, the completion date for receipt of the final consideration was eight (8) months from the date of execution of the agreement, or such date as the parties may appoint.

According to the said clause, 45 days before the completion date, the property was supposed to have been 85% complete whereafter the Plaintiffs were supposed to provide either a letter of offer from a Financier or an undertaking from an advocate.

It is the Plaintiff's case that they instructed their advocates for a variation of the completion date of the Agreement; that they engaged Messrs K & K Designers Limited to inspect the house and that the reports of the Plaintiffs' and the Defendants' experts are at variance.

While Clause 7 of the extension Agreement states that the house is 97% ready, the conclusion by the Plaintiffs' expert states that the unit is far from being complete.

The Plaintiffs have also taken issue with a surcharge of Kshs.4,500,000/= provided in the Extension Agreement.

According to the Plaintiff, the Agreement was subject to the Law Society of Kenya conditions of sale and the surcharge should be calculated in accordance with condition No.2(1) of the said conditions.

Clause 11 of the Agreement provides as follows:-

“All claims and disputes whenever arising under this Agreement shall be referred to arbitration in accordance with the provisions of the Arbitration Act of Kenya by a single arbitrator to be appointed by Agreement between the parties, or failing agreement within fourteen (14) days of the notification by either party to the other of the existence of a dispute or claim, to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch, Nairobi on the Application of either party.”

The question of whether the Defendants suit property was 97% ready as observed by the Defendant's experts at the time the 2nd Defendant demanded for the payment of the purchase price or it was too far from being complete before the completion notices were issued can only be determined by the arbitrator.

It is also the arbitrator who can determine the chargeable surcharge upon extension of the agreement and whether the notice terminating the agreement was valid or not.

All I can say for now is that the issues that the Plaintiff's have raised in the Complaint, and which I have stated above are not frivolous. Those issues should proceed for hearing for determination by an arbitrator pursuant to the provisions of the agreement of 19th March, 2015.

For those reasons, I allow the Plaintiff's Application dated 7th September, 2016 in the following terms:-

1. A conservatory order be and is hereby issued restraining the Respondents from selling and/or transferring ALL THAT property known as unit 16 on L.R. No. Ngong/Ngong/60648 pending the hearing of the dispute by the arbitrator.
2. This matter be and is hereby referred to an arbitrator pursuant to Clause 11 of the Sale Agreement dated 19th March, 2015.
3. Each party to bear his/its own costs.

It is so ordered.

Dated Signed and delivered at **Machakos** this 27TH day of **January 2017**.

O. A. ANGOTE

JUDGE