



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

Civil Case 721 of 2007

NIZAR HUDANI.....PLAINTIFF

VERSUS

ELIZABETH MUGURE MUKUNYA.....1ST DEFENDANT

THE CO-OPERATIVE BANK OF KENYA.....2ND DEFENDANT

THE COMMISSIONER OF LAND.....3RD DEFENDANT

THE REGISTRAR OF TITLES.....4TH DEFENDANT

**VIJAY MORJARIA & HITESH MORJARIA.....5TH
DEFENDANT**

R U L I N G

By Sale Agreement entered into between the plaintiff and the 1st defendant on 17th July 2006 (whom I will herein refer to as the vendor) it was agreed that the vendor shall sell and the purchaser shall purchase the suit property LR No 7785/793 at a purchase price of Sh. 6,8000,000/=. At the time the vendor entered into this Sale Agreement the suit property was mortgaged to the Co-operative Bank and it was further agreed that the purchaser shall pay the outstanding amount to the Co-operative Bank to redeem the title and in the alternative the purchaser's Advocate shall give an undertaking to the Bank to pay the aforementioned sum. On payment of the purchase price to the vendor's Advocate and upon receipt of the discharge of charge from the Co-operative Bank and the title the vendor's Advocate shall forward the following documents to the purchaser's Advocate:

- (a) Duly executed Transfer of the property in triplicate.
- (b) Title Deed of the property.
- (c) Valid Rates and Land Rent Certificate.
- (d) Consent to transfer.

On 3rd July 2006 the Plaintiff's Advocate forwarded to the 1st Defendant's Advocate the Agreement for Sale duly executed by the plaintiff together with a cheque for Shs. 680,000/= being a 10% deposit on the purchase price which money was duly received by the 1st Defendant's Advocates to hold the same as

stakeholders. On 19th July 2006 the plaintiff's Advocate received a copy of the Agreement of Sale duly executed by the 1st Defendant and stamped by Revenue Authority. Despite the fact that the Plaintiff was able and willing to complete the sale and this never happened. On 30th October 2006 the plaintiff's Advocate had written directly to the 2nd Defendant the chargee requesting the 2nd Defendant to directly transfer the subject property by exercising its statutory powers of sale under the charge but there was no response. On 31st October 2006 the Plaintiff's Advocate wrote once again to the 2nd Defendant giving his professional undertaking for the full settlement of all the monies owed to the 2nd Defendant by the 1st Defendant upon advise by the 2nd Defendant of the actual sums due and owing and further in exchange for the title documents and all completion documents to enable finalization of the transaction.

On 24th January 2007 the Plaintiff's Advocate wrote to the 2nd Defendant forwarding a draft transfer for approval by the 2nd Defendant. On 22nd February 2007 the 2nd Defendant wrote to the Plaintiff's Advocate confirming that the draft transfer forwarded to it by the Plaintiff's Advocate was in order for execution.

On 6th August 2007 the Plaintiff's Advocate wrote to the 2nd Defendant requesting the 2nd Defendant to advise on the actual balance outstanding in the 1st Defendant's loan account with the 2nd Defendant to enable the Plaintiff's Advocate to forward the cheque for the amount in exchange for the completion documents and an executed Discharge of Charge. On 28th August 2007 the 2nd Defendant's Advocate confirmed receipt of the letter dated 6th August 2007 and promising to revert to him after the 2nd Defendant consulting the 1st Defendant on the same matter. On 5th September 2007 the 2nd Defendant wrote the Plaintiff informing him that the 1st Defendant had advised the 2nd Defendant that she would not be proceeding with the sale transaction and as such the Plaintiff's Advocate should take up the matter directly with the 1st Defendant.

On 5th October 2007 the Plaintiff's Advocate wrote two letters to the 2nd Defendant in which he enclosed two banker's cheques for Sh. 4,600,000/= and Shs. 400,000/= for the settlement of the outstanding loan amount advanced to the 1st Defendant by the 2nd Defendant. The Plaintiff's Advocate also put the 2nd Defendant on notice that to the extent that all monies owed to the 2nd Defendant were fully settled, the 2nd Defendant was obliged under the law to release the title documents and all the completion documents to facilitate finalization of the sale transaction.

On 8th October 2007 the 2nd Defendant wrote the Plaintiff's Advocate returning the two bankers cheques which had been forwarded to the 2nd Defendant on 5th October 2007 and generally disclaiming any liability on its part and blatantly refusing to honour the representation made to the Plaintiff's Advocate to transfer the suit property to the Plaintiff under the Statutory Power of Sale arising from the charge and consequently the suit property was transferred to the 5th Defendant. Mr. Gautama for the Plaintiff submitted that copy of the Sale Agreement was made available to the bank and they knew about it.

The facts as stated above are not in dispute. Mr. Gautama submits that the vendor having negotiated the purchase price with the Plaintiff, and having executed the Sale Agreement and accepted Shs. 680,000/= from the Plaintiff which was 10% deposit, a constructive trust was created and all that he wanted was to maintain the status quo awaiting the hearing of the main suit. While Miss Nyambura for the 2nd Defendant in her submissions conceded that the 2nd Defendant was made aware of the sale transaction between the Plaintiff and the 1st Defendant over the suit premises and had communicated its approval but later the 1st Defendant wrote and informed the bank that she was not proceeding with the sale. She further submitted that the bank had no contract with the Plaintiff and therefore was under no duty to deal with the Plaintiff and that the bank correctly exercised its statutory power of sale. And Mr Kondele for the 5th Defendant submits that the 2nd Defendant was an innocent purchaser for value and was not party to the transactions which gave rise to this incident. He further submitted that the contract between the Plaintiff and the 1st Defendant and that the Plaintiff's remedy is against the 1st defendant for damages.

I have carefully, considered the Plaintiff's application in light of the affidavits evidence on record and arguments by counsel for the Plaintiff and the Defendants bearing in mind that an injunction is a great equitable remedy for the protection of those legal rights of parties to litigation which have been or are threatened by violation.

The necessary conditions for the grant of an interlocutory injunction are well established. They were laid down by the East African Court of Appeal in the celebrated case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358.

First the Applicant must make out a prima facie case with a probability of success at the trial; secondly an injunction will not normally issue if the injury feared may adequately be compensated in damages; and thirdly, if the court is in doubt, it should decide the application on a balance of convenience.

The court should bear in mind that it is not called upon at this stage to decide the merits of the case with finality.

Looking at the matter from the above perspective the first question to ask is whether the plaintiff has made out a prima facie case with a probability of success at the trial; that he has legal rights over the suit land which are threatened by unlawful acts of the Defendants.

It is Mr. Gautama's contention that the 1st Defendant having accepted Sh. 680,000/= being the 10% deposit and retained it a constructive trust had been created. The constructive trust traditionally arises when a particular principle of equity makes it the defendant's duty to hold the property or part thereof in equity for the plaintiff so that the court when imposing the constructive trust is retrospectively vindicating the pre-existing proprietary right. After the execution of the Sale Agreement and acceptance of the 10% deposit the rights and control of Elizabeth Mugure the registered proprietor over the suit premises were reduced to that of a mere trustee holding the suit premises in trust for the purchaser until the completion of the sale. As such she had no capacity to sell suit premises to the 5th Defendant and she could not sell what she did not have. It follows therefore that if the Plaintiff proves his case then the 5th Defendant had acquired nothing in law from the 1st Defendant.

The Applicant has satisfied the principles as enunciated in *Giella's* case above.

Accordingly the Plaintiffs Chamber Summons dated 6th December 2007 is allowed in terms of prayers 2, 3, 4 and 5.

Dated and delivered at Nairobi this 24th day of September 2008.

J. L. A. OSIEMO

JUDGE