



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS**

**CIVIL SUIT 31 OF 2009**

**ANNE KARURA KIBATI:.....PLAINTIFF/APPLICANT**

**VERSUS**

**SAMUEL BEDE OGEMBO:.....DEFENDANT/RESPONDENT**

**RULING NO. 1**

The plaintiff moved to this court, by way of a plaint dated 27<sup>th</sup> day of January 2009, and filed on the 28<sup>th</sup> day of January 2009. In a summary form the salient features of the same are as follows:-

-The disputants entered in to a sale agreement for the sale and purchase of the suit property namely 2259/23/2 at a purchase price of Kshs 5,000,000.00 and the plaintiff paid a deposit of Kshs. 1,250,000.00 as per the terms of the agreement.

- Completion date was 90 days which period was extended on the 8<sup>th</sup> September 2004 to enable the defendant obtain completion documents by the defendant.

-The balance of the purchase price of kshs. 3,750,000.00 was to be paid upon furnishing of the completion documents.

-Despite persistent requests by the plaintiff/applicant for completion documents, non were furnished despite the plaintiff being ready and willing to complete the sale. The defendant has either failed and or neglected to furnish the completion documents.

*-The plaintiff has become aggrieved and moved to this court, because the defendant is making moves to sell the property to 3<sup>rd</sup> parties.*

*The reliefs sought from the court are:-*

*-A permanent injunction restraining the defendant, whether by himself, his agents, successors or assigns from selling, transferring disposing or in any other way offering plot No 4 of the parcel of land known as LR NO. 225/141 (Original No 2259/2312 to any other except by way of transfer to the plaintiff.*

*-An order of specific performance compelling the defendant to complete the sale agreement dated 8<sup>th</sup> September 2004 and transfer plot number 4 of all that parcel of land known as L.R. No. 2557/141 original number 2259/2312 in favour of the plaintiff.*

*-Costs of this suit plus interest.*

*(d) And other or further order that the Honourable court may deem just and expedient.*

On the said pleading the plaintiff has anchored an application by way of chamber summons dated and filed the same date as the plaint. It is brought under order XXXIX Rule 1 and 2 of the CPR, section 3A and 63 (e) of the CPA and all other enabling provisions of the law. 4 prayers are sought namely.

1. Spent

*2 and 3 that the honourable court, be pleased to grant an interim injunction restraining the defendant whether by itself. His agents, servants, successors or assigns from selling, transferring, disposing, or in any other way offering for sale plot No 4 of that parcel of land known as LR No. 2259/141 (original 2259/23/2) to any other person other than the plaintiff pending the hearing of this application inter parties in prayer 2, and pending the hearing and determination of the main suit in prayer 3.*

4. That the costs of this application be provided for.

The grounds in support are derived from the body of the application, supporting affidavit, oral submission in court, and oral response to the defendants counsels oral highlights in court. The written submissions were rejected as they are un signed. The major ones are as follows:-

-The applicant executed a sale agreement with the defendant as evidenced by annexure AKK1 and made part payment AKk2.

-It is her stand that the balance of the purchase price was to be paid upon the defendants tendering to her the completion documents which were never tendered.

-That after the applicant felt that the defendant was taking rather too long to tender the completion documents, she instructed her counsel to take up the matter with the defence lawyer which fact resulted in the writing of annexure AKK 3, 4 whose central theme was that the completion documents had not been released by the commissioner of lands and city council of Nairobi, and as such the defendants were unable to tender them to the applicant, which communication came in the year 2007.

-That the applicant later came to learn from correspondence emanating from the city council of Nairobi to the commissioner of lands demonstrating that the developer had asked for partial release of documents for plot 2, 3 and 5 only to enable them comply with the subdivision conditions which request had been approved.

-concedes that she was advised by the defendants counsel to pay the balance of the purchase price as she awaits to get completion documents from the defendant which was contrary to the terms of the sale agreement.

-Concedes that indeed the completion time was 90 days from the date of the execution, but to her, this was subject to the defendant tendering the completion documents within that time, and that time ceased being of the essence when the defendant failed to tender the completion documents with that time.

