



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Environmental & Land Case 347 of 2008

HENRY KOWERO OGOYE.....1ST PLAINTIFF
COLLETA AWUOR OGOYE.....2ND PLAINTIFF
VERSUS

SAMMY OBERE OWUOR.....1ST DEFENDANT
GERALDINE O'REILLY OWUOR.....2ND DEFENDANT

R U L I N G

The plaintiffs moved to this court, by way of a plaint dated 21st day of July 2008 and filed on the 22nd day of July 2008. The salient features of the same are that:-

- The defendants are the registered owners of land parcel number LR number 15065/19 situate in Lang'ata area.
- Allege there is a sale agreement between the plaintiffs and the defendants over the sale and purchase of the said land comprising (0.198ha) at the purchase price of Kshs 4,000,000.00.
- They paid 10% deposit and further payments to the tune of Kshs 1,515,315.00.
- Completion date was 90 days from the date of the execution of the agreement or 7 days from the date of the execution of the transfer in the purchasers plaintiffs names and charge infavour of the financier which was Housing Finance of Kenya HFCK.
- It was the duty of the defendants to attend to subdivision which was done giving rise to two deed plans namely 287516 and 287517 dated 12th June 2008 respectfully.
- In pursuance of the said transaction, the plaintiffs went a head and secured finance from the Financier which were to be released upon the Registration of charge against the resultant title.
- Instead of forwarding title for the registration of the charge the defendants gave a notice of payment invoking default on the part of the plaintiffs and threatened to rescind the agreement.
- The defendants declined to execute the transfer documents.
- They plaintiffs have all along been ready and willing to complete their part of the purchase agreement and had the transfer been executed in time the charge would have been registered over the half share belonging to the plaintiffs and the transaction would have been settled.

In consequence thereof, the plaintiffs seek the following reliefs:-

- (a) *Specific performance*
- (b) *A permanent injunction restraining the defendants by themselves, their agents and/or servants from dealing and/or disposing off all that property known as LR number 15065/19.*
- (c) *Costs of this suit.*
- (d) *Such further or other relief as this honourable court may deem fit to grant.*

Simultaneously with the filing of the suit was also filed an interim application seeking the granting of an interlocutory injunctive relief. Five prayers are sought namely:-

- (1) Spent
- (2) Spent
- (3) That the defendants be restrained by themselves, their agent and/or servants until further order from disposing of and/or dealing with all that parcel of land known as LR number 15065/19 containing by measurement naught decimal one nine eight (0.198 ha) of a hectare situate on Bogani Road Karen.
- (4) That a date be fixed for hearing of this application.
- (5) That the costs of this application be provided for.

The grounds in support are set out in the body of the application, supporting affidavit and oral submissions in court. The major ones are a reiteration of the content of the plaint, whose salient features of the same are already on the record herein. Counsel for the applicant stressed the following in his oral submissions in court.

- They seek prayer 3 of the interim application for an interim injunctive relief in the manner sought pending the hearing and the determination of the suit.
- There is no dispute that the disputants herein entered into a sale agreement over the subject matter of the suit.
- The sale agreement made provisions for the completion time which was 90 days from the signing of the sale agreement or 7 days after completion of transfer.
- Subdivision was to be effected within that time frame but herein it was done beyond the 90 days.
- The defendants issued a completion notice in error as they could not do so before the charge in favour of the financier had been effected.
- The defendant were aware that part of the purchase price was being sourced from a Financier.
- Contend the completion notice was an attempt by the defendants to walk away from the transaction without any justification.
- The defendants cannot complain about delay in obtaining subdivision when it was their obligation to obtain the subdivision.
- The fact that the plaintiffs are the ones who carried out the subdivision does not water down the vendors obligation to carry out subdivision.

Turning to the notice of the preliminary objection, they stressed the following.

- Failure to comply with order 1 rule 12(2) does not make the suit incompetent as there is no time frame within which to file authorization by one litigant to a co-plaintiff to depone the verifying affidavit on his behalf or to file own verifying affidavit.
- Omission to give an undertaking as to damages does not invalidate a suit as there is room for compliance.
- The defendants purported there to sell to 3rd parties violates section 52 of the ITPA since the suit was already in court.
- Contends that the court, has jurisdiction to stop the defendants from disposing off the suit land pending the determination of the main suit.
- They contend that on the facts presented herein they are entitled to the reliefs sought as they have demonstrated a prima facie case to the relief of specific performance.

