



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 454 OF 2012**  
**(FORMERLY ELC NO. 165 OF 2012)**

JAMIL JOZ ..... PLAINTIFF

VERSUS

ALICE WANJIKU KARIUKI ..... DEFENDANT

**R U L I N G**

1. What is before this Court is the Plaintiff's Notice of Motion dated 28th March 2012 brought under the provisions of **Order 40 rule 1** of the *Civil Procedure Rules, 2010*, **section 3A** of the *Civil Procedure Act* and *Article 159* of the *Kenya Constitution*. The Application was originally filed in the *Environment and Land Division* of this Court but duly transferred to the Commercial Division on 16th July 2012. The said Application sought an order for temporary injunction to restrain the Defendant herein by herself, her agent or servant from transferring, alienating, mortgaging or howsoever dealing with Land Reference No. 330/1238, Nairobi (hereinafter called "the suit property") pending the hearing and determination of both the Application and the suit.
2. Both the Grounds in support of the Application as well as the Affidavit sworn by the Plaintiff dated 28th March 2012 detailed the following:

**"1. THAT the Respondent is the registered owner of Land Reference No. 330/1238 (Original number 330/124/5). It is hereinafter referred to as the suit property.**

**2. THAT on or about 29<sup>th</sup> June 2011, the Respondent offered to sell and the Applicant offered to purchase the suit property.**

**3. THAT the Applicant and the Respondent entered into an Agreement of Sale dated August 2011 for a consideration of Kshs. 21 million.**

**4. THAT the Applicant paid a deposit of Kshs. 2,100,000 being ten percent (10%) of the purchase price through cheque payment directly to the Respondent.**

**5. THAT the Agreement of Sale provided that the balance of the purchase price, being**

the sum of Kshs. 18,900,000, was to be deposited in an escrow account contemporaneously with the exchange of the completion documents in clause 4.3b of the Agreement of Sale.

6. THAT the completion documents were

- i. Photostat copy of the Vendor's Identity cards and PIN certificates;
- ii. 3 coloured passport photographs of the Defendant;
- iii. 2011 Rates Clearance Certificate;
- iv. Paid electricity and water bills for the property; and
- v. Duly filled valuation form.

7. THAT THE Applicant's Advocates of record on 5<sup>th</sup> November 2011 sent the Indenture of Conveyance to the Respondent's Advocates for signing by the Respondent and requested for the completion documents and the Original Agreement of Sale.

8. THAT the Respondent's Advocates did not avail the completion documents or the Original Agreement for sale.

9. THAT the Indenture of Conveyance was neither signed nor returned to the Applicant or his Advocates.

10. THAT at all material times the suit property was charged to Diamond Trust Bank who gave written consent for the sale of the property to the Applicant.

11. THAT the Applicant applied to First Community Bank for a facility which was approved.

12. THAT in a letter dated 5<sup>th</sup> December 2011 First Community Bank, through their advocates Taibjee and Bhalla Advocates, requested for a copy of the title deed from the Respondent's Advocates so as to carry out a search of the property. The same was not made available to them by the Respondent.

13. THAT in a letter dated 10<sup>th</sup> January 2012 the Respondent through her Advocates issued to the Applicant Completion Notice of 21 days.

14. THAT the Completion Notice was in breach of the Agreement for sale.

15. THAT in a letter dated 20<sup>th</sup> January 2012, First Community Bank issued an undertaking to pay the Respondent fifteen million subject to the receipt of the following documents:

- (a). Registration of Re-Conveyance from Diamond Trust Bank Kenya Limited;
- (b) Transfer to the Applicant, free of encumbrances of the subject property; and
- (c) Registration of Mortgage in favour of the Plaintiff and First Community Bank Limited.

