



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 218 OF 2016

ALICE KARIUKI.....PLAINTIFF

VERSUS

TELKOM KENYA LIMITED.....DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff having a sale agreement with the defendant over certain land; deposit paid but balance not paid as agreed; defendant repudiating contract; plaintiff now wants defendant stopped from offering the land to other persons; prima facie case; plaintiff not adhering to the terms of the agreement; no prima facie case established; application dismissed)

1. This suit was commenced by way of a plaint that was filed on 17 July 2016. In her plaint, the plaintiff has pleaded that on 15 December 2015, she entered into an agreement with the defendant vide which the defendant offered to sell to the plaintiff the land parcel Nakuru Municipality Block 6/29 and LR No. 7935/5 Eburu at a consideration of Kshs. 25,000,000/= and Kshs. 5,500,000/= respectively. The plaintiff has pleaded that she paid the agreed deposit whereas the balance was to be paid through finance obtained from her bank. She has pleaded that she approached her bank for financing so that they can issue an undertaking for the balance. She has averred that the bank needed a valuation but the defendant failed to identify and/or point out the beacons of the properties or give access to the valuers. She has pleaded that despite requests to the defendant to point out the beacons the defendant has failed to do so thus frustrating completion of the contract. She has stated that she and her bank are willing and ready to complete the transaction subject to the defendant giving access to the valuers and pointing out the beacons of the suit land. What prompted her to file this suit is that the defendant invoked the termination clause in the sale agreement and is now looking for other buyers. She has averred that the contract provides that parties resort to arbitration/mediation and the action of the defendant of terminating the contract is illegal.

In the suit, the plaintiff has asked for the following orders :-

(a) An order of injunction restraining the defendant and/or its officers, servants, agents and whosoever acting on its behalf from alienating, disposing, selling and/or dealing with Nakuru Municipality Block 6/29 and LR No. 7935/5 Eburu in any manner prejudicial to the plaintiff as purchaser.

(b) That an order of injunction do issue restraining the defendant its officers, servants, agents or any other person whosoever acting on its behalf from alienating, disposing, selling and/or dealing with properties known as Nakuru Municipality Block 6/29 and LR No. 7935/5 Eburu in any manner

prejudicial to the plaintiff's interests as purchaser pending reference to arbitration/mediation and determination thereto or until the hearing and determination of the main suit.

(c) An order of specific performance directing the defendant through its offices, servants, agents to complete the sale transaction and in particular identify and point out the beacons of the subject suit properties and give access to valuers appointed by the plaintiff's banker for purposes of valuation.

(d) A declaration to the effect that any purported termination of the sale agreements relating to Nakuru Municipality Block 6/29 is illegal, null and void.

(e) Damages,

(f) Costs.

(g) Such other further orders the honourable court shall deem fit to grant.

2. Together with the plaint, the plaintiff filed an application under Order 40 of the Civil Procedure Rules essentially seeking orders of injunction to stop the defendant from selling the properties Nakuru Municipality Block 6/29 and LR No. 7935/5 Eburu (hereinafter referred to as "the suit properties") pending reference to arbitration/mediation or pending determination of this suit. It is that application which is the subject of this ruling. In her supporting affidavit, the plaintiff has more or less repeated what is in the plaint, which I have set out above. She has also annexed a copy of the sale agreement entered into on 15 December 2015 and some correspondences exchanged with the defendant.

