



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
ENVIRONMENT AND LAND COURT
THIKA LAW COURTS
ELC.NO.229 OF 2017

BROADSPECT INVESTMENT LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

FRANCIS NJOROGE MWANGI.....DEFENDANT/RESPONDENT

R U L I N G

The matter coming up for determination is the Plaintiff/Applicant's *Notice of Motion* application dated **14th December 2016**, brought under Sections 38 and 48 of the Land Act of 2012, Section 28 of the Land Registration Act No.2012, Sections 1A, 1B & 3A of the Civil Procedure Act and Order 40 Rules 1, 4 and 10 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The Applicant has sought for the following orders:-

- 1) *Spent*
- 2) *Spent*
- 3) *A declaration that the Sale Agreement dated 11th November 2014 is not only valid but binding between the parties herein.*
- 4) *A mandatory injunction compelling the Defendant/Respondent to transfer the agreed fourteen(14) acres of land excised from land parcel known as Kakuzi/Kirimiri Block 7/162 to the Plaintiff/Applicant.*
- 5) *That costs be provided for.*

The application is premised on the grounds stated on the face of the application and on the affidavit of **Josephat Kamau Kaniaru**, the Director of the Plaintiff's Company. These grounds are:-

- a) *That the parties entered into a Sale Agreement regarding fourteen acres of land excised from LR.Kakuzi/Kirimiri Block 7/162 on 11th November 2014.*
- b) *That the Plaintiff/Applicant in terms of the said sale agreement paid the Defendant/Respondent a sum of Kenya Shillings Ten Million, One Hundred and Thirty One Thousand and Six Hundred (Kshs.10,131,600/=) with the balance of the purchase price to be*

paid on completion.

c) That the Defendant/Respondent has refused failed and or neglected to complete the said transaction despite the Plaintiff's/Applicant's insistence.

d) That the Plaintiff/Applicant is ready, able and willing to complete.

e) That the Defendant/Respondent has now cut all lines of communications with the Plaintiff/Applicant.

f) That the granting of the orders sought shall not in any way prejudice the Defendant/Respondent.

In his Supporting Affidavit, **Josephat Kamau Kaniaru** averred that the parties herein entered into a Sale Agreement for sale and purchase of **14 acres** excised from **Kakuzi/Kirimiri Block 7/162**, whereby the Defendant/Respondent would sell the same to the Plaintiff as per the Sale Agreement marked **BIL 2**. Further that as per the terms of the said agreement, the Plaintiff/Applicant paid a sum of **Kshs.10,131,600/=** to the Defendant/Respondent which was equivalent of **60%** of the purchase price. Further that the **balance** of the purchase price amounting to **Kshs.7,280,000/=** was to be paid on completion. He also averred that at the completion date, the Defendant/Respondent requested for extension of time to allow him complete and the Plaintiff/Applicant granted the said extension. He also averred that the Plaintiff/Applicant made it clear to the Defendant/Respondent that it was ready, able and willing to complete the said Sale Agreement and the Plaintiff has persistently followed the Defendant to complete the same. However, the Defendant/Respondent has cut off all lines of communication and the Plaintiff/Applicant has not been able to get the Defendant/Respondent who is avoiding the Plaintiff herein. He alleged that the Defendant is now soliciting for other buyers for the said parcel of land and thus this application.

The Applicant has averred that it is just and fair that the Defendant/Respondent be stopped from disposing off the property as the Plaintiff will suffer irreparable harm.

This application is vehemently opposed. **Francis Njoroge Mwangi**, the Respondent herein swore a **Replying Affidavit** dated **1st February 2017**, and averred that he is the registered proprietor of **LR No.Kakuzi/Kirimiri Block 7/162**, located within Thika District. He also confirmed that on **11th November 2014**, he entered into a Sale Agreement with the Plaintiff for sale of **14 acres** from the above mentioned parcel of land for a consideration of **Kshs.18,200,000/=**. It was his contention that the purchase price was to be paid as per the deadlines set out in the Sale Agreement but the Plaintiff blatantly breached the same and failed to pay the amount as and when it was due. It was his contention that he issued the Plaintiff with **Twenty One (21) days Notice** to pay the sum of **Kshs.7,280,000/=** as per **Clause 3.3** of the Sale Agreement but the Plaintiff only paid **Kshs.1,000,000/=**.

