



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

**Civil Suit 977 of 2002**

**CLIVE MUTISO .....1<sup>ST</sup> PLAINTIFF/APPLICANT  
ANGELA ACHIENG OBARE .....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**V E R S U S**

**MITUNDU HOLDINGS LIMITED .....DEFENDANT/RESPONDENT  
RULING**

The Defendant was the registered owner of all the parcel of land known as LR. No. 209/10659 situate on Woodley, Nairobi Area. It subdivided it into various plots on which it was planning to construct residential maisonettes for sale. The Plaintiffs were interested in one of the maisonettes and this is when an Agreement for Sale "AA01" was signed between them on 27<sup>th</sup> June, 1996. The particular subdivision was LR. No. 209/10659/21. The interest being sold was leasehold. The purchase price was Kshs. 3,900,000/= of which KShs. 390,100/= was paid before the execution of the Agreement. Kshs. 390,000/= was to be paid within 30 days after the execution of the Agreement, Kshs. 390,000/= on or before 31<sup>st</sup> October, 1996 and the balance of Kshs. 2,730,000/= to be paid at completion. The completion date was 9 months after the execution of the agreement.

It was also agreed that:-

**"A. The vendor shall immediately upon the signing of this Agreement deliver to the Purchasers or their advocates the Deed Plan of the property to be sold and a copy of the original Grant or Certificate of Title for L.R. No. 209/10659. The Purchasers Advocates shall within seven (7) days of receiving the said documents deliver to the Vendor's Advocates the Transfer for execution by the Vendor. Within a further seven (7) days the Vendor's advocates shall deliver the documents of Title, executed Transfer, Consent to Transfer, Rates and Land Rent Clearance Certificate to the Purchaser's Advocates against their undertaking to pay the balance of the purchase price to the Vendor's advocates within Thirty (30) days of Notice of completion by the Vendor to the purchaser."**

On basis that the Defendant had breached the Agreement, had unilaterally purported to repudiate the same and had failed to complete the maisonette, the Plaintiffs filed this suit for specific performance, damages for breach of contract in lieu of or in addition to specific performance, and, in the alternative and without prejudice to the foregoing, refund of the sums paid as deposit together with interest as agreed. The Defendant denied it was in any breach of the Agreement and blamed the Plaintiffs for the failure of the Agreement which it had, in any case, rescinded. For the alleged breach by the Plaintiffs, the Defendant counterclaimed for loss of profit, loss of interest and general damages.

On 26<sup>th</sup> February 1997, the Plaintiffs lodged a caveat against the said LR. No. 209/10659/21 with the Registrar of Titles. This suit was filed on 7<sup>th</sup> July, 2002. On 24<sup>th</sup> April, 2010 the Plaintiffs received a letter dated 31<sup>st</sup> March 2010 from the Registrar of Titles informing them that they were required to withdraw the said caveat within 45 days unless it was extended by a court order. On 12<sup>th</sup> May, 2010 the Plaintiffs filed the present application under **section 57 (8) of the Registration of Titles Act Cap. 281** and **Order 36 Rule 3A** of the **Civil Procedure Rules** seeking essentially that the caveat remains in force until the suit has been heard and determined. The fear behind the application was that the Defendant would dispose of the property and thereby occasion irreparable loss if the caveat is not extended.

Mr. Gitonga for the Plaintiffs and Mr. Nagpal for the Defendant filed written submissions and addressed the court briefly on the application.

Section 57(8) of the Act above provides as follows:-

**“The caveator may, either before or after receiving the notice from the registrar, apply by summons to the court for an order to extend the time beyond the 45 days mentioned in the notice, and the summons may be served at the address given in the application to the caveatee, and the court may, upon proof that the caveatee has been summoned and upon such evidence as the court may require, make such order in the matter, ex parte or otherwise, as it deems fit.”**

On 14<sup>th</sup> May, 2010 counsel agreed to extend the caveat to enable this application be dealt with.  
In **Mohammed and Another –Vs- Haidara [1972] EA. 166 SPRY, V.P** observed as follows:-

**“.....a court faced with an application for the extension of a caveat is substantially in the same position as a court faced with an application for an interlocutory injunction. The result will be exactly the same if the application is allowed, in so far as any alienation will be precluded pending the determination of the suit. in either case the court has judicial discretion, and I can see no reason why different principles should apply merely because the circumstances of the application are different.”**

The judge followed the English decision in **Preston –Vs- Luck (1884), 27 Ch.D. 497** and stated that the applicant has to show a *prima facie* case with a probability of success and that, if the court was in doubt, it will decide the issue on the balance of convenience with the onus on the applicant to show that the inconvenience he would suffer from the refusal is greater than which the respondent would suffer from the grant of one.

