



REPUBLIC OF KENYA

THE LAND AND ENVIRONMENT COURT AT NYERI

ELC CASE NO. 212 OF 2013

AFRICAN COTTON INDUSTRIES LIMITED.....PLAINTIFF

VERSUS

RURAL DEVELOPMENT SERVICES LIMITED.....DEFENDANT

RULING

The plaintiff through an application under certificate of urgency dated 23rd October, 2013 and filed on 25th October 2013 in this court is seeking injunctive orders against the respondent's possibility of disposal and or alienation of the suit property being parcel of land **LR NO. KAKUZI/KIRIMIRI BLOCK 7/ 281** located within Makuyu measuring 51.28 ha (Suit property). The applicant states that the parties herein entered in a contract of sale via sale agreement executed on 2nd July 2013 and sale price set at Kshs.205, 360,000/=. The contention is because the respondent has refused to honour its contractual obligation by indicating intention not to obtain consent of the Land Control Board before expiry of time and also his intention to back off from the contract before performing.

Both the parties herein are limited liability companies, dealing with matters through their directors. The applicant's director is one Salim Hussein Anjarwalla (*hereinafter referred to as Salim*) while the respondent's directors are Dr. John Kibunga Kimani (*hereinafter referred to as Dr. Kimani*) and *Lilian Wanjiku Kimani (Lilian)* who are husband and wife. The applicant states that pursuant to the agreement he went ahead and paid 10% of the purchase price as deposit (Kshs.20, 536,000/=) at the time of execution as required in the contract.

However after few days afterwards the cheque was returned by the respondent before the completion indicating intention not to proceed with the contract on grounds that Dr. Kimani was seriously sick. With that twist the applicant kept on sending the cheque back but the respondent continued to return it. He even served a completion notice which was not honoured and completion date passed without the respondent doing anything. When the applicant realized that the respondent was actually waiting for the period for obtaining consent to lapse naturally by operation of law, he filed this application. This consent is a pre-requisite for the completion of the sale contract herein, and the applicant states that he will suffer prejudice and loss in the event that the contract is rescinded as he had invested heavily in the land having found it suitable for his purposes due to its location and accessibility including hiring workers, drawing development plans etc.

The applicant states that he went ahead to advertise his former premises for sale with the hope of relocation to the newly found premises. The applicant states that he has issued the respondent with completion notice which he has refused to oblige to. In the said notice of motion the applicant seeks the following orders in summary;-

- a. **An injunction restraining the defendant and his agents from advertising or offering for sale by any means, transferring, disposing alienating charging, leasing or encumbering the suit property till the matter is heard and determined.**
- b. **Order compelling the respondent to obtain the land control board consent, and in the alternative the Court Registrar be authorized to apply for such consent.**
- c. **Extension of time period for the application of the consent of the land control board under Sec 8(1) of the Land Control Act Cap 302.**
- d. **An order that the business plans of the applicant remain confidential to the parties herein.**

The applicant has annexed various documents in the application as exhibits. Of note is the acceptance of offer by the respondents letter dated 5th February 2013 where the conditions of acceptance are stated that the applicant pays deposit of 30% at the execution of the sale agreement, and the balance to be remitted within 60 days after execution of the sale agreement, and that the sale agreement be executed 7 days from the date of the letter of acceptance. It is evident from the correspondences that the parties failed to agree on some of those conditions and the sale was halted in the early April. The respondent explains that it was halted due to Mr. Kimani's travel to Sudan. The respondent's Board of Directors agreed by resolution there at to sell the suit property on 4th Feb 2013 as per annexure SA 12 which the applicant heavily relies on.

From the agreement which the applicant entirely relies on, clause 3:1, the deposit was supposed to be paid at the time of the execution of the sale agreement, and balance to be paid at the completion date. Completion date is stated as 60 days from the date of execution which falls on the 2nd October 2013. Under the special conditions of the sale D (c) it was the vendors duty to ensure the consent is obtained. It was the purchaser's right to rescind the contract if the vendor is not willing to complete and the applicant asserts that right. Parties had agreed to vacant possession on or before the completion date in clause J the applicant implying that he was not limited on investing on the land before completion.

