



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 571 OF 2017

(formerly Machakos ELC Case No. 222 of 2016)

MAUREEN WANGUI KAMANDE1ST PLAINTIFF

PAUL NGUGI KAHARA2ND PLAINTIFF

HASSAN AMIR MUSA BULHAN.....3RD PLAINTIFF

MICHAEL MUREITHI GAIKO.....4TH PLAINTIFF

OLIVE WANJIRU KAMANDE.....5TH PLAINTIFF

VERSUS

NICHOLAS MWANIKI WAWERU

T/A MAMBO MOTO MEDIA.....1ST DEFENDANT

MICROSTART HOLDINGS LIMITED.....2ND DEFENDANT

ANNE GATWIRI GATHUKU.....3RD DEFENDANT

RULING

The application before this court is a notice of motion application dated the 7th December, 2016 brought pursuant to Section 1A, 1B, 3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules, Section 2 and 3 of the Law of Contract Act, the Registration of Documents Act, the Constitution of Kenya and all the other enabling provisions of the Law. The Plaintiffs seek the following prayers:

1. Spent

2. That pending the hearing and final determination of the application herein the Honourable Court be pleased to order the Defendants/Respondents to deposit in Court a total amount of Kes. 6,820,000.

3. That pending the hearing and final determination of the Suit herein the Honourable Court be pleased to order the Defendants/Respondents to deposit a total amount of Kes. 6,820,000.

4. That the Honourable Court be pleased to halt on any dealings with the properties registered as Land Reference Numbers Kajiado/Kitengela/71158 and 71159 registered to the 2nd and 3rd Defendants/Respondents respectively pending the hearing and determination of the Application.

5. That pending the hearing and final determination of the suit herein the Honourable Court be pleased to issue an order restraining the Defendants/Respondents, their servants, agents and or employees and or anyone else working under their directions from further alienating, marketing for sale, disposing of or interfering with, all those parcels of land registered as Land Reference Numbers Kajiado/Kitengela/71158 and 71159 or any part thereof.

6. That pending the *interpartes* hearing of the Application herein the Honourable Court be pleased to issue a Status Quo Order against the 1st Defendant/Respondent's Bank Accounts, Mambo Moto Media's (the 1st Defendant/Respondents Trade Name) Bank Account and any such Bank Account for which he is the sole signatory, halting any dealings and or transactions.

7. That costs of this application be provided for

The application is based on the following grounds, which in summary are that the Plaintiffs entered into seven (7) sale agreements with the Defendants for the purchase of Plots in Kitengela, Kajiado County. In the Sale agreements the Defendants claimed the plots had been subdivided from Land Reference Numbers Kajiado/Kitengela/71158 and 71159 which is currently registered to the 2nd and 3rd Defendants/Respondents. The 1st Defendant/Respondent claims he has no authority to sell the said plots from the 2nd and 3rd Defendants/Respondents. The 1st Defendant/Respondent collected a total of Kshs. 6,820,000 from the Plaintiffs/Applicants as payment for their respective plots under the Sale Agreement. The Defendants/Respondents have failed to deliver the title documents to the Plaintiffs/Applicants over the suit parcels of land. The Plaintiffs/Applicants have realized the Defendants have charged the two titles Kajiado/Kitengela/ 71158 and 71159 to secure a loan. The existence of a Charge has the effect of ensuring no transfers could be made or effected on the said properties and the seven (7) Sale Agreements have been frustrated and the Plaintiffs/Applicants stand to loose the Kshs. 6,820,000.

The Application is based on the supporting affidavit of MICHAEL MUREITHI GAIKO who is the 4th Plaintiff herein where he deposes that he has been duly authorized by the Plaintiffs to swear the affidavit on their behalf. He avers that on diverse dates in 2014 and 2015 the 1st Defendant/Respondent entered into seven (7) Sale Agreements for the sale of plots to the Plaintiffs/Applicants with the 1st Defendant/Respondent collecting cheques amounting to Kshs. 6,820,000. Further, under clause 1 of the Sale Agreements, the 1st Defendant was the vendor who was authorized to sell, but did not indicate who authorized him and the Plaintiffs/Applicants were never shown any registered documents to the suit parcels. Further that there was no approved plan for subdivision of the suit properties and neither has there been an application for approval for subdivision nor a grant of subdivision by the County Government. He further avers that the Defendants without informing the Plaintiffs and after signing the Sale Agreements, charged the suit properties to UNAITAS SACCO SOCIETY LIMITED and DREAM CREDIT LIMITED and to date the charge on Kajiado/Kitengela/71158 still subsists and the Plaintiffs fear the said properties could be auctioned.