He also contended that the completion date was supposed to be the **11th May 2015**, on which date the Plaintiff still owed the Respondent substantial balance of the purchase price. Further that despite failure to complete payment of the purchase price, the Plaintiff/Applicant went ahead and trespassed into his land and was even in the process of selling the land to third parties without the express consent of the Respondent. He also averred that he had solicited out for an able Purchaser in order to raise the amount that is to be refunded to the Plaintiff and the same was done in good faith and he even informed the Plaintiff of the said plan. He contended that the Plaintiff went ahead and illegally registered a caution against his title with intention of frustrating his attempt to raise funds to refund the agreed money. It was his further contention that the Plaintiff was entirely to blame for failure to complete the sale transaction. He also contended that he had even tried to employ the services of a mediator but the Plaintiff went against what they agreed before the mediator and filed this suit. The Respondent further deposed that as a result of the Plaintiff's action and breach of Contract, he has suffered irreparable loss and damage. It was his further disposition that the Plaintiff has come to court with unclean hands and is therefore abusing the due process of this Court. He urged the Court to dismiss this instant application with costs to the Respondent.

This application was canvassed by way of **Written Submissions**. **The Law Firm** of **Nyoike & Associates**, Advocates for the Plaintiff/Applicant filed their Written Submissions on **21st April 2017**, and urged the Court to allow their application. Further, the **Law Firm** of **Auta Nyakundi & Co. Advocates** for the Defendant filed their Written Submission on **27th May 2017**, and urged the Court to dismiss the instant application.

This Court has carefully considered the instant **Notice of Motion**, the annexures thereto and the Written Submissions. The Court has also considered the relevant provisions of law and the Court makes the following findings.

There is no doubt that the Plaintiff and the Defendant herein entered into a **Sale Agreement** dated **11th November 2014**, for sale and purchase of **14 acres** of land out of land known as **LR No. Kakuzi/Kirimiri Block 7/162**, which is owned by the Defendant/Respondent herein. The Defendant attached a **Certificate Of Title** issued on **23rd September 2008**, showing that indeed this parcel of land is registered in the name of **Francis Njoroge Mwangi**, the Defendant/Respondent herein. It is also evident from the Sale Agreement that the purchase price was **Kshs.18,200,000/=** of which the Purchaser was to pay **10%** of the same, equivalent of **Kshs.1,820,000/=** upon execution of the Sale Agreement. The said Sale Agreement contains a schedule of payments in **Clauses 3.1, 3.2, 3.3 and 3.4**. Further the completion date was supposed to be on or before **180 days** from the date of the agreement which date was **11th May 2015**. However, it is evident that the said sale was never completed as stipulated in the Sale Agreement. The Plaintiff has alleged that it has paid **60%** of the purchase price and it is still ready, willing and able to pay the balance. However the Defendant has frustrated the said completion of the sale and has **threatened to sell** the suit land to other **3rd parties** and thus this suit.

On his part, the Defendant/Respondent has averred that the Plaintiff has breached the Sale Agreement and has failed to pay the full purchase price as per the Sale Agreement. That the said agreement is therefore void by operation of the law and the Plaintiff's application should be dismissed.

The Court has considered the prayers sought by the Applicant and has noted that on **prayer No.2**, the Plaintiff prayed for temporary injunction against the Defendant pending the hearing and determination of this application. The Court **granted prayer No.2** on **16th December 2016**. The Applicant did not seek for prayers of injunction pending the hearing and determination of the suit. The Application was canvassed and it is now being determined vide this Ruling. The said **Order No.2** is therefore valid upto the date of this Ruling. Since the Applicant did not seek for temporary injunction pending the hearing and determination of the suit, the Court finds that **prayer No.2 is now spent** and this Court will consequently not deal with that prayer for temporary injunction.

On **prayer No.3**, the Applicant has sought for an order that the Court do declare the **Sale Agreement** dated **11th November 2014**, as not only valid but also binding between the parties. The Sale Agreement is dated **11th November 2014**, and all the parties herein are in agreement that they did sign the same. The parties are also in agreement that the said agreement has been breached because the completion of the sale was not done as per the stipulated date and the payments of the purchase price were not done as stipulated in **Clauses 3.1 – 3.4**.