In opposition, the defendant filed a preliminary objection dated 29th day of July 2008 and filed the same date. 5 objections were raised namely:-

- (1) *abandoned.*
- (2) *The plaint is exfacie incompetent and should be struck out with costs as the verifying affidavit sworn by Henry Kowero filed therewith is incompetent for being in breach of the mandatory provision of order 1 rule 12 (2) of Civil Procedure Rules.*
- (3) *The claim by the 2nd plaintiff should be struck out with costs for failure to file as mandatorily required by order VII rule 1(2) of the CPR.*
- (4) *The application dated 21st July 2008 is fatally incompetent as the applicants have not made an undertaking as to damages which is pre-requisite to an application for an injunction.*
- (5) *The application dated 21st July 2008 is fatally incompetent as a prayer for an interlocutory order of injunction cannot be entertained when the contract relied on provides for damages by way of interest as against the parties in default. Award of damages for the breach.*

In addition to the grounds in the preliminary objection, there is a replying affidavit sworn by one Sammy Obare Owuor 2008 and filed the same date and one supplementary replying affidavit deponed on the 7th day of November 2008.

The salient features of the replying affidavit are as follows:-

- Concede signing and existence of a sale agreement between them and the plaintiffs for the sale of land reference number 15065/19 as deponed to at paragraph 2, 3 and 4 of the supporting affidavit.
- Concede receiving some payments from the applicants but contend that these were erratic and not in tandem with the terms of the sale agreement which clearly specified how the same were to have been made.
- That the applicants never obtained deed plans within the stipulated 90 days as the same were issued on 12th June 2008.
- Noticing that the applicants were dragging their feet, they respondents instructed their advocates to serve on them a completion notice dated 19th May 2008.
- Deny participating in the subdivision of the suit land and their advocates never received the transfer.
- They Respondents only received a letter applying for a loan but not information or proof of approval of the said loan.
- Contend that upon termination notice taking effect the Respondents entered into a sale agreement with another willing buyer.
- Contends applicants have moved the court with soiled hands as they filed the same 12 months after the contract was rescinded in the first instance, and in the second instance they have withheld vital information from the court.

In their oral highlights in court, the learned counsel for the respondent stressed the following:-

- Maintained suit is in competent because order 1 rule 12(2) had not been complied with as only the first plaintiff filed a verifying affidavit without authority from the 2nd plaintiff for the 1st plaintiff to depone on her behalf.
- Since the plaint is joint, once the same is struck out by reason of the 2nd plaintiff failing to file a verifying affidavit, nothing will

be left for the 1st plaintiff.

- The court, is urged to be guided by case law in which plaints or suits were struck out by reason of defective verifying affidavits.
- Rely on principles of injunctions exhibited, where by to demonstrate that where there is no undertaking as to damages an injunction cannot issue.
- Contend an injunction is not available because there is a remedy of an award of damages for breach of contract.
- Contend, it is the applicants who are in default of the sale agreement and as such they are not entitled to an injunction as the delay in the completion of the transaction is attributable to them.
- Contend that the doctrine of Lis pendens does not operate here to shield the applicants as the suit was filed after the Respondents had signed another sale agreement with a 3rd party.
- Court to note that if an injunction is granted, it will amount to condemning the 3rd party purchaser unheard.

In reply, counsel for the application stated that giving of an undertaking can be made as a condition for granting of the injunction.

On the law, and case law, the court, was referred to section 52 of the transfer of Property Act which reads:- : *During the active prosecution in any court having authority in British, India or establishing beyond the limits of British India by the governor General in council of a contentious suit or proceeding in which any right to immovable property specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party, there to under any decree or order which may be made therein, except under the authority of the court on such terms as it may impose.*”

The case of MAWJI VERSUS US INTERNATIONAL UNIVERSITY AND ANOTHER (1976-80) 1 KLR 229 where it was held inter alia that “*the court, has power to prevent a breach of the provisions of section 52 of the transfer of property Act in proceedings before it, in which any right to immovable property is directly and specifically in question by imposing a prohibitory order against the title of the property to prevent all dealings in it pending the final determination of the proceedings except under the authority of the court, and upon such terms as it may impose*”.

