



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

Civil Case 443 of 2009

MAHAT CARL JOHNSON.....PLAINTIFF/APPLICANT

VERSUS

MARLBOROUGH PROPERTIES LTD.....DEFENDANT/RESPONDENT

R U L I N G

This application relates to a notice of motion brought under sections 3, 3A and 63(e) of the Civil Procedure Act, Order XXXIX Rules 1, 2, 3 Order L Rules 1, 2 and 3 of the Civil Procedure Rule. It seeks the following orders

1. THAT this application be certified as urgent.
2. THAT service of this application be dispensed with in the first instance.
3. THAT pending the hearing and determination of this application interpartes the defendant, his servants, agents and anybody authorized by it be restrained by way of temporary injunction from advertising for sale, selling, transferring or interfering with, the property known as Flat No. B7 on L.R. No. 330/375
4. THAT pending the hearing and determination of this suit by the Defendant, his servants, agents and anybody authorized by it be restrained by way of temporary injunction from advertising for sale, selling, transferring or interfering with, the property known as Flat No. B7 on L.R. No. 330/375.
5. THAT a mandatory injunction do issue against the Defendant directing and compelling the Defendant to put the Plaintiff in possession of Flat No. B7 on L.R. No. 330/375.
6. THAT the costs of this application be provided for.

In his submissions Mr. Muga the applicant's counsel stated that he relies on the supporting affidavit of the applicant dated 24th June, 2009. Further to the above, the learned counsel submitted that in October 2005 the parties entered into a land sale agreement dated 21st October 2005. In the said agreement the defendant agreed to sell to the plaintiff the suit property known as L.R. 3330/375 at a price of Kshs.3.7 million. Consequently, the applicant paid Kshs.2,960,000/- leaving a balance of Kshs.740,000/- that had to be paid on the completion date. It was also agreed that the completion date was to be 14 months from the date of the agreement or within seven days of the registration of the lease. By 21st December 2006 the sale agreement had not been completed. Apparently, the defendant had taken a loan of unknown value from Shelter Afrique and hence there was need for a partial re-conveyance in order to discharge the suit properties from all encumbrances as per clause 11 of the agreement. Another reason for the delay is that the respondent had encountered problems of completing construction of the suit premises. Despite the predicament of the respondent the applicant indulged him up to the year 2008 when he transferred the suit premises. On 7th May 2009, the respondent purported to issue a completion notice requiring the applicant to pay the balance of the purchase price within 7 days. Later, the applicant paid the two cheques for Kshs.479,781/40 dated 12th May, 2009. The applicant also paid another cheque of Kshs. 260,218/60 on 15th May, 2009. However the respondent purported to reject the two cheques on the pretence that they were not paid within the stipulated time and wanted to rescind the whole agreement. In addition to the above, the respondent has also refused to put the applicant in possession of the suit property and has even threatened to resell the property to a third party. According to the applicant's counsel, the conduct of the parties was to waive the essence of time in these transactions. When the respondent was not able to complete the project on time, they sought the indulgence of the applicant that was innocently granted. It was the opinion of the applicant's counsel that the seven

(7) days given by the respondent was an ambush since the same was delivered on a Thursday and hence never gave the applicant reasonable time. To support his submissions, the applicant's counsel quoted the case of *Giella vs. Cassman Brown & Co. Limited [1973] EA* at page 358. Apart from the above, the applicant's counsel submitted that taking into account that the notice was issued on a Thursday, it was mischievous and unwarranted on the part of the respondent to rescind the contract for receiving the balance on 15th May, 2009 instead of 14th May, 2009. He was of the considered opinion that there was no delay on the part of the applicant taking into account that the whole transaction had been delayed by the respondent for almost four years. Even assuming that there was one day delay in completing the transaction, it was not unreasonable or inexcusable to defeat the applicant's right to the property. In support of his submissions, he quoted the case of *Jamunyu vs. Nyaga [1983] KLR pg. 282* where the court stated:

"Where the defaulting party pays the balance within a reasonable time, equity in all probability would apply, and he would be entitled to the transfer."

