REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 122 & 119 of 2006

JOSEPH WAINAINA IRAYA T/A QUEEN CHIC INN …..................................... PLAINTIFF

VERSUS

H. E. DANIEL ARAP MOI ……………………………............................ 1ST DEFENDANT

SHADRACK NGUGI KAMAU T/A BLACKIE AUTO SPARES...............2ND DEFENDANT

R U L I N G

The Plaintiff in H.C.C.C. No. 119 of 2006, Shadrack Ngugi Kamau t/a Blackie Auto Spares filed the said suit on 9th November 2006 against the Defendants, Joseph Wainaina Iraya t/a Queenchic Inn and H.E. Daniel Arap Moi seeking the following orders:-

(i) An order of temporary injunction from dealing in the land in any way pending the hearing and determination of this suit.

(ii) An order of permanent injunction against the 2nd Defendant from dealing in the land in any way whatsoever.

(iii) An order against the 1st Defendant that the land be shared equally among the parties in the verbal agreement and further the 2nd agreement was entered into under duress.

(iv) An order of specific performance against the 2nd Defendant to part with possession and ownership to the land in favor of the Plaintiff and the other buyers.

(v) Costs of this suit.

The suit property referred to in this case is parcel of land known as Eldoret Municipality/Block 15/239 belonging to the second Defendant. It is the Plaintiff's case that on or about 16th March, 2006 the first

Defendant and the second Defendant entered into an agreement (referred to as the 1st Agreement) over the sale of the land for a consideration of Kshs. 21,450,000/= of which the first Defendant paid a deposit of Kshs. 4,000,000/=. The Plaintiff averred that it was part of the agreement that the second Defendant would pass possession and title of the land to the Defendant upon the signing of the first Agreement.

The Plaintiff further contends on or about February 2006 he had entered into a verbal agreement with the first Defendant and two other persons, namely, Stephen Kihara Karobio and Benson Njuguna Chege to buy the suit property and that they would share the land equally among themselves. The Plaintiff further added that the four contributed towards the purchase price as follows:-

The Plaintiff …………………………. Shs. 1,000,000/=

The 1st Defendant ………………….. Shs. 1,000,000/=

Stephen Kihara Karobio ……………. Shs. 2,000,000/=

Benson Njuguna Chege …………….. Shs. 1,000,000/=

TOTAL Shs. 5,000,000/=

The Plaintiff claims that Shs. 4,000,000/= was to be paid as deposit for the purchase of the land and Kshs. 1,000,000/= was to be paid to M/s. Sunkuli and Company, Advocates for the second Defendant as legal fees for the transaction. It is the Plaintiff's claim in this action that the first Defendant without any authority of the other parties to the verbal agreement proceeded to have the Sale Agreement prepared in the name of "his Inn Queen chic" (sic) and to the exclusion of the other purchasers.

On the basis of the said suit, the Plaintiff simultaneously filed an application on 9th November 2006 under Certificate of Urgency seeking to restrain the Defendants by way of a temporary injunction from dealing with the suit land. The plaintiff through counsel appeared before me on the said date and I granted interim orders on the said lines pending the inter partes hearing of the application on 22nd November, 2006.

Shortly thereafter, on the 14th November, 2006, the first Defendant in H.C.C.C. No. 119 of 2006 in an apparent ignorance of the existence of the said suit and exparte orders obtained against him on 9th November 2006, instituted his own suit. This is H.C.C.C. No. 122 of 2006 in which he sued the second Defendant in the earlier suit, H.E. Daniel Toroitich Arap Moi in respect of a Sale Agreement relating to the parcel of land comprised in Title No. ELDORET MUNICIPALITY BLOCK 15/239. This is the very same property in H.C.C.C. No. 119 of 2006.

In this latter suit, the Plaintiff Joseph Wainaina Iraya, inter alia, claims that:-

Ø The Defendant, H.E. Daniel Toroitich Arap Moi is the registered proprietor of all that parcel of land known as L.R. No. Eldoret Municipality Block 15/239 having been so registered on 21.9.2003 under a leasehold tenureship of 925 years and 3 months effective from 1.8.1983 and measuring 21.454 Hectares.

