



REPUBLIC OF KENYA
IN THE
ENVIRONMENTAL AND LAND COURT NAIROBI
ELC NO. 862 OF 2014

PAUL NJERUPLAINTIFF

VERSUS

ANTHONY MUCHIRI WAHOME.....1ST DEFENDANT

WILLIAM MWANGI GATHUMA.....2ND DEFENDANT

PAUL KINUTHIA NJENGA.....3RD DEFENDANT

JAMES WAWERU MWANGI.....4TH DEFENDANT

NGISA RONALD MORARA T/A MORARA NGISA & CO ADVS.....5TH DEFENDANT

RULING

1. The Plaintiff originally filed the suit herein at the Machakos High Court on 11 May 2012. The suit was however on 12 June 2014 transferred to this Court for disposal as the Environment and Land Court had not been constituted in Machakos County. Together with the Plaintiff, the Plaintiff also filed under a certificate of urgency an application by way of Motion seeking injunctive orders against the Defendants. The application which was dated 9 May 2012 sought orders particularly to restrain the 1st through the 4th Defendants from selling, advertising for sale, and or alienating and or disposing off, selling by public auction or completing any conveyance or transfer of any sale concluded by auction or private treaty the land known as Kajjado/ Mailua/3028-3031 (both inclusive) (**“the suit property”**) pending determination of the suit. That was the substantive order sought by the Plaintiff.
2. The Plaintiff’s case as can be gathered from the various affidavits filed by the Plaintiff may be stated as follows. The Plaintiff agreed to sell to the 1st through 4th Defendants the suit property. The parties executed a sale Agreement on 18 August 2011. The suit property measuring approximately 95 acres was to be excised from title number Kajjado/Mailua/1057. The agreed purchase price was Kshs. 6,175,000/=. The 5th Defendant acted as the mutual counsel for both parties to the transaction. That the Defendants paid the deposit amount late and contrary to the provisions of the Sale Agreement and further delayed and defaulted in paying the balance of the purchase price.

3. The Plaintiff felt aggrieved as the Plaintiff had only agreed to sell the suit property at a concessionary rate on the understanding that the completion would be expedited to enable the Plaintiff synchronize the transaction with yet another transaction where the Plaintiff was intending to purchase a property.
4. The Plaintiff also blamed the 5th Defendant for not expediting the process and for further transferring the suit property to the other four defendants without having received the full balance of the purchase price. The Plaintiff contended that having received no payment he issued completion notices to the Defendants on 13 March 2012.
5. In response and through affidavits filed by the 3rd Defendant, the 1st through the 4th Defendants contended that the blame for the delay in completing the transaction lay squarely on the Plaintiff and the 5th Defendant. The said Defendants further stated that they honored their part of the bargain as soon as the transfers were effected. They stated that they had fully paid the purchase price and had the titles issued in their respective names.
6. The 5th Defendant also filed a Replying affidavit on 18th Nov 2014. Whilst confirming having acted for both the Plaintiff and the other Defendants in the conveyancing transaction, the 5th Defendant blamed the Plaintiff for the delay in concluding the transaction as even the subdivision process which was being undertaken by the Plaintiff was only completed after the 90 days completion deadline in the Sale Agreement had lapsed. The 5th Defendant stated that the consent to transfer had then to be applied for and was obtained much later. The 5th Defendant also confirmed that the full purchase price had either been paid to the Plaintiff or accounted for. The payment, the 5th Defendant stated, had been made to the Plaintiff directly or through his advocates. The 5th Defendant blamed the delay in settling accounts with the Plaintiff on the Plaintiff's unwillingness to settle the 5th Defendant's fees. This latter fact of payment and accounts is denied by the Plaintiff who has commenced disciplinary proceedings against the 5th Defendant before the 5th Defendant's professional body's disciplinary organ, the Law Society of Kenya's Disciplinary Tribunal. The cause before the Disciplinary Tribunal is Disciplinary Cause No. 88 of 2012.
7. The Parties prosecuted the application by way of written submissions which were also highlighted before me on 4 Nov 2014.
8. Ms. Dawai for the Plaintiff submitted that the Defendants' behavior was wanting. That pursuant to the Sale Agreement of 18 August 2011, the Plaintiff was entitled to rescind the transaction in its entirety as the titles were availed in December 2011 yet the Defendants did nothing to complete the transaction until three months later. That even after the transfers were effected in favour of the Defendants they still failed to pay the balance of the purchase price in time without good reason. Counsel submitted that there was a prima facie case as the Defendants were in breach of contract and that the Plaintiff stood to suffer irreparably in the absence of an injunction. The Plaintiff it was further submitted had suffered great loss as a parallel transaction had fallen through due to the Defendants' breach.
9. Mrs. Kuria for the 1st through 4th Defendants on the other hand submitted that the Plaintiff's suit was completely misconceived as the dispute should have been referred to arbitration. Further counsel submitted that there was no prima facie case established as the Defendants had fully paid the purchase price and further that delay had been occasioned not by the 1st through 4th Defendants but by the 5th Defendant together with the Plaintiff. The Plaintiff's attempt to rescind the contract it was further submitted came too little too late as the suit property had already been transferred and any loss by the Plaintiff in the circumstances could be easily quantified.
10. I have reflected on the matter and carefully considered the submissions by counsel as well as all the affidavits filed herein. I am aware that at this stage of the proceedings and dispute, I only need to satisfy myself that the Plaintiff has established a prima facie case with chances of success and that in the absence of an injunction the Plaintiff will suffer irreparable loss. If in doubt, then I have to weigh the prejudice and hardships the denial or granting of an injunction will occasion to either party. Of course, as an injunction is an equitable and discretionary remedy I

