



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO.123 OF 2010**  
**ATIENO OKELLO .....1<sup>ST</sup> PLAINTIFF**  
**DENNING JUSTUS OLOUCH .....2<sup>ND</sup> PLAINTIFF**  
**VERSUS**  
**KIAMBERE FLATS LIMITED.....DEFENDANT**

**RULING**

1. This is the plaintiffs' chamber summons dated 2<sup>nd</sup> March 2010. It is expressed to be brought under order 39 rules 1, 2 and 2A (2) of the repealed Civil Procedure Rules and sections 3A and 63 of the Civil Procedure Act. The plaintiffs pray for an injunction to restrain the defendant from selling, alienating or dealing with an apartment known as Block A, Unit 6 erected on Land Reference Number 209/11413 in Nairobi other than with or to the plaintiffs pending the hearing of this suit. The 1<sup>st</sup> plaintiff has sworn an affidavit in support dated 2<sup>nd</sup> March 2010.

2. The application is contested. There is filed a replying affidavit sworn on 23<sup>rd</sup> February 2012. There are common grounds. The defendant is the owner of the suit land on which is erected the suit apartment. The defendant, by its agent's letter of offer dated 6<sup>th</sup> April 2009, offered and the plaintiffs accepted, to purchase the apartment at a consideration of Kshs 9,000,000. As per the terms of offer, the plaintiffs paid a 10% deposit of Kshs 900,000. The parties were thereafter to execute a formal agreement for sale. Completion was to take place within 90 days of the letter of offer. The letter of offer is executed on 9<sup>th</sup> April 2009.

3. Beyond that point, the events are heavily contested. Apparently, the plaintiffs were borrowing the balance of the purchase price. A draft sale agreement was in the meantime forwarded on 5<sup>th</sup> June 2009 in a covering letter dated 20<sup>th</sup> May 2009. The plaintiffs sought to insert a clause on the financing arrangements. On 27<sup>th</sup> August 2009 (and well outside the completion period) the plaintiffs received the amended sale agreement. The plaintiffs in the meantime received a letter of offer from Standard

Chartered Bank dated 5<sup>th</sup> November 2009 approving a mortgage loan facility for part of the purchase price of the apartment. Earlier, and on 28<sup>th</sup> September 2009, the defendant gave the plaintiff written notice to return the sale agreement duly executed within 7 days. On 2<sup>nd</sup> October 2009, the defendants forwarded to the plaintiffs a refund cheque of Kshs 765,000 and sought to cancel the sale. The plaintiffs submitted that the defendant intends to sell the property to a third party. As the property values have escalated, the plaintiffs would be prejudiced. The defendant's case plain and simple is that the plaintiffs breached the terms of the letter of offer. When the plaintiffs failed to return the amended sale agreement duly executed, the defendant made a demand through its lawyers in a letter dated 15<sup>th</sup> June 2009. The letter gave the plaintiffs 7 days to do so in default of which the defendant would be at liberty to dispose of the property. This was later to be reinforced by the defendant's counsel's letters of 26<sup>th</sup> August 2009 and 25<sup>th</sup> September 2009.

4. When one party such as the plaintiff approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly in Giella Vs Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR.

5. Fundamentally, parties are bound by commercial agreements to which they enter freely. I agree with Justice Ringera in Morris & Company Limited Vs Kenya Commercial Bank [2003] 2 E.A 605 that such parties must be held up to their bargain. It is also not the true province of the courts to rewrite contracts for the parties. See National Bank of Kenya Limited Vs Pipeplastic Samkolit & another [2001] KLR 112. See also Salim Manji & another Vs Southern Credit Banking Corporation Limited Nairobi HCCC No 515 of 2002 [2006] e KLR, and Habib Bank A.G. Zurich Vs Pop in Kenya Ltd and others Civil Appeal No 147 of 1989, Court of Appeal (unreported).