Ø On or around 15th March, 2006 the Plaintiff got into a sale agreement with the Defendant of the whole of that parcel comprised in Title No. Eldoret Municipality Block 15/239 for a consideration of Kshs. 21,450,000/= out of which the Plaintiff paid and the Defendant acknowledged receipt of Shs. 3,500,000/=.

Ø Pursuant to the agreement referred to above the Plaintiff made a further payment of Shs. 1,500,000/= to the Defendant through the latter's advocates, M/s. Sunkuli & Company Advocates on 5.4.2006. The said Advocates drew the Sale Agreement.

Ø The Defendant gave the Plaintiff possession of the suit land as it was understood between them that the

Plaintiff would subdivide the land and offer the resultant portions to the public by way of sale so as to raise the balance of the purchase price and some profit for the Plaintiff.

Ø No sooner had the Plaintiff taken possession and commenced the subdivision exercise than disagreement arose between the Third Parties on the one hand an the Plaintiff and the Defendant on the other hand resulting in Nairobi H.C.C.C. No. 186 of 2006 at Milimani Commercial Courts.

Ø The Third Party successfully obtained an injunction against the Plaintiff and the Defendant ex parte and which was finally dismissed on 20.6.2006.

Ø The Third Party was dissatisfied with the ruling and sought to appeal to the Court of Appeal. Its application for injunction pending appeal was allowed ex parte on 12.7.2006 and is pending hearing inter partes on 21.11.2006.

Ø Owing to the disruption caused by the Third Party suit the Sale Agreement could not be completed within the 90 days set out in the Agreement.

Ø The Plaintiff sought to remind the Defendant that the disruption occasioned by the Court Order had severely altered their agreement of 15.3.2006 through a letter by its advocates to the Defendant's advocates which was neither acknowledged nor replied to.

Ø The Plaintiff became uncomfortable with the Defendant's silence over their sale agreement and derived to search the suit property at the Municipal Council of Eldoret and Uasin Gishu District Lands office whereat he discovered that the Defendant had through a Third Party, M/s. Raiply Wood Limited, paid the land rates and withdrawn the greed card from the register of Block 15, thus making a search impossible.

Ø The Plaintiff meanwhile received information that the Defendant had struck another deal of sale of the same property No. Eldoret Municipality Block 15/239 with M/s. Raiply Woods Limited, without rescinding or revoking the previous agreement between him and the Plaintiff. The Plaintiff contends that the subsequent agreement by the Defendant is null, void and illegal.

The Plaintiff also pleaded fraud, illegality and nullity. The particulars supplied in his plaint are that the subsequent sale agreement with the M/s. Raiply Woods Limited,:-

(a) Has been made in violation of existing High Court Orders issued in Nairobi HCCC Milimani Commercial Courts No. 186 of 2006.

(b) Has been entered into without revoking and/or rescinding the earlier agreement with the Plaintiff.

(c) It is tailored to defeat or extinguish the Plaintiff's rights as a Purchaser without good cause.

(d) It has been discretely negotiated in circumstances that suggest fraud or ill-motive.

The Plaintiff seeks Judgment against the Defendant for the following orders:-

(a) A declaration that the agreement of sale between the Plaintiff and the Defendant of 15.3.2006 is alive and valid as between them and against all else made subsequently.

(b) An injunction permanently restraining the Defendant and all who may claim through him from dealing with L.R. No. Eldoret Municipality/Block 15/239 to the exclusion of the Plaintiff.

(c) Specific performance of the agreement of sale between the plaintiff and the Defendant over and about all that parcel of land known as Title No. Eldoret Municipality Block 15/239 subject to the payment of the balance of the purchase price.

(d) Any other or further relief the Court may deem fit to grant owing to the circumstances.

(e) Costs of this action.

