REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL NO. 821 OF 2014

HARJINDER SINGH BHOGAI……1ST PLAINTIFF

KULWINDER SINGH SANDHU……..…….. 2ND PLAINTIFF

VERSUS

EDWARD MUKUNDI KARANJA..……..……..…. 1ST DEFENDANT

VERONICA WANJIKU KARANJA …….……..2ND DEFENDANT

R U L I N G

The Plaintiffs by a plaint dated 25th June 2014 and filed on the same date seeks judgment against the defendants jointly and severally for:

a. An order for specific performance compelling the defendants to transfer the suit property to the plaintiffs, in the alternative-
b. A refund of Kshs.3,100,000/- paid to the defendants as deposit,
c. Damages for loss of bargain,
d. Interest on (b) and (c) above at court rates, and
e. Costs of the suit.

The plaintiffs suit is predicated on an agreement of sale entered into between the plaintiffs and the defendants in writing dated 10th January 2011 which the plaintiffs contend the defendants are in breach of and thereby precipitating the instant suit.

Contemporaneously with the plaint the plaintiffs filed a Notice of Motion application expressed to be brought under Order 40 Rule 1 (a), Order 51 rule 1 of the Civil Procedure Rules 2010 and seek the following substantive order:-

"That pending the hearing and determination of this suit, there be an order of injunction restraining the defendants whether by themselves, their officers, beneficiaries, employees and/or agents, from selling, transferring, alienating, developing or whatsoever dealing with the suit property being subplot NO.1, a subdivision of L.R. NO.2259/44, Karen".

The plaintiffs application is interalia based on the grounds that appear on the body of the application and the affidavit sworn in support by **Kulwinder Singh Sandhu**, the 2nd plaintiff on 25th June 2014. Some of the grounds upon which the application is based are:-

a. The plaintiff entered into an agreement with the defendants on 10th January 2011 pursuant to which the defendants agreed to sell and transfer sub plot NO.1, (hereinafter the "**suit property**") which is a subdivision of **L.R.NO.2259/44**, Karen to the plaintiffs.
b. The purchase price of the suit property was Kshs.31,000,000/- and the plaintiffs paid a deposit of Kshs.3,100,000/- to the defendants pursuant to the agreement.
c. On the completion date, which was 25th May 2012, the plaintiffs tendered the balance of the purchase price together with the stamp duty and bank charges payable on the transfer and the registration fees all amounting to Kshs.29,142,000/- in readiness of and with view to completing the sale.
d. The defendants were not ready to complete the sale alleging they did not have the original title to **L.R. NO. 2259/44**, Karen (hereafter "**the parent property"**).
e. The defendants have failed, neglected or refused to complete the sale and transfer the suit property to the plaintiffs.
f. The plaintiffs have been at all material times ready, able and willing to complete the sale.

The 2nd plaintiffs affidavit in support reiterates the grounds and provides supporting documentation by way of annextures including the agreement of sale dated 10th January 2011 and documents evidencing payments.

The Defendants have filed a defence to the plaintiffs plaint where they deny being in breach of the agreement of sale as alleged by the plaintiff and instead place blame on the plaintiffs for breaching the agreement for sale by placing a caveat on the suit property in contravention of special condition '**O**' which rendered it impractical for the defendants to complete the sale transaction.

The 1st defendant **Edward Mukundi Karanja** filed a replying affidavit in opposition to the plaintiffs Notice of Motion sworn on 25th November 2014 and filed in court on the same date. The defendants admit the agreement for sale dated 10th January 2011 but do not admit being in breach of the agreement. The Defendants position is that they had no role to play in the delay occasioned in obtaining the relevant rent clearance certificate, consent to transfer and rates clearance certificate as those were being processed by third parties whom they had no control over. Besides the defendants state that the plaintiffs lodged a caveat against the head title which hindered the processing and completion of the subdivision exercise. Further the defendants aver that the original title **I.R.5751 of L.R.NO.2259/44** was misplaced by their Bank Kenya commercial Bank which necessitated the making of an application for issue of a provisional title by the Registrar of titles to enable the sale transaction and the subdivision exercise to progress to completion. The Defendants aver that the plaintiffs did not make disclosure of these facts to the court when making the application for injunction and are thus guilty of material non disclosure which should disentitle them from obtaining the equitable remedy of injunction.