-Contends that on the basis of the documentation exhibited, a prima facie case has been made out because on their part, they paid the deposit and only awaited the completion documents to be tendered to them to pay the balance of the purchase price which has now been deposited in court.

-They have exhibited documents exchanged between them and the defence to show that they have all along been willing to complete the transaction and that it is the defendants who failed performed their obligation under the contract.

-That they moved to court, because they became genuinely aggrieved by the conduct of the defendant in moving to sell the same plot to a 3<sup>rd</sup> party.

-The balance of convenience is also in their favour as they have and are still willing to complete the transaction upon being handed the completion documents by the defendants.

The defence have moved to oppose both the suit and the interim application on the basis of a defence filed, replying affidavit, written skeleton arguments, oral high lights in court, annexures and case law. The major grounds in support are as follows;-

-Concede they entered into a sale agreement between them and the plaintiff/applicant and part payment made though one installment was paid late but accepted.

-That time was of the essence as condition (d) stipulated clearly that the completion date was to be within 90 days, which time was not complied with as the applicant failed to tender the balance of the purchase price and as such she is in breach of the said agreement, and cannot seek an injunctive remedy to protect the same.

-In dispute existence of any loss which has been occasioned to the applicant which can entitle her to any injunctive relief and contend that if any loss has been occasioned or suffered by the applicant then the same can be compensated for by of an award of damages and not an injunctive relief.

-If the applicant by any means is suggesting that parties did not agree on time as being of the essence, or how that was to be interpreted, then there is no agreement in force which is capable of being enforced by way of an injunctive relief.

-The court, is urged not to pay attention to the alleged depositing of the purchase price into court, as the same has been made five years later when the value of the property has appreciated, a matter the court, cannot afford to ignore.

-Contend an injunction can not issue as the property sought to be protected is the mother title, which has now been subdivided and new titles which were not subject of the contract issued. 2ndly by reason of failure to comply within time, which time, was of the essence, the contract is in capable of being performed.

In response to that submission counsel for the applicant has urged this court, to grant the relief sought because they have earned the same, as they have demonstrated that they have all along been willing to complete the transaction, but the same has been frustrated and the court, will need to determine which of the parties frustrated the contract. The balance of convenience also tilts in their favour because he paid the deposit, have all along been willing to complete the transaction and they have deposited the balance into court.

On case law the court, has been referred to the case of **MICHIRA VERSUS GESIMA POWER MILLS LIMITED (2004) 2EA 166** decided by the CAK where it was held inter alia that “*there was no meeting of the minds of the contracting parties, thereby making the contract in capable of performance. The agreement did not provide for the time within which the balance of purchase price would be payable, or secure the payment. The fact that the agreement was uncertain on the fundamental term on the payment of the purchase price, made the entire agreement void for uncertainty. Further the agreement was capable of being construed as providing for two different dates for giving vacant possession by the respondent and this has occasioned an uncertainty. Neither party could be held to be in breach of the uncertain agreement or be entitled to any damages from the arbiture agreement.*”

*Alternatively since neither party endovoured to perform his obligations in order to bring the contract to fruition, it can be inferred from that in activity that the parties’ mutually rescinded the agreement by abandoning it thereby discharging each party from the performance of the agreement”*

The case of **SULEIMAN VERSUS AMBOSELI RESORT LIMITED (2004) 2KLR 589** where it was held inter alia that: “*Traditionally, on the basis of the well accepted principles set out by the court, of appeal in GIELLA VERSUS CASSMAN BROWN, the court, has had to consider the following*

questions before granting an injunctive relief

- (i) Is there a prima facie case with a probability of success?
- (ii) Does the applicant stand to suffer irreparable harm if relief is denied?
- (iii) On which side does the balance of convenience lie.?

