



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 380 OF 2015

WILBERT KIPSANG CHOGE:::::::::::::1ST PLAINTIFF

LEAH KADALI NDEGE:::::::::::::2ND PLAINTIFF

VERSUS

CLEOPHAS KIRWA MELLY:::::::::::::1ST DEFENDANT

SARAH KOSGEY:::::::::::::2ND DEFENDANT

RULING

The plaintiffs have come to court claiming that on 23rd May 2015 the plaintiffs entered into a written agreement with the defendant for purchase of parcel of land known as NGERIA/CHEPYAKWAI BLOCK 2 (KAPLELACH)/125. The plaintiffs paid a sum of Kshs.1,050,000/- (one Million and fifty thousand shillings only) to the defendants and a balance of Kshs.1,950,000/- (One Million nine hundred and fifty thousand shillings only) was to be paid to the defendants, upon the defendants obtaining the requisite consent and delivery of signed transfer forms, original title deed and other facilitative documents for transfer of the parcel to the Plaintiffs. The Defendants have instead evicted the Plaintiffs, their servants and verbally threatened to resell the parcel of land to a third party without any justifiable reason. That the Defendants have interfered with the possession of the parcel by the Plaintiffs against the terms of the agreement by removing, furniture, electronics, evicting the Plaintiffs and denying them access the suit parcel. That due to the actions of the Defendants the plaintiffs has suffered great loss and damage and continues to do so. That the defendants have threatened verbally and in action to resell the parcel and give possession to other third parties.

The plaintiff prays for orders that a permanent injunction restraining the Defendants, agents, servants or any other third party from evicting the plaintiff, entering, utilizing, transferring or in any way dealing with the parcel NGERIA/CHEPYAKWAI BLOCK 2 (KAPLELACH)/125 and an order of specific performance against the Defendants in complying with the agreement dated 23rd May 2015 in default the Court do act on their behalf. Costs of this suit with interest to be paid to the plaintiff and any other relief this court deems fit to grant.

The plaint is accompanied with notice of motion in which the plaintiff prays for an order of injunction that the defendant by themselves, their agents, servants or any third parties are hereby restrained by an order of injunction from evicting the plaintiff, entering, removing furniture and electronic items, destroy planted crops, remaining on, disposing, transferring or in any other way dealing with the parcel of land known as NGERIA/CHEPYAKWAI BLOCK 2 (KAPLELACH)/125 pending hearing and determination of the application inter parties and subsequently the suit. Costs of this application are sought to be in the cause.

The application is based on grounds that on 23rd of May 2015 the plaintiff vide an agreement purchased the Defendants parcel of land known as Ngeria/Chepyakwai Block 2 (Kaplelach/125 registered in their joint names. That the applicant paid a total of Kshs.1,050,000/- (One Million and fifty thousand shillings only) which was acknowledged by the Defendants. That the plaintiff took possession of the parcel immediately and fenced off the parcel, equipped the house with electronic items, furniture and planted crops and trees awaiting final payment of the purchase price upon delivery of consent, signed transfer forms and original title deed. However instead of delivering consent, signed transfer forms, original title deed and facilitating transfer of the parcel to the plaintiffs, the defendants want to evict the plaintiffs, remove electronic items and furniture from the house the and the plaintiff's servants on the parcel, in breach of the terms of the contract. That the defendants have threatened to sell the said parcel to other third parties to the detriment of the plaintiffs. That it is only fair and just that the plaintiff's interest be protected by way of an injunctive order against the defendants, third parties or agents of the Defendants.

The same is supported by the affidavit of Wilbert Kipsang Choge who states that he purchased the parcel of land known as NGERIA/CHEPYAKWAI BLOCK 2 (KAPLELACH)/125 from the defendants where the 1st defendant is the registered owner. The agreed purchase price was Kshs.2,900,000 (Two Million Nine Hundred Thousand Shillings Only) and paid Kshs.1,050,000/= (One Million and Fifty Thousand Shillings Only).

The balance of Kshs.1,950,000/= (One Million Nine Hundred and Fifty Thousand Shillings Only) was agreed to be paid upon delivery of consent, signed transfer forms and the original title deed by the defendants to enable him transfer the parcel to themselves as per the agreement dated 23rd of May, 2015.

Subsequently, the defendants refused to deliver the relevant documents as per the agreement and therefore making it difficult for the plaintiffs to transfer the parcel to themselves.

Moreover, the defendants have gone ahead and threatened to evict the plaintiffs, resell the purchased parcel and have refused to accept payment of the balance without any justifiable reasons though the advocates acknowledged receipt of the postdated cheques.

That the defendants have threatened to remove furniture and electronic items from the house in the suit parcel and have threatened to deny the plaintiffs access hence the planted crops and trees can be destroyed leading to more damages.

That the plaintiffs claim that they have already started the process of developing the parcel but the defendants have threatened to evict the plaintiff's servants from the purchased parcel without the knowledge of the plaintiffs and against the terms of the agreement. The defendants have threatened to harm the plaintiffs, their agents or servants over the suit parcel. The plaintiffs need the protection of the honourable court for peaceful possession and specific performance as per the terms of the contract.

The application was heard under certificate of urgency and an interim order of injunction issued. The 1st defendant filed a replying affidavit stating that the defendant entered into an agreement of sale of 2.5 acres of the parcel of land known as Ngeria/Chepyakwai Block 2 (Kaplelach)/125 with the plaintiffs. The completion date was to be within ninety days from the date of execution, thus, 23.8.2015. The plaintiff paid a sum of Kshs.900,000/= but did not take possession of the land as the same was in possession by the defendants. He handed over the completion documents to the plaintiffs' counsel and the said plaintiff paid a total of Kshs.1,050,000/=. The ninety days lapsed but the plaintiff failed to pay the balance even after being given 18 more days hence he was given 21 days notice.

Upon being served with the notice, the plaintiff attempted to take possession forcefully but he ended up being charged in court. The plaintiffs attempted to pay through post dated cheques but the defendants refused and returned the cheques to the plaintiffs' advocates. Ultimately, the defendants rescinded the contract.

The defendants have also filed an application to discharge the order granted for injunction on grounds that the plaintiffs were guilty of non disclosure of material facts. On the application dated 7.10.2015,

The plaintiffs submits that they have established a *prima facie* case with a probability of success as it has not breached the agreement dated 7.10.2015. The plaintiffs argue that the defendants failed to avail the completion documents as demanded from the plaintiffs and instead chose to refund the money.

The defendant on his part argues that the plaintiffs breached the agreement when they failed to pay the balance before the completion date. They were given 18 days notice but still failed to pay. Moreover, that they were refunded by defendants and that the contract has been rescinded.

I have considered the two applications and do find that by agreement dated 23.5.2015, the defendants jointly agreed to sell to the plaintiffs 2.5 acres of land comprised in title Number Ngeria/Chepyakwai Block 2(Kaplelach)/125 at a mutually agreed upon purchase price of Kshs.2.900,000. The completion period was 90 days from the date of execution or such other date as the parties may agree upon.

The parties further agreed that the consideration of Kshs.2,900,000/= was to be paid in instalments and that the joint purchasers were to take vacant possession upon payment of Kshs.900,000/=. It was further agreed that the balance of Kshs.1,900,000/= was to be paid by the joint purchases to the joint vendors upon the vendors obtaining the requisite consent. It is not contested that the plaintiffs paid Kshs.1,050,000/= to the defendants but it is contested that the plaintiff took vacant possession.

It is contested that instead of delivery of the consent, the defendants went to evict the plaintiffs from the land, however, the defendants argue that the completion period had lapsed and notice was given but the plaintiffs never paid.

I have scrutinized the agreement of sale and do observe that it has two provisions on completion arrangements. Clause 1(1) provides completion period, thus ninety days from the date of execution or as the parties may agree. The parties herein appear to have agreed that the balance of Kshs.1,900,000/= was to be paid by the joint purchases to the vendors upon the latter obtaining the requisite consent. I have not seen the consent. So far, the plaintiffs have satisfied the court that they have paid Kshs.900,000/= as agreed but the defendants have not satisfied this court that they obtained consent as agreed. It was the defendant's obligation to ensure that the consent was obtained.

On this basis, I do find that the plaintiffs have satisfied the court that they have a *prima facie* case with a probability of success.

On irreparable loss, I do find that the plaintiffs' loss, if injunction is not granted is not irreparable as the plaintiffs were refunded the purchase price and appear to have accepted the same and therefore, they cannot have the refund and the land, they should have sent back the purchase price with a rider that they had performed their part of the bargain or they should have shown that they have retained the money in the account. I have not seen such evidence.

The balance of convenience tilts hands towards not granting the application for injunction as the plaintiff received a refund of the money partly paid. Ultimately, the application is dismissed with costs in the cause. Application dated 17.10.2015 is dismissed with no order as to costs.

DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF JUNE, 2016.

ANTONY OMBWAYO

JUDGE