The agreement herein is for sale of land and as stipulated in **Section 3(3)** of the **Law of Contract**, the said contract must be in writing and should be signed by all the parties herein. In the instant Sale Agreement, the same is in writing and is signed by the parties and therefore the Sale Agreement is a valid Sale Agreement which is capable of enforcement. See the case of **Nelson Kivuvani ..Vs.. Yuda Komora & Ano. Nairobi HCCC No.956 of 1991** where the Court held that:-

“The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligation express or implied of each of the parties and signed and witnessed by two witnesses who signed against their names amounts to a valid contract.”

The parties herein entered into a valid Sale Agreement or Contract and they are thus bound by the terms of the said Contract. See the case of *National Bank of Kenya Ltd ..Vs..Pipeplastic Samkolit (K) Ltd & Ano, Civil Appeal No.95 of 1999*, where the Court held that:-

“The parties are bound by the terms of their Contract, unless coercion, fraud or undue influence are pleaded and proved.”

The Court has found that the instant Sale Agreement is valid and therefore the parties herein are bound by the terms of the said Sale agreement. Therefore in answer to ***prayer No.3***, the Court finds and declare that the Sale Agreement dated ***11th November 2014***, is not only ***valid*** but also ***binding*** between the parties.

Of importance to this case is ***Clause No.12*** on ***Default***. It is stipulated in the said Sale Agreement ***Clause No.12*** that if the Vendor fail to comply with his obligations, then the Purchaser may give the Vendor ***21 days Notice*** in ***Writing***. The Purchaser also has right to rescind the Contract with full payment of the moneys paid plus ***25% interest***. The Plaintiff has averred that the Defendant breached the Contract herein. Then the Plaintiff/Applicant should have utilized the provisions of ***Clause No.12*** of the ***Sale Agreement*** herein since parties are bound by the terms of their Contract.

On ***prayer No.4***, the Plaintiff is seeking for mandatory injunction to compel the Defendant to ***transfer*** the ***14 acres*** of land to the Plaintiff/Applicant as per the Sale Agreement. This is indeed an order for specific performance and it is a final order. The Court has considered the ***Plaint*** dated ***14th December 2016***, and noted that ***prayer No.(a)*** of the said ***Plaint*** is ***similar*** to the instant ***prayer No.4*** of the ***Notice of Motion***. This is a final prayer and granting it now means that there is no need of proceeding with the main suit. The bone of contention herein is whether the Sale Agreement herein has been breached and whether the same though valid has become voided by operation of law. The said issue is a disputed one which can only be resolved by calling of evidence.

The principles for granting of mandatory injunction were well laid down in the case of *Kenya Breweries Ltd & Ano..Vs..Washington O. Okeyo, Civil Appeal No.332 of 2000. 1EA 109*, where the Court held that:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application”. See *Volume 24 Halsbury Laws of England 4th Edition Paragraph 948*

In the instant case, the Plaintiff/Applicant has alleged that the Defendant/Respondent has breached the Sale Agreement. The Sale Agreement provides for remedies in case of default by the Vendor. The Court cannot hold that the Defendant/Respondent herein is attempting to steal a march against the Plaintiff. The Defendant/Respondent has alleged that the Plaintiff has breached the terms of the agreement. The Plaintiff/Applicant has alleged that it is not in breach. The said allegations are disputed facts which need to be canvassed through oral evidence. This Court cannot find that the case herein is a clear one which ought to be decided at once.

Having now carefully considered the available evidence, the Court finds that apart from finding that the Sale Agreement herein is valid and binding to the parties especially ***Clause No.12*** on default, the Court finds that ***prayer No.4*** is ***not merited*** and the same is consequently dismissed entirely with costs to the Defendant/Respondent.

The upshot of the foregoing is that the Plaintiff's ***Notice of Motion*** dated ***14th December 2016***, is not merited and the same is dismissed in terms of ***prayer No.2*** and ***4*** entirely with costs to the Defendant/Respondent.

It is so ordered.

Dated, signed and delivered at THIKA this 17th day of July 2017.

L. GACHERU

JUDGE

17/7/17

In the presence of

Hon. Gacheru, J

Court clerk – Rachael

No appearance for Plaintiff/Applicant

M/S Wachira holding brief for Mr. Nyakundi for the Defendant/Respondent

Court – Ruling read in open Court in the presence of M/S Wachira holding brief for Mr. Nyakundi for the Defendant/Respondent and absence of the Plaintiff/Applicant and its advocate though Ruling date was taken in Court in the presence of all the advocates representing the parties herein.

L. GACHERU

JUDGE

17/7/17