The case of **KOMASAI PLANTATIONS LIMITED VERSUS BANK OF BARODA KENYA LIMITED (2003) 2ER 535**. The court, held that “the applicant had demonstrated that it has a prima facie case with a probability of success and an injunction would be granted, because the terms used in the notice demanding payments within three months gave less than the stipulated three months for the defendant. Rule 15 (d) of the Auctioneer Rules which provide for 45 days notice before sale was ultravires the Auctioneer Act, and its general purpose and with a log in the power of sale and violated section 569A and 69 of the Transfer of property Act, as well as sections 65 and 74 of the Registered land Act. Rule 15 (d) was this void and a nullity.”

The case of **HELGA HAHMANN VERSUS CHARLES MUMBA MWAGANDI MOMBASA HCCC NO. 4/2008** decided by L. Njagi on the 9<sup>th</sup> day of May 2008. The applicant there in sought an order to restrain the defendant/respondent/his agents, servants and/or representative from in any way selling, transferring and/or alienating the applicant’s house and motor vehicle. At page 4, 3<sup>rd</sup> paragraph from the top the learned judge set out the principles set out in **GIELLA VERSUS CASSMAN BROWN AND COMPANY LIMITED (1973) EA 358** in which SP AND, V.P said at page 360/=

“The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly if the court, is in doubt, it will decide an application on a balance of convenience”

At page 6, 4<sup>th</sup> paragraph from the top, the learned judge ruled:-

“The most convenient step to take in this application is to maintain the status quo, until this case is heard and determined. In as much as the respondent avers in paragraphs 20 of his replying affidavit that he has no intention whatsoever of disposing off the house as he has no other house to live in, he will not be prejudiced by any such order.

The case of **BRIDGE UP CONTAINERS SERVICES LIMITED VERSUS JAMES MATHENGE MWAI AND 3 OTHERS MOMBASA HCCC NO. 317 OF 2007** decided by F. Azangalala J on the 27<sup>th</sup> day of June 2008 but read by Njagi J. On an application for an injunction to restrain the defendants from interfering with the plaintiffs quiet enjoyment at page 3, 3<sup>rd</sup> paragraph from the top, the learned judge set out the principles on the granting of injunction as established by the case of **GUIELLA VERSUS CASSMAN BROWN AND COMPANY (SUPRA)** and on that basis the learned judge made the following observation at page 5, 2<sup>nd</sup> paragraph from the top thus:- “ In the premises I have come to the tentative conclusion at this interlocutory stage that the defendants cannot rely on the illegality of the user of the premises by the plaintiff, as a basis for seeking to terminate the tenancy of the plaintiff over the suit premises. In other words the plaintiff has shown a prima facie case that he enjoys a valid tenancy over the suit premises.....In the premises I find an a prima facie basis that unless the injunction sought is granted, the plaintiff faces a real threat of being evicted from the suit premises, even before, the defendants claim in the counter claim is adjudicated upon. I find in the circumstances that if that event occurred, the plaintiff would suffer irreparable injury which include loss of good will built over along period of time.

The case of **MOHAMED S. BAKHRESA VERSUS NASRA ABDULWAHAB AHMED MOMBASA HCCC NO. 192 OF 2006** decided by Maraga J on the 31<sup>st</sup> day of October 2006. at page 7,

3<sup>rd</sup> paragraph from the top it had been conceded by the defence counsel that the plaintiff had remitted funds into the defendants accounts, that the defendant had conceded that the plaintiff had purchased for ger 2 properties, she failed to state the source of the funds used to purchase the other properties in her name, which the plaintiff claimed had been acquired with his funds. On the basis of that reasoning the learned judge ruled thus:-

*“Taking all these factors and the plaintiffs’ allegations of fraud, and misrepresentation, into account, and the legal issues raised it cannot be said that the plaintiffs claim is frivolous or without foundation as contended by counsel for the defendant. To the contrary, I think the plaintiff has made out a prima facie case with a probability of success. As some of the properties are movables and money in the bank accounts, the plaintiff fears of the defendant disposing off them are not without foundation. If they are disposed off, the plaintiff is likely to suffer irreparable loss. A preventive order is therefore called for”*