The Defendants point to provisions of special conditions **'J**' and '**O**' to fortify their argument that they were not to blame for the non completion of the transaction.

Special condition '**J**' provides:-

"The purchaser hereby acknowledges and it is a condition precedent for this transaction that completion is subject to a successful completion of the subdivision exercise of the parent property to excise the property and consents and approvals by or from the municipal and other relevant government authorities being granted. Failure to receive the consents after due application will constitute a frustrating event in which case the deposit shall be refunded within 30 days of the frustrating event but with no other claims from either party".

Special Condition '**O'** provides:-

"The purchaser may not without the written consent of the vender put a caveat or restriction or encumbrance on the property or on the title to the parent property".

The defendants further aver that the plaintiffs have not demonstrated a prima facie case against the defendants to warrant the grant of a temporary injunction and additionally the defendants state that the plaintiffs have in the alternative prayed for damages which is a clear manifestation that the plaintiffs cannot suffer any damage that cannot be compensated for in damages.

The parties filed written submissions to ventilate their respective positions. The plaintiffs filed their submissions dated 30th January 2015 while the Defendants submissions dated 23rd February 2015 were filed on 25th February 2015. The submissions by both parties reiterate the facts as set out in the affidavits which are mainly not disputed save that the parties give divergent constructions to the provisions of the agreement of sale that are in contention. The parties in their submissions have submitted on the applicable law and referred the court to various authorities in support of their propositions.

As submitted by the plaintiffs the main issue for determination in this application is whether the plaintiffs have met the test for the grant of a temporary injunction pending the hearing and determination of the suit as established in the case of **Giella –vs- Cassman Brown (1973) EA 358.** The court in the case laid down the conditions that an applicant required to satisfy in order to obtain an order of temporary injunction thus:-

i. An applicant must show a prima facie case with a probability of success,
ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury,
iii. When the court is in doubt, on the balance of convenience.

The plaintiffs submit that they have demonstrated they have a prima facie case that has a probability of success, it is the plaintiffs contention that they met all the conditions and obligations placed on them under the agreement of sale and have been willing and ready to complete the sale transaction as evidenced by their payment of the deposit as required and tendering of the balance of the purchase price on the date of completion. The plaintiffs rely on the case of **Mrao Limited –vs- First American Bank of Kenya Ltd & 2 others (2003) KLR 125** where the Court of Appeal in considering what constitutes a prima facie case held thus:-

"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".

The plaintiffs submission is that having fully satisfied and fulfilled their obligations under the agreement for sale they have established a right to have the suit property preserved pending the adjudication of the final rights of the parties by the court.

The Defendants in their submissions point to special conditions **'J'** and '**O**' reproduced above and aver that the sale Agreement was subject to obtaining consents and approvals by or from the Municipal or other relevant Government authority which were not forthcoming inspite of the defendants having made payments of the relevant dues. The Defendants further submit the original title to the parent property was misplaced by their Bankers, the Kenya Commercial Bank, which necessitated the making of an application to the Registrar of Titles to be issued with a duplicate or a provisional title. The Defendants submit that the plaintiffs were kept abreast of the intervening events and circumstances and the plaintiffs agreed and committed to allow the Defendants to process the duplicate title to enable the transaction to progress to completion.

The defendants submit that inspite of the plaintiffs agreeing to wait for the processing of the provisional title, the plaintiffs on the 17th August 2012 behind the backs of the defendants lodged a caveat against the property which fact did not come to the notice of the defendants until 20th March 2013 when the provisional title could not be issued owing to the subsistence of the caveat by the plaintiffs. The defendants contention is that the plaintiffs lodgment of the caveat was in breach of special condition **'O'** which expressly prohibited the purchaser from placing a caveat and/or any other encumbrance without the

written consent of the vendor. The Defendants submission is that the act of the plaintiffs in registering the caveat were in breach of the agreement and in effect served to frustrate the contract and that was conduct on the part of the plaintiff that ought to disentitle the plaintiff of the equitable remedy of injunction. The Defendants aver that the plaintiffs were all the time aware that the Defendants had not obtained the requisite approvals and consents for the subdivision to facilitate the transaction for no fault attributable to the defendants. The loss of the original title through the hands of the defendants bankers was not anticipated and the plaintiffs were made aware of the said loss and of the necessity to process the issuance of a provisional title to which the plaintiffs gave their tacit support. It was thus an act of bad faith on the part of the plaintiffs to lodge a caveat against the title when they knew or ought to have known such an act would hinder the processing of the provisional title and the eventual subdivision.

In response to the Defendants averments that the agreement had been frustrated by their inability to obtain the requisite consents and clearances, the plaintiffs argue that the defendants had not been diligent and/or had not taken reasonable and diligent steps to fulfill their obligations under the contract and cannot therefore rely on the doctrine of frustration to escape from liability. For this proposition the plaintiffs rely on the cases of **Neon & Norlo Signs (Kenya) Ltd –vs- Alarkhia and others (1970) EA 82, Karia & co. Ltd –vs- Dhanani (1969) EA 392 and Karachi Gas Co. Ltd –vs- H. Issaq (1965) EA 42.**

In regard to the registration of the Caveat the plaintiffs state that they did so to protect their interest in the suit property as there were indications that the defendants were not going to complete the transaction. The plaintiffs further argue that It was not mandatory under the agreement of sale for them to obtain the consent of the defendants in writing before they could lodge a caveat and contend the obligation to seek consent under the agreement was discretionary. I have for my part considered special condition '**O'** of the agreement for sale and my view is that the special condition is indeed couched in mandatory terms and did not leave any discretion to the plaintiffs to lodge a caveat without the written consent of the vendor. The words **"The purchaser may not without the written consent of the vendor put a caveat** -------leave no room for discretion and emphasize that "**written consent**" was a pre requisite before the registration of a caveat.

Both the plaintiffs and the defendants allege breach of the agreement by the other. While there is evidence that the plaintiffs were willing, able and ready to complete the transaction the defendants have equally tendered evidence in rebuttal which if proved would discharge them of being in breach of the agreement for sale. The defendants have for instance tendered evidence that they did not obtain the consents timeuously and it was not for want of any action on their part. Further the defendants have tendered evidence to support the loss of the parent title which was the subject of the subdivision and have shown they initiated the process to obtain the duplicate or provisional title to further the processing of the sale transaction. The Defendants have further tendered evidence to show the plaintiffs lodgment of the caveat hindering the processing of the provisional title. Without making a finding on the velacity of the evidence since that will be within the province of the trial court, I would nonetheless observe that the Defendants appear to have a credible defence which if proved would rebut the case of the plaintiff.

In the premises having regard to all the material placed before me I am not satisfied the plaintiffs have demonstrated a prima facie case with a probability of success. On the issue whether or not the plaintiffs would suffer irreparable damage if the temporary injunction sought is not granted, I am not persuaded that the plaintiffs would suffer any damage that cannot be compensated in damages.

The value of the subject property could be easily ascertained by a valuer if the need arose. Apart from the plaintiffs having identified the subject property as a possible site where they could establish a home there is nothing else that is unique that is associated with the property that would make the property so treasured to the plaintiffs that the plaintiffs would suffer irreparable damage if the property was lost. No doubt within the Karen area one would find similar properties being sold though they could be in different locations. It is noteworth that the plaintiffs have pleaded for damages in the alternative and this in my view is a clear indication that the plaintiffs acknowledge damages would be an adequate compensation inspite of not perhaps being the preferred remedy. Thus I hold that the plaintiffs would not suffer any irreparable harm and any damage suffered would be compensatable in damages.

Having held that no prima facie case has been established and that damages would be an adequate remedy I need not consider where the balance of convenience would lie. The upshot is that I find the plaintiffs application for injunction dated 25th June 2014 to be without merit and the same is dismissed with costs to the Defendants.

Ruling dated, signed and delivered this **8th** .day of **May** .2015.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Ochieng……. For the Plaintiffs

N/A……. For the Defendants