3. The defendant has opposed the application through the replying affidavit of Robert K. Irungu, its legal advisor. He has not denied that the two parties had a sale agreement. He has pointed out that the completion date was 90 days from the date of execution of the agreement which would have been 14 March 2016. He has deposed that through letters dated 29 March 2016 and 30 March 2016, the defendant notified the plaintiff of its willingness to complete the sale and sought the bank undertaking for the balance. Through a letter dated 31 March 2016, the plaintiff asked for Beacon Certificates which were forwarded by a letter dated 13 April 2016. The defendant wrote further on 19 April 2016 notifying the plaintiff of its willingness to complete the sale and attached the completion documents. The plaintiff however failed to procure the bank undertaking within time, and on 21 April 2016, the defendant issued the plaintiff with a 21 day completion notice as stipulated in the sale agreement. It is deposed that on expiry of the said notice the defendant had the option to terminate the agreement and the 10% deposit paid would be forfeited. On 20 May 2016, the defendant issued the plaintiff with a cancellation notice in respect of Nakuru Municipality Block 6/29. In respect of LR No. 7635/5, vide a letter dated 10 June 2016, the defendant forwarded a cheque for Kshs. 550,000/= being the amount in excess of the deposit of 10% which was forfeited following the plaintiff's failure to complete the transaction. It is denied that the defendant failed to show the plaintiff or her bank the beacons to the properties or failed to allow them access. It is the view of the defendant that the plaintiff was not ready to complete the transaction. It is averred that having failed to complete the transaction, the defendant could deal with the properties as it wished including offering them for sale. The defendant has asked that this application be dismissed.

4. The plaintiff filed a supplementary affidavit vide which she has inter alia deposed that the beacon certificates were of no value without the defendant physically pointing out the ground location of the beacons. She has deposed that the letters written by the defendant were meant to exert undue influence and pressure on her. She has contended that she held a meeting with the defendant's officials and all they had were the title documents and no other completion documents. She is of the view that the defendant has unreasonably refused to extend the completion period. She has contended that one of the clauses in the agreement, Clause 5 to be precise, is against public policy, the constitution, the common law and equity and that contracts barring a party from seeking justice in a court of law are void and should be so held.

5. At the hearing of the application, the plaintiff's counsel wholly relied on the pleadings and affidavits

filed. Counsel for the defendant had already filed written submissions which he relied on. I have considered these in my ruling and I take the following view of the matter.

6. The application before me is one for injunction. The principles upon which applications of this nature are considered were laid down in the case of *Giella vs Cassman Brown (1973) EA 358*. To succeed, one has to demonstrate a prima facie case with a probability of success and also show that he/she stands to suffer irreparable loss if the injunction is not granted. If the court is in doubt, it will decide the application on a balance of convenience.

7. There is no contention that the parties herein entered into a sale agreement on 15 December 2015. There are actually two separate sale agreements each for the land parcel Nakuru Municipality Block 6/29 and LR No. 7935/5 Eburu. The purchase price for the former land parcel is Kshs. 25,000,000/= whereas the purchase price for the latter is Kshs. 5,500,000/=. In the first agreement, the plaintiff paid a deposit of 10% which is Kshs. 2,500,000/= at the signing of the agreement. In the second agreement, the plaintiff paid 20% of the sale agreement which is Kshs. 1,100,000/=. In both agreements, the completion period was to be 90 days. It does appear that a portion of the Eburu land has a base transmitter station and the parties agreed that after completion of the sale, the plaintiff would lease out this portion to the defendant for a period of 15 years. Other than the above, the two agreements are drawn in similar terms.

8. It appears the parties had an understanding that the balance would be paid by the plaintiff's bank and the plaintiff was to furnish an undertaking from her bank that the balance would be paid within 14 days of registration of the transfer documents. The vendor/defendant was to be deemed to have fulfilled its obligations under the agreement if on or before the completion date, they confirmed to the purchaser's/plaintiff's advocates that they have in their possession the completion documents. On receipt of the undertaking from the plaintiff's bank, they were to release the title documents and the documents required for transfer of the properties to the plaintiff. Under Clause 5 of the agreements, if the balance was not paid before the completion date, the defendant as vendor was to serve the plaintiff with a 21 days notice requiring the plaintiff to make payment and if on expiry of the notice, the plaintiff would not have made payment, the defendant had the option of terminating the sale and upon termination, the plaintiff would forfeit the 10% deposit paid as agreed liquidated damages.

9. Clause 12 of the agreements does provide inter alia that the purchaser admits that she has inspected the property and purchases it with full knowledge of its actual state and condition and shall take the property as it is. The arbitration clause is Clause 18 which provides that disputes shall be referred to an arbitrator but before doing so, parties would agree to settle the matter by negotiations and mediation.

