REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 156 of 2007

KENYA INSTITUTE OF MANAGEMENT.....PLAINTIFF

VERSUS

KENYA REINSURANCE CORPORATION.....DEFENDANT

RULING

The Plaintiff came to this court vide a plaint dated 14th February, 2007 and filed the same date, seeking and order in the nature of a permanent injunction to restrain the defendant, its servants and or agents from advertising for sale and/or offering for sale in any manner whatsoever or selling the property known as LR.No. 209/11154 – Nairobi otherwise known as South C Sports Club to any other party whatsoever save the plaintiff.

(b) An order of specific performance directed at the defendant, to compel the defendant to sign all documents and do all acts for the purposes of completing the contract between the plaintiff and the defendant for the sale by the defendant and the purchase by the Plaintiff of the property known as LR. N.209/11154 – Nairobi and the developments therein.

(c) General damages.

(d) Costs of the suit.

(e) Interest on (c) and (d) at court rates.

(f) Any further or alternative relief.

The plaint was accompanied by an interim application under certificate of urgency. The same was brought by way of chamber summons under Order 39 rules 1, 2 and the Civil Procedure Rules. It was dated and filed the same 14.2.07 but was amended on 15th February, 2007 and filed the same date. The interim reliefs sought are:-

(1) The defendant be restrained by himself, servants and or agents from advertising for sale and or offering for sale in any manner whatsoever or selling the property known as LR.No.209/11154 – Nairobi otherwise known as South “C” Sports Club do any other party whatsoever pending the hearing of this suit and or further orders of this court.

(2) That pending the hearing hereof the Honoruable Court do issue an order in the nature of a temporary injunction to restrain the defendant its servants/and or agents from advertising for sale or offering for sale in any manner whatsoever or selling the property known as LR. No.209/11154 Nairobi otherwise known as South “C” Sports Club to any other party whatsoever.

(3) That costs be provided for.

The grounds in support are stated in the body of the amended application and the supporting affidavit accompanying the original application, case law, grounds in the written skeleton arguments and oral submissions in Court.

(1) That a preliminary point raised by the defence against the plaintiffs claim as well as the interim relief was declined by this court.

(2) While reiterating the salient features of the Plaint and the supporting affidavit, Counsel for the applicant invited the court to agree with their assertion that the following matters are is not in dispute namely.

(i) That the defendant is the registered owner of the suit property namely LR. No.209/11154 – Nairobi which is otherwise known as South "C" Sports Club.

(ii) That the defendant advertised the property for open sale through the press and the inter net on 24th January 2006. The Plaintiff is the only one who responded to purchase the same with an initial offer to pay Kshs 170 million.

(iii) The offer triggered negotiations through correspondences exhibited herein culminating in the plaintiff agreeing to pay 200 million as the purchase price for the said property.

(iv) At first part of the negotiation was that, the defendant would finance 80% of the purchase price through mortgage arrangement with them. But later on backed out and asked the plaintiff to make an arrangement for a financier for the said 80%.

(v) The Plaintiff duly made arrangements for an alternative financier, namely Barclays Bank of Kenya and when the defendant was informed of the same instead of giving the letter of offer, a attempted to revile from the negotiations prompting these proceedings.

(3) In view of the matters stated in number 2 above, they contend that the defendant has no answer to their claim as his only excuse is that the provisions of section 3 (3) of the Law of Contract Act Cap.23 Laws of Kenya have not been met. In response to the same the applicants contend that the said provisions does not rule out existence of a collateral contract entered into by the parties binding on the party's sort of formalizing the same.

(4) They contend they are within principles established by case was entitling a litigant, to specific performance. They are such a litigant, because the defendant made an offer which they accepted negotiated the price, which they accepted and are ready and willing to pay the same as against the defendant's mere reliance on technicalities.

(5) They content that they are within the exception rule wherein injunction should be granted as opposed to damages even when such an award of damages are a possibility because:-

(i) They complied with all the terms set by the defendant.

(ii) The plaintiff will suffer irreparable harm as the property is prime and it cannot be replicated.

(iii) It has incurred expenses on the long negotiations.

(iv) The defendant has unreasonably withheld the letter of offer.

(v) The defendant has suffered nothing and stand to suffer nothing as what they want is 200 million which is available.

(vi) It was open tender and only the plaintiff respond.

(vii) The Plaintiff is a reputable institution and there is no allegation of any insincerity or mischief on its part.

(viii) This court should not allow arrogant litigation on the part of the defendant to go un chastised.

On case law the court was referred to the case of **MUMIAS SUGAR COMPANY LTD VERSUS FREIGHT FORWARDERS (K) LTD NAIROBI CA 297/03.** In this case one of the issues for consideration was argument that the alleged lease or sub lease un enforceable in view of the provisions of the law of contract Amendment Act No.21 of 1990. After consideration of all the relevant factors, at page 11 of the judgment line 4 from the bottom the court of appeal observed that "*We consider that a contract to enter into a lease or sub lease contained in correspondence between the parties consisting of letters signed by authorized employees of companies being the intended lessor and lessee is not prevented from being the basis of a suit by subsection (3) of the law of contract Act Cap.23. such correspondence is a sufficient memorandum".* Further at page 12 line 7 from the top, it is observed "*Having found that there was a valid enforceable contract to enter into a sub leave but that there was no sublease in existence as pleaded by the respondent we now need to consider what orders we should make"* At page 15 line 1 from the top the court went on to state "*we are dealing with a case in which we have found that a binding contract to enter into a lease does exist of which contract the superior court failed to order specific performance."*

The case of **NICOLENE LD VERSUS SIMMONDS 1953 1QB 543.** The summary of the facts are that a contract for the sale of a quantity of reinforcing steel bars was expressed to be subject to "*the usual conditions of acceptance"* The seller having repudiated the contract, the buyers claimed and were awarded by the trial judge damages for breach of contract. On appeal the seller contended that the contract was not concluded there being no consensus Ad idem in regard to the usual conditions of acceptance.

