



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
LANDS AND ENVIRONMENT DIVISION
ELC CIVIL CASE NO. 809 OF 2012

MAUREEN MUTHUA..... PLAINTIFF

VERSUS

NATHAN KAHARA1ST DEFENDANT

WESTLAND PRIDE LIMITED..... 2ND DEFENDANT

RULING

The Plaintiff filed this suit on 7th November 2012 vide a plaint of even date. The plaintiff inter alia seeks an order of permanent injunction, specific performance of the agreement, and damages for breach of contract being equivalent of the value of the apartment at the date of judgment in lieu and/or in addition to specific performance.

Simultaneously with the plaint the plaintiff filed the notice of motion dated 7th November 2012 and under prayer 3 thereof seeks the following order:-

3. That this Honourable court be pleased to issue a permanent injunction restraining the Defendants/Respondents or any of them, by themselves, their servants, agent or otherwise howsoever from completing the sale and/or transferring to any other party other than the plaintiff the property known as Apartment NO. E4 on LR NO.5/55, Nairobi formerly LR NO. 5/47 Nairobi in Westlands area in the city of Nairobi, pending the hearing and determination of the suit filed herewith.

The plaintiffs application was predicated on the grounds set out on the face of the application and the grounds contained in the supporting affidavit sworn by **Maureen Muthua**, the plaintiff herein on the 7th November 2012 and the supplementary affidavit sworn on 30th January 2013.

The Defendants oppose the application on the grounds contained and set out in the replying affidavit sworn on 15th March 2013 by **Daniel Ojijo Agili**, managing Director of the 2nd Defendant. On the directions of the court both parties filed written submissions which the respective counsel high-lighted before me on 30th July 2013.

The basic facts in this matter are not disputed and the only contested issue is whether the sale agreement between the plaintiff and the 1st Defendant was rescinded by reason of the Plaintiff's letter dated 24th February 2011 through her advocates giving notice to the Defendant to complete the transaction and failing which a refund of her purchase deposit was to be made by the Defendant.

The plaintiff's case is that she entered into an agreement with the 1st Defendant on 31/3/2008 to purchase Apartment NO. E4 on L.R. NO. 5/47 for the consideration of Kshs.7,250,000/- and paid a purchase deposit of Kshs.1,450,000/- to the 1st Defendant and the balance of Kshs.5,800,000/- was to be paid on completion. As there was a delay on the part of the vendor in completing the construction of the apartments, the plaintiff's patience appears to have run out and by a letter dated 24/2/2011 the plaintiff through her Advocates gave a notice to the Defendant to complete the transaction within 14 days or return the whole deposit with interest. The Defendant did not respond to the plaintiff's letter immediately but wrote to the plaintiff's advocates on 14th April 2012 in the following terms:

“ We refer to the above matter, the sale agreement herein and your letter dated 24th February 2011. Please refer to clause 3 of the sale Agreement on completion. In light of your client's decision to pull out of the sale, our client shall proceed as per clause 11 of the sale Agreement. We shall keep you posted’.

Clause 3 of the Agreement for sale provided for completion whereas, clause 11 provided for rescission upon notice of breach. Pursuant to the said letter the Defendant had accepted the rescission and this was further confirmed by the Defendant's Advocates letter of 7th June 2012 where the Defendants notified the Plaintiff that they had sold the apartment to a third party and were now in a position to make a refund of the deposit and sought the details of the plaintiff's Bank account to enable the Defendants to transfer the funds. Clause 11 of the agreement for sale provided that in case of rescission the vendor was entitled to resell the apartment.

The plaintiff in her letter of 20th April 2011 while acknowledging the Defendants letter of 14th April 2011 indicated that she had had a change of heart as regards rescission of the Agreement and requested that the matter be held in a beyance. Having regard to the correspondences exchanged between the parties the Defendant did not rescind their acceptance of the rescission of the Agreement by the plaintiff. The Defendants by their letter of 7th June 2012 requested to be furnished with the plaintiff's Bank Account details so as to make the refund of the deposit

The Defendants in their opposition to the plaintiff's application vide the replying affidavit of Daniel Ojijo Agili maintain that the plaintiff terminated the agreement vide her letter of 24th February 2011 and the Defendants appropriately responded to her letter vide the Defendants letter of 14th April 2011. The plaintiff was advised vide the Defendant's letter of 7th June 2012 that the apartment had been sold to a third party and that the Defendant was ready and able to make the refund of the deposit as demanded by the plaintiff if only the plaintiff could furnish the Bank account details.

The Defendants contend the plaintiff's application for injunction is without any merit as the plaintiff filed the same after the Defendant had already notified her the apartment had already been sold to a third party. The Defendants contend the application is mischievous and misconceived as it seeks to injunct an act that has already taken place.

I have reviewed the pleadings and the material placed before the court and I have considered the submissions filed by the parties and the authorities cited to me. The issue that stands to be determined by the court is whether the plaintiff has satisfied the well settled conditions for the grant of an injunction as enunciated in the ***GIELLA- VS. CASSMAN BROWN & COMPANY case (1973) EA 358.***

Whereas in the present case there is no doubt the parties entered into a sale agreement and the plaintiff paid a substantial deposit of Kshs.1,450,000/- there is concern whether after the plaintiff gave notice to rescind the agreement which the Defendants actually accepted and offered to refund the deposit the purported withdrawal by the Plaintiff of the rescission notice by a subsequent letter gave the agreement fresh life. That is a matter for the trial court to decide after hearing the evidence. The Defendant duly notified the plaintiff vide the letter of 7th June 2012 that the apartment in question had been sold to a third party. If that fact is established to be true then the order of injunction that the plaintiff seeks cannot be granted as the court cannot grant an order whose effect would be to infringe on other persons contractual

rights who may not necessarily be parties to the present action. The court equally cannot give an order in vain where an order cannot be enforced.

In the premises I am not satisfied that the plaintiff has demonstrated she has a prima facie case with a probability of success.

As to whether the plaintiff has satisfied the second limb of the conditions for grant of injunction that she would suffer irreparable loss or damage, that cannot be adequately. Compensated by an award in damages I would answer in the negative. Under prayer 'c' of the plaint the plaintiff prays for ***“Damages for breach of contract being equivalent of the value of the apartment at the date of Judgement in lieu and/or in addition to specific performance”***. By this prayer the plaintiff has virtually pleaded herself out of an order for an interim injunction as it is a clear manifestation that damages would be an adequate remedy. If the Defendants are decreed to have breached the agreement for sale and damages were to be awarded, it would be quite possible to establish the market value of the apartment as at the time of judgment since the same could be valued by a professional valuer.

In the premises I find and hold that an award of damages would be an adequate remedy and that the Plaintiff would not suffer any damage or loss that cannot be compensated for in damages.

As I do not entertain any doubt in regard to whether or not the Plaintiff has established a prima facie case and/or whether an award of damages would be an adequate remedy in the event the plaintiff is successful at the trial I need not consider in whose favour the balance of convenience would tilt.

I therefore for the reasons set out above find the plaintiff's Notice of motion application dated 7th November 2012 to be without any merit and the same is ordered dismissed with costs to the Defendants.

Ruling dated and delivered at Nairobi this 17th day of November 2013.

J.M. MUTUNGI

JUDGE

In presence of :

.....**1st PLAINTIFF**

.....**2nd PLAINTIFF**

..... **DEFENDANT**