6. The primary contractual agreement between the parties here is the letter of offer from the defendant's agent, Property World Limited, dated 6<sup>th</sup> April 2009 and executed by the plaintiffs on 9<sup>th</sup> April 2009. The plaintiffs were required at clause 5 to pay the deposit of Kshs 900,000. That they did. They were also to pay a further sum of Kshs 461,500 to the defendant's lawyers, P.J. Kakad, upon signing the sale agreement. The plaintiffs, by executing the letter of offer, agreed to pay the total sum of Kshs 9,461,500 being the sale price of Kshs 9,000,000 and the registration fees of Kshs 461,500 aforesaid. By a letter dated 17<sup>th</sup> August 2009 the defendant forwarded an engrossed sale agreement and lease agreement over the apartment which was to be returned together with the balance of Kshs 8,561,600. A copy of the identity card of the 1<sup>st</sup> plaintiff was also to be availed. As requested by the plaintiff, the sale agreement was amended and sent to the plaintiffs by a letter dated 26<sup>th</sup> August 2009. That letter bears a receipt stamp of the plaintiff's lawyers of 27<sup>th</sup> August 2009. By 25<sup>th</sup> September 2009 the agreements had not been returned to the vendors lawyers prompting the 7 day's notice mentioned earlier to terminate the contract. The plaintiffs did not oblige. The contract was cancelled. As per clause 6 in the letter of offer, the plaintiffs were to forfeit 1.5% of the sale value. The defendants thus sent a refund cheque of Kshs 765,000 on 2<sup>nd</sup> October 2009. It was not until 3<sup>rd</sup> November 2009 that the plaintiffs, by their counsel's letter of even date, returned the amended agreement of sale. That letter is material and stated;

“P.J. Kakad & Co.

*Advocates*

*4<sup>th</sup> Floor, Jubilee Place*

*Mama Ngina Street*

*P. O. Box 57762-00200*

**NAIROBI**

*Dear Sirs,*

**RE: SALE OF FLAT NO. A6 ON L.R. NO.**

**209/11413 – NAIROBI.**

**KIAMBERE FLATS LTD. TO DENNIGN JUSTUS OLOUCH**

**AND MARY ATIENO OKELO**

*We are enclosing the executed Agreement for Sale and the Lease (in triplicate) together with the Purchasers' photographs for further action.*

*We are also enclosing your Client's Cheque No.030696, which we do not have instructions to accept, for onward transmission to your Client.*

*Please proceed and have the documents registered.*

*We are contacting our Client's financiers and should revert with the requisite professional undertaking shortly.*

*Yours faithfully,*

**LUMUMBA, MUMMA AND KALUMA ADVOCATES**

**PETER KALUMA**

7. On the face of it, by 3<sup>rd</sup> November 2009, nearly 7 months from the date of letter of offer, the plaintiffs had not executed a formal sale agreement or at any rate returned it to the defendant. Clearly, the plaintiff was still to “contact the (plaintiff’s) financiers and should revert with the requisite professional undertaking shortly”. The plaintiffs also returned the cheque for Kshs 765,000. Again from the annexures and affidavit of the plaintiff, the bank was to provide Kshs 6,150,000 only. A further sum of Kshs 2,500,000 was to be procured from Kingsize Sacco to settle the balance. While the letter of offer from the bank is exhibited, there is no evidence of any financing arrangement from the Sacco. The only sum then paid by the plaintiffs was the 10% deposit of Kshs 900,000. I have thus come to the conclusion that the plaintiffs, on the basis of evidence before me at this stage, were in breach of the contract of sale. The plaintiffs should not benefit from that breach. I would thus say that the plaintiffs have not made out a strong *prima facie* case with a probability of success.

8. Even if I were to agree with the plaintiffs that the amended sale agreement was presented outside the original completion period, the sale agreement was not returned with the Kshs 461,500. The amended sale agreement has not even been annexed to show whether the completion date was extended. Fundamentally, the sale agreement was not executed or forwarded to the defendants until 3<sup>rd</sup> November 2009 under the letter I referred to. There is then a sense in which the plaintiffs have withheld some facts leaving the court deliberately in a blind spot.

9. True, the plaintiffs would be prejudiced due to escalation of property prices. Under the principles in *Giella Vs CassmanBrown & Company* (supra), I am satisfied that the plaintiffs can be compensated in damages if they are successful in the suit. I have not been provided with evidence to show that the defendants would not be in a position to pay such damages. I am not in doubt that the plaintiffs have thus not met the threshold for grant of an interlocutory injunction. I am thus disinclined to exercise my discretion in their favour.

10. In the result, the plaintiffs’ chamber summons dated 2<sup>nd</sup> March 2010 is hereby dismissed with costs to the defendants.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 8<sup>th</sup> day of May 2012.**

**G.K. KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of**

Mr. Mak Oloo for Kaluma for the Plaintiffs.

Mr. Mulangu for the Defendant.