REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO.324 OF 2017

IMMACULATE GICUKU MUGO…..……..…PLAINTIFF/APPLICANT

MUGO WANJOHI MARINGA…..…..……..……..…PLAINTIFF/APPLICANT

VERSUS

KAHAWA SUKARI LIMITED……..……...……....DEFENDANT/RESPONDENT

RULING

The Plaintiffs/Applicants herein brought this ***Notice of Motion*** application dated ***14th March 2017***, and sought for the following orders against the Defendant:-

1) Spent.

2) Spent.

3) Pending the hearing and determination of this application, a temporary order of injunction do issue restraining the Defendant, its agents, servants or anyone whomsoever from allotting, selling, charging, transferring, trespassing or otherwise howsoever from alienating all those properties known as Ruiru Kiu/Block 3/1737, Ruiru Kiu/Block 3/1755 and Ruiru Kiu Block 3/1756.

4) Costs.

The application is supported by the grounds stated on the face of the application and on the ***Supporting Affidavit*** of ***Immaculate Gicuku Mugo***. The grounds are:-

a) Vide written memorandums of sale evidenced in writing between the Plaintiffs and the Defendant, the Plaintiffs agreed to buy and the Defendant agreed to sell all those properties known as Ruiru Kiu Block 3/1737,1755 and 1756 (hereinafter the suit properties)

b) The agreed purchase price for all the suit properties were Kshs.6,600,000/= and no completion date is stated in the application forms numbers 818,819 and 820.

c) The mode of the payment of the purchase price had no agreed instalments and no timelines and the Plaintiffs have been depositing purchase price as and when they get, the last instalments having been made on December 2016.

d) On 7th March 2017, the Plaintiffs went to clear the purchase price when they were informed

that the properties had been sold by the company to third parties who had offered better prices.

e) The Defendant's action is in breach of the memorandum of sale and amounts to unjust enrichment as the suit properties have been sold to third parties without their consent and without prior notice.

f) The Plaintiff is ready and willing to pay the entire balance of the purchase price.

In her Supporting Affidavit, **Immaculate Gicuku Mugo** reiterated the contents of the grounds in support of the application. She further averred that the Defendant should not be allowed to renege on the agreement and memorandum of sale by reason of getting better offers without their notice and consents. She also contended that unless the Defendant is restrained by way of injunction, the Applicants will lose the plots which are located in the prime area and will indeed suffer irreparable loss and damage. She further contended that she is ready to provide such security including deposit of the entire purchase price or as the Court may direct. She urged the Court to allow the application.

The application is ***opposed***. The Respondent filed a ***Notice of Preliminary Objection*** dated ***28th March 2017***, and averred that:-

i. The Respondent/Defendant offered for sale three plots namely Kahawa Sukari Ltd Plots No.1737,1755 and 1756 to the Applicants as per the allotment certificate but not title no.Ruiru/Kiu Block 3/1737,1755 and 1756 as alleged by the Plaintiffs.

ii. That the application is an abuse of the Court process and should be dismissed.

Further ***Alice Wacheke Muiruri,*** one of the Director of ***Kahawa Sukari Ltd,*** swore a ***Replying Affidavit*** and averred that; on ***12th August 2014***, the Defendant offered to sell ***plots no.1737, 1755*** and ***1756,*** respectively at ***Kshs.2,200,000/= per plot*** to the Applicants herein. She further averred that the Applicants paid a ***commitment fee of Kshs.150,000/=*** as deposit and promised to pay the balance within ***90 days*** from the date of the commitment. She averred that the Plaintiffs/Applicants never paid the balance of the purchase price within ***90 days*** as verbally promised or as stipulated in the allotment certificate. She also stated that ***on 14th October 2016***, the Applicants were served with ***Demand letter*** reminding them to pay the balance of the purchase price. After the demand letter, the Applicants paid a deposit of ***Kshs.2,200,000/=*** in ***three instalments*** and failed to meet the demand of the Defendant to pay the entire purchase price. Therefore the Defendant ***terminated*** the entire ***contract*** on ***16th December 2016***, and such notification was sent to the Applicants. Further the Applicants were informed that they were entitled to one plot which they had completed payment. There was a ***refund of Kshs.300,000/=.*** She alleged that the plots being purchased were ***Kahawa Sukari Ltd Plots no.1737,1755*** and ***1756 but not Ruiru/Kiu Block 3/1737, 1755*** and ***1756*** as alleged by the Applicants. She averred that the application and entire suit is an abuse of the Court process as the Applicants failed to complete the sale for over a period of 4 years. She urged the Court to dismiss the instant application.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the relevant provisions of law and it will render itself as follows;-

The orders sought herein are equitable reliefs granted at the discretion of the Court, but which discretion must be exercised judicially. See the case of ***CMC Motors Group Ltd & Another…Vs…Evans Kageche Boro, Civil appeal No.295 of 2001***, where the Court of Appeal held that:-

"in granting the injunctory reliefs, the Superior Court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the Learned Judge if it is satisfied that the Learned Judge did not exercise is discretion judicially…."

Further as the court delves into the available evidence to determine whether to grant or not to grant the injunctive orders sought, the Court will take into account that at this stage, it is not supposed to make conclusive findings of facts or law based on affidavits evidence.The Court is only supposed to determine whether the Applicant is entitled to the order sought based on the usual criteria. See the case of ***Airland Tours and Travel Ltd…Vs…National Industrial Credit Bank, Milimani HCCC No.1234 of 2003***, where the Court held that:-

> ***"In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law".***

The criteria to be considered in determining this application is the one set out in the case of ***Giella…Vs… Cassman Brown & Co. Ltd (1973) EA 358***, which is:-

> ***a) The Applicant must establish that he has a prima facie case with probability of success.***
>
> ***b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
>
> ***c) When the Court is in doubt, to decide the case on a balance of convenience.***

Therefore the Court will first consider whether the Applicant has a *prima-facie* case with probability of success at the trial.

In the case of ***Mrao Ltd…Vs…First American Bank of Kenya Ltd & Others (2003) KLR 125***, the court held that;-

> "***prima-facie case means more than an arguable case, that the evidence must show an infringement of a right and the probability of success at the trial".***

Has the Applicants herein established that there is an infringement of any of their rights herein?

There is no doubt that the Plaintiffs herein did receive plot application forms for ***plots no.1737,1755*** and ***1756*** for purchase of the stated plots for the price of ***Kshs.2,200,000/= per plot***. The said purchase price was to be paid within the stipulated time specified by the letter of allocation which was to be given to the Applicants.

The said application forms are not dated but according to the allotment certificate dated ***12th August 2014***, the first deposit towards the purchase of the said plot was done on ***12th August 2014***. The second deposit was affected on ***15th September 2014***. The two deposits were for ***Kshs.150,000/=*** which meant the Applicant paid ***Kshs.300,000/=*** as deposit by ***15th September 2014***. The balance was indicated as ***Kshs.6,300,000/=.*** The allotment certificate showed that the Plaintiffs were the allottees of the three plots ***No.1737,1755*** and ***1756*** subject to the conditions of sale and regulations thereof. This Court believe the said regulations are the ones contained in the plot application forms.

The Applicants have alleged that the said plot application forms did not have completion date and to them, time was not of essence. However, the Respondent has alleged that the Plaintiffs/Applicants verbally undertook to pay the balance of the purchase price within a period of ***90 days***. It is evident that the Plaintiffs did not pay the balance until ***17th October 2016***, when a further ***deposit*** of ***Kshs.700,000/=*** was paid. This was after the Defendant had issued a ***Demand Letter*** dated ***14th October 2016***, demanding payment of the balance of the purchase price within a period of ***14 days***. Thereafter, the Plaintiffs made a further ***payments*** of ***Kshs.900,000/=*** and ***Kshs.700,000/=*** on ***14th December 2016***. The ***balance*** after ***14th December 2016*** was ***Kshs.4,000,000/=.***

The Court has also seen a letter dated ***16th December 2016***, wherein the Defendant/Respondent informed

the Plaintiffs of the resolve to terminate the contract for failure to pay the full balance of the purchase price. Further, the Defendant informed the Plaintiffs that they were entitled to one plot which they had fully paid for, with a refund of ***Kshs.300,000/=*** which the Defendant was willing to refund anytime. The Plaintiffs cannot therefore claim that they were not informed of the termination of the contract.