The case of BHARMA I KANJI SHAH AND ANOTHER VERSUS SHAH DEPARDAVJI (1965) EA 91 where it was held inter alia that “*an interlocutory injunction restraining the defendant from exercising the power of sale should be granted on the usual undertaking as to damages and on imposition of additional terms.*”

The case of AMINA OMARI AND FREDRICK SUTER KILIMO VERSUS LONRHO AGRI-BUSINESS AND KENYA AIRPORTS AUTHORITY ELDORET HCC NO 42 OF 2002 decided by Gacheche J on the 24th day of February 2006. In which Gacheche J struck out the suit of the 2nd plaintiff because he had not complied with the provisions of order VII ruled 1(2) and 3 CPR by filing a verifying affidavit to the plaint and for failure to take steps to comply despite being put on notice as regards this omission.

The case of UHURU HIGHWAY DEVELOPMENT LTD AND 3 OTHERS VERSUS CENTRAL BANK OF KENYA AND 4 OTHERS (2003) KLR 62 which dealt with among others the court of appeals’ right to interfere with the superior courts’ exercise of judicial discretion a matter not relevant to this ruling.

The case of PETER NJUNGE NG’ANG’A AND KEZIAH WANJIKU NG’ANG’A, THE JOINT ADMINISTRATORS OF THE ESTATE OF GEORGE MOCHU KARUIKI NG’ANG’A (DECEASED) VERSUS THE ESTATE OF ALI OMAR (DECEASED) AND KHALID HIHAL HAMAD NAIROBI HCC NO 973 OF 2001 decided by Ang’awa J on the 6th day of November 2003, in which a preliminary objection was raised as to the competence of the suit by reason of only one plaintiff filing a verifying affidavit, counsel filing a

verifying affidavit to an amended plaint. The court held:-

- (i) *An advocate is not permitted under the rules to file a replying affidavit.*
- (ii) *The rules do not permit a verifying affidavit to be filed to an amended plaint. The verifying affidavit so filed by counsel was struck out on two fronts namely because it was not supposed to have been filed in the first place, and in the second place because it had been deponed by counsel.*
- (iii) *The original plaint had only one deponent to the verifying affidavit. The other two plaintiffs were given time by the court, to comply by filing their own verifying affidavit.*

The case of ANTHONY KABURI KARI AND TWO (2) OTHERS VERSUS RAGATI FACTORY CO LTD AND 10 OTHERS NAIROBI MILIMANI COMMERCIAL COURT CIVIL CASE NO 876 of Ransely J as he then was, on the 18th day of July 2001. In which the learned judge as he then was struck out the 2nd and 3rd plaintiffs from the suit because the first plaintiff had deponed the verifying affidavit without the authority of the other two plaintiffs.

On the courts assessment, the Rival arguments herein, have presented, the court with 2 fronts for determination, namely, the technical objection front and the merit front. The technical front deals with the objection to the competence of the plaint by reason of only one plaintiff having filed a replying affidavit and failure to comply with the provisions requiring or permitting one plaintiff to depone a verifying affidavit on behalf of the other and the effect of such none compliance. Where as the merits aspect deals with the issue as to whether an injunctive relief sought by the plaintiff applicant is merited or not and if merited on what basis and terms is it to be granted.

The technical objection are based on the order VII rule (1) (2) (3), and order 1 rule 12 (2) CPR provisions. These require that a plaint be accompanied by a verifying affidavit. Where there is more than one plaintiff, each and every plaintiff is to file a verifying affidavit, failing which the other plaintiffs can authorize in writing one of them to depone the verifying affidavit and the same has to be filed in court. Herein it is common ground that only the first plaintiff filed a verifying affidavit on his behalf.

Reference was also made to case law emanating from courts of concurrent jurisdiction with this court, in some of which non compliance invited penal consequences, where by the offending pleadings were struck out, while in others the offending pleadings got a reprieve from the court, where by the offending pleadings were spared by the litigants being given time within which to comply. The question that the court, has to ask itself is which of the two routes is it to take in resolving the technical objection raised herein. In this courts' opinion, the route to be taken will depend on the courts' construction of the relevant provisions herein. Order 1 rule 12 (1) (2) reads:-

“0.1 rule 12 (1) where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, anyone or more of them may be authorized by any other of them to appear pleading or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving if an shall be filed in the case.”

