



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 178 OF 2015

SAID ABDALA AZUBEDI.....PLAINTIFF

VERSUS

SAMUEL MBUGUA IKUMBUDEFENDANT

RULING

(Application for injunction; plaintiff seeking to have defendant stopped from interfering with collection of rent on premises; defendant having agreed to sell property to plaintiff; defendant moving to cancel the agreement but plaintiff suing for specific performance; ambiguity in the agreement as to whether rent was to be collected by plaintiff or defendant pending completion of the sale; the conduct of the parties however being that the plaintiff was allowed to collect rent; application allowed)

1. The application before me is the motion dated 22 June 2015 filed by the plaintiff. It is an application filed pursuant to the provisions of **Order 40 Rules 1(a), 2, 4(1) and 10 (1) (a)** of the Civil Procedure Rules and Section 42(1)(b) of the Land Act, 2012. It is an application seeking orders of injunction, to restrain the defendant from selling, transferring, or interfering in any way with the applicant's collection of rent over the property registered as Nakuru Municipality/ Block 5/ 133 (the suit property). Despite being duly served with summons and the application, the defendant has not entered appearance and neither has he filed any reply to the subject application.

2. This being an application for injunction, I stand guided by the principles stated in the case of ***Giella vs Cassman Brown (1973) EA 358*** where it was laid down that an applicant needs to demonstrate a prima facie case with a probability of success, and also show that he stands to suffer irreparable loss if the injunction is not granted. If in doubt, the court will decide the application for injunction on a balance of convenience.

3. In order to make a determination of whether the applicant has laid down a prima facie case with a probability of success, it is inevitable that I make a preliminary assessment of the plaintiff's case. The case of the plaintiff as pleaded is as follows :-

4. Through an agreement entered into on 31 July 2013, the defendant sold to the plaintiff the suit property at the sum of Kshs. 75,000,000/=. It was a term of the agreement that the plaintiff would pay a sum of Kshs. 10,000,000/= at the signing of the agreement and thereafter a further sum of Kshs. 10,000,000/= 90 days thereafter, which is said to have been done, and the defendant acknowledged receipt. It was also agreed in the said agreement and an addendum, that the plaintiff would start collecting rent from August 2013, which was effected, until about the month of July 2014, when the defendant attempted to interrupt this which the plaintiff strongly resisted. All this time, the property was charged to Barclays Bank of

Kenya Ltd and there was a pending case, but the defendant undertook to arrange for an appropriate professional undertaking, so that the bank could release the title documents, and execute the discharge of charge. The agreement also contained a clause that the balance of the purchase price, that is Kshs. 55,000,000/=, would be financed by the First Community Bank, and so as to make this possible, the defendant was to forward the original title document, the discharge of charge from Barclays Bank, the transfer instrument, coloured passport size photographs of the defendant and any other document required to complete the transfer of the property to the plaintiff. The defendant so far has not availed these documents but has sought extension of time which the plaintiff has granted.

5. However, on 22 January 2015, the defendant purported to cancel the contract, on the allegation that he is unable to get the completion documents. It is the position of the plaintiff that this is in flagrant breach of the sale agreement and is a desire by the defendant to unjustly enrich himself by purporting to be ready to refund the sum of Kshs. 20,000,000/= less the sum of Kshs. 8,100,000/= being rent collected by the defendant. It is the position of the plaintiff that the defendant cannot walk in and out of the contract at will. In this suit, the plaintiff has asked for orders of specific performance directing the defendant to comply with the terms of the contract of 31 July 2013 and a permanent injunction restraining the defendant from the suit property.

6. To the supporting affidavit, the plaintiff annexed a copy of the sale agreement and various correspondences exchanged between his counsels in the transaction, M/s Ikua, Mwangi & Company Advocates, M/s Sichangi & Partners for the vendor, and counsel for First Community Bank, who were the financiers of the plaintiff. I have looked at these documents.