In a subsequent case, the Court of Appeal of Kenya in **Bandali –Vs- Mwalagaya, Civil Appeal No. 38 of 1980 at Nairobi**, Law, J.A. sought to explain what Spry, V.P in the case above meant. He stated as follows:-

**“ On my reading of Spry VP’s judgment, it seems to me that in equating an application for the extension of a caveat with an application for an interlocutory injunction, the learned VP only had in mind the requirement for the applicant in each case to show that the inconvenience he would suffer from the refusal of an injunction is greater than that which the respondent would suffer from the grant of one. I see no reason to apply any different principles as regard the extension of a caveat.”**

The Judge held that the other principles relating to interlocutory injunctions should not be applied to extension of caveats. Miller and Potter JJA agreed with him. This court will be bound by this decision and will apply its principles in determining the present application.

The consideration that should be borne in mind is that the Defendant has a right to the disputed property. Under **section 23 (1) of the Registration of Titles Act** he has a conclusive title which cannot be defeated. Such right of a proprietor entitles the owner to use it as he wishes, and to be able to alienate or otherwise dispose of the same. The Plaintiffs’ claim is that they were buying it under a contract which the Defendant breached. They sought an order to enforce the contract. It is, however, clear from their plaint that they would be willing to accept general damages for the breach, or the refund of the money paid under the contract and with interest.

The court is also entitled to make some preliminary observations about the Agreement which was signed on 27<sup>th</sup> June, 1996. It is clear that KShs. 390,000/= was paid before execution. The next payment was KShs. 390,000/= to be paid within 30 days of execution. It was paid within time. The following 390,000/= was to be paid on or before 31<sup>st</sup> October, 1996. It was not paid. On 7<sup>th</sup> January, 1997 the Defendant wrote to rescind the Agreement. The Plaintiffs protested that on 21<sup>st</sup> January, 1997 the Defendant wrote seeking payment of the balance of the purchase price within 21 days or the Agreement be rescinded. By 12<sup>th</sup> February, 1997 there was no payment. The Defendant considered the Agreement rescinded. On 15<sup>th</sup> February, 1997 the Plaintiffs unilaterally sought to pay the 390,000/- by depositing a cheque of the amount. The Defendant declined by sending a refund cheque. The Plaintiffs did not bank it until it went stale. They returned it on 18<sup>th</sup> January, 1998. On 2<sup>nd</sup> February, 1998 the Plaintiffs accepted the refund.

In the plaint it was alleged that the Defendant had not complied with Special Condition A by failing to deliver the Title Documents to the Plaintiffs’ Advocates within 14 days of the execution of the Agreement. The Defendant responded that it had on 25<sup>th</sup> July, 1996 provided a copy of the Grant and Deed Plan to the Plaintiffs. This was denied in the Reply to Defence and Defence to counterclaim. In the affidavit sworn by the 2<sup>nd</sup> Plaintiff in support of this application there was no allegation that the Defendant had failed to provide copy of the Deed Plan and Grant as had been agreed.

On the material presented by the parties, I find that although a contract was signed between the parties it would

appear the same was rescinded due to breach by the Plaintiffs who, in any event, would be willing to accept damages or refund of deposit plus interest. Given the proprietary interest that the Defendant has in the property, I find that it would suffer greater prejudice and injustice if the caveat is left in place.

The consequence is that the application is dismissed with costs, and the notice issued by the Registrar shall take effect.

**DATED AND DELIVERED AT NAIROBI  
THIS 6<sup>TH</sup> DAY OF OCTOBER 2010**

**A. O. MUCHELULE  
J U D G E**