



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**

**ELC. 593 OF 2010**

**OL LOITA ROAD LIMITED.....PLAINTIFF/  
APPLICANT**

**V E R S U S**

**KENYA COMMERCIAL BANK LTD.....DEFENDANT/  
RESPONDENT**

**R U L I N G**

The Defendant is the registered proprietor of L.R. No. 209/10343 Loita Street, Nairobi (hereinafter referred to as “the suit premises”). The Plaintiff claims that by letter of offer dated 20<sup>th</sup> August 2010 and an agreement dated 28<sup>th</sup> September 2010, the Defendant agreed to sell the suit premises to it at KShs. 225,000,000/= of which it paid KShs. 22,500,000/= being 10%. The money was paid into the Defendant’s instructed account by way of electronic system known as RTGS. The balance was to be paid on or before the completion of the transaction. The suit premises were sold not with vacant possession as it was subject to the controlled tenancy of one Peris Nasimiyu Nandabwa trading as Lexus Investments.

The Plaintiff states that the Defendant has since failed and/or neglected to proceed with the transaction or to complete it. The suit was filed for a permanent injunction to restrain the Defendant, by itself, its servants, agents or employees or otherwise howsoever from offering for sale, alienating, transferring the suit premises to any other person other than to itself; a declaration that, owing to the various correspondences, memorandum and agreements, and by the retention of the said 10%, there exists a trust and fiduciary relationship between the two and that the Defendant is estopped from denying the existence of the contract; an order that the Defendant should execute all necessary documents to transfer the suit premises to the Plaintiff, and, in default, the Deputy Registrar be authorized to execute such documents; in the alternative and without prejudice, damages for breach of contract, trust and unjust enrichment.

With the suit was filed a chamber application under sections 1A, 1B, 3A and 63 (c) of the Civil Procedure Act and Order 39 rules 1(a) and (b), 2, 2A, 3 and 9 of the Civil Procedure Rules for a temporary injunction to restrain the Defendant from offering for sale, selling, alienating, transferring or disposing the suit property until the suit is heard and determined; an interlocutory mandatory injunction directing the Defendant to deliver and file in these proceedings the original of the duly executed Sale Agreement between the parties on or before the hearing and determination of the suit; and an order to have this suit

consolidated with **HCCC No.438 of 2010** for the two cases to be determined together.

In **HCCC No. 438 of 2010** Peris Nasimuyu Wandabwa t/a Lexus Investments has sued the Defendant over the same suit property. Peris is claiming that the Defendant is in the process of selling the property in respect of which she is a controlled tenant, and which it is seeking to illegally terminate, when she had the first option to purchase. The suit was filed on 2th September 2010 along with a motion for temporary injunction. It would appear the injunction was granted to restrain the Defendant from entering into a sale agreement, selling, transferring, leasing, charging or in any other manner disposing of the property, terminating the tenancy agreement or harassing or evicting her.

On 16<sup>th</sup> November 2010 an application under Order 1 rule 10(2) of the Civil Procedure Rules was filed to join the present Plaintiff, Ol Loita Road Limited, in the suit to protect its interest as a purchaser. The application is apparently pending. If the Plaintiff is joined in those proceedings that will make the present application for consolidation unnecessary. I also note that the present suit and application were filed subsequent to those in **HCCC No. 438 of 2010**.

The Defendant swore a replying affidavit through George Kenga who is its Senior Manager, Facilities. He conceded that there was a Sale Agreement which had been signed by the Plaintiff and which was passed over to it for execution but that at that point, before execution, they were served with a temporary injunction in **HCCC No. 438 of 2010** restraining it from proceeding with the sale. Kenga denied that the Defendant had deliberately refused and/or neglected to execute and return the Sale Agreement. He claimed that the present application seeks orders whose granting would be in vain in view of the subsisting injunction. The Defendant lastly asked that the present suit be found to be an abuse of the process of the court which ought to be stayed given the other suit. I note that until the Plaintiff has been joined in the proceedings in the other suit, the provisions of section 6 of the Civil Procedure Act would not apply to it.

The application was prosecuted for the Plaintiff by Mr. C. N. Kihara and defended by Mr. Chacha Odera for the Defendant. I consider what each had to say and also their written submissions.

There was no further affidavit sworn by the Plaintiff to controvert the averment that the execution of the Sale Agreement by the Defendant was interrupted when it received the injunction in the other suit. That position has to be accepted. If that is so, then no contract exists between the parties. The Plaintiff executed its part but the Defendant has not. The legal position is that both the suit and the application have no basis. Indeed, the Defendant, in paragraph 8 of the defence, pleaded that the Plaintiff has no cause of action there being no executed agreement between them. It relied on the provisions of section 3(3) of the Law of Contract Act (Cap. 23) which provides as follows:-

“3. *No suit shall be brought upon a contract for the disposition of an interest in land unless-*

(a) *the contract upon which the suit is founded –*

(i) *is in writing;*

(ii) *is signed by all the parties thereto; and*

(b) *the signature of each party has been attested by a witness who is present when the contract was signed by such party.*

*Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.”*

Before the amendment that introduced this section, the previous section 3 read as follows:-

*“3. No suit shall be brought upon a contract of the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it.*

*Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract:-*

(i) *has in part performance of the contract taken possession of the property or any part thereof; or*

(ii) *being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”*

It is clear from this previous section that the contract had to be in writing and signed by the parties, or had to be evidenced by some memorandum or note in writing and signed by the party to be charged or his representative, or, in the absence of a formal contract or some evidence of it in writing, there was part performance of it by, let us say, payment of a deposit towards the purchase price or there was willingness to pay and there has been the taking of possession of the property or part of it. That was the law that the Court of Appeal was discussing in the decisions of **Morgan –Vs- Stubenitsky [1973] KLR 188** and **Wagichiengo –Vs- Gerald [1988] KLR 406**. The High Court decisions in **Western Pumps Limited – Vs- Joseph Wainaina Iraya t/a Queen Chick In and H.E. Daniel Arap Moi, HC (Milimani Commercial Courts) C.C. No.186of 2006** and **Metra Investments Ltd –Vs- Gakweli Mohamed Wawakah, HC (Milimani Commercial Courts) CC No. 54 of 2006** deal with the amended law, and are clear that matters have been made quite strict. If a party is seeking to enforce a contract in relation to land, the contract has to be in writing and signed by the parties to it and witnessed as required by the section. It is notable that in the Court of Appeal decision in **Nabro Properties Ltd. –Vs- Sky Structures Ltd and 2 Others [2002] 2KLR 299** there existed an executed contract, but the Memorandum and Articles of Association of the appellant required execution by two directors and yet the agreement was executed by one director. The Appellant, as purchaser, had failed to complete the contract. The Court of Appeal held that that was an invalid contract which could not entitle the appellant to an order for specific performance.

There is no dispute that no contract was executed between the Plaintiff and the Defendant. The Plaintiff refers to “correspondences” and “memorandum”, but these preceded the Sale Agreement that it prepared and signed before forwarding to the Defendant from whom it sought its signature. This Sale Agreement was not executed by the Defendant. I find the “correspondences” and “memorandum” constituted discussions and intention to enter into the Sale Agreement which eventually was not executed by the Defendant. Without the Agreement no order for specific performance can issue. It follows that, for the purposes of a temporary injunction, the Plaintiff does not have a *prima facie* case which can succeed if the first principle in **Giella – Vs- Cassman Brown & Co. Ltd [1973] EA 358** is considered.

I am aware that in a suit for specific performance damages are usually not an appropriate remedy, but that is in a case where there is a valid contract or agreement. In this case, there isn't. What the Plaintiff has paid is KShs. 22,500,000/= which is 10% of the purchase price. There is no evidence the money cannot be recovered from the Defendant which is a bank that is quoted on the stock exchange. No irreparable harm or loss has therefore been demonstrated.

The balance of convenience cannot tilt in favour of the Plaintiff who does not have a valid legal agreement with the Defendant that can be enforced by an injunction.

Prayer 4 sought an interlocutory mandatory injunction. The law is that such an injunction is granted quite sparingly and only in exceptional circumstances such as where the applicant's case is very strong and straightforward (**Showind Industries Ltd. -Vs- Guardian Bank Ltd & Another [2002] 2 KLR 378**). Such a case does not exist here.

Mr. Kihara asked the court to find that there exists a constructive trust between the parties, now that there was no executed Agreement. He relied on the conduct of the parties, correspondences and memorandum. He submitted that such trust is allowed by the proviso to section 3. Mr. Odera's response was that there was no evidence to support the finding of a trust in favour of the Plaintiff.

In the Plaintiff's advocates' written subdivisions he stated as follows:-

*"The plaintiff avers that it has a prima facie case with a high probability of success, as the defendant in spite of its denial, has executed the Agreement for Sale, received and taken into its benefit the 10% deposit sum of KShs. 22,500,000/=. The plaintiff submits that, the defendant is now holding title to the disputed property, on trust to the plaintiff."*

Either there was a legal contract signed by the parties, or there wasn't. In paragraph 8 of the Plaintiff states as follows:-

*"8. The Plaintiff contends relationship and ever since the execution of the contractual documents and the payments of the deposit price, the defendant hold the said property as a trustee by way of an implied or a constructive trust, pending the payment of the balance of the purchase price, the registration of a transfer in favour of the Plaintiff and completion and is obligated in law to finalise the sale transaction and/or to specific performance, notwithstanding that the plaintiff has failed to return the original Agreement for Sale."*

The Plaintiff is saying that there is a trust because the Defendant executed the contract but has failed to return the executed document and further that it has failed and/or refused to complete the transaction. The available evidence shows that there was no signed contract and that the failure on the part of the Defendant to sign the same, or to complete the contract was not deliberate but because of an intervening act, which is the injunction in the other case. There would therefore be no basis to construct a trust in favour of the Plaintiff, or at all.

In all, I dismiss the Plaintiff's application with costs.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF APRIL 2011**

**A. O. MUCHELULE**

**JUDGE**