



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 855 OF 2015

DAVID MWOSE MWALUKO.....PLAINTIFF

-VERSUS -

ERASTUS KIARIE GITAU.....DEFENDANT

RULING

What is before me is the Plaintiff's Notice of Motion dated 1st September 2015 in which the Plaintiff has sought a temporary injunction to restrain the Defendant from dealing with, interfering with, alienating or otherwise disposing of all that parcel of land known as L.R No. 13459/13 (Original No. 13459/4/1) hereinafter referred to as "the suit property") pending the hearing and determination of the suit. The Plaintiff has also sought an order that the Registrar of Titles be prohibited from removing the caveat registered as IR 65358/2 against the title of the suit property pending the hearing and determination of the suit. The application was supported by the affidavit and further affidavit sworn by the Plaintiff on 1st September 2015 and 24th September 2015 respectively. The application was opposed by the Defendant through a replying affidavit sworn on 17th September, 2015.

The Plaintiff and the Defendant entered into a written agreement for sale dated 25th November, 2010. The sale was in respect of a portion measuring approximately half (1/2) acre of all that parcel of land known as L.R No. 13459/13 (Original No. 13459/4/1) hereinafter referred to as "the suit property"). Under the said agreement, the Plaintiff agreed to purchase the suit property from the Defendant at a consideration of Kshs. 10,000,000/= on terms and conditions which were set out in the said agreement. The agreement provided among others that the completion date was ninetieth day from the date of the agreement or seven days after registration of transfer whichever is earlier or such other date as the parties may mutually agree. The agreement provided further that the Plaintiff was to pay to the Defendant 10% of the purchase price on or before the execution of the agreement and the balance in the sum of kshs. 9,000,000/= was to be paid to the parties advocates to hold as stakeholder on or before the completion date and in any event in exchange of the completion documents pending the completion and successful registration of the transfer of lease in favour of the plaintiff. The agreement provided further that on or before the completion date, the Defendant was to give to the Plaintiff's advocates the following documents in respect of the suit property;

- a) An instrument of Transfer of lease in triplicate duly executed by the Defendant in favour of the Plaintiff or the Plaintiff's nominee as directed by the Plaintiff.
- b) The original Title Deed of the property.
- c) Letter of consent to transfer the property to the Plaintiff.

- d) A copy of the Defendant's National Identity Card.
- e) A copy of the Vendor's PIN Certificate.
- f) Three recent passport size coloured photographs of the Defendant.

The agreement provided further that in the event that the Plaintiff defaulted in the payment of the balance of the purchase price, the Defendant being ready and willing to complete the agreement was entitled after giving to the Plaintiff twenty one (21) days notice demanding the payment of such balance, either to rescind the agreement for sale or to sue for specific performance.

The Plaintiff brought these proceedings contending that the Defendant had purported to rescind the agreement for sale herein and wanted to remove the caveat that the Plaintiff had registered against the title of the suit property to protect his interest as a purchaser so that he may sell the property to a third party. The Plaintiff contended that the Defendant had not issued him with a completion notice and that in any event the Defendant was not ready and willing to complete the agreement even after receiving a substantial portion of the purchase price.

The plaintiff brought this suit seeking specific performance of the said agreement and damages. As I have stated earlier in this ruling, in the application before me, the Plaintiff has sought a temporary injunction to restrain the Defendant from dealing with the suit property pending the hearing and determination of the suit. The Plaintiff has also sought an order prohibiting the Registrar of Titles from removing the caveat which was registered by the Plaintiff against the title of the suit property pending the hearing and determination of the suit.

In response to the application, the Defendant contended that the Plaintiff had breached the said agreement for sale by failing to pay the balance of the purchase price and was duly given twenty one (21) days completion notice before the Defendant rescinded the agreement and sought to refund the payments which had been made by the Plaintiff. The Defendant contended that he had obtained all the consents and approvals to sub-divide LR. No. 13459/13 and had processed the Deed Plans. The Defendant annexed to his affidavit copies of the Deed plans, the approvals for the subdivision of the suit property and the alleged completion notice.

I have considered the Plaintiff's application and the response thereto by the Defendant. I am satisfied on the material before me that the Plaintiff has satisfied the conditions for granting a temporary injunction which are set out in the case of Giella vs. Cassman Brown & Co. Ltd. (1973) E.A 358. The plaintiff has demonstrated that he has a prima facie case with a probability of success against the Defendant and that he stands to suffer irreparable damage which cannot be compensated in costs in the event that the orders sought are not granted. I am persuaded that the Plaintiff had fulfilled his part of the sale agreement between him and the Defendant and that what remained was for the Defendant to avail completion documents so that the Plaintiff can pay the balance of the purchase price. The Defendant who has purported to rescind the agreement for sale has not satisfied me that prior to the issuance of the purported completion notice, he was ready and willing to complete the agreement. I am in agreement with the Plaintiff that the Deed Plans annexed to the Defendant's affidavit were not sufficient to complete the agreement. Furthermore, it is doubtful if the Defendant served the completion notice in accordance with the terms of the agreement. I have noted that there are alterations in the postal address of the Plaintiff in the purported notice and in the certificate of posting which have not been explained.

For the foregoing reasons, I find merit in the Notice of Motion dated 1st September, 2015 which I allow on the following terms;

1. Pending the hearing and determination of the suit herein, the Defendant is restrained from alienating, selling or otherwise disposing of LR. No. 13459/13 or the subdivisions thereof.
2. Pending the hearing and determination of the suit herein, the caveat registered against the title of L.R No. 13459/13 as IR 65385/2 shall remain inforce.

3. The Plaintiff shall have the costs of the application.

Delivered and Signed at Nairobi this 27th day of June, 2017

S. OKONG'O

JUDGE

Ruling read in open court in presence of:

N/A for Plaintiff

N/A for Defendant

Kajuju Court Assistant