



REPUBLIC OF KENYA
IN THE ENVEIROMENT AND LAND COURT

AT MILIMANI

ELC NO. 619 OF 2016

GODFREY MBUURI GACHURA.....PLAINTIFF

=VERSUS=

MUGA DEVELOPERS LIMITED.....DEFENDANT

RULING

1. The Plaintiff/ Applicant filed a Notice of Motion dated 9th June 2016 in which he sought an injunction restraining the Defendant/ Respondent, its agents and/or servants from selling, disposing of, transferring and/or dealing in any other manner whatsoever with Villas number ***SPG/03/P3/H083 and SPG/ 03/ P3/ H090 of Hibiscus Court 4, Villas*** erected on ***LR No.28223/33*** (Fourways Junction) Nairobi pending the hearing and determination of the suit herein.

2. The Applicant contends that on 21st September 2015, he entered into an agreement for sale of villa number SPG/03/P3/H083 and SPG/ 03/ P3/ H090 of Hibiscus Court 4 Villas erected on LR No.28223/33 (Fourways Junction) Nairobi (suit premises). He bought each Villa for Kshs.23,500,000/= making a total of Kshs.47,000,000/= which he duly paid to the Respondent. The Respondent has however declined, refused, and or failed to grant him access and possession of the suit premises. Efforts to negotiate with the Respondent have been futile prompting him to file this application.

3. The Respondent has opposed the Applicant's application through a replying affidavit sworn on 15th July 2016. The Respondent contends that the Applicants have not come to Court with clean hands. That the Applicant has come to court without clearing pending issues with the Respondent and that this application is only meant to embarrass the Respondent.

4. The Respondent further contends that the Applicant has not disclosed to the Court that the agreements he is referring to in the application were subject to another agreement made between the Applicant and Suraya Property Group Ltd which is a sister company to the Respondent. That though, consideration is mentioned in the agreements between the Applicant and the Respondent, there was actually no payment made. The Applicant had intended to purchase half an acre from Jacaranda Holdings Limited. The Applicant was to transfer the properties to Suraya Property Group Ltd in exchange of two Villas at Fourways Junction. That has not happened and therefore the Applicant cannot claim that any of his rights have been violated or are threatened with violation. That if the applicant was to be granted an injunction, it will amount to the applicant seeking to have the suit premises for no consideration at all.

5. I have considered the applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties herein. Before I start addressing the issue of

injunction in this matter, I must point out that counsel for the Respondent raised the issue of rescission of the agreement and reference to arbitration. These two issues were responded to by the Applicant through supplementary submissions filed on 27th February 2017. This Court is not dealing with the issue of rescission of the agreements or arbitration which has been raised through submissions.

6. The granting of a temporary injunction is an exercise of judicial discretion. Such discretion is exercised on sound legal principles. An injunction being an equitable remedy, an applicant must come to court with clean hands. The Applicant is also expected to demonstrate that he has a prima facie case with probability of success. A prima facie case was described in the case of **Mrao –Vs- First American Bank of Kenya Limited and 2 others (2003) KLR 125** as follows:-

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case” It is a case 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 as to call for an explanation or rebuttal from the latter”

7. In the Instant case, the Applicant is contending that he paid for the suit premises but that the Respondent has refused to give him access or possession of the same. Contrary to the Applicant’s assertions, the Respondent has shown that possession of the suit premises was subject to the Applicant transferring two properties which he was in the process of acquiring from Jacaranda Holdings Limited. The Applicant has not transferred those properties to the sister company of the Respondent. It is therefore difficult to see which of his right has been infringed as to call for a rebuttal from the Respondent.

8. The Applicant is contending that though there was an earlier agreement between him and the Respondent’s sister company, that agreement was not referred to in the subsequent agreements and therefore cannot be admissible to vary or add to the subsequent contract. This may be perfectly be so and the applicant’s counsel has cited a number of authorities to that effect. The question however remains whether the Applicant paid any consideration in respect of the suit premises as to give him a right to access the same.

9. It is clear that the sale of the suit premises was subject to the Applicant transferring the two plots he was in the process of acquiring from Jacaranda Holdings Limited. He cannot seek to have the suit premises when he has not paid for them as contemplated in the agreement between him and the Respondent’s sister company. The applicant cannot seek to shelter under the law of contract when it is clear that that contract was made in anticipation of transfer of properties which he was in the process of acquiring. I therefore do not see any prima facie case which the Applicant has to warrant grant of injunction. Even if he were finally to succeed, this is a matter which he can be compensated in damages. Even if the Court were to consider the balance of convenience, the same tilts in favour of the Respondent in that the suit premises are in their possession and the property which its sister company was to be given has not been given. I therefore find no merit in the Applicant’s application which is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, Signed and Delivered at Nairobi on this 31st day of July 2017.

E.O.OBAGA

JUDGE

In the Presence of :-

M/s Mwachiro for Mr Njuguna for Plaintiff

Mr Wachira for Mr Onsare for defendant

Court Assistant: Hilda

E .O. OBAGA

JUDGE