



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

MILIMANI LAW COURTS

Civil Suit 410 of 2009

CYRUS NYORI N. MBUGUA.....PLAINTIFF

VERSUS

SAUL CHEMOS TUKA.....DEFENDANT

R U L I N G

1. Before me is a Chamber Summons dated 29/07/2009 expressed to be brought under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Section 3 of the Law of Contract Act and all other enabling provisions of the law. The Applicant seeks the following orders:-

1. *Now spent..*

2. *THAT a mandatory injunction do issue compelling the defendant whether by himself or his servants, agents, employees, or any other person claiming under him to forthwith vacate and/or move out from Land Reference No. Nairobi Reference No. Nairobi/Block 26/232 pending the hearing and determination of this application inter partes.*

3. *THAT a mandatory injunction do issue compelling the defendant whether by himself or his servants, agents, employees or any other person claiming under him to forthwith vacate and/or move out from Land Reference No. Nairobi/Block 26/232 pending the hearing of this suit.*

4. *THAT an order do issue compelling the defendant and/or his advocates to unconditionally release and return the original Title Deed to Land Reference No. Nairobi/Block 26/232 to the Plaintiff.*

5. *THAT costs of this application be provided for.*

2. The application is premised on the following 11 (eleven) grounds which appear on the face thereof:-

(a) *The Plaintiff is the registered and equitable owner of all that parcel of Land Reference No. Nairobi/Block 26/232 situate within the Republic of Kenya.*

(b) *By an agreement entered into between the Plaintiff and the Defendant on or about 18th February 2009 (hereinafter referred as "the said Agreement), the plaintiff agreed to sell and the defendant agreed to purchase all that parcel of land known as Land Reference No. Nairobi/Block 26/232 for an agreed sum of Kenya Shillings Eighteen Million (Kshs.18,000,000/=) and subject to terms and conditions therein prescribed in the said agreement.*

- (c) *The Plaintiff and the defendant agreed in writing that if the purchaser shall fail to comply with the condition relating to completion, the vendor may give a further 30 day notice and if the purchaser shall not comply with the said notice the Vendor shall at the Vendor's sole option be entitled:*
- (i) *To forthwith forfeit for the Vendor's own benefit as liquidated damages the sum of Kenya Shillings One Million Eight Hundred Thousand (Kshs.1,800,000/=) and declare this agreement to be rescinded; or*
- (ii) *To sue the purchaser forthwith for all sums due and unpaid by the purchase (sic) under the terms hereof and for specific performance; or*
- (iii) *To rescind this agreement and resell the said property either by public action or by private treaty subject to such stipulations and conditions as the Vendor may in the deficiency in price which may result upon and all expenses in connection with or incidental to such resale or attempted resale shall be made good by the purchase (sic) to the vendor and shall be recoverable by the vendor as liquidated damages after giving credit to the purchaser for moneys paid by the purchasers to the vendor's advocates PROVIDED ALWAYS that any increase in the price shall belong to the vendor absolutely.*
- (d) *Upon execution of the sale agreement the defendant/purchaser was given vacant possession of Land Reference No. Nairobi/Block 26/232 by the plaintiff pending completion of the sale. However, the defendant/purchaser continues to occupy the suit property belonging to the plaintiff despite having failed, refused and/or neglected to pay the balance of the purchase price to the plaintiff being Kenya Shillings Fourteen Million (Kshs.14,000,000/=) to date.*
- (e) *The Law Society of Kenya Conditions of Sale (edition 1989), provide that where the purchaser takes possession of the property before completion, other than under a lease or tenancy entered into before the contract, the purchaser occupies the property as a licensee of the vendor and not as a tenant and taking such possession is not an acceptance of the vendor's title or a waiver of the purchaser's right to make requisitions or objections to title.*
- (f) *That there are other willing buyers ready to purchase the same property while the defendant continues to occupy the same without paying any rent nor undertaking to clear the balance of the purchase price.*
- (g) *The defendant/purchaser has, on more than one occasion, through his advocates sought indulgence from the plaintiff to allow him more time but it now proves that this is a delaying tactic without any intention to complete.*
- (h) *There has been numerous correspondences between the plaintiff and the defendant's advocates wherein the plaintiff expressed his intention to apply the proceeds from this transaction in another transaction, as was expressed under clause 1(b), but this has been made impossible by the delay tactics of the defendant. (sic)*
- (i) *That the house comprised in the suit property L.R. NAIROBI/BLOCK 26/232 continues to undergo waste and depreciating in value while the defendant continues to occupy the same.*
- (j) *It would therefore occasion grave prejudice to the plaintiff if this application is not heard urgently and in any event well before the courts vacation.*
- (k) *In the circumstances of this case it is only fair and just that the court grants the orders sought herein.*

3. The application was filed under the vacation Rules and on the 5/08/2009, Wendoh J certified the application urgent. The Applicant was directed to serve the application forthwith upon the Respondent for interpartes hearing on 18/08/2009. On the 6/08/2009, the application together with the Certificate of Urgency dated 29/07/2009 were served upon the firm of **C. W. Wanjihia & Co.** Advocates of 4th Floor

Longonot Place, along Kijabe Street. A duly served copy was returned with the Affidavit of Service filed in court on 18/08/2009. The Process Server Mr. Noel M.N. Munyithya, states in his Affidavit of Service that when he got to the offices of M/s C. W. Wanjihia & Co. advocate, he found Ms. C. W. Wanjihia herself who was personally known to him and that in his presence, Ms/ Wanjihia instructed her secretary to accept service of the court documents, and that accordingly the Secretary accepted service of the documents as instructed and acknowledged receipt thereof by stamping at the forefront of the process server's copy, now filed in court.

4. This application came up for interpartes hearing before me on 18/08/2009, but on that day neither the Respondent nor his advocate who had been duly served appeared in court. Being satisfied that service had been properly effected upon M/s C.W. Wanjihia & Co. Advocates on behalf of the Respondent, I allowed the application to proceed. Mr. Murungi Mwiti of Murungi Mwiti & Co. Advocates appeared for the Applicant. Mr. Mwiti told the court that the Applicant and the Respondent entered into an Agreement for Sale by the Applicant, Cyrus Nyori Ndungu Mbugua to the Respondent, Saul Chemos Tuka of all that parcel of land known as LR No. NAIROBI/BLOCK 26/232- NAIROBI at the agreed purchase price of Kshs.18,000,000/= (Kenya Shillings Eighteen Million only). He also stated that the completion was to be 90 days from the date of signing the agreement. According to a copy of the Sale Agreement annexed to the Supporting Affidavit of the Applicant dated 29/07/2009, the firm of M/s C. W. Wanjihia & Co. Advocates acted for both parties in the transaction which was executed on the 18/02/2009. Mr. Mwiti told the court that the 90 days allowed for completion of the Sale had long lapsed and that the Respondent was not making any efforts whatsoever towards completing the Sale.

5. Mr. Mwiti also relied on the Applicant's Supporting Affidavit sworn on 29/07/2009. The deponent reiterates the averments constituting the grounds in support of the application and says that upon execution of the Agreement of Sale on 18/02/2009, the Respondent was given vacant possession of the suit premises. A copy of the Agreement is annexed to the affidavit and marked "CNM 2", while a copy of the Certificate of Lease of the suit property showing the registered owner to be Cyrus Nyori Ndungu Mbugua is annexed and marked "CNM 1". According to "CNM 1", the Applicant became the registered owner of the suit property on 9/06/2006.

6. The deponent also says that the Agreement of Sale clearly stipulated that the completion period would be 90 days from the date of execution of the agreement, failing which the Applicant was obligated to give a 30 day notice to the Respondent specifying the default and requiring the Respondent to remedy such default before expiration of the 30 day notice. The Applicant says that the Respondent neither completed the sale within the 90 days nor did he adhere to the 30 day notice given to him after the 19/05/2009 when the 90 days' completion period expired. Annexure "CNM 3" is a copy of a letter dated 21/05/2009 written by M/s Murungi Mwiti & Associates Advocates to M/s C.W. Wanjihia & Co. Advocates bringing to the latter's attention the fact that the Completion Date had come and gone without the Respondent completing his part of the bargain, and pointing out how the Respondent's failure to complete was adversely affecting the Applicant. This is what the letter said:-

"CW. WANJIHIA & CO.

Advocates

Longonot Place, 7th Floor

Harry Thuku Road, Kijabe Street

P. O. Box 25172

NAIROBI.

Attn: Ms. Caroline Wanjihia

Dear Madam,

RE: SALE OF L.R. NO. NAIROBI/BLOCK 26/232 NAIROBI

The above matter refers.

On behalf of our mutual client, the vendor herein, we wish to bring to your attention that the completion period for the above sale transaction has expired. We especially note Clause 9 of the sale agreement and terms and conditions therein.

Further, it is well within your knowledge that the sale proceeds from his transaction, were to be used by us, in another transaction where our mutual client is the purchaser.

Kindly therefore, advise us on when you intend to complete his transaction.

Yours faithfully,

For: MURUNGI MWITI & ASSOCIATES ADVOCATES

MURUNGI D. MWITI

C.C. Client”

7. The deponent further says that in response to the letter of 21/05/2009 M/s C. W. Wanjihia wrote their letter dated 28/05/2009 on behalf of the Respondent, informing M/s Murungi Mwiti that they were not able to forward the balance of the purchase price totaling Kshs.14,000,000/= because they had not received expected proceeds from another transaction. M/s C. W. Wanjihia asked for indulgence “for at least another month as we are sure we shall have completed the other transaction by then and released the amount due to your client to you”. The Applicant says that despite the Respondent being indulged as requested the Respondent did not complete the sale; and the Applicant, through a letter written on his behalf by his advocates on record, gave the Respondent the final 7 days’ notice. The letter dated 20/07/2009, called upon M/s C.W. Wanjihia to impress it upon the Respondent “to pay the balance of Kenya Shillings Fourteen Million (Kshs. 14,000,000/=) or terminate the sale contract and your client Mr. Chemos Tuka vacates the premises with immediate effect”. According to the Applicant, the Respondent did not heed the 7 days notice, hence these proceedings. By another letter dated 30/07/2009, addressed to C.W. Wanjihia & Co. Advocates by M/s Murungi Mwiti & Associates Advocates (see annexures marked “CNM 6” to the Applicant’s supporting affidavit), M/s C.W. Wanjihia & Co. Advocates were put on notice under Clause 6 of the LSK Conditions of Sale that the Applicant proposed to “authorize our agents to enter the property and evict your client if he shall not have vacated the house and surrendered the keys to our offices by 1st August 2009”. It is the Applicant’s contention that the suit property is being wasted by the Respondent who continues to enjoy the same whilst he is not paying any rent for it and without giving any undertaking for the payment of the balance of the purchase price.

8. The application is not opposed. The Respondent though duly served did not file either a Replying Affidavit or grounds of opposition. It behoves me at this point to give the facts of the case before I move on to consider the merits of the application.

9. Briefly, the facts are that by an agreement entered into between the Applicant/Plaintiff and the Respondent/ Defendant on or about 18/02/2009, the Plaintiff agreed to sell and the Defendant agreed to buy the suit property at the agreed purchase price of Kshs.18,000,000/= subject to the specific conditions set out in the agreement. Clause 9 of the Agreement provided as follows:-

“9. If the Purchaser shall fail to comply with any of the conditions hereof or of the condition subject to which this sale is made including the condition relating to the completion of the sale the Vendor may give to the purchaser at least thirty (30) days’ notice in writing specifying the default and requiring the Purchaser to remedy the same before the expiration of such notice AND if the purchaser shall not comply with the said notice the Vendor shall at the Vendor’s sole option be entitled:

- (a) To forthwith forfeit for the Vendor's own benefit as liquidated damages the sum of Kenya Shillings One Million Eight Hundred Thousand (Kshs.1,800,000/=) and declare this agreement to be rescinded; or
- (b) To sue the Purchaser forthwith for all sums due unpaid by the Purchaser under the terms hereof and for specific performance; or
- (c) To rescind this agreement and resell the said property either by Public action or by private treaty subject to such stipulations and conditions as the Vendor may in the deficiency in price which may result upon and all expenses in connection with or incidental to such resale or attempted resale shall be made by the Purchaser to the Vendor and shall be recoverable by the Vendor as liquidated damages after giving credit to the Purchaser for moneys paid by the Purchasers to the Vendor's Advocates PROVIDED ALWAYS that any increase in the price shall belong to the Vendor absolutely.

So that the Applicant has the sole discretion to take any of the above options to bring the sale agreement between himself and the Respondent to an end. The Respondent failed to pay the balance of the purchase price and also failed to voluntarily vacate the suit premises. In his plaint dated 29/07/2009 and filed in court on the same day, the Applicant, who acknowledges that the Respondent paid only Kshs.4,000,000/= (Kenya Shillings Four Million) out of the total purchase price of Kshs.18,000,000/= seeks the following reliefs:-

- (a) General damages
- (b) A mandatory injunction compelling the defendant whether by himself or his servants, agents, employees or any other person claiming under him to forthwith vacate and/or move out from Land Reference No. Nairobi/Block 26/232.
- (c) A declaration that the sale agreement dated 18th February 2009 between the plaintiff and the defendant has been rescinded.
- (d) An order compelling the defendant and/or his advocates to release and return the original title deed of the property to the plaintiff Land Reference No. Nairobi/Block 26/232 (sic).
- (e) Mesne profits with effect from 18th February 2009.
- (f) Costs of this suit together with interest thereon at such rate and for such period as this Honourable Court may deem fit to order.

10. The principles governing the grant of injunctions, both interlocutory and mandatory are to be found in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**. The Applicant must show (a) that he has a prima facie with a probability of success; (b) that unless the orders sought are granted, the Applicant is likely to suffer irreparable loss and damage and (c) that in case of doubt, the balance of convenience would still tilt in favour of the Applicant. The Applicant in this case seeks a mandatory injunction against the Respondent on the basis of the reasons that have been explained elsewhere in this ruling. Although it is in the discretion of the court to grant or not to grant the orders sought, nonetheless the guidelines set down in the **Giella case** (above) must be adhered to. A mandatory injunction will be granted in circumstances “*infringement of the right has created a state of affairs continuing to damage the Plaintiff. The injunction is granted with the purpose of altering or modifying the state of affairs so that the Plaintiff's right will no longer be infringed*” (see Richard Kuloba, **Principles of Injunctions**, OUP 1987, p. 77).

11. I have now considered the pleadings before me. I have also considered the grounds upon which the Applicant has based his prayers, the affidavit in support and the annexures thereto. It is apparent to me that the Respondent still keeps a substantial portion of the purchase price which he should have released to the Applicant on or before 19/05/2009 and he also keeps and occupies the suit premises at the utter detriment of the Applicant. I note that the agreement of sale was explicit as to what should happen if the

Respondent failed to observe any of the conditions of the sale. There is evidence to show that the Applicant availed every possible indulgence to the Respondent to remedy the default. The Applicant also gave the Respondent the option to voluntarily move out of the suit premises when he (Respondent) could not pay the balance of the purchase price within the time given. The Respondent has not done so, and it is my considered view that the Respondent's actions have a continuing negative and costly impact on the Applicant. The Applicant continues to suffer damage at the hands of the Respondent and it looks unlikely that the Respondent can pay damages to the Applicant even if such damages were to be ordered.

12. In the final analysis, I am satisfied that the Applicant has established that he has a prima facie case with a probability of success. That if the orders sought herein are not granted the Applicant will continue to suffer irreparable damage of losing both the balance of the purchase price and the suit property. I also think that even the balance of convenience would tilt in favour of the Applicant. What of the fact that the Respondent has remained silent even after being duly notified of the complaints' against him? The upshot of what I am saying here is that the Applicant's application dated 29/07/2009 has merit and I accordingly allow the same upon the following terms:-

(a) **THAT** a mandatory injunction do issue compelling the Defendant whether by himself or his servants, agents, employees or any other person claiming under him to forthwith vacate and/or move out from Land Reference No. Nairobi/Block 26/232 pending the hearing and determination of this suit.

(b) **THAT** an order do issue compelling the Defendant and/or his advocates to forthwith and unconditionally release and return the original Title Deed to Land Reference No. Nairobi/Block 26/232 to the Plaintiff.

(c) **THAT** costs of this application shall be borne by the Defendant.

It is so ordered.

Dated and delivered at Nairobi this 1st day of September 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Mwangi (present) for the Plaintiff

N/A For the Defendant

Weche – court clerk