The learned counsel also submitted that the cheques were never returned to the applicant who is willing and able to complete the contract. He also pointed out that the property has already been transferred to the plaintiff and what remains is for the respondent to release the keys and to allow the plaintiff to access the said property and enjoy quiet possession. The respondent has not only refused to release the keys but has also threatened to sell the said property and hence extinguish the plaintiff's rights. It was his view that if the respondent is allowed to sell the property, then the applicant will suffer irreparable loss and damage. He concluded by stating that in the plaint, they have prayed for specific performance and that in that kind of a suit, damages are not an adequate remedy. It was on that note that they have prayed for prayers No. 4, 5 and 6. On the other hand Ms. Wakiugu for the respondent has opposed the application while relying on the replying affidavit of Nicholas Stock. She pointed out that the nature of the reliefs being sought by the applicant are of an equitable nature. Secondly, she also submitted that the grounds on which such order can be granted are well settled. Besides the above, the respondent's counsel stated that prior to the execution of the sale agreement the applicant had paid Kshs.250,000/- as deposit. She further acknowledged that the applicant later paid a further deposit of Kshs. 2,960,000 in October, 2005. She also confirmed that the completion date was 14 months from the date of sale or within 7 days of the registration of the lease in the applicant's favour or within 7 days of the issuance of the Certificate of Occupation by the Nairobi City Council – whatever came first. Ms. Wakiugu also confirmed that the 14 months were to expire on 21st December, 2006. Significantly the respondent's counsel did not deny that there was a delay in the completion of the construction. However, she explained that the circumstances were beyond the respondent's control as her client had to terminate the contract of the contractors for failing to proceed regularly and diligently. Later, the contractor was granted temporary injunctive orders which were lifted around September – October 2007. She further informed the court that there was another contractor who was appointed thereafter. Following the above, the respondent's counsel communicated to the applicant's counsel as shown in Ex. 'NS5' in which he requested the latter to proceed with the stamping of the lease so that the registration process proceeds or at the very least coincide with practical completion which was to be at the end of April 2008. She emphasized that the delay by the applicant was in proceeding with stamping and valuation. Further to the above, she also submitted that on 30th September 2008 the applicant presented the cheque for stamp duty of Kshs.148,510/- that enabled the respondent's counsel to proceed with valuation that resulted into the government valuer endorsing the lease with the higher value than that in the lease document. Specifically, the re-assessment required additional stamp duty of Kshs.92,000/-. Though several reminders were sent to the applicant on the above balance, he never responded. It was only after the respondent threatened to charge interest that the applicant through his advocates remitted the cheque for additional stamp duty. On 11th October 2008 the applicant stated that he would only pay the balance after the lease had been registered in his favour. The consequence of failing to remit the balance compelled the respondent to pursue a partial re-conveyance and the respondent's counsel insisted that the balance of the purchase price be deposited in an escrow account. Following a stalemate the applicant insisted that he would only release the balance on registration of the lease. *Consequently, the applicant had to wait for the global re-conveyance which would discharge all the remaining unregistered titles in the development*. According to the respondent's counsel his client had committed himself to give the applicant an encumbered property. As a result of the above, it took a while before the global re-conveyance was issued to the respondent by Shelter Afrique who were the financiers. She further submitted that the applicant breached the sale agreement by failing to remit the balance of the purchase price by 21st December, 2006 which was 14 months after execution of the sale agreement. She also took issue with the fact that the applicant had failed to remit the balance of the purchase price after receipt of the Certificate of Occupation from the Nairobi City Council. It was also her submission that since the applicant had been in breach of the agreement and had tainted his hands he does not deserve any equitable relief. It is on that score that she has urged this court to dismiss the application. On 23rd November 2009 Mrs. Tongoi made an appearance on behalf of the respondent. She submitted that they had indicated to the applicant that the head title at that time had been charged to Shelter Afrique for purposes of financing and at no time did the applicant raise any objections to the delay that the transaction had been subjected to. She observed that the applicant proceeded to keep silent all through when he had a remedy to rescind the agreement in terms of clause 16A. According to her, that inaction on the part of the applicant is tantamount to estoppel and hence the applicant cannot now turn around and cite delay on the respondent's part and equate it to a breach on their part for failure to pay the balance within the stipulated time. Mrs. Tongoi also took issue that when the documents were ready and were delivered to the applicant's counsel through a letter dated 23rd April 2009, no cheque was forthcoming within 7 days of the delivery of the said letter. In response to the above, the respondent's counsel wrote a letter dated 7th May 2009 Ex. 'NS13' which gave a completion notice under clause 17 of the agreement. She further submitted that even if the principles of equity were to be ascribed to the case, the total balance of Kshs.740,000/- ought to have been forwarded to the respondent's advocate for the transaction to come to a close. She further submitted that the action of returning the cheque to the sender actually constituted non acceptance of the same. She further clarified that the returned cheques which were refused by the applicant's advocate are still lying in their offices. She further clarified that the fact that the said cheques have not been banked to date sent a clear signal that they were not accepted in the eyes of the respondent and hence the contract was