It was held inter alia that there being no usual conditions of acceptance the condition was meaningless and therefore could be ignored and that the contract was complete and enforceable.

As per Denning L.J. A distinction must be drawn between a clause which is meaningless and a clause which is yet to be agreed. A clause which is meaningless can often be ignored, whilst still leaving the contract good, where as a clause which has yet to be agreed may mean that there is no contract at all, because the parties have not agreed on all the essential terms.

The case of **HEILBUT SYMONS & CO. VERSUS BUCKLE TON [1913] A.C.30** in which it was held inter alia that the question whether an affirmation made by a vendor at the time of sale constitutes a warranty depends on the intention of the parties to be deduced from the whole of the evidence and the circumstances that the vender assumes to assert a fact of which the purchaser is ignorant though valuable, as evidence of intention, is not conclusive of the question.

The case of **NARAN BHAI C. PRAJAPAT VERSUS ASHOK COTTON CO. LTD [1964] E.A. 309**. The brief facts are that in January l963 the Plaintiff negotiated with the defendant to purchase a plot owned by the defendant. The Plaintiffs' advocate inspected the title deed of the property which showed the ground rent payable as shs 700/= per annum. The sale was concluded but when the transfer was submitted to the ministry of Lands and Surveyors for the Ministers consent, and registration, the plaintiff received a copy of a letter written to the defendant stating that the rent for the plot had been shs 1,200/= per annum since January 1, l960, when it was revised and that consent could not be given until the rent in arrears had been paid. The defendant paid the amount required to make up the increased rental to l962, whereupon consent was given and the transfer registered. Subsequently the plaintiff paid the rent for l963 and sued the defendant claiming compensation for the defendant's failure to disclose the increased rent when the terms of the sale were concluded. It was held inter alia that by his conduct in paying without protest, the increased rent and having his name registered as owner of the property, after he had learned the correct rental of the plot, the plaintiff was stopped from complaining.

The court was also referred to certain passages in Chitty on contract on the formation of the contract at the offer and accept once stage. The court has schemed through and wishes to note a few points for purposes of the record. At page 51 3rd paragraph line 3 from the bottom it is observed "*The task of the court is to extract the intention of the parties both from the terms of their correspondence and from the circumstances which surround and follow it and the question of interpretation may be thus stated"*. At page 54 line 9 from the top "*the judges will always seek to implement and not to defeat reasonable expectations……. In particular they will not be deterred from proclaiming the existence of a contract merely because one of the parties after agreeing in substance to the proposal of the other introduces a phrase or clause which when examined is found to be without significance. If there appears to be agreement on all essential matters neither on the face of the document or by praying in aid commercial practice or the previous course of dealing, between the parties, the court will ignore a subsidiary and meaningless addendum."*

At page 55 2nd paragraph line 5 on acceptance the writer continues "*The inclination of judges, whenever possible and especially in commercial transaction is final the existence of a contract is further evidence in their readiness to assume that the acceptance of an offer may have a retrospective effect. It may then serve to clothe with legal force the conduct of parties who have acted on the faith of the assumption (quoting Mega W J in Trollope and Colls Ltd Versus Atomic Power Construction) frequently on large transactions a written contract is expressed to have retrospective effect, some times lengthy retrospective effect, and this is cases where the negotiation on some of the terms have continued up to almost if not against; the date of the signature of the contract. The parties have meanwhile been conducting their transactions with one another. It may be for many months on the assumption that a contract would ultimately be agreed on lines known to both parties though with the final form of various constituent terms of the approved contract still under discussion. The parties have assumed that when the contract is made when all the terms have been agreed in their final form, the contract will apply retrospectively to the proceedings transactions. Often as I say, the ultimate contract expressly so provides. I can see no reason why if the parties so intend and agree such a stipulation should be denied legal effect. In the case under consideration there was no such express stipulation. But the parties had assumed that a contract would in due course be made, they had given orders and carried out work on this assumption and no other explanation of their conduct was feasible. The learned Judge therefore imported into the contract when ultimately made a term that it should apply retrospectively to all that had been done in anticipation of it"*.

At page 82, 3rd paragraph line 14 from the bottom the writer quotes **LORD MOULTON IN INTTELLBUT, SYMONS & CO. VERSUS BUCKLETON (supra)** stated thus "*The role of the judges in thus Constructing a contract was accepted and explained in l913 by Lord Moulton.*

It is evident both on principle and on authority that there may be a contract the consideration for which is the making of some other contract. If you will make such and such contract I will give you one hundred pounds is in every sense of the word a complete legal contract. It is collateral to the main contract but each has an independent existence and they do not differ in respect of their possessing to the full the character and status of a contract.

The use of the title collateral contracts to designate such creatures is thus sanctioned by high authority and indeed, had been known to the law for the previous fifty years.

The name is not perhaps altogether fortunate. The word 'collateral' suggest something that stands side by side with the main contract springing out of it and fortifying it. But as will be seen from the examples that follow, the purpose of the device is usually to enforce a promise given prior to the main contract and by for which this main contract would not have been made. It is often though not always rather of preliminary than a collateral contract. But it would be pedantic to quarrel with the name if the invention itself is salutary and successful".

At page 85 line 9 from the top, the writer concludes

"*But there is good authority for saying that where the facts justify the conclusion a court may properly*

construct a collateral contract from things said or done during the preliminary negotiations. Used with discretion, an instrument has thus been forged which without offending Orthodox views of contract may enable substantial justice to be done."