must also consider all factors and circumstances including but not limited to the conduct of the parties: see **Giella v Cassman Brown & Co [1973] EA 368**, **Bonde v Steyn [2013]2 EA 8** and also **American Cyanamid Co v Ethicon Ltd [1975] 1 All E R 504**.

11. The dispute herein revolves around the performance and completion of Sale Agreement dated 18 August 2011.
12. The Agreement, executed between the Plaintiff as the vendor and the 1st through the 4th Defendants as the Purchasers, was for the disposition of the suit property to the Purchasers. The suit property was to be excised from the larger property known as Kajiado/ Mailua/1057, then owned by the Plaintiff. The 5th Defendant acted for both the vendor and the purchasers. Completion date was stated as 90 days from the date of execution of the agreement which was 18 August 2011. The Purchase price of Kshs. 6,175,000/= was payable in two equal installments. The first installment was payable upon execution whilst the second installment was stated to be payable on “ the completion date and upon successful transfer of the title in favour of the Purchasers”. The Plaintiff was to undertake the process of excision of the portion of land sold. The Agreement contained a default clause. If the vendor was in default then the amount paid towards the purchase price was to be refunded to the Purchasers without any interest upon expiry of a 21 day completion notice issued by the purchasers. If the purchasers were the ones in default, the vendor was to exercise the right of forfeiture and appropriate 10% of the deposit paid and the purchasers were then obligated to return all the completion documents in the same good as they were on delivery by the vendor. The documents were to be returned unused. Under the default clause the purchasers also had the option of paying interest at an agreed default rate of 10% per annum on any outstanding balance. The Agreement also had a dispute resolution clause where all disputes were to be referred to an arbitrator if the dispute was not resolved amicably.
13. It is apparent that when the initial deposit was paid , it was paid outside the prescribed and agreed time but with little complaint from the Plaintiff. It is also apparent that payments were being made to the mutual counsel, being the 5th Defendant. There is however controversy on who and what caused the delay. The Plaintiff appears to lay blame on the Defendants and conversely the Defendants, especially the 5th Defendant, state that the delay was occasioned by the Plaintiff who took some time on the subdivision process. The Plaintiff admits that the titles for the subdivisions were only available on or about 5 December 2011. All this while the 5th Defendant and the Plaintiff held to the deposit. The completion period apparently lapsed before the titles were availed. It is easy to conclude that there was default on the part of the Plaintiff. The 1st through 4th Defendant did not however issue any notice to the Plaintiff and that meant that the transaction could still be concluded.
14. The 1st through 4th Defendants bid their time until the properties were transferred to them in March 2012. It is not clear what action the Plaintiff took between December 2011 (when the titles were availed) and March 2012(when the transfers were registered), but any conveyancer will testify that the Plaintiff in between these two dates must have signed an instrument of transfer and or applications for consent. For the period until March 2012 I have not found any material to help lay blame on the 1st through the 4th Defendants.
15. The Sale Agreement also dictated that the balance of the purchase price was to be paid “ on the completion date and upon successful transfer of title in favour of the purchasers”: see clause 3 of The Sale Agreement. This, no doubt, was a rather ambiguous clause. A completion date unless otherwise stated cannot be the same day the transfers are registered. Completion date ordinarily means the day the parties close the transaction. It is the day the vendor hands over completion documents and vacant possession, and the purchaser in exchange pays the balance of the purchase price. In the instant case, the actual registration was mixed up with the completion date and as to what the parties actually meant must be left to the trial court and tested testimony rather than conjecture.