Reasons advanced for the rescission of the contract by Lilian was that Mr. Dr. Kimani who is a majority shareholder of the respondent was not in right frame of mind to enter into a contract and execute one on behalf of the company, having suffered brain injury out of a road traffic accident which had on 28th Feb, 2013, whose impact had not been discovered until he returned to Sudan where he is alleged to have been working in the month of June. It's stated that he was evacuated by plane back to Nairobi hospital where Lilian states that it had he had suffered memory loss hence unable to understand the implications of his decision at the time of executing the agreement. The applicant states that the claim is based on the willful breach on the part of the respondents, adding that the reasons advanced are not adequate as he was dealing with a company with its own personality and not individuals. Applicant prays that the respondents be forced to obtain consent in preparation for the issuance of orders of specific performance at the end of the hearing.

The respondents filed their response on the 20th November 2013 thus the replying affidavit of Lilian. She explains how her husband, was affected by the accident and that by April 2013 she had indicated that she did not want to proceed with the sale. She explains how she was forced to sign the sale agreement by her husband who was ill, and that she did it only to save his life for the sake of his health hence the signing was done under duress. After the execution, she explains that her husband's health deteriorated the more, causing the need to rescind the contract completely. She avers that her husband had earlier intended to sell off the suit property so that he can invest in the real estate like others, forcing her to sign the Board of Director's resolution to sell the suit property, when he was in his right mind. She adds that the reasons for her not to proceed with the transaction was brought to the applicants in due time, that Dr. Kimani was not in good mental frame, having been the significant player in the sale process.

The other reason for rescission of the contract she avers is because the suit property is the family matrimonial home and could not be sold without the consent of the children who have filed their objections even though it is registered as a property of respondent a limited liability company. She adds

that the suit land being subject to overriding interests of other persons as per the attached affidavits, cannot be disposed of without their consent. She adds that the sale was always pushed by the applicants all through. She avers that a court cannot compel a party to sell off its property, or obtain consent in favour of a party, stating that the suit is incompetent and a waste of the courts time and prays the motion to be dismissed with costs.

The parties filed their written submission and came for highlighting on the 19th March 2014. The applicant was represented by *M/s Abdalla*, and *Mr Waweru Gatonye* was present for the respondent. The parties canvassed the application each relying on the pleadings, written submissions and filed bundle of authorities. We shall examine the submissions as below.

The applicant relies on the pleadings on record, affidavits of *Salim Hussein Anjarwalla*, and the bundles of authorities earlier filed. The applicant submits that since the time for obtaining the consent by the respondent had not lapsed at the time of filing its suit and submissions on 10th Dec 2013 and the suit generally, the orders can be granted as sought, and that the defendant cannot rely on his wrong to frustrate the contract deliberately. Salim adds that the court has power to extend time for obtaining consent even retrospectively. He adds the pleadings were filed in time seeking for the order to force the respondent to obtain the consent, and had prayed that in case time was to lapse before the consent is obtained, a prayer for extension of time for that purpose.

At all that material times, he argued that all the parties were legally represented during the transaction and none of them can turn around on ground of any misunderstanding as he ought to have voiced it through their advocate at the time of executing the agreement as required by the law. As regards incapacitation of Dr. Kimani, applicant adds that when dealing with a company a person will not go about inquiring about capacity of directors, as long as agreements are properly executed, relying in the case of *Nabro properties Ltd vs Sky structures Ltd & others*. He adds that the opposition by family members as having an overriding interest in the suit property is immaterial.

He argues that the breach by the respondents goes to the root of the contract, and if the court fails to grant the orders sought, he will be left with no remedy while it has established a prima facie case. He argues that the court has the power to grant the orders sought, and that the applicant has made the application before the expiry so that the court can grant the appropriate orders. He relies on the decided case of *Enkasiti Flower growers Ltd (2006) Eklr* where the court extended time retrospectively for 9 years to meet ends of justice.