rescinded. Besides the above, she further submitted that the delay in completing the project on time was not the *doing of the respondent but that of the contractor who was previously engaged by the financier Shelter Afrique*. According to Mrs. Tongoi the applicant has failed to demonstrate to the court how it would suffer irreparable loss were the injunction not to be granted. It was their position that an injunction would not be an equitable remedy at this stage. In support of her submissions, she quoted the following cases:

- *Gem Securities East Africa Limited vs. Uzima Press Limited Civil Suit No. 635 of 2005.*
- *Assanand vs. Pattitt [1989] KLR page 252*
- *Manzoor vs. Baram EALR [2003]*
- *Nhamuyu vs. Nyaga [1983] KLR*
- *Ramji Vekaria vs. Municipal Council of Eldoret Civil Suit No. 145 of 2004*
- *Locabil International Finance Limited vs. Agroexport & Others*
- *Western Pumps Limited vs. Joseph Wainaina Iraya t/a Queen Chick Inn – Civil Case No. 186 of 2006*
- *Ndungu Boro vs. Peter K. Njuguna - Civil Case No. 96 of 2002*
- *Margaret Alivdza vs. L.Z. Engineering Construction Limited*

She concluded her submissions by stating that an injunction issued at this stage would be extremely prejudicial and detrimental to the respondent.

This court has carefully considered the opposing submissions by the learned counsels. From the above, it is apparent that both parties contributed largely to the delay in the completion and execution of the agreement that they had earlier entered into. On the part of the applicant, there was definitely a delay in making payments at the appropriate time. That has been admitted as shown in the submissions made by the applicant's counsel. On the other hand, the respondent has also admitted that he delayed in completing the project due to the problems that he had with the main financier who was Shelter Afrique. Secondly, the respondent's counsel has also admitted that they had problems with the first contractor who had to be removed from the site. Under those circumstances, it is not fair for any of the parties to wholly blame the other for the delay in completion of the agreement that they had actually entered into.

In the case of ***Giella vs. Cassman Brown & Co. Limited*** the court held:

“(iii) the court’s discretion to grant an injunction will not be interfered with unless it has not been exercised judicially;

(iv) an applicant must show a prima facie case with a probability of success.

(v) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;

(vi) when the court is in doubt, it will decide the application on the balance of convenience.”

Having considered all the factors carefully, the court is of the considered opinion that had the parties not taking extreme positions then they would have reached a compromise. This was a matter which could have easily been settled between the parties given the circumstances of this case. This court finds that the balance of convenience is actually in favour of the applicant. The upshot is that, I hereby grant the application in terms of prayer No. 4. Specifically, I hereby direct that pending the hearing and determination of this suit, the defendant, his servants, agents and anybody authorized by it be restrained by way of temporary injunction from advertising for sale, selling, transferring or interfering with, the property known as Flat No. B7 on L.R. No. 330/375.

Those are the orders of this court. Costs in the cause.

**MUGA APONDI
JUDGE**

Ruling read signed and delivered in open court in the presence of:

Muga - Plaintiff's Counsel

Mrs. Tongoi - Defendant's Counsel

**MUGA APONDI
JUDGE
10TH FEBRUARY, 2010**