REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Case 212 of 2009

CAPRICON BUILDERS & ALLIED LTD.....PLAINTIFF
VERSUS
1. MAGANA HOLDINGS LIMITED
2. RANK GLOBAL MANAGEMENT LIMITED.....DEFENDANTS

R U L I N G

This is an application by **chamber summons dated 09.07.2009** for temporary injunction, essentially to preserve the suit land, **L.R Kajiado/Kitengela/Ololooitikoshi/22185,** pending disposal of the suit.

The Plaintiff's case as set out in the **plaint dated 09.07.2009** is that by a written sale agreement, it bought from the 1st Defendant the suit land and paid the full purchase price. The purchase price was KShs. 350,000/=. The Plaintiff has pleaded that the purchase price was paid partly directly to the 1st Defendant and partly through the 1st Defendant's duly appointed agent, the 2nd Defendant. The Plaintiff therefore seeks specific performance of the contract.

The Defendants have not filed defence; it would appear that they may not as yet have been served with summons to enter appearance.

The application is brought under **Order 39, rules 1, 2** and **3A** of the **Civil Procedure Rules** (the **Rules**). It is supported by the affidavit of one **George Kamau Ngochi,** a director of the Plaintiff. To that affidavit are annexed various documents, including copies of sale agreement, title deed, receipts and some correspondence between the parties.

The Defendants have opposed the application. The 1st Defendant filed a replying affidavit on 24.09.2009. The 2nd Defendant filed grounds of opposition dated 02.11.2009.

The 1st Defendant's replying affidavit is sworn by one **Jack Okello,** the property manager of the 1st Defendant. He points that the copy of the sale agreement exhibited by the Plaintiff is neither dated nor witnessed, nor sealed by the Plaintiff. He also points that the sale agreement exhibited is not executed by the 1st Defendant. It is the 1st Defendant's case therefore that the sale agreement is not valid. Without a valid written sale agreement, the 1st Defendant further argues, the sale transaction was null and void from the beginning.

The 1st Defendant has also denied that the 2nd Defendant was its duly appointed agent to receive any part of the sale price from the Plaintiff on its behalf. The 1st Defendant has also raised issues in respect of some of the receipts exhibited.

Finally, the 1st Defendant has pointed out that the sale would have been subject to the provisions of the **Land Control Act, Cap 302** (hereinafter called the **Act**)and that there is no land control consent. As such the transaction would be void.

The grounds advanced by the 2nd Defendant are, substantially that the Plaintiff has not met the legal requirements for the grant of the temporary injunction sought. Those requirements are now well established. The Plaintiff must first demonstrate that he has a *prima facie* case with a probability of success. Secondly, the Plaintiff must demonstrate that he stands to suffer irreparable loss unless the order sought is granted. If the court is unable to decide the application on those two points, it will decide it upon a balance of convenience.

I have considered the written submissions filed on behalf of the parties, including the cases cited.

It was the duty of the Plaintiff to exhibit a sale agreement that has been duly executed by the parties to the transaction. It has not done so. For purposes of the present application, it is not sufficient that the Plaintiff might, at the trial, be able to demonstrate that there was indeed a sale agreement duly executed by the parties.

Secondly, the Plaintiff concedes that the transaction was subject to the provisions of the Act, and that there was no land control consent obtained. The Plaintiff argues, however, that it was the duty of the 1st Defendant to obtain the consent and that in any case, the same can be obtained at any time.

Section 6(1) of the Act provides that any transaction that is subject to the provisions of the Act,
"...is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act. "
Section 8 (1) of the Act provides as follows:-

"An application for consent in respect of a controlled transaction shall be made in the prescribed from to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto;

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit."

Needless to say, no application to this court has been made for extension, and no extension of the period has been obtained.
Section 7 of the Act provides as follows:-

"**If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid , but without prejudice to section 22."**

It is clear that the Plaintiff's available remedy is for **refund** of the purchase price paid and not **specific performance** of the sale.

The Plaintiff has thus not made out a *prima facie* case for specific performance with a probability of success. The Plaintiff's available remedy being refund of the purchase price paid, it has not demonstrated that it stands to suffer irreparable loss unless the order sought is granted.

In the result, I find no merit in this application. It is hereby dismissed with costs to the 1st Defendant. As the application was essentially against the 1st Defendant, the 2nd Defendant needed not respond to it. I will therefore not grant it any costs. Those will be the orders of the court.
DATED AND SIGNED THIS 29TH DAY OF APRIL 2010

H.P.G. WAWERU
JUDGE
DELIVERED THIS 30TH DAY OF APRIL 2010