On the issue of Dr. Kimani's health the applicant submits that the board resolution to sell was made when the said director was in the right frame of mind, and there is no indication in the treatment notes that there was instance of mental incapacity. It's the applicants submission that in any event Lilian had at one point offered a reduced acreage of the suit property of about 30-40 acres which Mr. Salim refused to take.

On the issue of overriding interest, applicant submits that the suit land could have been sold subject to the spousal interest of the wife. And that cannot be raised as an impediment at this stage. He adds that this allegation is far fetched and in contravention of a warranty in the contract in clause L(e) which reads... ***'the property is not subject to any overriding interest or equities in favour of a third party or other rights which grants 3rd parties any none registrable interests or right in the property...'*** He denies the allegation that the suit property is a matrimonial home, relying on Geo survey report which he says found that there is no one living in that suit property.

Relying on the principles for grant of injunction set in ***Giella -Vs- Cassman Brown & Co Ltd (1973) EA 358*** the applicant asserts that he has met the conditions for grant of the orders sought having established a prima facie case with a probability of success. He adds that he has been ready and willing to perform his part but denied the opportunity by the respondent. He asserts it is the respondent who is in breach. He adds that the grant of the order for acquisition of consent and or extension of time for obtaining it so as to transact is what he is seeking so that the stage for the completion can be prepared in the contract. He argues that the court can issue mandatory injunction in form of specific performance requiring the offender to carry out an obligation to remedy a damaging situation as per ***Halsbury's law of***

The defendant in response filed his written submission in opposition of the applicant's motion, relying on the affidavit of Lilian, bundle of authorities in addition to other pleadings filed in the suit which were reiterated at the hearing. The respondents main argument running through the submissions and the authorities is that failure to obtain the consent in time has rendered the transaction void Since it has refunded the deposit in respect of the sale in terms of **Sec 7 & 22 The Land Control Act**, the responded submits it owes the applicant nothing and the court should dismiss the application.

The defendant also relies on the overriding interests on the suit property as being a matrimonial home where other persons who are not directors of the respondent have an interest like children and blood relatives who have attached papers in opposition. It also submitted that even though at the time of execution of the agreement condition of the deponent is not talked about, it was voiced to the applicant's in good time and were informed of the respondent's lack of intention to proceed with the transaction, due to the deteriorating state of health of Dr. Kimani. The respondent has availed before the court numerous authorities on the issue of consent including ***Fred C. Fedha & Another -Vs- Edwin Asava Majani(2010)eKLR-m*** where the court of appeal dismissed order of specific performance issued by the high court stating that a party cannot be forced to transact over his own property by issuing vain orders. ***Kariuki Vs Kariuki Civil Appeal No 26 of 1979, Mapis Investment K Ltd Vs Kenya Railways Corporation, Dulu Igwo Vs Lydia Wangui Kamau & Another (2013) Eklr, Kahia Vs Nganga***, Court of Appeal of Kenya At Nairobi,16 of 2001. It has also availed a few on principles of injunction including the famous Giella case (supra) relied on by the applicant.

The applicant filed reply to the respondents written submission urging the court to distinguish some of the authorities relied on by the respondent. Among them the case of ***Dulu Igwo***, where the applicants states that the agreement had no completion date, and the contract had no clear terms like their contract, and as regards the consent, applicant had sought the courts intervention well before the time had lapsed, and has in any case applied for the grant of orders of extension if need be. He relies on the provisions of the statutes and general interpretations act section 57 on the issue of computation of time.

The case of ***Kahia Vs Nganga*** where the applicant was evicted from a land he had bought and developed without consent, the applicant stated that in that case the parties had not applied for the consent by the time the defendant died. The applicant argues in this case he had not been indolent in his part. In the case of ***Gitanga Mwaniki*** the applicant argues both the parties had been in breach of the terms of the contract, adding reliance on the case of ***Aziz Brothers Vs Bhatia brothers ltd (2001) EA 7*** where the court found that a party who has performed his part may be assisted by the court.