The case of **OPENDA VERSUS AHN (1984) KLR 208** in which it was held inter alia that “a condition precedent for specific performance of an agreement is that the purchaser must pay or tender the purchase price to the seller or such person as he directs at the time and place of completing the sale. The respondent did not have to tender physically the balance of the purchase price and interest if the appellant had clearly refused to accept it and by so acting waived that requirement”

There is also reference to the book by Roger Halson on contract law. At page 460 paragraph 801, it is stated- *“the remedy by specific performance is equitable relief given by the court, to enforce against a defendant the duty of doing what he agreed by contract to do, a plaintiff may, therefore obtain judgement for specific performance even though there has not in the strict since been any default by the defendant before the issue of the writ (page 461) paragraph 802.) The most fundamental principles were (i) that equity followed the law and (2) that it applied its remedies as supplementary to legal remedies and on the ground of their inadequacy (page 462) paragraph 803) it is the same time appropriate to compel the performance of a contract by the equitable remedy of an injunction rather than by specific performance. In general an injunction is the proper method of restraining a defendant from committing a breach of a negative obligation or from interfering with the plaintiff’s exercise of his rights under the contract, whereas specific performance is the proper method of compelling a defendant to perform a positive obligation of his own under the contract. An injunction may some times be used as a method of putting pressure on a defendant to perform his part of the contract which the court, would not be prepared to enforce directly by an order for specific performance for example the court, might grant an injunction to enforce a valid covenant against accepting employment with a competitor contained on a contract of personal service which is not directly enforceable by any action for specific.....*

*The court, may grant an interlocutory injunction in aid of specific performance. For example it may forbid the removal of the subject matter of the contract from the jurisdiction pending trial.*

*(page 474) paragraph 814..... since land may have a peculiar and special value to a purchaser, a claim for specific performance of an agreement to sell or grant an interest in land will not be refused on the ground that damages would be an adequate remedy even if the interest to be granted is a lease for a short term or a mere contractual licence to enter on land for a temporary purpose”*

On the courts’, assessment of the facts herein, it is clear that there are common grounds or undisputed facts common to both sides. For purposes of the record these are:-

1. There is in place an agreement of sale between the disputants annexure AKK1. clause (a) thereof specifies clearly that what was being sold was a portion of 1 acre named as portion 4 which was comprised in a portion of land reference number 2259/141 (original) 2259/23/2. This one acre was to be carved out of the total acreage comprised in the said portion of LR 2259/141 being approximately 4.91 acres as shown by the content of special condition (b)

2. The terms of payment are found in condition (d) which stipulates the following

(a) “Full purchase price Kshs. 5,000,000/=

(b) 250,000.00 being 5% of purchase price was to be paid upon execution of the sale agreement. This amount was duly paid and its receipt acknowledged.

(c) Kshs. 1,000,000.00 was to be paid after 30 days from the date of the execution of the agreement. According to the plaintiff this amount was paid within time and accepted. Whereas according to the defendant it was paid beyond the 30 days period but was none the less accepted as shown by annexure S02 and AKK2.

(d) Kshs. 750,000/= was the balance of the purchase price. It is agreed by both sides that this amount was to be paid within 90 days. It is common ground that this money was not paid within the stipulated 90 days.

3. It is common ground that both sides have disagreed as regards the effect of that non compliance of the payments of the balance of the purchase price within the stipulated 90 days. According to the defendant that obligation lay with the plaintiff and since they did not comply with that condition, they stand non suited. Whereas the applicant on the other hand has asserted that there are certain procedural steps that the defendant was required to fulfill in order to enable the applicant comply with that condition which procedural steps the defendant has not complied with as at the time the applicant moved to court, to protect her interests. The provision is none other than special condition (d) which reads:- *“(d) on or before the completion date the vendors advocate will deliver to the purchasers Advocate the following documents*

*(a) Consents to transfer from the commissioner of lands and the relevant local authority (if any)*

*(b) A valid rates clearance certificate*

*(c) Land rent clearance certificate*

*(d) Form for valuation of stamp duty duly completed and signed.*

*(e) All documents of title relating to the property that are in the vendor’s possession (if any) upon the purchasers professional undertaking to pay the purchase price within 30 days from the delivery of the document”. On the basis of this consent the applicant has asserted that time could not run before the defendant complied with special condition (d).*