16. **THAT the documents requested for by the Advocates of First Community Bank were not availed to them.**
  17. **THAT the Respondent did not act on the undertaking from First Community Bank.**
  18. **THAT the Applicant had already issued a cheque for Kshs. 3,900,000/= to his Advocates of record.**
  19. **THAT the Respondent is in breach of the Agreement for sale.**
  20. **THAT the Applicant has a prima facie case for the grant of temporary injunctions.**
  21. **THAT there is sufficient legal and factual basis for the preservation of the suit property pending hearing of the application and the suit.**
  22. **THAT unless this Application is certified urgently and immediately or as the Court may deem fit and temporary injunctions or conservatory orders issued pending hearing and determination of this Application and the suit will be rendered purely academic and nugatory and the Applicant will suffer irreparable damage.**
  23. **THAT the Agreement between the parties is for the sale of land and damages will be inadequate to compensate the Applicant.**
  24. **THAT there is imminent danger the Respondent may alienate the property.**
  25. **THAT the balance of convenience lies in the grant of temporary injunction”.**
3. The Plaintiff’s said Application came before Court under Certificate of Urgency on 28th March 2012 and on that day a temporary injunction was granted by **Namweya J.** restraining the Defendant pending the hearing of the Application. Those interim orders were extended on several occasions by the Court pending the delivery of this Ruling.
  4. The Replying Affidavit of the Defendant was sworn on 4th July 2012. The Defendant admitted the Agreement for Sale of the suit property but pointed out that she had advised the Plaintiff that the same was charged to the Diamond Trust Bank as security for a loan facility of Shs. 12 million. The Defendant pointed to the provisions of clause 4.3 (b) of the said Agreement for Sale dated 1st August 2011 which provided, *inter-alia*, as follows:

**“4. 3 (b) In exchange with the confirmed payment of the balance of the Purchase Price of Kenya Shillings Eighteen Million Nine Hundred Thousand (Kshs. 18,900,000.00) paid directly by RTGS to Paramount Bank Limited (the “Vendor’s Bank”), the Vendor’s Bank shall issue an irrevocable undertaking to the Purchaser’s Advocates that they will procure on behalf of the purchaser by the paying the sum of Kenya Shillings Twelve Million (Kshs. 12,000,000.00) directly to Diamond Trust Bank to facilitate the release of the Original Indenture of Conveyance which is currently being held by Diamond Trust Bank, release the Original Indenture of Conveyance to the Purchaser’s Advocates and to hold the balance pending successful registration of the Transfer in favour of the Purchaser. On confirmation by the Vendor’s Bank that the Purchaser has remitted the balance of the purchase price directly to the Vendor’s Bank, the Vendor’s Advocate shall release the following remaining completion documents to the Purchaser’s Advocates:**

**I. Transfers in triplicate (to be prepared by the purchaser’s Advocate) duly executed by the Vendor;**

- ii. 2011 Rates Clearance Certificate together with payment receipts thereof;**
  - iii. Photostat copy of the Vendor's ID Cards & PIN Certificates;**
  - iv. Three (3) colored passport sized photographs of the Vendor's;**
  - v. Duly filled valuation form, and;**
  - vi. Any other documents required to effectively transfer the property to the Purchaser.”**
5. The Defendant pointed out in her Replying Affidavit that the said Paramount Bank had confirmed on 10th August 2011 that upon receipt of the balance of the purchase price for the suit property which it would hold in escrow, it would issue an irrevocable undertaking to the Plaintiff's advocates that it would pay out from the amount held the sum of Shs. 12 million directly to the said Diamond Trust Bank. The Defendant went on to say that in a complete departure from the terms of the Agreement for Sale, her advocates had received a letter by Email from the Plaintiff's said advocates dated 24th of August 2011 stating that the payment of the balance of the purchase price would be contemporaneous with the exchange of documents as set out in the said Agreement and would not be limited to the Discharge of the Defendant's said Mortgage. The Defendant went on further to say that the completion documents were to be released on confirmation of the payment of the balance of the purchase price which the Plaintiff had failed to pay up to and beyond the 30 day completion period. The Defendant also noted that she was under the impression that the Purchaser was a cash buyer. However she had subsequently been informed that he had sought a mortgage facility of Shs. 15 million to finance part of the balance of the purchase price for the property. In view of the strict timelines and having a new financier involved in the transaction more than two months after the period for completion had elapsed, was not acceptable to the Defendant. As a result, the Defendant had instructed her advocates to issue a completion notice to pay the balance of the purchase price as stipulated in the said Clause 4 (b) of the Agreement for Sale. She made it quite clear that in her opinion, the Plaintiff was the one in breach of the terms of the Agreement for Sale and she noted that her loan with the said Diamond Trust Bank continued to accrue interest at a high rate.
6. The Plaintiff's submissions were filed herein on 21<sup>st</sup> December 2012. She acknowledged the payment of the deposit of Shs. 2.1 million by the Defendant but submitted that the said Agreement for Sale provided that the balance of the purchase price being Shs. 18.9 million was to be deposited in an escrow account contemporaneously with the exchange of the completion documents which were:
- a. The Defendant's Identity Card and PIN Certificate
  - b. Three coloured passport photographs of the Defendant
  - c. A Rates Clearance Certificates of 2011
  - d. Paid electricity and water bills for the suit property
  - e. A Valuation form for Stamp Duty duly completed.