In ***Clause no.5*** of the plot's application form, it is clear that:-

> ***"If payment of the proposed provisional selling price was not received by the Company or its appointed agents within the time specified by the letter of allocation, the offer shall lapse at the expiry of the period given for the payment unless the period is extended by the Company at its discretion".***

Though no letter of allocation was attached by either of the parties, the Defendant stated that the Plaintiffs had verbally promised to pay the balance of the purchase price within a period of ***90 days***. It is evident that was not done. Further, the Defendant issued a demand letter on ***14th October 2016***, demanding full payment of purchase price within a period of ***14 days***. That meant that by ***28th October 2016***, the Plaintiffs/Applicants ought to have cleared payment of the purchase price. That did not happen and there was no evidence of extension of the period by the Respondent as stipulated in ***Clause no.5*** of the plot application form. It is very clear that the Plaintiffs took such a long time to pay any further deposits after ***15th September 2014***, wherein they had only paid ***Kshs.300,000/=*** out of ***Kshs.6,600,000/=.*** There was indeed inordinate delay on the part of the Plaintiffs in clearing the purchase price.

The Plaintiffs did not adhere to the conditions of the sale and they cannot claim that the Defendants have breached the sale contract. It is very clear that injunctive orders are equitable remedies and whoever seeks for them must come to court with clean hands. See the case of ***Amalo Company Ltd…Vs…Trust Bank Ltd, Kisumu HCCC No.7 of 2004(B)***, where the Court held that:-

> ***"A grant of interlocutory injunction is equitable remedy and accordingly the applicant's conduct in all the matters relating to the suit must meet the approval of the court of equity before he can obtain the reliefs he seeks."***

The conduct of the Applicants herein in failing to pay the balance of the purchase price within a reasonable time, means that it does not meet the approval of the Court and they have not come to court with clean hands.

For the above reasons, the ***Court finds*** that ***the Applicants have not established*** that they have ***a prima-facie case with probability of success at the trial.***

Having failed to establish the first condition for grant of injunctive orders, the Court finds that there is no need of considering the other conditions as they are sequential in that the second condition is considered if the first one has been established. See the case of **The Attorney General…Vs…Kenya Commercial Bank Ltd, Afraha Educational Development Co. Ltd & Others, Nakuru CCC No.260 of 2004**, where the Court held that:-

> ***"The Judge should address himself sequentially on the conditions for granting an application for injunction instead of proceeding straightaway to address himself on the third condition because where the Applicant has not registered interest in the land comprised in the title in dispute and therefore has not demonstrated that it has a prima-facie case with probability of success, no interlocutory injunction would be available***."

Further, the Court has also noted that the Respondent had filed ***a Notice of Preliminary Objection***, wherein it alleged that the plots that were sold to the Applicants were plots no.***Kahawa Sukari Ltd plots No.1737,1755*** and ***1756***, whereas the Plaintiffs/Applicants are claiming ***titles No.Ruiru/Kiu Block 3/1737,1755*** and ***1756***. The Plaintiffs have alleged that these are the same plots which acquired a new look after the title deeds were issued. However, for the Court to establish whether ***plots No.1737, 1755*** and ***1756*** are not the same as titles ***No.Ruiru/Kiu Block 3/1737,1755*** and ***1756***, it has to call evidence and

therefore it has to ascertain facts. However, it is evident that ***Preliminary Objection*** raises pure points of law which do not have to call for ascertainment of facts. The said ***Preliminary Objection*** can also dispose off the matter preliminarily. See the case of ***Mukisa Biscuits Manufacturing Ltd…Vs… West End Distributors Ltd 1969 EA 697***, the Court held that:-

> ***"A Preliminary Objection is in the nature of what used to be called a demurrer. It raised a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary Objection does nothing but unnecessarily increase costs and on occasion confuse the issues***."

The ***objection*** raised herein by the Respondent ***does not qualify as a preliminary objection*** as described in the ***Mukisa Biscuits Case (supra).*** The ***same is dismissed entirely***.

Having now carefully considered the Plaintiffs'/Applicants' ***Notice of Motion a***pplication dated ***14th March 2017***, the ***Court finds it not merited*** and it ***is dismissed entirely with costs to the Defendant/Respondent.***

The Plaintiffs to prepare the main suit for hearing expeditiously by complying with Order 11 within a period of 45 days from the date hereof and thereafter take a date for Pre-trial Conference before the Deputy Registrar of this Court.

It is so ordered.

Dated, Signed and Delivered at Thika this ***3rd*** day of ***November*** 2017.

L. GACHERU

JUDGE

In the presence of

Mr. Njoroge holding brief for Mr. Muturi for Plaintiffs/Applicants

No appearance for Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

3/11/2017

Court –Ruling read in open court in the presence of the above stated advocate.

L. GACHERU

JUDGE

3/11/2017