The defendant on the other hand relies on special condition (g) which reads:-

*“This agreement and everything herein contained shall be null and void for all purposes and all monies paid here under shall be forfeited by the purchaser should they fail to pay the afore mentioned balance as stipulated in (d) above. Further the purchaser shall hand back the 1<sup>st</sup> property to the vendor.”*

4. It is common ground that the part payment made by the applicant towards the purchase was not forfeited in terms of special condition (g) but was offered to be refunded to the applicant by the defendant on 1<sup>st</sup> December 2008 as shown by annexure SO1 but the offer was turned down by the applicant.

5. It is also common ground that the plaintiff/applicant has tendered the balance of the purchase price into court, as a condition for erasing an injunctive relief pending hearing interpartes.

6. It is also common ground that the defendant is not willing to take the said deposit, tendered to court, and the reasons given by them for the said non acceptance are (i) the plaintiff/applicant is guilty of breach of the term of the said contract.

(ii) The same has been tendered 5 years after execution of the said agreement without taking into consideration an element of appreciation of the market value of the suit property.

7. It is also on record that the defendant has indeed offered to sell the said property to a 3<sup>rd</sup> party.

8. It is also common ground that from the correspondences exhibited herein by both sides the vendor who is the defendant demanded the payments of the balance of the purchase price vide their letter part of annexure SO2.

9. The correspondence in SO2 appears not to have been acted upon. OR 26<sup>th</sup> April 2007 SO3 was written to the purchaser along the following lines:-*“If your client wants to take possession, she has to pay the balance while the final completion documents are being prepared”* it is clear that SO3 is a qualification of special condition (d)

10. It is common ground that SO3 was not acted upon setting in motion an exchange of correspondences over the said subject matter among them is a letter marked AKK3 dated 5<sup>th</sup> September 2007. A perusal of the same reveals that the purchaser’s counsel had done correspondence to the vendors advocate dated 5<sup>th</sup> September 2007 annexure AKK3. It is evident from a reading of the same that the applicants counsel had sent communication to the vendors dated 3/12/2004, 17/1/2005, 8/2/2005, 24/8/2006, 26/9/2006, 17/11/2006/1/2/2007, 11/4/2009, 25/4/2007 all inquiring about the completion documents. It is further to be noted that the writer was informing the vendors counsel that his client was concerned because the other purchaser had received title with the exception of her and the writer was anxious to get the feed back. Of worth noting, is the letter mentioned in AKK3 of 25/4/2007 referred to in SO3 dated 26<sup>th</sup> April 2007 wherein the vendors counsel notified the purchasers counsel that *“If your client wants to take possession, she has to pay the balance while the final completion documents are being prepared.”*

11. It is common ground that exchange of correspondences continued into 2008. Those exhibited by the applicant are contained in a bundle marked AKK4. There is one dated December 17, 2007 from the applicants counsel, to the defendants counsel, notifying them that there has been inordinate delay in completing the transaction and they would like to have the completion documents. This was responded to by the one dated 25<sup>th</sup> January 2008 from the vendors counsel to the purchasers counsel. The relevant portion of the same reads:-*“Kindly note that the property has not been released by the city council of Nairobi and the commissioner of lands and as such my client is unable to complete at this moment.”* This was responded to by the purchaser’s counsels letter dated 29<sup>th</sup> January 2008 and the relevant portion reads:- *“Kindly let us know what is required to be undertaken to facilitate the release of the property and how soon the same can be effected to enable us advise our client accordingly.”* Neither party has exhibited a response by the vendors counsel of that request, as what the court, has is SO1 dated 1<sup>st</sup> December 2008 enclosing a refund of the deposit paid by the applicant herein.