The defence on the other hand have opposed the application on the basis of their grounds set out in their replying affidavit sworn on 19th day of February 2007 and filed on the same date, annextures, written skeleton arguments, oral submissions in court and case law. The main points relied upon by them are:-

(1) They agree there were negotiations between the parties with a view to selling the subject suit property to the plaintiff but the said negotiations did not fructify into a contract as the plaintiff did not meet the conditions demanded by the defendant.

(2) They maintain that the provisions of Section 3 (3) of the Law of contract Act apply because:-

(i) The suit is for disposition of an interest in the land.

(ii) There was no written contract.

(iii) There was no document signed by all parities and attested by a witness.

(iv) There was no agreement between the parties which incorporated the agreed terms.

(3) The defendants are in possession of the suit property, they have an agreement with a 3rd party from whom they are receiving income.

(4) They maintain that, the Plaintiffs have not demonstrated a prima facie case with a probability of succe4ss because:-

(1) The documents relief upon do not have a corporate seal and so they do not bind the corporation as what is relied upon has not been signed land sealed by the corporation seal.

(5) *They contend that it will be wrong for this court to withhold the said property from sale to a 3rd party by the defendant in the absence of any proven sale to the Plaintiff/applicant.*

(6) *No ground has been made for the issuance of specific performance as they contend that the relief is available for a completed contract and not for purposes of completing a contract.*

(7) *As regards the court being asked to enforce a contract by assumption, they contend that if this court were to yield to the plaintiffs demands, it will be creating a dangerous precedent by compelling one party to sell its property to another party more so a public entity not withstanding the fact that there is no letter of offer from the public entity or sale agreement drawn and executed by the party and without any evidence that the plaintiff has worn the tender to purchase the property.*

(ii) *That the plaintiffs stand is unsupported by any known law in our jurisdiction or any judicial authority.*

(iii) *They are aware the court has been urged by the plaintiff for this court to be guided by the decisions of Bigg Versus Doyd (supra) and Nicolene LD Versus summond, they on their part urge the court to distinguish those decisions from the facts herein because:-*

(i) *After acceptance of the offer, the bars were shipped from their location.*

(ii) *The issue at hand did not include a public body.*

(iii) *There were no statutory provisions therein for such contracts.*

(8) *They contend that the ingredient of the applicant suffering irreparable loss in the event, that an injunction is not granted cannot arise because:*

(i) *It is not disputed that the property had not changed hands or ownership.*

(ii) *The only thing that the plaintiffs had done was to seek financing from another institution without the consent or the involvement of the defendant and so any injury suffered by them as a result of that is self inflicted.*

(iii) *The plaintiff has not demonstrated or proved payment of any consideration to the defendant for the subject property.*

(iv) *It is the defendant who stands to suffer loss as the property valued 200,000,000.00 then and whose value is not known now with an arrival in came of 2,800,000.00 risks being disposed off without its Board's decision.*

(9) *They also contend that the balance of convenience is their favour because:-*

(i) *They have the title to the property which cannot be ousted by the interest of the plaintiff as an interested purchaser or whose intention to purchase was not accepted by the defendant.*

(ii) *The Plaintiff had at the time of moving to court not paid any consideration for the same which cannot be ousted by an offer to make payment which the defendant refused to accept.*

(iii) *The defendant as the registered proprietor of the suit property has a lease agreement with South C Sports Club generating annual income of Kshs 2,800,000 and will be greatly inconvenienced if the said income were to be lost as opposed to the plaintiff who stands to loose nothing.*

(iv) *The defendant intends to sell the said property through an open tender system under the provisions of the exchequer and Audit Act, public procurement Regulations and public procurement and disposal Act 2006 which governs public entities such as the defendant herein, which provision require that all properties of public bodies have to be sold by way of tender and there is no provision by sale by way of court orders.*

(v) *The value of the property now is in excess of 200,000.000.00.*

(vi) *The defendant is a profitable institution and should the Plaintiff win in its litigation against them when the property shall have been disposed off, the defendant will be in a position to compensate them by way of damages*

(10). The facts of the Mumias case (supra) are distinguishable.

On the law they rely on the provisions of section 3(3) of the law and contract Act Cap.23 laws of Kenya which provides "No suit shall be brought upon a contract for the disposition of an interest on land unless:

(i) *The contract upon which the suit is founded.*

(ii) *It is in writing;*

(iii) *Is signed by all the parties thereto;*

(iv) *Incorporates all the terms which parties have expressly agreed in one document; and*

(b) *the signature of each party signing has been attested by a witness who is present when the contract was signed by such a party".*

Further reliance was placed on Halisburys Laws of England Fourth Edition Volume 24 paragraph 920 page 488 line 3 from the bottom where it is stated. "*pending proceedings for specific performance, the court will grant an injunction to restrain a vendor from dealing with property if there is a clear and undisputed contract, but if this is open to doubt, the question becomes one of the comparative convenience and an injunction will be granted or refused according to the side to which the balance of inconvenience inclines."*

Halisburys Laws of England volume 44 (1) Fourth Edition paragraph 803 pg. 462 line 8 it is stated "*The court may grant an interlocutory injunction in aid of specific performance. It may forbid the removal of the subject matter of the contract from the jurisdiction pending the trial, or a disposal of the subject matter by the defendant……"*

The Court has power to grant mandatory injunction to protect contractual rights either at the trial or on an interlocutory application. A party who has committed a breach of a negative obligation may be ordered to take action to restore the status quo. A vendor may be ordered to take positive action to prevent serious damage. At page 545 paragraph 931 line 4 from the bottom, it is stated "*the court has power to make an interlocutory order to enforce the performance of a contractual obligation. In a purchaser's action, the defendant may be restrained by injunction from disposing of the property or creating rights over it in consistent with the terms of the contract". At page 546 paragraph 932* "If the purchaser has been let into possession on the property, the court may make an interlocutory order directing him to pay the purchase price into Court.