In the case of ***Kariuki Vs Kariuki*** the applicant argues that unlike in this case where the defendant refused completion of the transaction by varying the terms and when the plaintiff refuses to agree with the new terms the defendant refused to transfer the property and or obtaining the requisite consents having taken part payment. It relied on the case of ***Nebro properties (Supra)*** where a legal maxim "No man should take advantage of situations to benefit from his wrong" was restated. As regards the ***Mapis Case*** where there was an illegality, the applicant states there is no illegality in this case at all.

After considering all the rival arguments and, I will be guided by the principles set in the case of Giella to answer help me answer the following questions before i can come to conclusion whether each the principle laid there at have been met for granting the orders sought. Bearing in mind this is an interim application.

- a. **Whether incapacity of director can void a contract.**
- b. **Whether orders of extension of time can be sought in anticipation of expiry before the time actually expires, and what happens when time expires before the application is dispensed with.**
- c. **Whether a party who has performed its duties in contract can seek assistance from the court**

and what assistance should the court grant in case of an unwilling seller.

- d. **Can a specific performance be ordered in the circumstances?**
- e. **What is the effect of the overriding interests in a property registered in names of a company- does issues of trust law arise from such a title.**

The applicant has relied on the decided case of **Solomon vs. Solomon and Co. Ltd [1897] AC 22, where** it was established that a registered company is a legal person separate from its members and that the status of the individual directors doesn't affect a company's dealings. Individual shareholding per director is also irrelevant. As regards the contracts entered into on its behalf, like Dr. Kimani being the dominant shareholder as Lilian places before the court that due to his mental incapacity, I have looked in the ***Palmer's Company Law Vol 1, in page 3019 & 3033*** its required contracts for dealing in interest in land to be in writing and sealed, and in page 3035 that the powers of the directors are to bind the company unless there is proof of a situation when a company is not bound, because it is required at the time of executing a contract a party to be advised completely by his advocate and if there is any incapacity be noted and advised at that instance. I find there is probability of success on this point as regards the binding nature of the contract and it's validity contract awaiting proof to the contrary.

The applicant has sued the respondent seeking the court to force the defendant to perform his contractual obligation in the contract. The defendant is stated to have indicated through Lilian and later through its conduct of returning the deposit that it was unwilling to continue with the contract and completion time has passed and time for obtaining the consent was running out. The applicant has approached the court before the intended time lapse to try to salvage the position the defendants continued breach of the contact would have left him in, if he was indolent. Since the applicant waited for the completion time to lapse, he has instituted a suit for breach of contract and seeks the orders of specific performance which are some of remedies in cases of breach of contract.

When an innocent party finds itself in a position where the other has breached the contract has a right to elect how to treat the breach, as repudiated and move on, or to enforce it through the assistance of the court. The applicant has stated he elected to enforce his rights under the contract. This is a right provided for under contract law and can be granted if the innocent party is successful in the end. This position is stated in **Cheshire, Fifoot & Furmstones 14th edition on law of contract at pg 599 & 698** as well as that of **Halsbury Law of England** (Supra) and other texts. However in the recent case of **Fred Fedha** (Supra) relied on by the respondent, our Court of Appeal was of the opinion that this kind of relief is not available because a party cannot be forced by a court to perform obligations in a contract if it's not willing to, and I find in line with the court of appeal ruling that order may not be available for the applicant at the conclusion of the hearing of the matter, considering the fact that the respondent has already returned the deposit which form cause of action in most matters, slimming the probability of success of the applicant.

The other issue is that of extension of time for obtaining the consent. I have looked at the pleadings and found that at the time of filing suit, and submissions by the applicant time had not lapsed. Also the respondent filed his reply before expiry of time which was to expire on 2nd January 2014. The defendant filed his submissions on the 15th January 2014 after the time for obtaining the consent has lapsed. The respondent's arguments in the submissions are mainly based on the lapsed time for obtaining the consent and there appears to be a shift from the previous stressing of the sickness of Dr. Kimani, after the actual lapse of time.