12. It is un-disputed that in the applicants bundle marked AKK4 there is found a correspondence from the city council of Nairobi dated 28<sup>th</sup> July 2004 addressed to the commissioner of lands. The relevant portion reads:- *“The developer has requested for a partial release of three sub plots to enable him to comply with the imposed subdivision conditions. I would therefore, recommend partial release of 3 sub plots namely 2, 3 and 5 only.”* There appears to be a response to the said communication from the commissioner of lands dated 30<sup>th</sup> July 2004. The content reads:- *“further to my letter Ref: No 77092/14 of 30<sup>th</sup> June 2004 and city council letter Ref CPD/A/DM/SN of 28<sup>th</sup> July 2004. I hereby accord final approval for plots 2, 3 and 5”. There is no dispute that these approvals do not include request for approvals and approvals for plot No 4 subject of these proceedings.*

13. It is not disputed that annexure AKK6 is a sale agreement between the disputants herein and one Duncan Kabul in respect of plot No 2259/141/4 subject of these proceedings dated the 10<sup>th</sup> day of April 2008, before the offer of refund of part payment of the purchase price paid by the applicants herein.

14. It is also not disputed that the plaintiff/applicant herein has lodged a caveat against transaction adverse to her interest in the said suit property as shown by annexure AKKs, lodged on 14<sup>th</sup> April 2008 as shown by AKK5.

15. There is also no dispute that the plaintiff/applicant through counsel had written a letter to the

vendors counsel dated 16<sup>th</sup> June 2006 whereby it was indicated that the applicant wished to sell the property or her purchasers interest in the said property to one John Musinga, but there is no indication as to what the defendant vendor made of it as the response has not been annexed

It is against the afore set out common grounds that the applicant now seeks an injunctive relief to protect her interest pending determination of her plea for specific performance. The principle for granting such a relief as demonstrated by case law cited have crystallized. All that the applicant has to demonstrate are the following:-

- (i). That she has a prima facie case with a probability of success.
- (ii). That if not granted the applicant will suffer irreparable loss which cannot be compensated for by way of damages.
- (iii). Where the court, is in doubt as regards (i) and (ii) above it will decide the matter on a balance of convenience to both sides.

These principles were established in the famous case of **GIELLA VERSUS CASSMAN BROWN AND COMPANY LIMITED (SUPRA)**. But as observed by Ojwang J in the case of **SULEIMAN VERSUS AMBOSELI RESORT LIMITED (SUPRA)** *“the above set out are traditional principles, but the law regarding the grant of an injunctive relief is not cast in stone, for the same has always kept growing to greater levels of refinement to cover new situations not exactly fore seen before.”* Those that this court, has judicial notice thereof also developed by case law are the following:-

- (a) One cannot be allowed to trample another’s rights at the pain of damages. Where the beneficiary of a denial of the granting of an injunctive relief has behaved in a high handed and oppressive manner so as to steal a match against his opponent, and or in total and flagrant disregard of the law. For equity does not aid a law breaker.
- (b) The injury that the defendant is likely to suffer should an injunction be granted in favour of the plaintiff at the interim level, and then the plaintiffs loses at the end of the trial would out weigh the injury that the plaintiff would suffer if an interim injunctive relief were denied at the interim level and the plaintiff succeeded at the end of the trial.

These principles have been applied to the rival arguments herein, and the court, makes a finding that the strong point put forward by the applicant is that she is entitled to protection at this interim level because:-

- (i). She is not in breach of any of the terms of the contract as she has always been ready and willing to complete the transaction.
- (ii). That failure to complete the transaction has been occasioned by the default of the defendant who failed to tender to them the completion documents.
- (iii). That they are ready and willing to complete the transaction and to demonstrate this willingness on their part they have deposited the balance of the purchase price in court.

To counter that argument, the respondent has argued that an injunctive relief at an interim level is not available to the applicant because:

- (i). She seeks to injunct deeds in the mother title.
- (ii). She failed to complete the transaction within the stipulated 90 days and yet time was of the essence.
- (iii). Being in breach of the terms of the agreement, the applicant cannot take refuge under equity.

(iv). Damages will be an adequate compensation to the applicant.

(v). There appears not to have been a consensus on the terms of the agreement making enforcement impossible and as such it cannot anchor an injunctive relief.