On case law the court was referred to the case of **WESTERN PUMPS LIMITED VERSUS JOSEPH WAINAINA IRAYA T/A QUEEN CHICK INN AND H.E. DANIEL ARAP MOI, NAIROBI HCCC (MILIMANI COMMERCIAL COURTS) NO 186 OF 2006**. Fred A. Ochieng 7, at page 8 of the ruling set out the provisions of section 3(3) of the Law of Act Cap.23 Laws of Kenya. At line 6 from the bottom the learned judge observed thus "*pursuant to those provisions, it is my considered view that the plaintiff has failed to prove that it has a prima facie case with a probability success. It does not have any contract in writing as between itself on the one hand, and the defendants on the other hand. It would appear wholly in adequate for the plaintiff to seek to obtain an order for specific performance of a contract between the 2nd defendant and Queen chick Inn Limited. In any event, even that agreement was not attested by any witnesses secondly the plaintiff has not demonstrated that it would suffer irreparable loss or damage if no injunction is granted as prayed. He has paid a specific amount of money. If the 2nd defendant was held to have been wrong in receiving the money without giving to the plaintiff consideration for the same, I do not see any difficult in the plaintiff receiving reimbursement together with interest thereon. There has been no suggestion that the second defendant who the plaintiff believes should earn about Kshs 100 million from a sale of the plots curved out of the suit property, would be unable to compensate the plaintiff finally. I hold the view that the balance of convenience tilts in favour of the defendants. The reason for that is that plaintiff has at no time had possession of the suit property".*

The case of **METRA INVESTMENTS LTD VERSUS GAKWELI MOHAMED WAWAKAH NAIROBI MILIMANI HCCC NO. 54 OF 2006**. Rainsley J. as he then was at page 5 of the ruling stated thus "*As the case is presented there is no evidence that an agreement in writing exists signed by both parties and witnessed as is required by Section 3 (3) of the law of Contract Act.*

In the absence of such agreement the section is clear that no suit shall be brought for the disposition of an interest in land.

The applicant does not appear therefore to have a prima facie case with a probability of success.

The relief formerly available under the doctrine of part performance no longer exists".

The case of **NABRO PROPERTIES LTD VERSUS SKY STRUCTURES LTD AND 2 OTHERS (2002) 2 KLR 299**. This is a Court of Appeal decision. The brief facts are that appellant purchased property from respondent, registered a caveat to protect its interest, but failed to complete the purchase and the respondent moved to remove the caveat and transferred the property to a 3rd party the second added party. The High Court declined a remedy to the appellant who moved to the Court of Appeal which held inter alia:

(1) *The Memorandum and Articles of Association required execution by the Director. The agreement was executed by one director only and was therefore invalid for want of proper execution as it is also incapable of enforcement.*

(2) *An invalid agreement cannot be a basis for entitling one to an order for specific performance.*

(3) *A party seeking specific performance must show and satisfy the court that it can comply and be ready and able; a mere statement that the appellant was ready to pay is no sufficient to discharge the burden cast on the appellant.*

(4) *The sale agreement was impossible to perform, therefore it could not form a cause of action for specific performance"*

In **OPENDA VERSUS AHN [1984] KLR** 208 the Court of Appeal 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 persons 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 by so acting waived that requirement.

(2) A purchaser is entitled to recover damages at large where a seller refuses to implement an agreement for any reason other than a defective title and compensation contemplated by the contract or which could reasonably have been in contemplation of the parities as likely to be wasted if the contract is broken. The interest which the respondent was charged on the loan by the building society could be recovered from the appellant as damages because the appellant must have realized that the respondent's expenditure on the loan would be wasted if the contract was not performed. As the appellant's breach of the contract resulted in the waste of the respondent's expenditure the appellant was liable for the expenditure".

Further in Blacks law Dictionary Eighth Edition by Bran A. Garner page 1435, it is stated "specific performance is an equitable remedy that was within the courts discretion to award whenever the common law remedy is in sufficient either because damages would be in adequate or because the damages could not possibly be established …… In essence the remedy of specific performance enforces the execution of a contract according to its terms, and it may therefore be contrasted with the remedy of damages which is compensation for non-execution. In specific performance, execution of the contract is enforced by the power of the court to treat disobedience of its decree as contempt for which the offender may be imprisoned until he is prepared to comply with the decree… It is not strictly accurate to say that the court enforces execution of the contract according to its terms for the court will not usually intervene until default upon the contract has occurred, so that enforcement by the court is later in time then performance carried out by the person bound without than intervention of the Court".

In **QUEENS PHARMACEUTICAL LTD VERSUS RUPPHARMS LTD [2002] KLR 1 OTIENO J. as he then was (now JA)** held inter alia that, the document if it were to bind a limited liability company like the plaintiff had to have the company's seal or at least its stamp.

Lastly the defences' stand is that on the basis of the foregoing submission and case law the facts and decisions in the Mumias Case (supra) is distinguishable from the facts herein as the said case related to a lease and not land.

In response to the defence submissions, counsel for the Plaintiff/Applicant reiterated their earlier submissions and then added the following:-

(1) They have established existence of offer and acceptance from the correspondences exhibited by both sides.

(2) The Defendant was duly informed that money requested was available.

(3) The company's seal is not relevant at this stage. It will be relevant when it comes to the stage of sealing of the main contract.

(4) They still maintain that there is demonstration of the existence of a collateral contract which has not been ousted because a lease subject of the proceedings in the Mumias Sugar Company Ltd case (supra) and the sale of land herein are same as they are both subject to the provisions of Section 3 (3) of the Law of Contract Act and are both dispositions in land.

