



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL MISC. NO. 1005 OF 2013**

**NANCY MWEMBU MUNGAI..... PLAINTIFF**

**VERSUS**

**ANDREW KATANA MWAEBWA..... DEFENDANT**

**RULING**

The plaintiff by an application dated 19<sup>th</sup> August 2013 seeks the following orders:-

1. That this Honourable court be pleased to grant a mandatory injunction restraining the Defendant whether by himself, his employees, servant, agents from doing any of the following acts, disposing of or otherwise completing by conveyance or transfer of any sale, lease or otherwise interfering with the plaintiffs quiet possession and ownership of Title number **Nairobi/Block 74/128** pending hearing and determination of this suit.
2. That this Honourable court be pleased to order the Defendant to transfer title number **Nairobi/Block 74/128** to the plaintiff.
3. That the costs of the application be borne by the Defendant/Respondent.

The application is supported on the grounds that appear on the face of the application and on the supporting affidavit of the plaintiff annexed to the application. The Plaintiff and the Defendant entered into an agreement of sale dated 11<sup>th</sup> May 2012 where the Defendant agreed to sell to her the suit property title NO. **Nairobi/Block 74/128** for the consideration of **Kshs.5,7000,000/-**. Under the agreement completion date was expressed to be 12<sup>th</sup> August 2012 by which date the plaintiff was to pay the balance of **Kshs.1,480,000/-** after having made a payment of **Kshs.1,400,000/-** on 12<sup>th</sup> July 2012 when the Defendant was to have been granted. Vacant possession of the suit premises. The plaintiff was not in a position to meet the terms of the agreement of 11<sup>th</sup> May 2012 and the same was varied through addendums to the agreement made on 26<sup>th</sup> June 2012 and 29<sup>th</sup> September 2012 both of which are annexed to the plaintiff's affidavit in support of the application.

The plaintiff states that as per the addendum dated 29<sup>th</sup> September 2012 she had paid to the Defendant a total of **Kshs.1,830,000/-** and the Defendant was to grant her possession of the suit premises while the balance of **Kshs.1,473,000/-** was to be paid to the Defendant on or before 31<sup>st</sup> December 2012 and in case any amount was to be unpaid by 31<sup>st</sup> December 2012 the same would accrue interest at the rate of 24% per annum. The plaintiff avers the Defendant did not grant her vacant possession of the house in October 2012 as agreed but rather requested and it was mutually agreed that the tenant who was in the house be allowed to stay on until December 2012 but when the Tenant vacated the suit premises the Defendant

moved into the house in January 2013. The plaintiff further avers that the Defendant did not grant her vacant possession but instead took possession of the house when the tenant vacated despite the plaintiff paying to the defendant the sum of **Kshs.500,000/-** that the defendant insisted on being paid before he could grant vacant possession to the plaintiff.

The plaintiff further states that the Defendant vide a letter dated 13<sup>th</sup> February 2013 informed her he was terminating the agreement for sale for alleged default and/or breach of the agreement and that he would refund to the plaintiff the sum paid by her towards the purchase. The Defendant forwarded three (3) postdated cheques drawn in favour of the plaintiff for **Kshs.750,000/-** each. The copy of the letter and copies of the cheques are annexed and marked “NMM8” and “NMM9” respectively. The plaintiff contends that the Defendant’s refusal to grant her possession and to complete the sale transaction is likely to cause her irreparable damage since she had utilized all her savings in purchasing the suit property and therefore prays for an order of restraint in terms of the prayers in the Notice of Motion.