16. The transfers were nonetheless registered and titles issued in favour of the Defendants on 9 March 2012. The defendants were consequently obligated to pay the balance of the purchase price then. As time was of the essence they had to effect payment immediately. They delayed and four days later the Plaintiff issued them with a notice dated 13 March 2012. It is unnecessary to go into the contents of the notice save to point out that the Plaintiff had decided to invoke Clauses 11.2, 12 and 18 of the Agreement which involved the revocation and rescission of the Agreement whilst demanding a retransfer of the suit property to the Plaintiff. However, contrary to the provisions of the Sale Agreement, it would appear that the Plaintiff did not refund the purchase price paid less any amount which was to be forfeited. The Plaintiff only expressed a willingness to effect such refund. That alone would bring into doubt and question the effect of the notices dated 13 March 2012 allegedly served on the Defendants on 19 March 2012 but which the Defendants deny receiving.
17. Secondly and more critically, the Sale Agreement gave the Defendants an option to pay interest at the default rate of 10% p.a in the event there was delay on their part. Clause 11.2 gave the Defendants that option. That would point towards the inference that the Plaintiff did not have the sole prerogative to decide when to turn his back on the Sale Agreement if the Defendants were in default. The Defendants had an option, preserved by the Sale Agreement, to opt to pay interest rather than settle for a repudiation. Even though therefore it can be said that the Defendants delayed some 7 days in paying the balance of the purchase price, I do not hold the view that such breach automatically entitled the Plaintiff to rescind the Sale Agreement. In consequence and in the totality of the facts before me, I do not find that the Plaintiff has established a prima facie case.
18. It would not be necessary to delve into the issue as to whether or not the Plaintiff stands to suffer irreparably. I may however point out that the Sale Agreement anticipated not just instances of liquidated damages in the event of default on the part of the Defendants but also payment of default interest if there was delay in payment. Consequently, I also hold the view that monetary compensation would be adequate remedy if the Plaintiff succeeds at trial and the suit property is beyond reach. Perhaps, I may add that the Plaintiff has already commenced action against the 5th Defendant seeking an account as well as damages. That action is before a competent statutory tribunal and I will say no more.
19. Before I conclude, it would perhaps be appropriate to say a word on the Defendants plea of *forum non conveniens*. True, the Sale Agreement had an arbitral clause. True, there has arisen a dispute touching and concerning the Sale Agreement and in particular the completion thereof. However, the arbitral clause expressly allowed either party to move the court for injunctive orders pending resolution of the dispute. The Plaintiff consequently was perfectly entitled to file this suit and seek interim orders of protection. The arbitral course of resolution of this dispute still ought to be pursued.
20. In conclusion, I find that the Plaintiff's application dated 9 May 2012 lacks merit as the Plaintiff has not established a prima facie case with chances of success. The said application is consequently dismissed. The costs of the application will however abide the outcome of the suit.
21. Orders accordingly.

Dated, Delivered and Signed at Nairobi this 4th day of May 2015

J.L. ONGUTO

JUDGE

Ms. Dawai instructed by the firm of Mugambi & Company Advocates for the Plaintiffs

Ms. Kuria instructed by the firm of Jane Gachuiga & Associates Advocates for the 1st, 2nd, 3rd and 4th Defendants

Mr. Makori by the firm of Enonda, Makoloo, Makori & Co. Advocates for the 5th Defendant



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