Order VII rule 1(2) and (3) on the other hand read:- *“O.VII rule 1(2). The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.*

(3) The court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with sub rule (2)”

The court of appeal has construed these provisions in the case of RESEARCH INTERNATIONAL EAST AFRICA LTD VERSUS JULIUS ARISI & 213 OTHERS NAIROBI CA 321 OF 2003 decided on 27th day of April 2007. The construction of order VII rules (1) (2) and (3) is

discussed by the law lords of the CA starting page 3 – 10 and order 1 rule 12(2) CPR at pages 9-10. In respect of both the following observations were made. At page 10, line 10, from the top, it is observed thus:- *“in our view, the true construction of rule 1(2) of order VII CPR is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing and files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule”*. Page 9, line 8 from the bottom:- *“ rule 12(2) of order 1 Civil Procedure Rules which requires that the authority if granted should be in writing and signed by the person giving it. Further that such authority should be filed in the case.”* Pg 10, line 3 from the bottom: *“ Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provision of rule 1(2) of order VII Civil Procedure Rule and that their suit was liable to be struck out by the superior court under rule 1(3) of order VII Civil Procedure Rules. The superior court however had a discretion. It had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the plaintiff another opportunity to comply with the rule.*

From the above reasoning of the court of appeal in their cited decision, it is proper to conclude that.

- (1) It is mandatory for each plaintiff to file a verifying affidavit verifying the content of the plaint.
- (2) Where more than one plaintiff is suing, each one of them has to swear a verifying affidavit.
- (3) In the absence of compliance with number 2 above the additional plaintiff can authorize anyone of the other plaintiffs to depone so on his/her behalf by complying with the provisions of order 1 rule 12(2) by filing a written authority in the case.
- (4) Non compliance with order VII rule 1(2) is not totally fatal. There is a reprieve in order VII rule 1 (3) whereby the court, has a discretion from the use of the word *“may”* to allow a party comply. As reasoned by the court of appeal each case has to be viewed on its own circumstance. This court, has no doubt that is why in some decisions none compliance invited penal consequence while in others the defaulters were given a reprieve.

This court, has applied the a fore setout reasoning to the facts of this case and it is satisfied that the default of the 2nd plaintiff to depone a verifying affidavit on the one part, and on the second part her failure to authorize the first plaintiff to depone the verifying affidavit on her behalf is not fatal to the entire suit. Had the circumstances warranted a penalty it is only her name which would have been struck out. The circumstances that prevailed in the cases where penal consequences be fell the defaulters, it is on record from the facts of those cases that the victims were alerted of the default but took no action. Herein after the default was raised, counsel on record for the plaintiffs said that they are willing to comply. For this reason the default will not attract penal consequences but a reprieve whereby the 2nd plaintiff will be allowed time to comply.

Turning to the merits of the application, it is on record that what the applicants are seeking from the court, at this interim stage is an injunctive relief. As per case law, cited, all that the applicants need to do is to bring themselves within the ambit of the ingredients for granting one as set out in the case of GIELLA VERSUS CASSMAN BROWN & CO LTD (1973) EA 358, which are:-

- (a) *A demonstration that the applicant has a prima facie case with a probability of success.*
- (b) *A demonstration that if an injunction is not granted, the applicant will suffer irreparable loss which cannot be compensated for in monetary terms.*
- (c) *Where the court, is in doubt about ingredient (a) – (b) it will decide the matter on a balance of convenience to both parties.*

In addition to the above there are other ingredients which have been developed by case law that this court has judicial notice of namely:-

- (1) That the injury to be suffered by the plaintiff were he to be denied an injunction at the interlocutory stage and then succeed at the end of trial, out weighs the injury that the defendant stands to suffer should the injunction be granted at the interlocutory stage then the plaintiff losses at the end of the trial.
- (5) Even if damages are on adequate remedy, an injunction will none the less issue if the respondent is shown to have acted in an oppressive and high handed manner. See the case of WAITHAKA VERSUS INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION (2001) KLR 374 decided by Ringera J as he then was, where he held inter alia that; *it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If the adversary has been shown to be high handed or oppressive in its dealing with the applicant this may move a court of equity to hold that one cannot violate another citizens rights only at the pain of damages*". The case of FILM ROVER INTERNATIONAL LTD AND OTHERS VERSUS COMMON FILM SALES LTD (1986) 3 AER 772 where it was held inter alia that "in determining whether to grant an interlocutory injunction or not, the question for the court, was whether the injustice that would be caused to the plaintiff if an injunction was refused and he succeeded at the trial out weighed the injustice to be suffered by the defendant if an injunction was granted at the interim stage and the defendant succeeded at the trial. The case of ALKMAN VERSUS MUCHUKI (1984) KLR 353, where it was held inter alia that:
 - (i) "Equity does not assist law breakers.
 - (ii) *A wrong doer cannot keep what he has unlawfully taken just because he can pay for it.*"

This court has applied the above principles to the rival arguments herein and the court, makes a finding that what the applicants have put forward as their grounds in support are:-

- There is an agreement of sale in place.
- There is part payment.
- It is the defendants who defaulted on their obligation under the contract.
- They are ready and willing to comply.
- They are ready and willing to comply with terms as to undertaking.