The Defendants/Respondents filed a replying affidavit sworn by one NICHOLAS MWANIKI WAWERU the 1st Defendant herein where he deposes that the Plaintiffs' application and supporting affidavit are contradictory, misconstrued, factually, legally and consists of grave misrepresentations. He avers that the Plaintiffs' have used the police to harass him over the suit parcels and none of them have finished paying for the plots. He states that he has informed the Plaintiffs/ Applicants that he is ready to complete the transaction and that the Charge over KAJIADO/KITENGELA/71159 has been discharged. He further avers that none of the Plaintiffs/Applicants had bought plots in KAJIADO/KITENGELA/71159 but had purchased the plots for construction of Green Houses and were well aware he had a memorandum of understanding with the 2nd and 3rd Defendants at the time of signing the Sale Agreements whose preamble stated as follows; '*The vendor has authorised the promoter to sell the above plots and proceed with the project. It is hereby agreed: That the promoter shall sell the plots. That the Vendor has authorized the promoter to receive payment for the plots. That the Vendor shall sign all the necessary papers to allow the purchasers obtain the Title.*'

He states that the registered owners undertook to sign all necessary transfer documents as there was no donation of the power to himself, and he did not register a Power of Attorney. It was also agreed that the

proceeds of the Sale would be applied towards paying the registered owners of the Properties a pro - rata purchase price for the land and towards purchasing and installing Green houses.

Both parties filed their written submissions and the same were highlighted on 20th April, 2017.

Mr. Murage Counsel for the Plaintiffs/Applicants submitted that the entire suit is premised on seven(7) Sale Agreements and that any variation of the contract must be consented to by the parties to the Sale Agreements. He relied on the case of **CA 282/2004 Margaret Njeru Muiruri Vs. Bank of Baroda (K) Ltd** where **Waki, Warsame & Gatembu JJA** in referring to the Case of **National Bank of Kenya Ltd Vs. Pipe Plastic Sankolit (K)** restated the principle that ' **A court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of the contractNevertheless courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party**' He submitted that the Court should be limited to the Sale Agreements herein. and as per the said Sale Agreements properties were to be transferred to the Plaintiffs but however the said properties do not exist. Further that the Defendants' have not furnished in court any documents to prove subdivision had been undertaken and frustration of the contract is of no fault of the Plaintiffs/Applicants. He submitted that in the Sale Agreements, the Defendants stated there were no encumbrances to the suit properties and yet they have Charged the said properties to two financial institutions UNAITAS SACCO SOCIETY LIMITED and DREAM CREDIT LIMITED. He stated that the 1st Defendant should adhere to the terms of the Sale Agreements and that one parent property 71159 was sold a day after the Charge against it was lifted, hence the Plaintiffs genuine concern to be worried. He further submitted that the Law Society Conditions for Sale (1989) do not and cannot apply as they were not incorporated into any of the Sale Agreements nor can the Court apply them to the Sale Agreements. He relied on the **Case of Mukika Chai Dzombo Vs. Coast Development Authority (2014) eKLR** where **Justice Angote** stated that ' **the agreement of sale did not state that the Law Society Conditions of Sale shall apply. Consequently, the stringent conditions provided for in the Law Society Conditions of Sale on the procedure that a party must comply with before an agreement of sale can be rescinded does not apply.....**' He further submitted that the Completion Notices are invalid as not only do their authorizing regulations as claimed by the 1st Defendant/ Respondent fail the test of admissibility and applicability, as there was no provision for the issues of the said Notices in any of the seven (7) Sale agreements.