(5) They maintain that they are in a position to comply with any conditions that the court may impose should it find it fit to grant a conditional relief.

The foregoing case law and legal texts cited to this Court by either side bring to the fore certain principles of law relied upon by either side as pillars in support of their case which this court is enjoined to consider when assessing the facts herein in order to determine whether to grant the relief sought or not. In considering these pillars, this court has to bear in mind the fact that:-

(i) It is not the trial court.

(ii) Expression of opinion which are likely to prejudice the mind of the trial court should be avoided.

(iii) It has to bear in mind the fact that its appraisal of documentary evidence does not have the advantage of having that evidence tested and scrutinized in cross examination in order to determine whether it withstand the test of cross-examination or not.

(ii) While relating the legal principles, raised to the facts of the case, it should not be for purposes of drawing final conclusions on the matter but to use them to show the triable issues and the possible strengths of each sides' case for purposes of anchoring or disanchoring the interim relief claimed and also to high light the legal hurdles that the trial court has to go over in finally bringing the matter to rest.

For the plaintiff's case, the following are the identified pillars:-

(1) **<u>The role of the Court</u>**. This is found in the principles gathered from chitty on contract (supra) pages 51, 54 and 82.

(i) *The court is enjoined to extract the intention of the parties both from the terms of their correspondences and the surrounding circumstances*. It is undisputed that the intention of the parties herein is not disputed. The intention of the defendant then and even at the time of arguing the interim proceedings to sell the suit property. Whereas the intention of the plaintiff was and still is to purchase the said property.

(ii) *The judge should always seek to implement and not to defeat reasonable expectations and should not be deterred from proclaiming the existence of a contract because one of the parties after agreeing in substance to the proposal introduces a clause or phrase which when examined is found to be without significance*. The reasonable expectations of the parties at the time of negotiations was for the defendant to dispose off the property as a a vendee. Where as that of the plaintiff was to purchase the property as evidence implementation of these expectations is for the trial court. On the other hand the reasonable expectations at the interim proceedings is for the Plaintiff to earn the interim relief sought, while the defendant is to earn the denial of that interim relief to the plaintiff. The implementation of that reasonable expectation is the business of this court. The plaintiff will earn his reasonable expectation if he brings himself within the ambit of the principles for granting the same. The defendant will earn his reasonable expectation if he dislodges the plaintiffs claim to the interim relief.

(iii) *The inclination of the Court is and should be to find the existence of the contract. The search for such existence does not spare conduct of the parties. If it can be shown that the assumption of the parties was that a contract would ultimately be agreed upon along the lines known to both parties, subject to variation that would ultimately appear in the constituent terms of the contract*.

The final pronunciation as to the existence or non existence of the contract herein lies with the trial Court. The duty of this Court at this interim stage is to determine that when the facts displayed herein are considered in the light of principles of law cited, there appears to be reasonable ground to hold that there is sufficient material on the basis of which a court of law can reasonably construe and make findings as to the existence or non existence of the contract. In the circumstances of this case the conduct of the parties, non-denial of both parties of entering into negotiations to sell on the part of the defendant and to purchase on the part of the plaintiff as well as the correspondences exhibited by both parties constitute sufficient material on the basis of which a Court of Law can reasonably make findings as to the existence or none existence of a contract.

(iv) *When a plea of existence of a collateral contract is made by one party the court should proceed on the premise that there may be a contract, the consideration of which is the making of some other contract. For example if A tells B that if B does action EFG, A will in turn do action xyz and the two parties believe that each means what he is telling the other. If B goes ahead and does action EFG, A will be bound because there is a suggestion of existence of something that stands side by side from the main contract springing out of it and fortifying it*.

Herein the defendant advertised the property for sell, the plaintiff offered to purchase the same. It is on record that the initial purchase price was 170 million. But then the defendant changed and told the Plaintiff that if he raised that to 200 million and financed 80% of it on his own they would conclude a contract of sale and when he was told that the Plaintiff had now raised the 200 million is when the defendant developed cold feet prompting these proceedings. This is the basis on which the plaintiff hinges their claim of existence of a collateral contract. As to whether a collateral contract exists or not is for the trial court to determine. For now, the duty of this court is to determine whether one has been displayed. The Court is of the opinion that the conduct of the parties herein, in advertising the property for sale, entering into negotiations for sale and purchase, negotiations on the purchase price and efforts made by the Plaintiff to secure the required purchase price firstly from the defendant and then later on from a 3rd party and the fact that the terms negotiated and agreed upon were the ones to form the basis of the contract all go to display existence of a collateral contract in terms of principles set out by Chitty on contracts (supra).

As regards the existence of the desire of the parties to be bound, the plaintiff says, that desire has always existed right from the time they made the offer to purchase the property and still persist to the present date. The defence has not stated that they were not serious about the sale. Their complaint is that the plaintiff failed to meet the terms of the contract which has been denied by the Plaintiff, and which is therefore a triable issue.

5. *The purpose of a collateral contract is to enforce a promise given prior to the main contract and for the absence of which the main contract would not have been made. Enforcement arises where the facts justify the conclusion that a court may properly construct a collateral contract from things said or done during the preliminary negotiations. It is used with discretion, without offending Orthodox views on contract to enable substantial justice to be done*.

In the circumstances of this case if the plaintiffs', argument that, existence of a collateral contract is not defeated by the provisions of Section 3(3) of the Law of Contract Act Cap. 23 Laws of Kenya, in line with the decision in the **MUMIAS CASE (SUPRA),** and that the facts of the MUMIAS case are not distinguishable as asserted by the defence, are upheld by the trial court the court would have upheld the principle of substantial justice as opposed to adherence to technical justice. The trial court would have gone along way to fortify this principle by establishing that although a property owner has a right to sell or not to sell it, he has no right to dangle it with impunity before the eyes of a serious intending buyer and where he does so, he has to be made to meet the consequences for his impunity by either being put on

hold in the exercise of his right of sale to a 3rd party, pending the trial or to ultimately be told to specifically perform the contract in favour of the serious intending purchaser before whose eyes the sale was dangled with impunity as alleged by the Plaintiff.