The defendants have countered this by stating that:-

- Indeed concede existence of a sale agreement
- Accept part payment of the purchase price but which was even not paid on terms and erratically paid.
- There was time within which to complete, which was of the essence and when the applicants failed to comply, they respondents, issued the completion notice which was not complied with, leading to the rescission of the contract.
- They, respondents, had no alternative but to sell the property to another willing buyer.
- That it is the applicants who were in default of their obligations under the sale agreement as they failed to raise finance in time and failed to carry out the subdivision of the property within the 90 days stipulated.

This court, has revisited the said agreement of sale HKO1 attached to the supporting affidavit, and perused clause 1 and 2 thereof and finds that, the two clauses simply talk of sale of an undivided half share of the suit plot. There is no stipulation as to which part was to

initiate and meet the cost of subdivision. This is therefore an arguable point.

Clause 3 on the other hand deals with mode of payment while clause 4 deals with completion period. For purposes of the record these read “3 the purchase price is Kenya shillings four million (Kshs 4,000,000.00 payable as below:-

- (a) *The sum of Kenya shillings one hundred thousand (Kshs 100,000.00) being part of the deposit towards the purchase price paid directly to the Vendors before the signing of this agreement.*
- (b) *The sum of Kenya shillings Three hundred thousand (Kshs 300,000.00) being a further payment towards the deposit to make a total of Kenya shillings four hundred thousand (Kshs 400,000.00)*
- (c) *The balance of the purchase price in the sum of Kenya shillings three million six hundred thousand (Ksh 3,600,000.00) shall be payable seven (7) days upon the successful registration of the transfer of a half portion by way of sub-sale in the purchasers names and charge in favour of the financier shall be paid to the vendors.*
- (4) *The completion date is ninety (90) days from the execution of this agreement or seven (7) days upon the successful registration of the Transfer in the purchasers names and charge in favour of the Financier”. A construction of these clauses reveals that on their face, they do not specify who was to carryout the subdivision. They further reveal that completion date was to be within 90 days or 7 days after transfer in the purchasers names.*

The court has been informed that no transfer documents were drawn up and signed. Each side has blamed the other for non completion. Lack of provision as to which of the two parties was to undertake subdivision in order to facilitate transfer to the plaintiffs, there is provision in clause 5 thereof that the sale was subject to law society conditions of sale (1989) in so far as they are not inconsistent with the conditions contained in the agreement or specially excluded.

Scheming through the said law society conditions annexed as part of anneture HKO 1, reveals that vide clause 9 thereof, the vendor is supposed to have delivered the abstract of title to the purchaser within 14 days from the date of the contract. There has been no deponement from either side that this condition was complied with.

There is also clause 17 on subdivision where the sale requires subdivision. A perusal of the same reveals the following:- “ 17 where the sale requires the subdivision of any property, immediately on the signing of the contract, the vendor shall at his own expense.

- (1) *Apply for approval of the subdivision.*
- (2) *Course a survey to be carried out and deed plans issued by the Director of surveys and*
- (3) *Where, the title is registered under the Registered land Act course mutation or subdivision form to be prepared and a separate register for the property to be opened in accordance with section 25 (2) of the registered land Act.”*

In the absence of existence of a contrary provision in the sale agreement, contrary to the content of clause 17 of the law society conditions, there is no way the defendants can wriggle out of their obligations under this clause. It therefore follows that the applicants have an arguable case with a probability of success in so far as the defendants have deponed that the major reasons for rescinating the contract was by reason of failure to complete the contract in time more so when it is stated, that the contract was rescinded after notice to complete had been given by the defendants which notice the applicant state that it was given in error.

