

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

Civil Case 30 of 2010

COCOA HOUSING CO-OPERATIVE SOCIETY LTD.....PLAINTIFF

VERSUS

**CHARITY WAMBUI MWANGI & ANOTHER..... 1ST DEFENDANT
OLUOCH AWINO T/A**

OLUOCH-AWINO & COMPANY ADVOCATES.....2ND DEFENDANT

R U L I N G

1. The Chamber Summons dated 5th February 2010 is brought under the provisions of sections 63 of the **Civil Procedure Act** and order **XXXVIII** of the **Civil Procedure Rules**. The applicant seeks for orders that the Defendants do jointly and severally deposit in court title documents in respect of LR No. **209/4844/28**, **2009/4844/47** and **LR No. 209/4844/22 NAIROBI** within 7 days of the order or in the alternative they deposit a sum of Kshs.7.4 million as the court will direct.
2. The applicants also sought for an order restraining the Defendants from dealing with those properties until the sum of Kshs.7.4 million is deposited. This application is based on the grounds that on 18th July 2008 the plaintiff executed a sale agreement for the sale of the suit premises at a consideration of Ksh.24,200,000/=. According to the sale agreement, the transaction was supposed to be completed within a period of 2 months from the time of the execution and time was of essence. The 1st Defendant was supposed to deposit 10% of the purchase price which was supposed to be paid to the plaintiff.
3. The 2nd Defendant was acting as advocate for both plaintiff and 1st Defendant. A further agreement was executed on 20th April 2009 and the 1st Defendant was supposed to pay a sum of Kshs.17 million to the Plaintiff and in turn the plaintiff was to release the title documents for the first two properties but retain the property known as LR No.209/4844/28 until the balance of the purchase price was paid. The balance of the purchase price was to be paid when the vacant position of the suit premises or in the alternative the tenants were to conform with the terms stipulated in the agreement. Subsequently the issue of sitting tenants was amicably resolved and the 1st Defendant was to pay the plaintiff the sum for Ksh.7.2 million that she was withholding. The plaintiff has been demanding for the balance of the purchase price on several occasions without success. In an attempt to defeat the plaintiffs claim for the balance the 1st Defendant has been trying to dispose of the suit premises.
4. As regards the 2nd Defendant the applicant contends that title No.209/4844/28 was released to him in his capacity as an advocate he ought to have held the title as security to secure the payment of the balance of the purchase price by the 1st defendant but he colluded with the 1st Defendant and released the title. The plaintiff therefore filed a suit seeking for the return of the title and all the payments of the balance of purchase price simultaneously with the filing of the suit the applicant filed this application seeking for interim orders. This suit was filed before the high court central registry by an order on 5th March 2010 by Justice Mbogoli Mshaga. This file was transferred to this court and was consolidated with HCC No.30 of 2010.
5. This application was opposed. Counsel for the respondents relied on the replying affidavit sworn by Mr. Mboya Awino the 2nd Defendant in the suit. According to the 2nd Defendant there was agreement dated 30th July 2009 signed by Eliud Makumi where they agreed to pay a commission to the 2nd Defendant after the deposit was paid and in the event that the 2nd Defendant was able to get a purchaser for

the suit premises for the price higher than Kshs.21 million the amount higher than Kshs.21 million would become his commission. The advocate claims to have appointed agents whom he paid commission. He claims that out of the Kshs.24 million paid he has fully paid commissions, rates, rents and other disbursements and for that reason no money is owing. When the matter came up for hearing Mr. Owuor appearing for the 2nd Defendant requested for time so that the 2nd Defendant could present the accounts with a view of recording a consent. The court gave them time to negotiate a settlement the matter was stood over to 14th July 2010 but Mr. Owuor did not appear and no settlement was recorded. Mr. Mbaabu learned counsel for applicant urged court to proceed and write a ruling.

6. This application is brought under the provisions of **Order XXXVIII** which deals with the furnishing of the security by a Defendant. This procedure is also provided for under the provisions of **Section 63 of Civil Procedure Act**. The plaintiff has annexed a copy of the two agreements in which the 2nd Defendant was acting for both the plaintiff and the 1st defendant in the matter of the sale of the three suit premises. It is indicated that the purchase price was Kshs. 24,200,000/= out of which 17 million was paid to the plaintiffs. The 2nd Defendant who was also acting for both parties was not supposed to release the title of LR No. 209/4844/28 until the balance of the purchase price is paid.

7. The 1st Defendant has not filed any papers to oppose this application although the 2nd Defendant filed the replying affidavit, the explanation given that the balance of the purchase price was paid as commission to agents and other disbursements is not cogent. I find the plaintiffs are entitled to the orders sought in chamber summons dated 5th February 2010. Accordingly the Plaintiff is granted prayer Nos. 2, 3 and 4 of the chamber summons dated 5th February 2010. The Plaintiff will also be entitled to the costs of this application.

RULING READ AND SIGNED ON THE 17TH SEPTEMBER 2010.

M. K. KOOME
JUDGE