Mr. Muindi who was Counsel for the 1st Defendant submitted that he concurs with the Plaintiffs that this is a contractual issue. He relied on Clause 3 of the respective Sale Agreements and stated that it is clear the Plaintiffs were purchasing green house plots. He further submitted that from the Sale Agreements, the purchase price is inclusive of green house plots and the claim over frustration of contract does not arise. He relied on the case of **Njeri Njoroge vs Njoroge (2002) eKLR** where the Court stated that for a contract to be frustrated, there has to be a catastrophic event to the contract that has occurred. He submitted that the Plaintiffs' only purchased 0.045 hectares out of a total of 10 acres and that the Charged property cannot be sold and there is no misrepresentation. He referred the Court to look at the Sketch plan and also Clause 2 of each of the Sale Agreements, as the plots were sold off plan. He stated that principles of granting temporary injunction has to be adhered to in accordance with the case of **Giella vs. Cassman Brown**. Further that the Plaintiffs have not established a prima facie case, since no full purchase price has been paid, and they will not suffer any irreparable loss or damage as they have only paid Kshs 6, 820,000 million which can be repaid back.

Issues and determination

The main issues for determination are

- Whether the Contract between the Plaintiffs and Defendant have been frustrated.
- Whether the Plaintiffs are entitled to the interlocutory injunction sought.

Both the Plaintiffs and the 1st Defendant concur there were seven (7) Sale Agreements which were duly

executed and that the Plaintiffs have so far paid Kshs. 6,820,000. The 1st Defendant admits the plots the Plaintiffs purchased have not been transferred to them, but he insists he does not have the Power of Attorney to do so. What is curious is that at the time of signing the seven (7) Sale Agreements, the 1st Defendant indeed signed them on behalf of the other vendors and even the Preamble of the said Sale Agreements is clear and states the following:

' The vendor has authorised the promoter to sell the above plots and proceed with the project. It is hereby agreed: That the promoter shall sell the plots. That the Vendor has authorized the promoter to receive payment for the plots. That the Vendor shall sign all the necessary papers to allow the purchasers obtain the Title.'

From the preamble, the court notes that the 1st Defendant indeed had the capacity to sign the seven (7) Sale Agreements as he was authorised by the vendors and also to receive payments, which he did. The issue of Power of Attorney to enable him effect the transfers to the Plaintiffs at this juncture should not arise.

Black's Law Dictionary defines frustration as **'the prevention or hindering of the attainment of a goal, such as a contractual performance.**

In the case at hand, the contractual performance emanating from the seven (7) Sale Agreements has been frustrated due to the actions of the Defendants.

In terms of injunctive orders sought by the Plaintiffs, It is now established in Kenya that the principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

Bearing this principle in mind, it is upon this court to interrogate whether the Plaintiffs/Applicants' have demonstrated a prima facie case with a probability of success at the trial.

In the instant case, the parties admit there were seven (7) Sale Agreements executed in respect of the suit parcels of land. The 1st Defendant has admitted that there is a Charge over the suit parcels, but insists the said suit parcels will not be auctioned. He has not given a guarantee in court over this. The Court notes that the said Charges to financial institutions were effected after the said seven (7) Sale Agreements had been executed and the 1st Defendant received a total of Kshs 6,820,000 on behalf of the vendor as had been agreed upon. The 1st Defendant failed to inform the Plaintiffs' about the Charges and insists the Plaintiffs only purchased plots for Green Houses and the Charged plots are bigger. The 1st Defendant submitted that the vendors are willing to transfer the plots to the Plaintiffs and has not given any timelines on when this would be effected.

The upshot of the matter is that Plaintiffs have established a prima facie to warrant an injunction as they raise triable issues which are best determined at the trial. The Court further finds that the contracts have been frustrated by the Defendants and the Plaintiffs have demonstrated they will suffer irreparable loss and damage if the orders of injunction sought are not granted.

I allow prayers 3 and 5 of the instant Notice of Motion application in the following terms:

1. That pending the hearing and final determination of the Suit herein the Defendants/Respondents do deposit a total sum of Kshs. 6,820,000 to a bank account mutually agreed upon by the parties herein within the next 30 days from the date hereof.

2. That pending the hearing and final determination of the suit herein the Defendants/Respondents, their servants, agents and or employees and or anyone else working under their directions are restrained from further alienating, marketing for sale, disposing of or interfering with, all those parcels of land registered as Land Reference Numbers Kajiado/Kitengela/71158 and 71159 or any part thereof

3. The costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 30th day of June, 2017.

CHRISTINE OCHIENG

JUDGE