10. The agreements were entered to on 15 December 2015 and since completion was to be within 90 days, completion ought to have been on 15 March 2016 or thereabouts. I have seen that copies of the sale agreements were formally forwarded to the plaintiff's advocates on 11 January 2016 and acknowledged via email on 15 January 2016. In the acknowledgement, the plaintiff's advocates stated that they were preparing the transfers and had requested the plaintiff to furnish the bank undertaking. The date of 15 March 2016 seems to have passed without either plaintiff or defendant completing their part of the agreement. In respect of the property LR No. 7935/5 Eburu, I have seen a letter dated 29 March 2016, where the defendant wrote to confirm that they are now in possession of all completion documents. They asked for the undertaking for the balance and demanded the undertaking by close of business of 1 April 2016 failure to which they would issue the 21 days completion notice. A similar letter was written on 30 March 2016, now in respect of the property Nakuru Municipality Block 6/29.

11. It is on 31 March 2016, that the plaintiff's counsel asked for beacon certificates for the properties "to enable their client secure the undertaking from the bank." The beacon certificates for both properties were then forwarded by the two letters dated 13 April 2016. On 19 April 2016, the defendant reminded the plaintiff's counsel of their letters of 29 March 2016 and 30 March 2016 which sought the plaintiff to complete the transaction.

12. On 21 April 2016, the defendant issued the plaintiff with the 21 day completion notice. It informed the plaintiff that if payment was not done within 21 days, the defendant would offer the property to

another buyer and the 10% deposit would be forfeited. There is an email from the plaintiff, which I am not too sure of the date, but could be 10 May 2016, which requested a 7 day extension. The defendant replied reiterating that completion has to be by 12 May 2016. On 20 May 2016, the defendant wrote to the plaintiff's advocates advising that the agreement has been terminated.

13. Now, in this case, the plaintiff accuses the defendant of having been the one who delayed the transaction by not pointing out the beacons or allowing the plaintiff and her valuer access to the properties so that they can be valued for purposes of financing. I have combed through the correspondences of the parties and nowhere have I seen any request by the plaintiff to be shown the beacons or any complaint that the bank's valuers have been denied access to the suit properties. If indeed there was such an issue, I believe the plaintiff would have raised it immediately. On my part, I think this is an afterthought on the part of the plaintiff. If it is this argument that the plaintiff wishes to hinge her case on, I am afraid that I am not persuaded, at least at this stage of the proceedings, that she has displayed a prima facie case with a probability of success in so far as she wishes to have the defendant specifically perform the contract. I have also pointed out at Clause 12 of the agreement which provided that the plaintiff had inspected the property which means that she must have known the boundaries thereof.

14. But it could be, without deciding the issue, and being careful that such determination can only be made after a hearing on its merits, that the plaintiff may have a case on whether or not the 10% deposit should be forfeited. I say so, because I note from clause 4.3 of the agreement, the vendor was to fulfill its obligations *"if on or before the completion date... they confirm to the purchaser's advocates that they have in their possession the completion documents listed in Clause 4.4 below"*. The letter confirming that all documents of completion are ready was written on 29 March 2016, way after the 90 days completion period. It does appear that the defendant was also in breach of the agreement and it is debatable whether it is entitled to forfeit the 10% deposit which was agreed to be liquidated damages. I do not believe that you can claim to be entitled to damages, when you yourself are in breach of the agreement. I must reiterate that I say the above guardedly, for I have yet to hear the matter, and I could very well come to another conclusion after hearing the suit on merit. But I feel that it is important that I point this out at this time.

15. That said, I have already stated that the plaintiff's case is hinged on accusations which I find unsubstantiated, and therefore I am of the view that the plaintiff has failed to demonstrate a prima facie case with a probability of success. I am not in doubt and therefore need not consider the balance of convenience. It is for the above reasons that I dismiss this application with costs to the defendant. For the avoidance of doubt, the interim orders are hereby vacated.

16. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 16th day of May 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Mr. Bundotich holding brief for Mr. Orange for the plaintiff/applicant.

No appearance on the part of M/s Iseme, Kamau & Maema Advocates for the defendant/respondent

Court Assistant : Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU