



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

Civil Case 63 of 2010

KENNETH KEMAMA PLAINTIFF

VERSUS

**SIENA HOLDINGS LTD. 1ST DEFENDANT
PHENOM LIMITED 2ND DEFENDANT**

RULING

This application is brought by way of a Chamber Summons dated 4th February, 2010 and taken out under **Order XXXIX Rules 1, 2, 3 and 9** of the **Civil Procedure Rules**, and **Section 3 A** of the **Civil Procedure Act**. The Plaintiff seeks an order for a temporary injunction to issue against the Defendants jointly and/or severally, their agents, servants and/or employees from evicting, trespassing, alienating, damaging and/or destroying the property within the Plaintiff's maisonette No.248 situated on all that piece of land known as Land Reference Number 209/18372/Langata, Nairobi pending the hearing of this application *inter partes*.

The application is supported by the Plaintiff/Applicant's affidavit sworn at Nairobi on and unspecified date in 2010, and is based on the grounds that –

- 1. *The Plaintiff entered into an agreement with the Defendants for the purchase of the afore-mentioned property on 11th November, 2008.***
- 2. *The Plaintiff was given early possession of the maisonette in September, 2009 and is in occupation of the said maisonette but the Defendants have now threatened him illegally and unlawfully in total contravention of the agreement entered into between the parties.***
- 3. *The Plaintiff is thus suffering irreparably and is not enjoying his quiet possession of the maisonette.***
- 4. *The Plaintiff's claim herein has high chances of success.***
- 5. *The Defendants will not stop threatening to evict the Plaintiff unless stopped by an order of this Court.***

Opposing the application, the Defendants filed a replying affidavit sworn by Nirish Chandul Shah, a Director of the 2nd Defendant Company and the General

Manager of the 1st Defendant, on 26th February, 2010. In the said affidavit the Defendants concede that there was a sale agreement for the purchase of the suit property but that the same was rescinded upon the Applicant's failure to comply with the salient conditions set out therein. However, the Plaintiff contends that the Defendants manipulated his inability to complete the contract by failing to avail to him the completion documents which were required by the Plaintiff's financier.

At the hearing of the application, Mr. Gichuru appeared for the Plaintiff while Mr. Savier appeared for the Defendants. After considering the pleadings and the respective submissions of both Counsel, I find that the main issues for determination in this matter are whether there was a contract for the sale of the suit property to the Plaintiff/Applicant; if so, whether each party observed its respective obligations arising from that agreement; and whether the Plaintiff has satisfied the conditions for the grant of a temporary injunction pending the hearing of this case.

From the record and the pleadings of both parties, it is evident that the parties did enter into an agreement for the sale of a maisonette No. 248 situated on Land Reference Number 209/18372, Langata, Nairobi. The agreement was dated 11th November, 2008 and was subject the Law Society Conditions of Sale (1989) Edition. Under Clause A of the Special Conditions of the said Agreement, completion was to take place on or before 31st October, 2008 or within thirty (30) days of certification by the Nairobi City Council that the maisonette was ready for occupation, whichever was the later. Clause B of the said Conditions read in turn –

“On completion the Developer's Advocates shall deliver to the Purchaser's

Advocate the following completion documents:

(a) The original Certificate of Title.

(b) Transfer in duplicate duly executed by the Vendor.

(c) Valid rates clearance certificate.

(d) Land rent clearance certificate.

(e) Consent to transfer.

(f) Copies of the Vendor's and the Developer's PIN Certificate.

(g) Certificate of occupation from the Nairobi City Council.

SAVE THAT in the event that balance of purchase price or part thereof is being financed the completion document shall be forwarded to the Purchaser's financiers' Advocates against their undertaking for the loan proceeds but the Purchaser shall be required to forward any balance not being financed to the Vendor's Advocates prior to forwarding of the said document.”

According to the Plaintiff, the documents referred to in Clause B hereinabove formed part of the documents required by

his financier (SAVINGS & LOANS LIMITED) to facilitate his obtaining a mortgage facility with them. To-date, these essential documents have not been given to him and as such he has not been able to get a financier for the balance in spite of having requested for them on several occasions in the last one year; yet, the Developer is demanding immediate payment of the balance and is also constantly threatening to evict the Plaintiff at any time without notice. It is further the Plaintiff's case that notwithstanding Article C of the Agreement, the Developer's contractor voluntarily handed over the maisonette to him in August, 2009 to occupy, secure it, and thereby stop the vandalism that was taking place to the inferior fixtures.

On the other hand, the Defendants concede that the Plaintiff originally agreed to purchase maisonette No.248 ("the suit property") under the terms of a letter of offer written by the 2nd Defendant's agent M/S Villa Care Limited to the Plaintiff, dated and signed by Plaintiff on 11th August, 2006. Under the terms of that letter, the Plaintiff undertook to pay the purchase price of Kshs.5,200,000/= in three tranches. The first one was a down payment of 20% amounting to Kshs.1,040,000/= upon execution of the letter of offer; 60% amounting to Kshs.3,120,000/= during construction on the suit property, and the remaining 20% amounting to Kshs.1,040,000/= upon completion. Thereafter, the Plaintiff paid the 2nd Defendant a deposit of Kshs.1,040,000/= on 14th August, 2006.

A formal agreement for sale between the Plaintiff and the Defendant was finally executed and collected personally by the Plaintiff on 11th November, 2008. The payment terms of the said agreement differed from those under the letter of offer and provided that as the unpaid balance of the purchase price amounting to Kshs.4,160,000/= was being financed, the same would be paid within 14 days of registration of the transfer and the Plaintiff's financier's charge.

In agreement with the Plaintiff's contention, the Defendants concede that the sale agreement provided a Special Condition B, referred to hereinabove, that upon completion the 2nd Defendant and its Advocate would forward the completion documents specified therein to the Plaintiff's financier's Advocates against a suitable undertaking from the latter Advocates. They further concede that the said agreement provided at Clause 6 that sale was subject to the Law Society Conditions of Sale (1989) Edition, which specifically provided at Condition 4 (b) that where the balance of the purchase price is to be financed, a suitable professional undertaking from an Advocate is to be delivered to the Vendor's Advocate on completion.

It is the Defendant's case that the construction of the subject maisonette was completed in November, 2008 but despite the 2nd Defendant's request the Plaintiff to complete the transaction, the Plaintiff failed to do so. This resulted in the Defendant's Advocates giving notice to the Plaintiff's Advocates on 3rd September, 2009 that if the transaction was not completed within 21 days, the Defendants would rescind the sale agreement. The Plaintiff failed to comply and the Defendants' Advocates notified the Plaintiff's then Advocates that the Defendants had rescinded the sale agreement and were

proceeding to resell the property to another buyer.

Finally, it is also the Defendant's case that in January, 2010, the Defendants discovered that the Plaintiff had irregularly and illegally and in breach of expressed terms of the sale agreement taken physical possession of the suit property as a consequence whereof the Defendants' Advocates, on 15th January, 2010, gave notice to the Plaintiff to vacate the suit property. Instead of vacating the suit property, the Plaintiff's Advocates wrote to the Defendants' Advocates on 20th January, 2010, forwarding a list of alleged incomplete works in the suit property. The next day the Plaintiff wrote directly to the Defendants' Advocates asking for, among other things, the completion documents which he alleged were required by his financier. On 29th January, 2010, the Plaintiff again wrote directly to the Defendants' Advocates notifying them that he had changed his Advocates. On 4th February, 2010, the Defendants' Advocates wrote to the Plaintiff reiterating that the sale agreement had been rescinded and demanding vacant possession of the premises. It was then that the Plaintiff filed this suit.

From the above account, one is left in no doubt that there was an express agreement between the Plaintiff and the Defendants whereby the Plaintiff undertook to buy the suit property from the Defendants, and the Defendants undertook to sell the same to the Plaintiff. On the issue as to whether each party observed its respective obligations arising from the sale agreement, I find that by the agreement between the parties, on completion of the transaction, the agreement provided that the Developer's Advocates were bound to deliver to the purchaser's Advocate the original certificate of title; the transfer in duplicate duly executed by the Vendor; a valid rates clearance certificate; a land rent clearance certificate; consent to transfer; copies of the Vendor's and the Developer's PIN certificate; and a certificate of occupation from the Nairobi City Council. A proviso to this general agreement was to the effect that in the event that the balance of purchase price or part thereof was being financed, the completion documents should be forwarded to the purchaser's financiers' Advocates against the latter's undertaking for the loan proceeds, but the purchaser would be required to forward any balance not being financed to the Vendor's Advocates prior to the forwarding of the said documents. In this instance, the transaction between the parties never got to completion as the contract was rescinded upon the Plaintiff's failure to pay the purchase price within the agreed time frame. For that reason, I find that the Plaintiff was at fault in failing to remit the balance of the purchase price within the agreed period.