The Defendant filed a replying affidavit dated 20<sup>th</sup> November 2013 in opposition to the plaintiff’s application for injunction. The Defendant admits entering into the agreement for sale with the plaintiff but asserts that the plaintiff failed to honour the terms of the agreement precipitating the cancellation/termination of the agreement. Under paragraphs 8, 9, 10 & 11 of the replying affidavit the Defendant chronicles the acts that led to the termination of the agreement. The Defendant avers that installment payment dates had to be revised and extended severally and even then the plaintiff failed to pay as agreed prompting the Defendant to issue a termination notice and offered to refund to the plaintiff the amount she had paid pursuant to the agreement. The Defendant states he issued 3 cheques for refund of the money paid by the plaintiff for **Kshs.750,000/-** each and the plaintiff accepted the cheques and infact banked 2 of them and one was paid while the other was unpaid since the plaintiff banked the same when the Defendant’s account did not have sufficient funds and the Defendant had instructed the plaintiff not to Bank.

The Defendant avers that the plaintiff was not able to abide by the terms of the agreement and that upon termination of the agreement the plaintiff readily agreed to receive the refund of the money she had paid and indeed has received part payment and she therefore cannot be entitled to an order of injunction.

The parties have filed written submissions where they each recap the facts of the case which are largely not in dispute and the only issue for determination is whether the plaintiff has established a prima facie case and whether she stands to suffer irreparable damage unless the injunction is granted. The conditions upon which an interlocutory injunction may be granted are now fairly well settled and the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358** still remains the leading authority where the conditions were laid down as follows:-

- i. A party has to demonstrate a prima facie case with a probability of success.
- ii. A party has to demonstrate/show that irreparable damage is likely to be suffered which is not compensatable by an award in damages.
- iii. The court could also determine the matter by considering the balance of convenience in case of doubt in regard to the above two conditions.

In the present case the determination of the issues turns on whether the plaintiff had demonstrated the Defendant breached the agreement for sale and that the plaintiff would **ipso facto** be entitled to an order of specific performance without more. The plaint by the plaintiff does not contain a prayer for specific performance and merely seeks a permanent order of restraint and/or injunction. Under prayer (2) of the Notice of Motion the plaintiff prays for an order against the Defendant to transfer the suit property to the plaintiff. It is inconceivable how such an order would be made at the interlocutory stage when it is not shown and/or demonstrated that the terms of the disputed agreement have been satisfied. Without any doubt it is only after the case is heard and evidence taken would a court be in a position to make an order for specific performance after being satisfied all the terms of the agreement had been met on the part of the plaintiff.

I have considered the material placed before the court by the parties and the submissions by the parties

and I am not persuaded that the plaintiff has demonstrated she has a prima facie case with a probability of success or that she cannot be compensated by an award of damages in the event she is successful at the hearing.

The plaintiff, it has been demonstrated has received partial refund of the payment she had made to the Defendant and that she infact presented the 2<sup>nd</sup> cheque for **Kshs.750,000/-** for payment even though the same was unpaid. The Defendant has stated he is ready to make refund to the plaintiff and has indeed demonstrated his willingness to do so. In the letter the plaintiff wrote to the Defendant annexed as “**NMM7**” in the supporting affidavit the plaintiff made demand for the refund of the whole amount she had paid to the Defendant which she computed as Kshs.2,325,000/- plus a sum of **Kshs.180,000/-** paid to Standard Chartered Bank and a further sum of **Kshs.360,000/-** paid to Equity Bank on behalf of the Defendant making an aggregate sum of **Kshs.2,865,000/-**. Thus the plaintiff had computed the total exposure and the total amount refundable to her in lieu of proceeding with the agreement and that in my view was acknowledgement that damages would be an adequate remedy. I therefore hold that the plaintiff has not proved and/or shown that damages would not be an adequate remedy in case no injunction is granted and she is successful at the trial.

The upshot is that I find and hold that the conditions for the grant of an interlocutory injunction have not been satisfied and I hold the notice of motion by the plaintiff dated 19<sup>th</sup> August 2013 has no merit and I order the same dismissed.

I direct that the costs of the application be in the cause.

Ruling dated, signed and delivered this 18<sup>th</sup> day of July 2014.

**J.M. MUTUNGI**

**JUDGE**

**In presence of:**

..... For the Plaintiff

..... For the Defendant