Due consideration has been made by this court, as regards the rival arguments advanced by both sides herein in line with the applicable principles of law governing the granting of this relief and the court, proceeds to make a finding that it is inclined to grant prayer 3 of the applicants application dated 27<sup>th</sup> day of January 2009 and filed on the 28<sup>th</sup> day of January 2009, pending the hearing and determination of the suit for the following reasons:-

1. An injunctive relief sought by the applicant has not been sought against the entire mother title as it has been specifically stated that what is to be restrained from being sold is plot No 4 of the parcel number LR NO. 2259/141 (original) 2259/23/2 which is the same parcel forming the subject of annexure AKK6 described as LR NO 2259/141/4. The subject parcel is therefore distinct from the mother title and it is identifiable.

2. The agreement of sale subject of these proceedings marked AKK1 stipulated rights and duties and obligations to be performed by either of the contracting parties to finally conclude the contract. The plaintiff/applicant was to pay the part payment of the purchase price, within a stipulated time. It is argued by the defence that one of these installments was paid late. Indeed the documentation on the record confirmed so but no penal consequences will be suffered by the applicant because the same was accepted by the defendant without any complaint and as such any breach of clause (d) by the applicant was waived by the defendant and cannot therefore operate to deny the applicant an injunctive relief.

3. Indeed the completion date was 90 days from the date of execution as per clause (d) but this has to be read in conjunction with the special condition (d) whereby the vendor who is the defendant was obligated to deliver to the purchaser or applicant completion documents. It is on record that no such documents were delivered, and there has been no demonstration on the part of the vendor that efforts were ever made to procure the same from the relevant authorities namely the city council of Nairobi and the commissioner of lands.

4. The content of annexure AKK3 demonstrates that all along the purchaser has been inquiring about the delivery of the completion documents.

5. Vide the vendors counsels letter dated 26<sup>th</sup> April 2007 indicates clearly that the vendors counsel was asking the purchaser to pay the balance of the purchase price as she waits the completion documents.

(ii) As late as at 25<sup>th</sup> January 2008 the vendors counsel notified the applicants counsel that as at that point in time the completion documents were not available.

6. The respondent vendor cannot take refuge under special condition (g) because a proper construction of the same would appear to be that it would be called into operation where the vendor had complied with the performance of his part, of the obligation in special condition (d), that is delivered the completion documents within the 90 days and the purchaser failed to comply with the payments of the balance of the purchase price within the same stipulated period of 90 days. Since special condition (d) was not operationalized, special condition (g) could not be operationalized.

7. In as much as the vendor has sought to disentitle the applicant of an injunctive relief at this interim stage because they have sought to comply 5 years later, they too share the blame because, if they felt that the plaintiff/applicant breached the 90 days stipulated period, they ought to have forwarded the part payment, but offering to refund the same in December 2008 instead of forfeiting may be construed as proof of non default on the part of the plaintiff/applicant.

8. it is the defendant vendor who was obligated to procure and avail completion documents, and their

lack of demonstration of efforts made to procure the same may be construed to be conduct that can be termed as high handed and oppressive since, they were in an advantageous position to that of the plaintiff/applicant which operates to displace the possibility of an award of damages being called into play as opposed to the grant of injunctive relief.

9. What has been stated in number 1-8 above goes to demonstrate that the plaintiff/applicant has a prima facie case with a probability of success because should the trial case find that it is the vendor who failed to perform his part of the contract, then a likelihood of success on the relief of specific performance is not remote. It is arguable.

(b) Though damages could be adequate compensation the conduct of the defendant vendor which can be termed as high handed and oppressive because they were in an advantageous position to obtain the approval as opposed to the plaintiff/applicant which efforts were withheld.

(c) The balance of convenience on the facts demonstrated herein and as assessed above tilts in favour of the applicant in that, an injunctive relief be put in place pending hearing and determination on the merits of the applicants plea on the relief of specific performance which this court finds arguable.

10. The costs of the application will be paid to the applicant as the applicant has demonstrated that she has a genuine complaint to move to court in the manner done.

**DATED, READ AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2009.**

**R.N. NAMBUYE**

**JUDGE**