From the above it is clear that if clause 9 and 17 of the law of society conditions which have not been specifically excluded by the agreement of sale, are construed in the applicants favour, then the court, is likely to rule in their favour that the respondents moved prematurely before they fulfilled their part of the contract and as such they should not be allowed to benefit from their wrong. This too, will

give the applicants an arguable case with a probability of success because should the court, rule that the respondent was at fault on moving in the manner moved, then the chances of applicants succeeding on their claim for specific performance is high.

Issue was raised about inconveniencing a 3rd party who is an innocent party to when the Respondents moved to enter into another sale agreement with. This other 3rd party is not a party to these proceedings. There is no deponement from him demonstrating how inconvenienced him/her or they are by the current proceedings. As such, the court, cannot make findings on the said allegation.

As regards the anchoring of the interim interlocutory injunctive relief, the court is of the opinion that the same is properly anchored on the prayer (b) in the reliefs irrespective of failure of the interim relief being mentioned in the body of the plaint.

As regards failure to give an undertaking as to damages, this court, is of the opinion that failure to do so does not disentitle the reliefs sought in the interim application because a reading of order 39 CPR does not state that where no undertaking as to damages has been given, the application is faulted. The use of the word "may" makes it discretionary for the court, to make an order for the same at the exparte stage or after the inter parties hearing. The court, therefore agrees with the assertion of the applicant that an undertaking as to damages can be given even after the interparties hearing. More so when the exparte order did not provide for the same.

As regards the issue of damages, indeed the value of the property can be quantified and paid for as damages. How ever in view of the findings of the court, that it is the Respondents who did not perform their part of the contract, allowing them to benefit from their default will amount to allowing them act in a high handed and oppressive manner towards the applicant. This act of high handedness and oppressiveness disentitles the respondent to the plea of damages being an adequate remedy and entitles the applicants to an interlocutory injunctive remedy.

For the reasons given in the assessment, the court proceeds to make the following orders.

- (1) The suit is not incompetent in its entirety by reason of the 2nd defendant failing to comply with the provisions of order VII rule 1(2) CPR and order 1 rule 12(2) CPR by reason of failing to file a verifying affidavit and authority to the first plaintiff to depone the same on her behalf because the court, has a discretion either to strike out the name of the 2nd plaintiff from the plaint or allow the defaulting plaintiff reprieve by giving a time frame within which to comply. The circumstances demonstrated herein, warrant the court, exercising its discretion infavour of the 2nd plaintiff by allowing her time within which to comply. The said record plaintiff has 30 days from the date of the reading of the ruling to either file a verifying affidavit or file an authority authorizing the first plaintiff to so depone on her behalf and to deem the verifying affidavit on record to have been so deponed on her behalf.
- (2) In any case even if the suit of the 2nd plaintiff were to be faulted, it is the name of the 2nd plaintiff which would have been struck off but not the entire suit.
- (3) Failure to give an undertaking as to damages at the time the exparte order was made does not disentitle the applicants to the said relief as a reading of order 39 CPR leaves room for the same to be given at the inter parties hearing stage. For this reason the applicant is given leave to give an undertaking as to damages within fourteen days from the date of the reading of the ruling.
- (4) On the merits of the application dated 21st day of July 2008, and filed on the 22nd day of July 2008, the court is inclined to grant prayer 3 thereof pending hearing and determination of the suit because:-
 - (a) The applicants have demonstrated that they have a prima facie case with a probability of success because the Respondent moved to rescind the contract before they respondents had fulfilled their part of their obligation under the contract of subdivision and enabling the transfer to be effected.
 - (b) Though damages can be quantified and paid, the fact that it is them who failed to fulfill their part of the contract, allowing them to take refuge under the payment of damages shield will amount to benefiting them from their own

wrong. Their conduct of moving to rescind the contract knowing that they were at fault amounts to behaving in a high handed and oppressive manner to the applicant which disentitles the respondents from taking refuge under the adequacy of damages, relief and entitles the applicants to an injunctive relief.

- (c) The balance of convenience is also in favour of the applicants as they made part payment which though are alleged to have been erratically, made were not rejected and tendered back, the Respondents has been faulted for moving in the manner moved, the applicants are willing to give an undertaking as to damages, and the 3rd party sought to be protected by the Respondent is not party to these proceedings, and has not complained of any inconvenience.
- (5) The applicants had a genuine complaint when they moved to the court, in the manner they did and so they will have costs of the application.

Dated, Read and delivered at Nairobi this 5th day of February 2010.

R.N.NAMBUYE

JUDGE