I note that the Plaintiff contends that he went into possession of the suit property with the alleged consent of the Defendants. However, it is the Defendants' case that their normal practice when giving possession of the maisonettes in that project to their respective buyers was to issue an appropriate letter to the buyer upon full payment of the purchase price forwarding the keys to the buyer. It is their further contention that no such letter was written by the Defendants in this case as the Plaintiff had not paid the balance of the purchase price, nor had the Defendants received any professional undertaking from an Advocate. In the light of that practice, which the Plaintiff has not countermanded by producing a copy of the letter of occupation from the Plaintiffs, I find that the Plaintiff was irregularly in occupation of the suit premises. In any event, under Clause C of the Special Conditions in the agreement of sale between the parties, it was clearly agreed that –

“The purchaser shall not be entitled to possession until the full purchase price and all outgoings including any interests due together with stamp duty and all other disbursements... and incidental costs

shall have been paid in full.”

In this instance, as it is not in dispute that the payment of the full purchase price was a condition precedent to the Plaintiff's entitlement to possession of the suit property, and the full purchase price was never paid, the Plaintiff was not entitled to possession of the suit property.

In the light of the above observations, the issue is now whether the Plaintiff is entitled to an interlocutory injunction pending the hearing and determination of the suit. In the case of **GIELLA v. CASSMAN BROWN & CO. LTD [1973] E.A. 358**, the Court observed that the first condition to be satisfied for the grant of such an injunction is that the Applicant must show a *prima facie* case with a probability of success. To the extent that the Plaintiff in this case had not complied with the conditions stipulated in the contract of sale as to completion of that contract, *prima facie*, he has not satisfied the conditions for the supply of the completion documents which would entitle him to obtain the balance of the purchase price. Secondly, the Plaintiff has not shown how he might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages which is the second condition to be satisfied as enunciated in **GIELLA'S CASE**. The 3rd condition in the aforesaid case is that if the Court is in doubt, it will decide an application on the balance of convenience. This Court is not in any doubt and therefore this condition does not apply to this case.

Even if the Plaintiff had satisfied the above conditions, he would not qualify for the grant of an interlocutory injunction pending the hearing and determination of this suit. This is because he simply did not apply for any such injunction. He only applied for an injunction pending the *inter partes* hearing of this application which hearing is now spent. For the avoidance of any doubt, his application is worded as follows -

“LET ALL PARTIES concerned attend the Honourable Court in chambers on the day of ... 2010 at 9.00 o'clock in the forenoon or so soon thereafter as Counsel for Plaintiffs/Applicants may be heard on an application for ORDERS:

- 1. That this application be certified urgent.***
- 2. That this application be heard ex parte in the first instance.***
- 3. That a temporary injunction do issue against the Defendants jointly and/or severally their agents, servants and/or employees from evicting, trespassing, alienating, damaging and/or destroying the property within the Plaintiff's maisonnete No. 248 situated on all that piece of land known as Land Reference Number 209/18372, Langata, Nairobi pending the hearing inter partes hereof.”***

The phrase “pending the hearing *inter partes* hereof” refers to the hearing of this application as stated at the head of the application. It is notable that the 3rd prayer hereinabove is the only substantive prayer sought in the application. The Plaintiff has not sought any temporary injunction pending the hearing of the suit. Since his prayer is limited to an injunction pending the hearing *inter partes* of the application, and the application has now been heard, it follows that once the application has been heard, that prayer becomes spent. In such circumstances, once the Court has heard such an application, it will have discharged its duty *vis a viz* that application, and it cannot grant any order of injunction pending the hearing of the suit since such an order is not prayed for. The Court can only grant that which is asked for. Consequently, I find that after the hearing of the

application, there is nothing more for the Court to do.

For the above reasons, I find that the Applicant is not entitled to an interlocutory injunction pending the hearing and determination of the suit and his application is accordingly dismissed with costs.

It is so ordered.

Dated and delivered at Nairobi this 13th day of May, 2010.

L. NJAGI
JUDGE