For now the role of this court is to simply state that such a finding is not remote, which the court here hereby does. The authority for this is that the decision of the Court of Appeal in the **MUMIAS CASE (SUPRA)** which was an interpretation of the very provisions of Section 3(3) of the law of contract Act Cap.23 Laws of Kenya on the basis of which the defence has anchored their defence, and opposition to the interim relief, which being a court of Appeal decision, it has binding effect on the decision of the superior court.

(6). On proof of the existence of ingredients for sustaining a claim to a relief of specific performance, as a prerequisite to the earning of an interim relief of an injunction, the requirement is that one has to demonstrate that there exists a clear and undisputed contract firstly, and secondly, satisfaction that the plaintiff can comply and is ready and able to comply. Thirdly, that the contract is one that it is not impossible to perform. Whether existence of these ingredients are to be upheld or not is for the trial Court to determine. For now it is sufficient for this court to demonstrate that these ingredients do exist. This is so because, firstly the plaintiff says that as at the time the defendant developed cold feet they had raised the 200 million. Secondly that they are willing to deposit the same as a condition for the granting of the interim relief. Thirdly that the contract is not impossible to perform as all that the defendant's needs to do is to accept the 200 million and then sign the formal contract. The fact that the defendant alleges that the property is now worth much more than 200 million does not make the contract impossible to perform as the ultimate trial court is not devoid of good judicial common sense. Neither has its fountain of justice dried up. Nor has it divested itself of its important tool is trade namely, inherent powers, judicial discretion and lack of prejudice which can all be employed in their totality to ensure that if the plaintiff earns his specific performance relief, the cost should be fair, and commensurate to the market value of the suit property minus elements of speculation, of course!

Turning to the defence, its pillars of defence are as follows.

(1) The Plaintiff has no chances of succeeding ultimately at the trial and for that reason cannot succeed on their request for an interim relief because:-

(i) it is wrong for the court to try and enforce a contract based on assumption.

(ii) It will be a dangerous precedent for this court to compel a public entity to sell its property to another party who has not worn a tender.

(iii) The plaintiffs arguments are not supported by any law known to our jurisdiction or by any judicial authority.

(iv) Authorities cited by the plaintiff are distinguishable because issues at hand did not include a public body.

(v) There were no statutory provisions involved.

In order to oust the foregoing defence assertions, in order to earn the interim relief sought, it has to be demonstrated that a public entity does not enjoy specific contractual privileges not amenable to other contracting parties. In this courts opinion this has been demonstrated by the plaintiff as no rule of law has been cited to show that a public entity enjoys such a privileged contractual position. It goes into the contracting arena as an equal to its opponent. The same situation prevails in the court room should a dispute arise concerning the contract.

As regards non-existence of a statutory provision and authority to support the plaintiffs stand, the court is of the opinion that Section 3 (3) of the law of contract Act Cap. 23 Laws of Kenya, the decision in the Mumias case (supra) as well as the existence of the remedy of specific performance is sufficient

proof that what the plaintiff is asking for is not out of the extra ordinary, but a matter of normal routine litigation issues within the judicial process of this jurisdiction. More so when what the Plaintiff is hanging on as central to their argument is a decision of the highest court of this land, which decision this court as a superior court only ignores or trashes it at its own peril of facing chastisement from above.

2. *The defendants' assertion that any damage suffered by the Plaintiff is self inflicted* has been ousted by correspondences to show that at first the defendant was to finance the purchase but later on changed mind, forcing the plaintiff to look for another financier for the 80% of the purchase price. They did not call off the deal as soon as they realized that they were not going to finance the 80% purchase price. It therefore follows that the plaintiffs' efforts of looking for another financier was occasioned by the defendant and it matters not that they were not involved in the actual search of the would be financier.

3. *On the assertion that the Plaintiff has not paid any consideration,* stands ousted by the plaintiffs assertion that the defendant developed cold feet as soon as they were informed that the money required was available and requested them to give the letter of offer to conclude the contract. There is nothing exhibited to show that the letter of offer was given but the Plaintiff failed to make payment.

4. *On the fear that the defendants stand to loose 2.8 million on annual income*, this argument can only be taken to operate during the pendence of the proceedings as the same income is bound to come to an end as soon as the property is sold. This alone cannot be used to deny the Plaintiff the right to an interim relief if procedurally earned, as the court is not devoid of a safeguarding remedy, where by the interim relief can be granted on condition that the defendant does not interfere with the flow of that income to the defendant during the pendence of the trial.

5. *As regards the compliance with the provisions of the Exchequer and Audit Act*, this argument can only hold if they were part of the negotiations. Since it has not been demonstrated, the issue remains one for the main trial during which time the trial court would be called upon to scrutinize the provisions of the said Act and determine whether they were operational as at the time negotiations were commenced;

(ii) If not, whether it has retrospective effect,

(iii) Whether there are exceptions for any type of contracts such as the one subject to these proceedings, and

(iv) Lastly whether the said Act is immune to sell by way of specific performance thro ugh a court order.

6. *As regards the current value of the property being in excess of 200 million*, this is a matter for the trial court to determine whether this is a sufficient reason to justify the defendant wriggling out of its obligation. For now it is sufficient to note that the plaintiffs' assertion that both parties had settled for 200 million up from 170 million as at the time the defendant developed cold feet prompting these proceedings has not bee ousted.

