



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & TAX DIVISION – MILIMANI**

**CIVIL CASE NO. 525 OF 2010**

**SIMON NJOROGI MUTURI..... PLAINTIFF**

**VERSUS**

**AMOS KABUE MWANGI .....1<sup>ST</sup> DEFENDANT**

**MARY NGIMA MUNYU.....2<sup>ND</sup> DEFENDANT**

**RULING**

By an application by Chamber Summons dated 30<sup>th</sup> July, 2010, and taken out under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the Applicant prays for a temporary injunction restraining the Respondent from alienating, transferring, selling or disposing the suit property, which comprises one half acre portion of LR No 2259/343 to any party other than himself. He also seeks an order that the Respondents be directed to give him vacant possession of the suit property in terms of the agreement for sale dated 24<sup>th</sup> March, 2008.

The application is supported by an affidavit sworn by the Applicant himself on 30<sup>th</sup> July, 2010. It is based on the grounds that under the terms of the agreement, the Respondents undertook to give the Applicant possession of the suit property upon payment of the deposit. The Applicant duly paid the deposit as agreed but the Respondents dishonoured their side of the bargain by declining to put him in possession of the property. The Respondents have therefore failed to perform their obligations under the agreement and instead they have purported to sell the property to some other parties.

Opposing the application, Amos Kabue Mwangi, the 1<sup>st</sup> Respondent, filed a replying affidavit sworn on 13<sup>th</sup> August, 2010. He admits in that affidavit, *inter alia*, the sale agreement dated 24<sup>th</sup> March, 2009; and also the payment of a deposit of Kshs 3 million. After payment of the said deposit, the Vendors proceeded with the subdivision process. However, he blames the Plaintiff for frustrating the process by declining to give any more money to the Respondents to pay the Nairobi City Council for the issue of final approval to subdivide, and also to facilitate the clearance of arrears in the Housing Finance Company of Kenya. Arising from that inability to get more funds from the Applicant, the Respondents identified an alternative buyer who was willing to help them salvage the whole property and who has since paid the agreed purchase price, taken possession and commenced construction work. In the context of all these, the Respondents are not in a position to give the Applicant vacant possession, but they are ready and willing to refund the deposit to the Plaintiff.

At the oral canvassing of the application, Mr Namachanja appeared for the Applicant while Ms Mwangi

appeared for the Respondents. After considering the pleadings and the submissions of counsel, I note from the prayers for judgment that the Applicant seeks against the Respondents an order for specific performance of the agreement, and an order for a permanent injunction restraining the Respondents from selling or disposing of the suit property to anyone else but the Applicant. Specific performance is an equitable relief. It is based on the existence of a valid and enforceable contract. Generally, the law takes the view that the purchaser for a particular piece of land cannot, on the Vendor's breach, obtain a satisfactory substitute, and for that reason specific performance becomes available.

With regard to the grant of an interlocutory injunction, the bottom line is whether the applicant has satisfied the conditions espoused in **GIELLA v CASSMAN BROWN & CO., LTD** [1973] EA 358. The first of these conditions is that the Applicant must show a prima facie case with a probability of success. I find it prudent to discuss this particular condition along with the issue of specific performance.

While the Respondents acknowledged the agreement of sale of the property to the Applicant, the first problem to be encountered while considering specific performance is that although the parties had specifically agreed that the completion date would be ninety (90) days from the execution of the agreement, it is now exactly one year after the date of execution of the agreement, and the transaction has not been completed. Indeed, the prospects of that completion are fairly remote. The Respondents have already accepted money by way of purchase from a third party whom they have already installed into possession of the suit property. That person has also commenced construction work on the suit premises. There is no evidence to suggest that such party is not an innocent purchaser for value without notice. He is also not a party to these proceedings. In such circumstances, the path to the grant of an order for specific performance is not as plain as should be. I find that the first condition in **GIELLA'S CASE** has not been satisfied.

Even if that condition had been satisfied, the second condition requires that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. In my humble view, the Applicant can easily be paid back his money and the 1<sup>st</sup> Respondent has offered to do as much in Paragraph 21 of his replying affidavit. I therefore find that since the Applicant can be compensated in monetary terms, the second condition for the grant of an interlocutory injunction has not been met.

Thirdly, if I was in any doubt, I would find that the balance of convenience favours that the matters remain as they are, otherwise we might stir the hornet's nest by interfering with a purchaser who is currently in possession of the suit premises and who, probably, is an innocent purchaser for value without notice.

For the above reasons, I decline to grant the injunction as prayed. However, even though the Respondents blame the Applicant for breach of the sale agreement, the buck stops squarely with them. The agreement contained an express provision that they would install the Applicant in possession of the suit property upon payment of the deposit. In spite of the deposit having been paid they did not honour that condition, and it is because of their failure to do so that we are here today. Secondly, although the Respondents hide under the cloak of the requisite consent not having been granted, Clause 3 of the Sale agreement is clear that "...**the Vendors shall obtain the necessary clearances and consent...**". The onus of obtaining that consent rests entirely upon the Respondents. By reason of the foregoing, the application for injunction is hereby dismissed. However, because it is the conduct of the Respondents which has precipitated this action, the Respondents shall bear the costs of this application. Orders accordingly.

**DATED and DELIVERED at NAIROBI** this 25<sup>th</sup> day of March 2011

**L NJAGI**  
**JUDGE**