The Plaintiff submitted that such completion documents and indeed the original of the Agreement for Sale were never availed to his advocates. Further, his advocates had sent an Indenture of Conveyance to the Defendant's Advocates for execution by the latter but the same was never acknowledged or returned. The Plaintiff admitted that it had applied to the First Community Bank for a facility to finance the balance of the purchase price of the suit property. Such facility was approved by the said Bank on 5th December 2011 and it was the Bank's advocates who had requested for a copy of the Agreement for Sale was not completed due to the default and breach of its terms by the Defendant. He further submitted that if a temporary injunction is not issued, he would suffer irreparable injury, for which damages would not be an adequate remedy. Should the injunction not be granted pending the hearing and determination of the suit, the Plaintiff would not be able to pursue the relief of specific performance which it had prayed for in respect of the suit property.

7. In concluding his submissions, the Plaintiff put reliance upon the following authorities: **Giella v Cassman Brown (1973) EA 358**, **Kiambu General Transport Agency Ltd v Kenya Breweries Ltd HCCC No. 1083 of 1997 (unreported)**, **Assanand v Pettitt (1989) KLR 252**, **Henry Ogoye & Anor v Sammy Owuor & Anor ELC No. 347 of 2008 (2010)eKLR** and **Waithaka v Industrial and Commercial Development Corporation HCCC No. 321 of 2001 (unreported)**. The Plaintiff identified that the issues to be determined by this Court was whether he had a *prima facie* case with a probability of success and whether there was a need to protect the interest of the Plaintiff in the suit property pending the hearing and final determination of the suit. He further submitted that the balance of convenience lay in the grant of a temporary injunction pending hearing of the suit. Further, as per the **Ogoye** case (supra) he noted that one of the principles that the Court would consider in determining the Application was whether the injury to be suffered by the Plaintiff, were he to be denied a temporary injunction and thereafter succeed at trial, outweigh the injury that the Defendant would suffer should the injunction not be granted.
8. In her turn, the Defendant filed her submissions herein on 23rd January 2013. Having outlined the Plaintiff's case as against her, the Defendant pointed out that she had informed the Plaintiff that the suit property had been charged to the said Diamond Trust Bank for Shs. 12 million and that the proceeds of sale were to go towards clearing her liability in that regard. The Defendant outlined the sequence of events in relation to the Agreement for Sale and emphasised that, in a complete departure from the terms thereof, the Plaintiff's Advocates had sent a letter via Email dated 24th August 2011 which stated that the payment of the balance of the purchase price would be contemporaneous with the exchange of completion documents including, but not limited to, the Discharge of the Plaintiff's Mortgage with the Diamond Trust Bank. The Defendant noted that as per the Agreement for Sale, completion was supposed to be 30 days from the date of execution thereof. Thus she was surprised when her advocates received a letter dated 5th December 2011 from the advocates acting for the First Community Bank which detailed that the Plaintiff had sought from the said Bank finance to the tune of Shs. 15 million towards the purchase price of the suit property. The Defendant pointed out that this was four months after the transaction had begun and well past the anticipated completion date and further, in total disregard of the Defendant's Advocate's letter dated 5th September 2011. In other words, it was the Defendant's position that it was not she but the Plaintiff who had breached the Agreement for Sale.
9. The Defendant then referred the Court to the following authorities: **Njamumu v Nyaga (1983) eKLR 282** (in which the Court had stated:

**“Before an agreement such as this can be rescinded the party in default should be notified of the default and given reasonable time within which to rectify it. Once notice of default has been given failure to rectify will result in the rescission of the contract.”**

**Amalo Company Ltd v Smith Kline Consumer Healthcare Ltd & Anor. (2007) eKLR**, **Giella v Cassman Brown** (supra), **Mrao Ltd v First American Bank Ltd & 2Ors (2003) KLR 125**, **Githinji t/a Limpopo Snacks v Kenya Commercial Finance Co. Ltd (2001) eKLR** as well as **Francis Ichatha v Housing Finance Company of Kenya Ltd HCCC No. 914 of 2001**. It was the Defendant's submission that the Plaintiff had not established a *prima facie* case with a probability of success in that he had not acquired any proprietary interest in the suit property and had breached the said Agreement for Sale. It was the Defendant's further submission that despite the Plaintiff maintaining that damages would not be an adequate remedy, he had not acquired any proprietary rights in the suit property nor had he shown how an award of damages would not adequately compensate him for the loss of the suit property. In the Defendant's opinion, the balance of convenience tilted in her favour as she stood to be greatly prejudiced if she was to continue to be restrained from disposing of the suit property in terms of the continuing accumulation of the loan taken from the Diamond Trust Bank, which had already threatened to exercise its statutory power of sale. The Defendant remarked that if the interests of the said loan continued to accrue, she may not be able to offset the loan amount as in all likelihood, it could exceed the market value of the suit property. She concluded that the Plaintiff had not met the requirements set out in **Giella v Cassman Brown** and requested the Court to dismiss his Application.

10. I have carefully perused the Grounds in relation to the Application, the Supporting Affidavit thereto and the Replying Affidavit of the Defendant. More particularly, I have examined the Agreement for Sale annexed to the said Supporting Affidavit at pages 17 to 38 and marked "B". That particular document is undated as is the copy of the same in the Plaintiff's bundle of suit documents. In Ground No. 3 to the Application, it just states:

**"THAT the Applicant and the Respondent entered into an Agreement of Sale dated August 2011 for a consideration of the Kshs. 21 million."**

Such left this Court wondering as to just why there was this vagueness on the part of the Plaintiff as to the actual date of the said Agreement for Sale. In the correspondence passing between the parties' advocates that followed, it was initially clear that from the Defendant's advocates' point of view the Agreement for Sale was dated 1st August 2011. On the other hand, the Plaintiff's advocates in their letters continued to refer to the Agreement for Sale but without putting any date upon the document until their letter of demand addressed to the Defendant dated 9th March 2012 when they finally detailed the date of the said Agreement as 1st August 2011.

11. As if this was not enough, clause 4.1 of the said Agreement explicitly detailed that the Completion Date should be 30 days from the date of execution of the same or such earlier date as the parties may agree in writing. It is apparent from the correspondence that no earlier date was agreed so consequently, in the strict interpretation of the said Agreement, the completion date thereof would have been 31st August 2011. By that date, clause 4.3 (b) stipulated quite clearly that the balance of the purchase price of Shs. 18.9 million would be paid to the Paramount Bank Ltd (the Defendant's Bank) to be held in escrow. Such would lead to the Bank issuing an irrevocable undertaking to the Plaintiff's (the Purchaser's) advocates that it would pay the sum of Shs. 12 million to the Defendant's mortgagees – Diamond Trust Bank Ltd to release the original Indenture of Conveyance. That clause went on to read that on confirmation from the said Paramount Bank Ltd that the Plaintiff had remitted the balance of the purchase price, then the Defendant's (the Vendor's) Advocates would release the detailed (as above ) completion documents. From the correspondence, those monies were never paid by the Plaintiff. As a consequence, it was not surprising that the Defendant sent an email to, presumably, her agents, which she copied in the Plaintiff's advocates, dated 25th August 2011. It reads:

**"Ann, I believe we are going nowhere with this people. Please look at the offer that came and negotiate with Jamil to be paid back his deposit. We were selling the property for a purpose but they may go beyond the required time at this rate. The agreement has a time but they may be stuck and cause us losses. Please act quickly. Alice"**

12. The Plaintiff's advocates interpreted that Email as evidence of the Defendant wishing to get out of the transaction. I don't see it that way for, in my opinion, I consider it perfectly natural for the Defendant to have been worried that 6 days before the date anticipated for completion, no monies had arrived at the said Paramount Bank. Indeed the series of Emails exhibited at page 80 of the bundle attached to the Supporting Affidavit are illuminating as there would seem to have been a suggestion that a caveat be placed as against the title of the suit property and that there was an attempt by the Plaintiff to vary the Agreement for Sale. Indeed, by their letter dated 14th September 2011 the Plaintiff's advocates addressing the Defendant's advocates would seem to allude to the completion Date being 90 days after the execution of the said Agreement for Sale. As this Court has detailed above, the Agreement for Sale clearly provides that completion will be within 30 days. To my mind, the Plaintiff's advocates may have been seeking an amendment to that period of time which, from the correspondence, was never agreed to by the Defendant. Indeed, the Defendant throughout the correspondence emanating from her personally, emphasised that time was of the essence in view of her need to pay back the monies borrowed from her mortgagees, the Diamond Trust Bank. Most certainly, and as emphasised by **Onyango Otieno J.** in the case of **Githinji t/a Limpopo Snacks v Kenya Commercial Finance Co. Ltd** (supra):

**"I cannot rewrite the contract between the parties and add a condition that the**

**property will not be sold if the Applicant suffers certain setbacks. I have to go by the contents between the parties as was entered into at the relevant time.”**

13. The Plaintiff was not able to comply with the principal condition of clause 4.3 (b) of the said Agreement for Sale which was the payment of the balance of the purchase price of Shs. 18.9 million to the Paramount Bank Ltd. It is not relevant, in my opinion, that the Defendant and/or her advocates did not have the completion documentation ready and available on the Completion date. Such was all secondary to the prime condition being the payment of the balance of the purchase price by the Plaintiff. It came as somewhat of a surprise to this Court that the Defendant waited as long as she did, to instruct her advocates to issue the Notice of Completion under the provisions of the Agreement for Sale. However, even after that notice was issued by the Defendant’s advocates on 10th of January 2012, the Plaintiff failed to comply with the same. As a result I adopt the clear finding of my learned brother **Emukule J.** in the **Francis Ichatha** case (supra) to the effect that:

**“A Plaintiff should not be granted an injunction if he does not have clean hands, and no Court of equity will aid a man to derive advantage from his own wrong for the Plaintiff seeks this Court to protect him from the consequences of his own default. He who seeks equity must do equity. The Plaintiff should not be protected or given advantage by virtue of his own refusal to make repayment to the Defendant/Respondent a debt of which he expressly undertook to pay. In sum the conduct of the Plaintiff/applicant has been such that he has taken himself out of the realm of the Court’s protection. In the GIELLA –VS-CASSMAN principles he has failed to establish a prima facie case with a probability of success, he will not suffer any loss for which he cannot be compensated in damages and there being no doubt the balances of all convenience will not be with him at all.”**

14. As a result, I dismiss the Plaintiff’s Notice of Motion dated 28th March 2012 with costs to the Defendant. The Interim Orders of this Court on that day are hereby lifted.

**DATED and delivered at Nairobi this 11<sup>th</sup> day of December, 2013.**

**J. B. HAVELOCK**

**JUDGE**