The issue of seeking orders of extension before expiry was addressed in the Supreme Court case of **Bwana Mohamed Bwana Vs Silvano Buko Bonaya & 2 Others(2104) eKLR** Where their lordships held "Court will not extend time before the expiry of the stipulated time". By the time ruling was delivered time had not lapsed in that case. I follow their lordship's decision, that the orders as sought could not have been issued before 2nd January 2014. This is in tandem with the provisions of the Land Control Act Sec 8(1) which only provides for extension after the time has lapsed.

However in this case time actually lapsed before the matter was dispensed with and now the court has to decide on it as is one of the prayers in the motion. Time cannot be extended before expiry as a principle, but in this case it has actually lapsed before the matter is dispensed with. I will have to deal with this unique position. I have not found the most relevant decisions on extension of time for obtaining consent of land control board, except the case of **Enkasiti** (supra) where the court found that a presidential exemption so obtained had not been gazetted and therefore the same was a nullity and therefore the court weighed on this uniqueness in granting orders extending time to regularize the omission. I am persuaded by the finding in the English High Court case of **Summit Asset Management Ltd Vs Andrew Clive Coates (2013) EWHC B 36(GB)** where the court found if a party is in anticipation of time lapsing before proceedings are dispensed with in respect of the extension, it is good to approach the court in time than waiting for it to lapse and start sorting a whole deal of delay. In this case the court was able to extend time retrospectively since deadline had expired before hearing was dealt with. Decision in this case was guided by the principles set in the Appeal Court case of England in the case of **Robert Vs Momentum Services Ltd (2003) EWCA cw 299**, also quoted in the recent case of **Mitchell Mp Vs News Group Newspaper Ltd (2013) EWCA CW 1537** (Mitchell case), the conditions the court ought to consider before granting extension of time and how to deal with applications for extension of time before or after expiry was considered and set as below.

"On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including --

- a. **The interests of the administration of justice;**
- b. **Whether the application for relief has been made promptly;**
- c. **Whether the failure to comply was intentional;**
- d. **Whether there was a good explanation for the failure;**
- e. **The extent to which the party in default has complied with other rules, practice directions and court orders and any relevant pre-action protocol;**
- f. **Whether the failure to comply was caused by the party or his legal representative;**
- g. **Whether the trial date or the likely date can still be met if relief is granted;**
- h. **The effect which the failure to comply had on each party;**
- i. **The effect which the granting of relief would have on each party."**

I have seen in the court of England the same rules have continued to be applied in the cases of **Kenaria Vs Keneria & Others (2014) EWHC 1165 (Ch)** among others. I find the court is able to extent time in this case because it lapsed while the application was still pending in the court. Had it been dispensed with before the expiry it would not have issued, only that the application has persisted till actual expiry. However I find if this order is made at this stage it may not serve any useful purpose as the court has been warned of the danger of issuing vain orders in the decided case of **Fred C Fedha** So this order can only be issued at the conclusion of the hearing when the court has established whether it is useful or not but not in the interim stage before the merits of the case are heard and determined since the suit was instituted before such an issue was relevant, then it will abide the outcome of the suit.

On the issue as to whether specific performance can be ordered this court finds that the respondent cannot be compelled to perform a void contract the parties having failed to comply with an express provisions of an Act of Parliament thus section 6 of the Land Control Act CAP302 Laws of Kenya . I do hold that specific performance can only issue in such a case where the consent of the land control board has been obtained by parties.

The last issue therein raised is that of overriding interests in the suit property and the usefulness of

completion of the contract than repudiation .. I have looked at section 28 of the land registration act 2012 and have found customary trust rights are some of overriding interests to be considered in a registered land. However I note in the sale agreement, there is a warranty to the contract breach of which relief is in damages. That issue can only be clearly settled after the hearing and the truth being ascertained.

In conclusion, I find that a prima facie case with a probability of success has not been clearly established ,however, on the second limb I find the applicant can be compensated by award of damages .Ultimately, I **hereby do allow prayer 5 of the application** and **dismiss prayers 1,2,3,4 and 6** and do hereby discharge the orders of status quo earlier on issued in the matter.

Dated, signed and delivered at Nyeri this 15th day of October 2014.

A. OMBWAYO

JUDGE