7. As regards the decisions, on case law, in the case of **WESTERN PUMPS LTD (supra) AND METRA INVESTMENT LTD (supra),** it is worth noting that though they upheld the provisions of section 3 (3) of Cap. 23 and declined injunctive relief, rules of judicial precedent operate to rank them inferior to the Court of Appeal decision in the Mumias case (supra).

Having identified the principles forming the pillars of arguments of reach side, the court now moves to consider and apply them to the facts displayed herein.

The ingredients to be satisfied are those set out in the celebrated case of **GIELLA VERSUS CASSMAN BROWN & CO. LTD. [1973] EA 358**. These are:-

(1) The Applicant must demonstrate the existence of a prima facie case with a probability of success.

(2) The Applicant must demonstrate that if the injunction is not granted, he will suffer irreparable loss

which cannot be compensated for by an award of damages.

(3) Where the court, is in doubt about ingredient 1 and 2 above it will decide the matter on the balance of both parties.

Save that there is an exception to the second ingredient also developed by case law. In the case of **FILM ROVER INTERNATIONAL LTD AND OTHERS VERSUS COMMON FILM SALES LTD [1986] 3 AER 772.** It was held inter alia that in determining whether to grant an interlocutory injunction or not, the question for the court was whether the injustice that would be caused to the defendant if the plaintiff was granted an injunction and later failed at the trial out weighed the injustice that would be caused to the plaintiff is an injunction was refused and he succeeded a the trial.

In the case of **AIKMAN VERUS MICHUKI [1984] KLR 353,** the court of appeal sitting on an appeal arising from a refusal to grant an injunctive relief by the superior court held inter alia:-

(i). The Respondents having unlawfully seized possession of the estates were infringing on the rights of the appellants and ought to have been restrained by an injunction as equity does not assist law breakers.

(ii). The position taken by the High Court that an injury suffered by the appellants as a result of the trespass was capable of being compensated by damages was wrong because a wrong doer cannot keep what he has unlawfully taken just because he can pay for it. The real injury arose from the unlawful seizure of the estates by the Defendants in defiance of the Law.

(iii). The Judge was wrong in his dispensation that because liability was in dispute granting an injunction would be unfair for being based on a contingent liability yet to be ascertained. Interlocutory injunctions can be properly granted where liability has not yet been ascertained.

Also in the case of **WAITHAKA VERUS INDUSTRIAL AND COMMERCIAL DEVEOPMENT CORPORATION [2001] KLR 374** on an application for an injunction Ringera J as he then was, held inter alia that "*it is not an inexonarable rule that where damages maybe an appropriate remedy, an interlocutory injunction should never issue. If the adversary has been shown to be high handed or a oppressive in its dealings with the Applicant, this may move a court of equity to hold that one cannot hold another citizen's rights only at the pain of damages."*

On the requirement of demonstration of existence of a prima facie case the question to be determined by this court is whether the correspondences exchanged between the parties and which are not in dispute are within the ambit of the ingredients envisaged by Section 3 (3) of the Law of Contract Act Cap 23 L.O.K. The Defendants have adamantly maintained the correspondences do not meet the requirements more so when they do not bear the seal of the company.

Whereas the stand of the Plaintiff Applicant on the other hand is that the issue of whether the correspondences authored by the management of the Defendant bind it or not is a matter for the trial court. For now it is sufficient to prove that there was such correspondences which fact has not been disputed. In the case of **QUEENS PHARMACEUTICAL LTD VERSUS RUP PHARM LTD [2002] KLR** Otieno J as he then was (now JA) held inter alia that the document if it was meant to bind a limited liability company like the plaintiff had to have the company's seal or at lest its stamp. This decision is a High Court decision and therefore of persuasive authority. It therefore assists in displacing the defence arguments that it is only proof of existence of the company's seal that can bind the company.

The court has judicial notice of the fact that in normal company business transactions chief officers of companies are guided in the discharge of their functions for the benefit of the company in accordance of what is popularly known as Memorandum of Understanding, and Articles of Association. None of them has been displayed here to demonstrate in what circumstances the management can bind the company, where the seal of the company has not been used. There is therefore room for these issues to be ventilated and tested at the trial. It is the trial court which will inquire into which correspondence bear the company's stamp and which does not and the weight to be attached to its content.

Further reliance was placed on the case of **MUMIAS SUGAR COMPANY LTD VERSUS FREIGHT FORWARDERS (K) LTD** (supra). It concerned a lease agreement which had not yet been formalized. The Court of Appeal in a judgment delivered on the 18th day of March 2005 upheld a firm agreement to enter into a lease based on correspondences. In ruling so the Court of Appeal interpreted the provision of Section 3 (3) of the Law of Contract Act Cap 23.

The Plaintiff has urged this court to be guided by that decision because the same is binding on this court and relates to a disposition in land. The defence on the other hand has urged the court to distinguish that authority because a lease is not a disposition in land. Section 3 (6) of Cap 23 defines disposition as "*includes a transfer and a devise, bequest or apportionment of property*".

The law Lords of the Court of Appeal set out the provisions of Section 3 (3) Cap 23 in extensor at page 11 of the judgment in the Mumias Sugar Case (supra) and then went on to say that they considered that a contract to enter into a lease or a sub lease contained in correspondences between the parties consisting of letters signed by authorized employees of companies being the intended lessor and lessee is not prevented from being the basis of a suit by subjection 3 of the law of Contract Act. In the courts opinion such a correspondence is a sufficient memorandum. The decision was construing the same provision under inquiry herein, save that the parties were titled as intended lessee and lessor. Herein the parties can safely be titled as intended vendor and vendee.

The construction is binding on this court. On its own, the court makes a finding that the central theme in that provision is that, "*the agreement upon which the suit is founded or some memorandum or note thereof is in writing"*. Applying that to the facts herein, the court is of the opinion that a correspondence can safely pass the test of being a memorandum or note.

For the reasons given on the construction of Section 3 (3) Cap 23, in the light of the Court of Appeal authority and also on the courts own construction that the correspondences can pass the test of memorandum or note, the court makes a finding that the Applicant has satisfied the ingredient of demonstrating the existence of a triable issue or a prima facie case with a probability of success.

As for the second ingredient of likelihood of suffering unreasonable loss, this court is of the opinion that the value of the property being known, the same can be compensated for by way of damages except if the conduct of the Defendant falls within the principles of case law on the exception.

The court finds that the scenario described herein falls into that category of the opponent acting in a high handed and oppressive manner. The courts reason for saying so is because

(i) The Defendant advertised to sell the property;

(ii) The Plaintiff showed an interest to buy;

(iii) Parties entered into negotiations;

(iv) Plaintiff went to great pains to solicit credit from the Defendant who at first agreed and then changed mind and told the Plaintiff to look for credit from any other source. The Plaintiff has asserted that he did so and when the Defendant was informed that they had managed to raise the required amount the Defendant developed cold feet prompting this action. They assert that the reason for moving to court was because they were serious in their negotiations; the property is unique and prime and cannot be replicated. They have raised what the Defendant wanted then.

In this courts opinion a party holding himself out as a vendor leading another holding himself out as the vendee, making the vendee alter his position and go to great lengths to negotiate not only for the purchase but for credit facilities and when he is informed that the intending vendee is ready to conclude the deal he backs out with the sole reason that the deal outside the ambit of the relevant law, by virtue of him retracting on the deal, can only be described as a person acting not only in a high handed manner but also in an oppressive manner considering the keen interest the Plaintiff had shown in the property as well

as the entire transaction.

It is on record that him Defendant has asserted that damages would be adequate. True; but as observed by Ringera J as he then was in the case of **WAITHAKA VERSUS INDUSTIRAL AND COMEMRICAL DEVELOPEMTN COPRORATION** (supra), the adversary cannot act in a high handed and oppressive manager just because he is in a position to pay damages. The court therefore finds that though damages may be adequate compensation herein this is a proper case where the high handedness and oppressiveness of the Defendant can only be tamed by an injunctive relief pending the hearing and the disposal of the suit.

Further as per the persuasive principle in the case of **FILMS ROVER INTERNTIONAL LTD AND OTHERS (SUPRA),** in view of the Plaintiff assertion that they have a keen interest in the property because it is unique, prime and cannot be replicated, a finding that the injustice that would be caused to the defendant if the plaintiff is granted the injunction and latter failed at the trial does not out weigh the injustice that will be caused to the plaintiff if the injunction is refused and if he succeeded at the trial.

The reason for hiding so is because the plaintiff would have lost the unique, prime property which cannot be replicated. Where as the defendant would have been compensated by the appreciation in value. This is confirmed by their own revelation in submissions that since negotiations broke off the property has appreciated beyond the 200 million mark the plaintiff is offering.

On the balance of convenience, the Defendants allegation of loosing income from the suit property and their assertion that the property has appreciated and now fetch much more than what the Plaintiff was offering, as well as allegation that the contract if upheld would offend the provision of Section 3 (3) of the Law of Contract Act, does not weight heavier than the Plaintiff's willingness to complete the contract and readiness to pay over what had been agreed upon. In the premises the court is of the view that the balance of convenience tilts in favour of the Plaintiff applicant.

Lastly the core of the claim is specific performance. Some of the considerations that a court seized of such matters has to consider is the conduct of the parties in relation to each other, part performance of the contract, if any sincere and honest demonstration of the aggrieved to perform his part of the contract or complete the performance should he be given a chance, and evidence of steps taken by the aggrieved party towards the fulfillment of that performance. As well as lack of or absence of an impossibility to perform the contract.

In this courts view the Plaintiff has demonstrated all these by the following:-

(i). When he saw the advertisement for sale, he expressed interest to purchase.

(ii). The expression of interest was accepted by the Defendant and then parties got into serious negotiations.

(iii). When the Defendant declined to finance the deal the Plaintiff got another Financier.

(iv). When he realized that the Defendant had developed cold feet he moved to court promptly for protection.

(v). He has been ready and wiling to prosecute the action and has promised processing the action for speedy disposal of the suit so that parties can know their correct position in the matter.

(vi). He had demonstrated that the action taken by them and the principles relied upon by them can be construed to be in built in the principles envisaged by Section 3(3) of the Law of contract Act Cap.23 Laws of Kenya.

(vii) They are ready and willing to deposit the 200 million or even pay it over to the defendant if they are willing to accept the same.

(viii) There is no allegation of an impossibility to perform the contract.

For the reasons given in this assessment, the Court is satisfied that the Plaintiff has laid ground for granting of an equitable relief in their favour. This may be conditional or unconditional. In view of the facts displayed herein, the court, is of the opinion that a conditional injunction is appropriate.

Prayer (1) of the application amended on 15th February, 2007 be and is hereby granted pending hearing and determination of the suit on the following conditions.

(i) That the plaintiff do deposit the said 200 million in a joint interest earning account in the joint names of Counsels of both parties within 60 days from the date of today's ruling.

(ii) That the same Plaintiff do process the suit and ready the same for hearing and disposal within the same 60 days from the date of today's ruling.

(iii) That the same plaintiff do give an undertaking not to interfere with any activities currently carried on the premises under the direction or supervision of the defendant, inclusive of any income generated there from for the benefit of the defendant.

(iv) That the same plaintiff do give an undertaking as to damages beyond the 200 million which is to be deposited should any arise.

(v) The defendant will have costs of the application.

(vi) There will be liberty to apply.

DATED, READ AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2008

R.N. NAMBUYE

JUDGE