On the same day, the said Plaintiff in HCCC No. 122 of 2006 filed the said suit, he took out an ex parte application for ex parte temporary injunctive orders against the Defendant, H.E. Daniel Toroitich Arap Moi. This Court being aware of the interim temporary orders it had granted in HCCC No. 119 of 2006 in respect of the same suit property declined to issue any further restraining orders and made the following orders instead:-

"*1. That the Court realized that another matter, to wit, Eldoret HCCC No. 119 of 2006 had been filed and an injunction has been issued preserving the subject-matter, Title No. Eldoret Municipality Block 15/239 against the current Plaintiff and Defendant both as Defendants and which is due for inter partes hearing on 22.11.2006.*

2. The property is therefore, in no danger of waste at all.

3. This application be served and heard inter partes on 22.11.2006."

On the 22nd November 2006, both the two cases and files in HCCC No. 119 of 2006 and HCCC No. 122 of 2006 were placed before me and when all the parties in the two suits were represented by their respective Counsel. After very careful consultations and deliberations between the advocates and the Court the following CONSENT ORDERS were in effect made and recorded:-

1. This suit Eldoret HCCC No. 122 of 2006 is hereby consolidated with Eldoret HCCC No. 119 of 2006.

2. The Plaintiff in HCCC No. 122 of 2006 shall remain the Plaintiff in the consolidated suit.

3. The Plaintiff in HCCC No. 119 of 2006, SHADRACK NGUGI KAMAU T/A BLACKIE AUTO SPARES shall be the second Defendant in the Consolidated suit and the provisions of Order 1, Rule 21 (1), (2) and (3) shall apply to him. The second Defendant's Plaint shall be considered to be his Notice of Claim as against the Plaintiff and the First Defendant.

4. The injunction applications in the consolidated suits are hereby consolidated and shall be heard and determined as one.

5. Hearing of the consolidated injunction applications shall be on the 1st December, 2006 at 12 noon. Interim orders are hereby extended until then.

6. The First Defendant shall file and serve his Replying Affidavit within the next five days.

7. The Plaintiff and Second Defendant to file and serve Supplementary Affidavits if necessary, before the hearing date. Each party to complete service of their pleadings on the other parties within the next five (5) days.

8. The Interim Orders are hereby extended on condition that the Plaintiff and the Second Defendant shall respectively lodge into this Court within the next 7 days a written undertaking that in the event that he shall be unsuccessful in the suit he shall bear and be responsible for any loss, damage, expenses and costs which shall be suffered and/or incurred by the First Defendant as a result of the grant and extension of the said ex parte interim orders.

The Second Defendant had been granted the ex parte Interim injunctive orders on 9th November 2006 in HCCC. 119 of 2006 on a similar condition as to damages and had already lodged the written undertaking. The hearing of the consolidated applications were not heard on 1st December, 2006 for reasons on record. They were finally heard on 18th December 2006.

By the said date, the three parties had filed and placed on record their subsequent respective papers in accordance with the Civil Procedure Rules and as ordered by the Court as follows:-

The Plaintiff:-

1. An Amended Plant dated 27th November, 2006.

2. A Replying Affidavit to the Second Defendant's application sworn on 20th November, 2006.

3. A Further Affidavit sworn on 30th November, 2006.

First Defendant:-

1. Grounds of Opposition dated 21st November 2006 to the Plaintiff's application.

2. Defence dated 27th November, 2006 to the Plaintiff's original plaint.

3. Defence dated 8th December, 2006.

4. Grounds of Opposition dated 21st November 2006 to the second Defendant's application.

5. Replying Affidavit sworn on 27th November, 2006 by Julius Ole Sunkuli, Advocate.

Second Defendant:-

1. Relied on his application and supporting affidavit.

In his Amended Plaint, dated 27th November, 2006, the Plaintiff set

up a claim of based on trust and added the following prayers to his claim:-

" ……………………………………………….

(c) (i) A declaration that in executing the Sale

Agreement, putting the Plaintiff in possession and accepting part payment of the price agreed, the Defendant became a trustee of the Plaintiff.

(c) (ii) A declaration that the constructive trust existing between them is determined upon payment of the balance of the purchase price."

The First Defendant in this Grounds of Opposition dated 21st November, 2006 to the Plaintiff's application, sets out the following grounds:-

(a) That the application is grossly defective, misconceived and an abuse of the process of the Court.

(b) That this suit is barred and offends the provisions of Section (a) and (b) of Section 3 (3) (a) and (b) and section (6) of the Law of Contract Act, Chapter 23 Laws of Kenya

That the suit herein is an abuse of the process of the court, as the Plaintiff ought to have moved appropriately in Nairobi HCCC No. 186 of 2006.

(d) That the application does not meet the requirements of the Law as more specifically set out in GIELLA –VS- CASSMAN BROWN (1973) EA 358.

(e) The Plaintiff is not a party to the purported agreement exhibited in the applicant and since he has no rights following therefrom, none can be breached.

(f) That the application is inadequately supported.

The First Defendant in his Amended Defence responded to the claim of a trust in the following manner:-

"*13 A. The 1st Defendant denies the contents of paragraph 14A of the Amended Plaint, and in particular the 1st Defendant avers that the Plaintiff is not entitled to the Declaration sought. He further denies signing any agreement with the plaintiff nor receiving any money from the plaintiff, and further that the 1st Defendant did not put the Plaintiff into possession of the suit property.*

13 B. The 1st Defendant does not admit receiving any part of the purchase price from the Plaintiff and further that the 1st Defendant has never at any given time placed himself or been placed by anybody in a position of trust for the Plaintiff or anybody at all with regard to the suit property, subject to payment of the purchase price at all.

13 C. The 1st Defendant avers that the Plaintiff is not entitled to any orders sought under paragraph 14 B and is a stranger to any constructive trust between the Plaintiff and the 1st Defendant denies that there was any constructive trust or any trust at all resulting with regard to the Plaintiff or the subject-matter at all, and further that no constructive trust is determinable upon payment of the balance price at all, and will put the Plaintiff to strict proof.

13 D. It is the 1st Defendant's further plea that the issue of trust cannot arise in the particular circumstances of this case in view of the clear provisions of the Registration of Titles Act relating to the manner of transfer and acquisition of interest in landed property and the equitable principles of trust now pleaded cannot oust clear and express provisions of the law. The said plea is, therefore, bad in law and cannot assist the Plaintiff's suit an inch.

13 E. The 1st Defendant further avers that the issue of trust, constructive or otherwise cannot arise in respect of an incomplete transaction and the Plaintiff's admission of non-payment of any purchase price by the intended purchaser within the contractual period, or at all is sufficient to disentitle it to this Honourable Court's discretion.

13 F. …………………………………………………… "

As the issues relating to the claim of the existence of a trust arose as a result of the amended pleadings and which issues did not arise in the pleadings at the time the applications and grounds of opposition were filed and since there were no objections, the Court did not intervene in the Counsel's submissions during the hearing. I think that it is fair and just that the issues on this cause of action be considered in consolidated applications.

The First Defendant in his Grounds of Opposition dated 21st November, 2006 to the Second Defendant's application set out the following grounds:-

(a) That the application is grossly defective, misconceived and bad in law.

(b) That the application is supported by an incomplete affidavit.

(c) That the application does not meet the requirements of Law as more specifically set out in the case of GIELLA –VS- CASSMAN BROWN (1973) EA 358.

(d) That there is no agreement capable of enforcement between the Plaintiff and the 2nd Defendant.

(e) That there is no agreement capable of enforcement between the 1st Defendant and the 2nd Defendant and therefore none can be enforced by the Plaintiff as against the Defendants whether jointly or severally.

(f) That the agreement relied on by the Plaintiff and purportedly dated 16th March, 2006 offends the provisions of Section 3 (3) (a) and (b) and section 3 (6) of the Law of Contract Act, Cap. 23 Laws of Kenya.

(g) That damages would suffice to compensate the Plaintiff if at all it has suffered any loss.

(h) That the application is not sufficiently or adequately supported.

I have carefully considered the consolidated applications of the Plaintiff and the Second Defendant, both supporting affidavits and Supplementary affidavits. I have also considered the Replying Affidavit of the First Defendant. Last but not least I have considered and taken into account the able submissions by Counsel on behalf of their respective clients.

As has been stated time and time again, the principles and conditions for the grant of interlocutory injunctions in Kenya are well established. They were laid out by the Court of Appeal of East Africa in the ground breaking case of GIELLA –V- CASSMAN BROWN & CO. LTD (1973) EA 358 in which the eminent Justices of Appeal (Sir William Duffus, P, Spry, V-P, and Law, J.A.) held that, at P. 360:-

" …………………………..

The conditions for the grant of an interlocutory injunction are now, I think 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 the application on a balance of convenience."

I am bound to apply the aforesaid principles and conditions against the facts and law disclosed by the consolidated applications. I also think that it is prudent to identity the questions or issues for determination by the Court at this interlocutory stage as disclosed by the pleadings, and the applications. While the two applications herein were consolidated, for convenience and to save precious judicial time and as the causes of action arose in connection with what appears to be related transactions on the face of it and definitely in respect of the same parties and subject-matter, the Plaintiff's and Second Defendant's causes of action and issues in their respective applications are clearly distinct and separate. As a result I will deal with questions/issues which I think are disclosed by each of the applications, separately:-

1. Issues for determination in respect of the Plaintiff's application vis-à-vis the First Defendant

The issues against which I must apply the principles in the GIELLA case as far as the Plaintiff's application is concerned, I think, are as follows:-

(i) Is the Plaintiff a party to the Sale Agreement exhibited in the Plaintiff's application.

(ii) Does the Plaintiff's suit offend the provisions of section 3 (3) (a) and (b) and section 3 (6) of the Law of Contract Act, Cap. 23 Laws of Kenya.

(iii) (a) Did the First Defendant put the Plaintiff into possession of the suit premises and receive part of the agreed purchase price?

AND

(b) If the answer to b (a) above is in the affirmative, has the Plaintiff shown on a prima facie case with a probability of success, the existence of a constructive trust resulting therefrom?

I will deal with the said three questions/issues in seriatim:-

(i) The disputed Sale Agreement according to the Plaintiff was entered into on or about 15th March 2006. The copy of the Sale Agreement exhibited in his application is undated. In the Second Defendant's application a copy of the same agreement is exhibited and dated 16th March, 2006 on the covering page (not in the actual body of the agreement).

Be that as it may, the said document is an agreed document. There is no dispute that it is the Agreement of sale which is the subject matter of the Plaintiff's suit. The said document/instrument is pleaded by the Plaintiff in Amended Plant and it speaks for itself. In paragraph 4 it is pleaded:-

"*4. On around 15th March, 2006 the Plaintiff got into a sale agreement with the Defendant of the whole of that parcel comprised in Title No. ELDORET MUNICIPALITY BLOCK 15/239 for a consideration of Kshs. 21,450,000/= out of which the Plaintiff paid and the Defendant acknowledged Kshs. 3,500,000/=.*"

It is my understanding and interpretation that "*got into a sale agreement*" means "entered into a sale agreement". In the prayers in the Amended Plaint, the Plaintiff inter alia, seeks an order for:-

"*(a) a declaration that the agreement of sale between the Plaintiff and the Defendant of 15.3.2006 is alive and valid as between them and against all else made subsequent.*"

It is of interest that the Plaintiff omitted to plead prayer (c) of the original Plaint dated 14th November, 2006 in the Amended Plaint dated 27th November, 2006. In the original plaint, it had been pleaded as follows;-

"*(c) Specific performance of the agreement of sale between the Plaintiff and the Defendant over and about all that parcel of land known as Title No. Eldoret Municipality Block 15/239 subject only to the payment of the balance of the purchase price.*"

This Court cannot tell or know whether this omission was deliberate or as a result of an inadvertent error. For the moment, the prayer for specific performance is not in the Amended Plaint. It is not necessary to speculate on the possible implications of this on the suit.

Coming back to the question/issue at hand, it is absolutely clear and certain that the parties to the Agreement for sale are the First Defendant, H.E. Daniel Arap Moi as Vendor and a limited liability Company called; Queenchic Inn Ltd as the Purchaser. The Agreement in Clause 6 states that the Advocates for the parties are Sunkuli & Company Advocates. The said Agreement for sale is drawn by Sunkuli & Co. Advocates.

Without any hesitation and on the basis of the instrument before the Court, I do hereby find and hold that the Plaintiff, Joseph Wainaina Iraya T/a Queenchic Inn is neither a party nor a Purchaser in the Agreement for sale which is the purported agreement in dispute in this suit. The Plaintiff did not plead or sue as having any beneficial interest in the said agreement. The pleadings are on the basis that he is the Purchaser and a party thereto. This he is not as he is bound by his own very pleadings. It is irrelevant what the Plaintiff depones in his subsequent affidavit about his instructions to the advocate drawing the agreement as these are not under-pinned in the principal pleading, the Amended Plaint. I also hold that the allegations and disputes as to whether Queenchic Inn Limited is registered or not as set out in the rival affidavits are totally irrelevant as those questions are not disclosed or raised in the Amended Plaint. By the time of the hearing of the consolidated applications, the Plaintiff had not filed any Reply to the Amended Defence.

As a result of the foregoing, I do hold that the Plaintiff is unlikely to succeed in his suit as he is not a party to the Agreement for Sale. He is not the Purchaser and on the basis of the same and the pleadings, he has no likely benefit or interest in the same. He is unlikely to obtain any of the reliefs he seeks against the First Defendant as he is non-suited as things stand at the moment.

(ii) With regard to the second issue and irrespective of the foregoing finding, Section 3 (3) (a) and (b) provide as follows:-

"*No suit shall be brought upon a contract for the disposition of an interest in land unless –*

(a) the contract upon which the suit is founded -

(i) is in writing,

(ii) is signed by all the parties thereto; and

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

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneer's Act, nor shall anything in it affect the creation of a resulting implied or constructive trust."

For the purposes of the first part of the said provisions i.e. Section 3(3) (a) and (b) as read together with Section 3 (6), a perusal of the Agreement for Sale shows that the signature of the Vendor, the First Defendant has not been attested by a witness at all as mandatorily required by the said provisions. Secondly, on the part of the Purchaser Queenchic Inn Limited, there appears one signature. From the affidavits of the Plaintiff it would appear that the appended signature belongs to him. Assuming he was signing on behalf of the said Company as an authorized agent or attorney, the same is, again, not attested by any witness. The attestation part for the said Purchaser which is a corporate body provides for and contemplates the sealing of the Agreement under the common seal of the Company.

Section 3 (6) of the Law of Contract Act, provides that:-

" …………………………………………………..

"*sign" ……………………………………………*

…………………………………………………..

in relation to a body corporate includes –

(a) signature by an attorney of the body corporate duly appointed by a power of attorney registered under the Registration of Documents Act;

(b) the affixing of the common seal of the body corporate in accordance with the Constitution or Articles of Association of the body corporate, as the case may be, in which case no further attestation shall be required."

The Plaintiff did not make any statements, averments or depositions in this regard to demonstrate that these provisions of Law were complied with. For certain, the Agreement of Sale was not "signed" by any affixation of the Common seal of the Company. At their own volition, the parties have invariably conceded that "Queenchic Inn Limited" by the date of the making of the Agreement for Sale had not been incorporated.

From the foregoing, I do hereby hold that Plaintiff's suit was brought in violation of the provisions of the first part of Sections 3 (3) (a) and (b) of the Law of Contract Act. The Plaintiff therefore has failed to demonstrate that it has a prima facie case with a probability of success.

Is this suit saved by the proviso to the aforesaid Sections? I think that this ought to be answered and determined under the third question/issue.

(iii) In respect of the third issue, the plaintiff claims that it was in put into possession of the suit premises by the First Defendant who also received part of the agreed purchase price. On the basis of this the Plaintiff claims that a constructive trust over the property has resulted in his favour. It is my understanding that this amounts to an alternative cause of action being raised by the Plaintiff. However, the prayers show that the alleged constructive trust is based on the Agreement of Sale. In prayer c (i) the Plaintiff seeks:-

"*(c) (i) A declaration that in executing the sale agreement, putting the Plaintiff in possession and accepting part payment of the price agreed, the Defendant became a trustee of the Plaintiff."*

I have already held that the Plaintiff has no rights accruing to him from the Agreement for Sale to which he was never a party. Any resulting, implied or constructive trust could only accrue to the Purchaser. I am also not satisfied that even at this interlocutory stage the Plaintiff has proved the existence of the ingredients that could possibly in law give rise to a trust of any type. The Plaintiff has therefore not proven that he has a prima facie case with a probability of success based on the cause of action of a constructive trust.

In paragraph 6 of the Amended Plaint, the Plaintiff pleads that:-

"*6. The Defendant gave the Plaintiff possession of the suit land as it was understood between them that the Plaintiff would subdivide the same and offer the resultant portions to the public by way of sale so as to raise the balance of the purchase price and some profit for the Plaintiff."*

It is clear from the foregoing that if for any reason the Plaintiff had any interest in the Agreement for Sale then his objective was to sell the intended portions and make profit. By the time the completion period had expired the Plaintiff by his own pleading claims that he had paid Shs. 3,500,000/=. This is an ascertained amount. Any likely profits from the sale of the proposed subdivisions is also ascertainable and pecuniary in nature. I therefore do hereby hold that applying the second limb of the conditions in the GIELLA case, any likely loss or injury which the Plaintiff is likely to suffer herein, which to me is remote, is capable of being compensated by an award of damages.

2. Issues for determination in respect of the Second Defendant's application vis-à-vis the First Defendant.

From the pleadings between the First and Second Defendants and the application, the issues that I see which arise for determination by this Court as between them are:-

1. Is there any Agreement in respect of the suit property between the First and Second Defendants?

2. Is there any privity of contract between the Second Defendant and the First Defendant in respect of the Agreement for Sale dated 16th March 2006?

I have carefully perused the Second Defendant's Plaint dated 9th November, 2006. There is no pleading in the said plaint that there was any agreement between the Second Defendant and the First Defendant. The Agreement of Sale dated 16th March, 2006 was between the First Defendant and a Company called Queenchic Inn Limited (irrespective of whether it existed then or not). The Second Defendant claims that he entered into a separate agreement with the Plaintiff in reliance that they were to purchase the suit property together. From the findings hereinabove, it is clear that in fact the Plaintiff himself was never a party to the Agreement for Sale and he has no enforceable rights thereunder.

Once the application by the Plaintiff fails, that of the Second Defendant cannot stand. I do hereby find that there is no privity of contract between the Second Defendant and the First Defendant. His suit therefore, does not show a prima facie case with a probability of success. In any case, any possible claim that he may have would be to the extent of his contribution of Kshs. 1,000,000/=. This is capable of being compensated and is not an irreparable injury or damage.

In conclusions, on the basis of the foregoing, the Plaintiff and the Second Defendant have not made out a case to warrant or justify the grant of interlocutory injunctive orders. Their consolidated applications are hereby dismissed with costs to be paid by the Plaintiff and Second Defendant jointly and severally to the First Defendant. I do hereby forthwith discharge and lift the Interim Orders of injunction.

In terms of the written undertakings as to damages, which were the condition for the grant of the Interim Orders, I hereby order that at the end of this suit, in the event the Plaintiff and Second Defendant shall not be successful, there be an inquiry as to whether the First Defendant suffered any loss, damage or injury as a result of the grant of the said orders - which are now discharged. If it is found that the First Defendant did suffer such loss, damage, injury and/or expense, the same shall be assessed and/or ascertained by the Court and the Plaintiff and the Second Defendant shall jointly and severally pay the said amount to the First Defendant.

Orders accordingly.

Dated and Delivered at Eldoret on this 19th day of January, 2007.

M. K. IBRAHIM

JUDGE