



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.23 OF 2015

ROBERT MUENDO KINAI.....PLAINTIFF

=VERSUS=

1. DAVID MUNYEKENYE SIMIYU

2. ALLAN CARLSON SIMIYU PEPELA.....DEFENDANTS

R U L I N G

Introduction

1. The Application before me is the one dated 20th February, 2015 in which the Plaintiff is seeking for the following orders:

(a) That there be an order of temporary injunction restraining the 1st and 2nd Defendants by themselves, servants and or agents or any person or persons acting under them from entering, trespassing, developing and or alienating the subject suit premises pending hearing and determination of this Application.

(b) That the costs of this application be in the cause.

The Plaintiffs'/Applicant's case:

2. The Plaintiff has deponed that one 2nd October 2014, he entered into an Agreement with the 1st Defendant for the sale of a parcel of land situated at Mtangani area, Malindi, at an agreed price of Kshs.600,000.

3. It is the Plaintiff's deposition that he paid a deposit of Kshs.180,000 leaving a balance of Kshs.420,000 which he was to pay by two (2) equal installments of Kshs.210,000; that he later learnt that the 1st Defendant had executed another sale Agreement with the 2nd Defendant and that the 1st Defendant acted dishonestly when he agreed to the postponement of the payment of the installments.

The Defendants'/Respondents' case:

4. In his Replying Affidavit, the 1st Defendant deponed that the contract executed between him and the Applicant was rescinded when he failed to pay the balance of the purchase price; that the Applicant never took possession of the suit property and that there is a similar application that was filed by the Applicant

which has not been prosecuted.

5. In his Affidavit, the 2nd Defendant deponed that he was not aware that the Applicant had purchased the suit property and that he is the rightful proprietor of the suit property.

Submissions:

6. The Plaintiff's advocate submitted that although the completion date as per the agreement between the Plaintiff and the 1st Defendant was 30th November 2014, the Plaintiff was unable to pay the 1st installment on the due date; that his client communicated to the 1st Defendant about the delay and that they agreed to postpone the payment on or before December 2014.

7. Counsel submitted that the agreement entered into by the 1st and 2nd Defendant dated 20th November 2014 was entered into even before the installment was due for payment.

8. Counsel submitted that no where in the contract did the parties herein make time to be of the essence.

9. The Plaintiff's counsel submitted that no notice was served on the Applicant by the 1st Defendant requiring him to pay the balance of the purchase price.

10. The Defendants' counsel submitted that there are two similar Applications on record, one dated 18th February 2014 and 20th February 2014 and that the Application should be dismissed for being an abuse of the court process.

11. In his submission, the 2nd Defendant's advocate submitted that the Plaintiff did not honour time-lines in the agreement between himself and the 1st Defendant; that his client is an innocent purchaser without notice and that it is the Plaintiff who is in breach of the sale agreement.

Analysis and findings:

12. On 16th March, 2015, the Plaintiff's and the Defendants' advocate agreed to dispose of the Application dated 20th February 2015 by way of written submissions. Indeed, it is the Application dated 20th February 2015 that was fixed for hearing on that day.

13. It therefore does not matter that there is still another Application dated 18th February, 2015 which has not been prosecuted.

14. It is not in dispute that on 2nd October 2014, the Plaintiff entered into a written agreement with the 1st Defendant for the sale of the suit property for Kshs.600,000.

15. According to the said Agreement, the Plaintiff paid a deposit of Kshs.180,000 and was to pay the balance by installment of Kshs.210,000 on 30th October and 30th November 2014.

16. The said agreement states that the 1st Defendant was to vacate the land seven days after the final payment which was indicated as 30th November 2014.

17. However, on 20th November 2014, the 1st Defendant entered into another Agreement over the same suit property with the 2nd Defendant in which he agreed to sale the suit property for Kshs.670,000. From the agreement, the full purchase price was paid by the 2nd Defendant on the day the Agreement was executed.

18. The completion date of the agreement between the Plaintiff and the 1st Defendant was supposed to be

on 30th November 2014. The agreement of 2nd October 2014 did not make time to be of essence.

19. Where parties do not state in the Agreement that time shall be of essence, a party can only rescind the contract after serving on the opposite party notice informing him that if he does not make payments within a specified time, the contract shall stand rescinded.

20. The general rule is that time is not of the essence unless the contract expressly states so.

21. In the case of **Gurder Singh Birdi & Marinder Singh Ghalora Vs Abubakar Madhbuti, Civil Appeal No. 165 of 1996 at Nairobi**, the Court of Appeal held as follows:

“ The modern law, in the case of contracts of all types may be summarised as follows: Time will not be considered unless (1) the parties expressly stipulate that condition as to time must be strictly conveyed with; (2) the nature of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay given notice to the party in default making time of the essence.”

22. The Agreement between the Plaintiff and the 1st Defendant never made the time-lines stipulated in the Agreement to be of essence.

23. After the Plaintiff defaulted in making payment in the second installment, the 1st Defendant was under an obligation to give the Plaintiff a notice stipulating that time shall be of essence and giving him reasonable duration within which to make the payments.

24. The 1st Defendant having not given the Plaintiff a notice in writing and considering that he entered into the Agreement of sale with the 2nd Defendant even before the completion date, I find and hold that the Plaintiff has established a prima facie case with chances of success.

25. For those reasons, I allow the Application dated 20th February 2015 as prayed

Dated and delivered in Malindi this **11th** day of **September** 2015.

O. A. Angote

Judge