



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

**Civil Case 187 of 2007**

**EVEREST LIMITED.....PLAINTIFF**

**VERSUS**

**KATHERINE WAMBUI KURIA.....DEFENDANT**

**R U L I N G**

The facts which gave rise to this litigation as gathered from the pleadings briefly may be stated. By sale Agreement entered into by the Plaintiff and the Defendant on 8<sup>th</sup> March 2005, the Defendant offered to sell and the Plaintiff agreed to purchase the Defendant's parcel of land known as LR No. 330/537 Thomson Estate Valley Arcade in Nairobi at the purchase price of Shs. 27,000,000/=. The Plaintiff paid the 10% deposit and the balance would be paid at the completion date. The property was registered in the name of the Defendant pursuant to a decree of this Honourable Court issued ex parte on 2<sup>nd</sup> March 2004 in Miscellaneous Civil Case No. 15 of 1984 (OS) in a suit between the Defendant and her Ex-husband one Sylvester Kuria Kinyanjui.

The Defendant failed to complete the sale and therefore breached the Sale Agreement by failing to avail to the Plaintiff the completion documents. On 13<sup>th</sup> April 2005 the Defendant's Ex husband one Sylvester Kuria Kinyanjui filed an application being HCCC No. 15 of 1984 seeking to set aside the order decreeing the suit property to the Defendant.

On 26<sup>th</sup> June 2007 the Plaintiff filed this suit against the Defendant seeking judgment for injunctive orders to restrain the Defendant from alienating, selling, or disposing the suit property, specific performance against the Defendant to the Agreement of Sale dated 8<sup>th</sup> March 2005 as well as costs of the suit.

Together with the Plaintiff brought an application by way of Chamber Summons under certificate of urgency seeking a temporary injunction to restrain the Defendant from alienating, selling, disposing, charging, mortgaging and/or dealing with the suit property in any manner whatsoever until the hearing and determination of the suit.

The Plaintiff appeared before the Duty Judge on 27<sup>th</sup> June 2007 who certified the application urgent and ordered that the same be heard inter partes on 4<sup>th</sup> July 2007. The judge further ordered that the Plaintiff do serve the defendant.

By 25<sup>th</sup> July 2007 service had been effected upon the Defendant and when the parties appeared before Aganyanya J (as he then was) the Defendant was granted 10 days to file a replying affidavit and the Plaintiff was granted a similar period to file further affidavit if any. The Defendant filed the replying affidavit on time but the Plaintiff filed a further affidavit out of time and without leave of the court to which the Defendant raised a Preliminary Objection.

Mrs Githae appearing for the Defendant/Respondent submitted that the said further affidavit having been filed 24 days out of time and without leave of the court the same should be expunged from the record.

But Mr Ogola for the Plaintiff/Applicant in opposition to the Preliminary Objection conceded that the

affidavit was filed out of time and without leave of the court but submitted that the delay of 21 days was not inordinate and urged the court to dismiss the Preliminary Objection.

After considering the application in light of the affidavit evidence on record and the submissions by both counsel, it is conceded that the affidavit was filed out of time without leave and in contravention of the court order issued on 25<sup>th</sup> July 2007. The court cannot allow its order to be violated with impunity. The Plaintiff who is represented knew well that he ought to have sought leave to file the affidavit out of time but decided to file the same without seeking leave and there is no explanation for doing so.

In view of the foregoing I uphold the Preliminary Objection and order that the affidavit filed herein by the Plaintiff on 30<sup>th</sup> August 2007 be and is hereby expunged from the record with costs.

Dated at Nairobi this 10<sup>th</sup> day of June 2008.

**J. L. A. OSIEMO**

**JUDGE**