7. I can see that the sale agreement is dated 31 July 2013. The completion date for the transaction is 180 days from the date of execution or such other date as may be agreed by the parties. In the agreement, it is set out that the property is charged to Barclays Bank Ltd but there is a dispute between the vendor and this Bank, which is pending in court, over the amount outstanding. It is set out that Barclays Bank is claiming the sum of Kshs. 770,000/= which is disputed and the matter is in court. It is stated that the vendor shall arrange for an appropriate professional undertaking to be issued to Barclays Bank through M/s Koceyo & Company Advocates who are acting for the vendor in the pending litigation, for the payment of any outstanding amount to Barclays Bank, so that the said bank can release the original title documents and discharge of charge. The purchase price was agreed at Kshs. 75,000,000/= with Kshs. 10 Million paid on execution of the agreement; Kshs. 10 Million to be paid within 90 days of the agreement. The balance of Kshs. 55 Million was to be financed by First Community Bank and was to be paid within 14 days of registration of the transfer to the plaintiff. Probably the most important clause for our purposes is the clause on possession which is laid down at paragraph 15 of the agreement. It is drawn as follows :-

The parties agree that the vendor shall give vacant possession to the purchaser on payment of the full purchase price and the vendor shall continue collecting rent from the tenants on the property until the full purchase price is paid.

8. Interestingly, there is a hand written part at the end of the typed agreement which, surprisingly, is dated 30 July 2013, and it states as follows :-

NB : The purchase (sic) will start collecting the rent and on receipt of Kenya Shilling ten million (Kshs. 10,000,000/=) on August 2013.

Signed.... 30/7/013.

9. The execution on the part of the purchaser is also dated 30/7/013 and not 31st July 2013, which at the beginning of the agreement is stated to be the date of the agreement.

10. It will be observed that in this application, the substantive prayer is that the plaintiff wants the defendant stopped from interfering with the plaintiff's collection of rent over the suit property.

11. There is of course some ambiguity within the agreement, on whether or not the plaintiff was to collect

rent, pending the completion of the agreement. In the typed clause 15, it is expressed that the defendant as vendor, is to continue collecting rent until the full purchase price is paid. However, in the inelegantly drawn handwritten addendum, it seems that it was agreed that the plaintiff, as purchaser, would start collecting rent on payment of Kshs. 10 million in August 2013. It is not very clear to me whether this Kshs. 10 Million, refers to the initial deposit, or the second installment. Be as it may, it is apparent that the defendant did allow the plaintiff to start collecting rent from the premises. This is demonstrated by various correspondences exchanged, including the letters of 11 July 2014 and 22 January 2015 from M/s Sichangi & Partners Advocates, who were acting for the vendor. In both letters, counsels for the vendor, stated that their client is proceeding to cancel the sale owing to various hitches. In the former, it was stated that the plaintiff has collected rent of Kshs. 4,950,000/= and in the latter, the rent collected by the plaintiff was stated to be Kshs. 8,100,000/=, which the defendant wanted deducted from the Kshs. 20 Million that he had already received as part of the purchase price, so that he may refund the plaintiff the balance thereof. It therefore seems that from their conduct, the parties had agreed that the plaintiff would continue collecting rent, pending completion of the sale. It is this position that the plaintiff wants preserved.

12. I would of course have benefited richly from the defendant but he has filed nothing in this suit. I have nothing to contradict the averments of the plaintiff. The parties have not so far agreed that the sale agreement may be cancelled, and it will be observed that in this suit, the plaintiff insists on specific performance since it is his view that the sale is still alive. That being the case, and the parties seemingly having agreed that the plaintiff would collect rent pending completion of the transaction, I think that the plaintiff has demonstrated, prima facie, that he is entitled to the prayer stopping the defendant from interfering with rent collection pending hearing and determination of this suit. The property also needs to be preserved.

13. I therefore allow the application and order the defendant not to interfere with the plaintiff's collection of rent on the suit property pending hearing and determination of this suit. I also order the defendant not to sell or transfer the suit property to any other person pending hearing and determination of this suit.

14. The plaintiff shall also have the costs of this application.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 22nd day of September 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of: -

Mr Biko holding for Mr. Wambeyi for plaintiff

N/A for defendant

Court Assistant: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU