



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 39 OF 2016

(Formerly NAKURU ELC NO. 344 OF 2015)

JAMES MUCHANGI GACHEMI PLAINTIFF

-VERSUS-

SOLIO RANCH LIMITED 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

RULING

Introduction

1. On **30th November, 2015** the plaintiff herein instituted the current suit seeking judgment against the 1st defendant for, *inter alia*, an order compelling the 1st defendant to complete the agreement allegedly entered between him and the 1st defendant over the property known as **LR NO. 11571/36-7A** (the suit property); a permanent injunction to restrain the 1st defendant from alienating, offering for sale, disposing of or selling the suit property to any other person other than himself ; damages in lieu of or in addition to the order of specific performance; interest on all sums found due to him; costs of the suit and any other relief which the court may deem fit to grant.
2. The plaintiff's case is that by an agreement dated **10th December, 2012** made between the 1st defendant and himself, through the 1st defendants agents, Tysons Limited, he agreed to buy and the 1st defendant agreed to sell to him the suit property at a consideration of Kshs.50 Million.
3. It is the plaintiff's case that he complied with the terms of the agreement, which terms were binding on the parties, upon execution. Although he complied with the terms of the agreement by, *inter alia*, paying the purchase price, the plaintiff laments that in breach of the agreement and without any justification, the 1st defendant refused to perform its part of the bargain. The plaintiff avers that he has been and remains ready, willing and able to complete the purchase of the suit property on the agreed terms.
4. Simultaneously with the plaint, the plaintiff filed the notice of motion of even date seeking to, *inter alia*, restrain the 1st defendant from alienating, offering for sale, disposing of or selling the suit property to any other person other than himself pending the hearing and determination of the application and the suit.
5. The application is premised on the grounds that the 1st defendant offered for sale to him the suit property being a sub-division of Lr. No.11571/6 at a cost of Kshs. 50 million; that in accordance with the

terms of a letter of offer dated 10th December, 2012 he paid the agreed consideration which the 1st defendant still retains.

6. Explaining that the 1st defendant breached the agreement executed between them by rescinding the offer in June, 2014, the plaintiff contends that, in the circumstances, it is mete and just to grant the orders sought.

7. The application is supported by the supporting affidavit of the plaintiff/applicant sworn on 28th November, 2015 and a further affidavit sworn on 9th March, 2016 in which the grounds on the face of the application are reiterated.

8. Vide the replying affidavit of the Chairman of the 1st defendant, **Fred N. Ojiambo**, sworn on 10th February, 2016 it is contended that the the agreement for sale of the suit property was rescinded by the 1st defendant after the plaintiff failed to accede to the terms of a collateral agreement to which the agreement relied on by the plaintiff was tied .

9. Arguing that there is no contract as contemplated by **Section 38** of the Land Act and **Section 3** of the Law of Contract Act, on which the plaintiff's suit and application can hinge on, the 1st defendant urges the court to strike out the application herein and the entire suit for being a fragrant abuse of the process.

10. On **1st December, 2015**, the court granted the plaintiff the orders sought pending the hearing and determination of the application.

11. The remaining issue for determination in this suit is whether the orders issued on 1st December, 2015 should be confirmed pending the hearing and determination of the suit (that is prayer 4 of the plaintiff's application for injunction, dated 30th November, 2015).

Analysis and determination

12. This being an application for a temporary injunction pending the hearing and determination of the suit, the burden is on the plaintiff/applicant to demonstrate that he has a *prima facie* case with a probability of success; that unless the orders sought are granted, he stands to suffer harm not compensable in damages and that the balance of convenience tilts in his favour. See **Giella v. Cassman Brown (1973) E.A 358.**

13. A *prima facie* case was defined by the Court of Appeal in the case of **Mrao v. First American Bank Ltd & 2 Others (2003)KLR 125** as a case where on the material presented to court, a tribunal properly directing itself will conclude that there was a right that had been breached by the other party as to call for rebuttal.

14. On whether the plaintiff has a *prima facie* case with a probability of success, having had an opportunity to consider the cases of the respective parties to this suit in the 1st defendant's application dated 10th February, 2015 in which the 1st defendant sought to strike the application which is the subject matter of this ruling and the suit on, among other grounds, the ground that the letter of offer was subject to a formal agreement of sale, which was none existent, I can do no better than adopt my ruling delivered on 11th October, 2016 which at the relevant part was that;

“..... 27. Have carefully read and considered the terms of the 2nd letter of offer with a view of ascertaining whether it supports the allegation by the applicant that the initial letter of offer was tied to that offer, contrary to the applicant's contention, I found no clause in that agreement which supports the said allegation.

28. I have also read and considered the various correspondences exchanged between the parties. I find nothing in them that supports the applicant's said allegations.

29. From the correspondences exchanged between the parties to this suit, the applicant's

contention that sell of the suit property was tied to the respondent buying the property offered for sell vide the 2nd letter of offer is communicated to the respondent vide an email from the applicant's advocate, Caroline Etyang, dated 30th November, 2015. Vide that email, marked JMG-5, the applicant's had this to say concerning the communication from Nicholas dated 2nd July, 2014.

“Our instructions was that the purchaser was to proceed with the purchase of the two properties on the terms of the letters of offer....your email of 19th June 2014 does not give us confirmation that we may forward to you the engrossments of the two agreements for execution by your client....Noting the above, we are instructed to, and hereby do, rescind the offer for the sale to your client, of the two properties being L.R Number 1157/36 and Number 1157/37.”

30. As pointed out herein above there is no document in the court's record that supports the applicant's contention that sale of the two parcels of land was conditional on the respondent buying the two properties.

31. Without going to the merits of the case, from the letters of offer herein, it is discernable that the properties on sale are distinct. The terms of offer are also distinct. In the absence of any evidence capable of showing that sale of the two properties was conditional on the respondent buying the two properties, I am unable to agree with the applicant that it could walk out of the two contracts merely because the respondent failed to buy the two properties as desired by the applicant.

32. On whether the letters of offer can form the basis of the plaintiff's claim, there being no dispute that the parties herein entered into an agreement for sale of distinct parcels of land and noting that the plaintiff seeks to compel the applicant to fulfil it's obligations under the agreements executed between them, I hold the view that the plaintiff's case is arguable. I say this because from the letter of offer in question, it is discernable what the subject matter of the offer was. The obligations of the parties are also discernable. Most importantly, the parties under clause 10 of the letter of offer agreed that until a formal agreement is executed, the terms of the letter will be binding on the parties after execution by the parties.

33. I am persuaded by the decision in the case of Eldo City Limited v Corn Products Kenya Limited & another (2013) eKLR where it was held:-

“To uphold the position where a party can pull out of a transaction when the parties are already at consensus ad idem, will not be prudent in the world of commerce. To my mind, that freedom should be limited up to a point the parties are still negotiating. Once all terms have been agreed and settled, that freedom should dissipate. Otherwise, mischievous parties with intention of selling their merchandise may engage serious purchasers in a wild goose chase knowing very well that they can pull out at any stage.”

34. I am also persuaded by the decision in the case of Kenya Institution of Management v. Kenya Reinsurance Corporation (2008) eKLR where Nambuye J., stated:-

“... a party holding himself out as vendor leading another holding himself out as the vendee, making the vendee alter his position and go to great lengths to negotiate not only for the purchase but for credit facilities and when he is informed that the intending vendee is ready to conclude the deal he backs out with reason that the deal outside the ambit of the relevant law, by virtue of him retracting on the deal, can only be described as a person acting not only in high handed manner but also in oppressiveness of the defendant can only be tamed by an injunctive relief pending the hearing and disposal of the suit...”
(emphasis supplied)

15. From the foregoing determination, I entertain no doubt that the plaintiff has established a *prima facie* case with a probability of success.

16. The subject matter of the suit being land, I find and hold that damages may not be an adequate remedy to the plaintiffs.

17. Though not in doubt concerning the foregoing determination, from the agreement executed between the parties to this dispute and in particular clause 10 of the letter of offer executed between the parties to this suit, I find and hold that the balance of convenience tilts in favour of the plaintiff who has fulfilled his obligations under that letter of offer (agreement).

18. The upshot of the foregoing is that the application dated 30th November, 2015 has merit and is allowed as prayed.

Dated, signed and delivered at Nyeri this 31st day of January, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Muturi for the plaintiff

Mr. Jillo for the defendant

Court clerk - Esther