



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

Civil Case 625 of 2006

MOUNT AGENCIES LTD.....PLAINTIFF

VERSUS

KIRKDALE & OTHERS.....DEFENDANTS

RULING

By way of a Plaint dated 15th June 2006 the Plaintiff sought judgment against the Defendants for the following orders:

- (a) A permanent injunction to restrain the Defendants either jointly and/or severally from interfering with the suit property being LR NO.209/4548 by erecting any development thereof or dealing with the suit property in any manner howsoever.
- (b) An order of mandatory injunction to compel the 4th Defendant to immediately and unconditionally cancel the purported transfer of the suit property in favour of the 2nd Defendant.
- (c) Specific performance of the contract.
- (d) General and punitive damages for breach of contract.
- (e) A declaration that the purported transfer is null and void.
- (f) A declaration that the purported charge is illegal, null and void.
- (g) Costs of the suit.

Simultaneously with the plaint the Plaintiff brought a Chamber Summons under certificate of urgency seeking orders:

1. That for reasons to be recorded, service of this Application be dispensed with in the first instance and the same be certified urgent.
2. That pending the hearing and determination of this Application inter partes this Honourable Court be pleased to issue an order of Temporary Injunction restraining the Defendants jointly and severally either through themselves, servants, or agents from interfering with the suit property by inter alia erecting any developments thereon or dealing with the suit property in any manner howsoever.

3. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of Temporary Injunction restraining the Defendants jointly and severally either through themselves, servants or agents from interfering with the suit property by inter alia erecting any developments thereon or dealing with the suit property in any manner howsoever.

4. That the Plaintiff be granted the liberty to apply for any further orders as the circumstances of the case may permit.

The application premised on the following grounds:-

(i) That sometimes in March 2003 the 1st Defendant offered the property LR NO.209/4548 for sale to the Plaintiff upon terms inter alia that the consideration for the sale of the property was Kshs.24,000,000/=.

(ii) That on 8th April 2003 the Plaintiff accepted the said offer and further tendered to the 1st Defendant a cheque for Kshs.2,400,000/= representing 10% deposit for the purchase price which cheque was duly received and accepted by the 1st Defendant.

(iii) That despite receiving and retaining the deposit and in blatant breach of the contract between the Plaintiff and the 1st Defendant, the 1st Defendant failed, refused and had continued to refuse to perform its part of the bargain.

(iv) That on 20th June 2005 two years later the 1st Defendant purported to cancel the Sale Agreement by purporting to refund the 10% deposit that had been paid and retained for over 2 years.

(v) That to the Plaintiff's consternation and surprise and without any notice whatsoever, the 1st Defendant had unlawfully, illegally and fraudulently purported to transfer the suit property to the 2nd Defendant.

(vi) That it is the Plaintiffs' case that the purported transfer is illegal, fraudulent and null and void.

(vii) That the Defendants have committed diverse acts of fraud as more particularly set out in the plaint as to vitiate the purported transfer.

(viii) That the 2nd Defendant has sought and obtained the approval of the 3rd Defendant to proceed with the Development of the suit property and the Plaintiff is apprehensive that works may commence sooner or later.

(ix) That by reason of accepting and retaining the deposit cheque, a constructive trust was created vide which the 1st Defendant held and holds this property in trust for the Plaintiff.

(x) That the totality of the circumstances, the 1st Defendant is estopped from renegating on his agreement to the Plaintiffs' detriment.

(xi) That the Plaintiff stands to suffer irreparable loss and damage unless an injunction order is issued by this Honourable Court.

(xii) That in any event the Plaintiff has now established that the 2nd Defendant does not exist in law.

The application is also supported by an affidavit sworn by JOHN NGUGI a Director of the Plaintiff Company on 15th June 2006 in which he avers that he is a Director of the Plaintiff Company conversant with the facts of this case as such he is competent and duly authorized to swear the affidavit; that sometimes in March 2003 the 1st Defendant offered the suit property for sale to the Plaintiff upon terms inter alia that the consideration for the sale of the property was kshs.24,000,000/=; that on 8th April 2003

the Plaintiff accepted the said offer by tendering to the 1st Defendant through the 1st Defendant's Advocates a cheque for Ks.2,400,000/= representing 10% deposit for the purchase price which cheque was duly received and accepted by the 1st Defendant; that the 1st Defendant accepted and retained the aforesaid cheque and further issued a receipt for the aforesaid payment (JN 1); that in a bid to fulfill the contractual requirement of the intention to create a legal relationship the Plaintiff in its letter forwarding the deposit aforesaid sought a copy of the executed sale agreement from the 1st Defendant (JN 2); that despite receiving and retaining the deposit and in blatant breach of the contract between the Plaintiff and the 1st Defendant the 1st Defendant failed, refused and had continued to refuse to sign the formal agreement and/or perform its part of the bargain (JN 3); that I am advised by the Plaintiff's advocate Messrs Odera Obar and Company Advocates which advise I accept as true and correct that upon acceptance of the deposit, a constructive trust was created vide which the 1st Defendant held and holds this property in trust for the Plaintiff; that I am further advised by the Plaintiffs' Advocate which advise I accept as true and correct that in the totality of the circumstances, the 1st Defendant's refusal to sign the formal agreement for sale and/or perform its part of the contract is clearly an act of fraud; that the Plaintiff is willing and has always been willing and ready to remit the balance of the purchase price to the 1st Defendant; that on or about 11th August 2004 the Plaintiff, strictly out of abundant caution and upon realization that the 1st Defendant was inexplicably delaying in concluding the agreement, sought to register a caveat against the suit property by lodging a caveat dated 11th August 2004 booked under day book Number 602 at the Ministry of Lands – JN4 (a bundle of documents lodged at the Ministry of Lands for registration); that the application for caveat could not be processed according to the lands office allegedly because the Deed File for the suit property had gone missing; that the Plaintiff remains awaiting the location of the Deed File and registration of the caveat to date; that on 20th June 2005, two years later, the 1st Defendant purported to cancel the Sale Agreement by purporting to refund the 10% deposit that had been paid and retained for over two years (JN 5); that he is advised by the Plaintiffs' Advocate which advise he accepts as true and correct that the purported cancellation of the Sale Agreement is illegal, fraudulent, null and void; that the Plaintiff has learnt that while his application for registration of the caveat is still pending at the Lands Office on account of missing file, the 1st Defendant purportedly transferred the suit property to the 2nd Defendant on 23rd December 2005 (JN 6); that he is advised by the Plaintiff's Advocate which advise he accepts as true and correct that according to the records at the companies registry, the 2nd Defendant does not exist in law (JN 6(a)), true copy of letter from the companies registry; that the Plaintiff has further learnt to its utter surprise that the 2nd Defendant registered a charge in favour of Investments and Mortgages Bank Ltd on the same date the transfer was registered (JN 7) true copy off title evincing the fact of registration of the charge in favour of Investments and Mortgages Bank Ltd; that he is advised by the Plaintiff's Advocate which advise he accepts as true and correct that the purported transfer and registration of a charge is an act of fraud perpetrated by the 1st, 2nd and 4th Defendants jointly and severally; that the Plaintiff has learnt to its surprise that even before the transfer of the property in its name, the 2nd Defendant had applied for approval of building plans with the 3rd Defendant which plans were approved before the purported transfer (JN 8) letter of approval; that he is advised by the Plaintiff's Advocate which advise he accepts as true and correct that the act of applying for and grant of the approval of the building plans by the 3rd Defendant before the registration of the transfer of the suit property remains illegal, unlawful and fraudulent and accordingly null and void; that he is advised by the Plaintiff's Advocate which advise he accepts as true and correct that in the totality of the circumstances and by reason of the acts of fraud perpetrated by the Defendants jointly and or severally the purported transfer is illegal, null and void ab initio; that unless restrained by an order of this Honourable Court, the Plaintiff stands to suffer irreparably.

The replying affidavit on behalf of the 1st Defendant was sworn by HARBANS SINGH AMRIT on 27th June 2006 in which he avers that he is one of the Directors of the 1st Defendant and that he is authorized by the 1st Defendant to swear this affidavit on its behalf; that he has read the proceedings in this matter which have also been explained to him by the 1st Defendant's lawyer S.S. JOWHAL; that on or about 8th April 2003 the said Advocate received a letter dated 8th April 2003 from the Plaintiff's then Advocates KARIUKI MUGUA & CO offering to purchase the suit premises and sought my instructions on the offer

to purchase the suit premises by the Plaintiff; that he instructed the said Advocates that the 1st Defendant had not agreed or passed any resolution to sell the suit property and that the cheque for Shs.2,400,000/= should be subject to contract to such a resolution being passed and strictly subject to contract being executed thereafter and if no contract was eventually executed the said Advocates were instructed to give to the Plaintiff's then Advocates KARIUKI MUIGUA & CO ADVOCATES professional undertaking to refund the proceeds of the said cheque for Shs.2,400,000/=.

The said cheque for Shs.2,400,000/= was consequently accepted subject to contract; that no contract of sale was ever executed either by the Plaintiff or the 1st Defendant and consequent upon the 1st Defendant not having passed a resolution to sell the suit premises to the Plaintiff the said Advocates were instructed to refund the cheque deposit of Shs.2,400,000/=; that as no agreement to sell was ever reached the cheque for Shs.2,400,000/= was refunded to the Advocate for the Plaintiff who declined to accept it and returned it to the Advocate for the 1st Defendant; that he is advised by S.S. JOWHAL ADVOCATES and verily believes that the Plaintiff is precluded and debarred from bringing this suit against the 1st Defendant for reasons of non-compliance with Section 3(3) of the Law of Contract Act and that this suit is an abuse of the process of the court and is frivolous and vexatious in the extreme; that the 1st Defendant is not guilty of any fraud or illegal acts as complained of in the plaint or in other proceedings filed herein and he is advised by S.S. JOWHAL ADVOCATES whom he verily believes that the matters in question do not create any constructive or other trust in favour of the Plaintiff and the same is being alleged merely to side step the provisions of the Contract Act; that the Deed File for the suit premises complained of as having been used to transfer the suit premises by the Plaintiff has been missing from the Lands Office for many years and consequently had to be reconstituted pursuant to an indemnity given by the 1st Defendant to the Government of Kenya

here was and is no fraud on the Plaintiff nor was the original deed file used by the 1st Defendant to transfer the suit premises to the 2nd Defendant; that the suit premises was transferred to the 2nd Defendant as it lawfully might without any fraud or any misrepresentation to the Plaintiff; and that the facts deposed to therein except where otherwise stated are true and with his personal knowledge and he make this affidavit in opposition to the application and the suit by the Plaintiff.

The replying affidavit on behalf of the 2nd Defendant was sworn by PRADIP KUMAR SHAH on 26th June 2006 in which he avers that he is the Director of the 2nd defendant and he is fully aware of the facts leading to this suit; that in his capacity aforesaid, he is competent and authorized to make this affidavit; that he has read and understood the Chamber Summons and the affidavit of John Ngugi both dated 15th June 2006, that he is a stranger to paragraphs 1-14 of the said allegations if true at all; that after his advocate on record having looked at the proposed caveat which is annexed to the affidavit, has advised him, which advise he verily believe to be true that the caveat would, not have been registered in any case even if the file was available as the concerned registry due to the reasons as stated herein below-

- that what is the purchaser's interest is not noted
- that the details of registration have not been filed
- that the title number has not been filed
- that there is no indications as to who on behalf of the Plaintiff signed the caveat
- that the said caveat is not dated
- that in response to paragraphs 14-21 of the affidavit he avers – that it is not true that the second Defendant does not exist in law, as the said company is duly registered as per the pertinent Laws of Kenya;
- that he came to know of the Sale of the Suit Property from the estate agent, M/S Country

Management Services Ltd and started negotiations of the purchase price and all other terms of sale therein;

- that eventually the above estate agent raised their fee note accordingly;
- that he then approached his then Advocates M/S Sheila Sheikh & Associates to do a due diligent report on the property and act for him in the said sale transaction before finalization of the terms;
- that in the meantime whilst the transactions of the property was being finalized but after the execution of the Agreement -

-(a) he applied for the approval of building plans at the City council of Nairobi's pertinent department;

-(b) That the application form for such approval was accompanied with the duly executed and stamped Sale Agreement; that to his knowledge, this fulfills their requirements for acquiring such approvals; that in any case if it did not fulfill the said requirements then the application would not have been accepted in the first instance; that however, one other requirement at the Nairobi City Council is to submit a copy of the transfer of the property on to the second Defendant which was done accordingly; that to his knowledge there is nothing illegal or fraudulent in the above procedure; that the Plaintiff will not suffer any irreparable loss which cannot be adequately compensated in damages; that the second Defendant shall suffer huge loss due to the injunction granted by this Honourable Court which are detailed as below:-

-(c) that it has borrowed monies by way of a loan from a bank and needs to service the said loan if the construction work is put to a halt, the 2nd Defendant shall not be able to pay the said loan and thus lose the property worth over Shs.28,000,000/= to the bank together with an additional amount as interest.

-(ii) that the construction work at the foundation of the new building is almost complete. The contract for the construction of the entire building has been awarded to a private contractor and due to the injunction stopping the said construction, the 2nd Defendant shall be in breach of this contract and be liable to damages due to such breach; that the contractor at the site is demanding payment for the work done which is in excess of Shs.2,500,000/=; that with time the costs of the construction materials will rise sometimes by over 20% to 40% if any delays take place; that a Deed of Indemnity was issued by the Directors of the 1st Defendant stating that there is no other transaction with respect to the said concerned property and if any claim is raised by the Plaintiff the same should be directed to the 1st Defendant only; that the remedy for the Plaintiff is against the 1st Defendant for damages or interest claimable as per the Registration of Titles Act; that the 2nd Defendant has not colluded with any one to commit a fraud as alleged; that the 2nd Defendant is a bona fide purchaser of the concerned property; that on the balance of probabilities, there are no chances of success for the Plaintiff against the 2nd Defendant in this suit and thus the injunction application ought to be dismissed and that the service of the Application of injunction upon the 2nd Defendant is against the Civil Procedure Rules and thus the 2nd Defendant prays that this Honourable Court to vacate the said temporary injunction against it.

In opposition to the Plaintiff's application the 3rd Defendant filed the following grounds of opposition namely:-

- that the prayers sought do not affect the 3rd Defendant and no orders can be made against the 3rd Defendant; that the Building Plans were properly approved by the 3rd Defendant; that there is no evidence or proper evidence has been provided to show that the said plans were not properly approved and that the said application is void ab initio as there was no contract between the Plaintiff and the 1st Defendant within the meaning of Section 3 of the Law of Contract Act.

The Application was argued before me at length and with commendable skill verve and vigour on 12th July 2006, 25th July 2006, 30th October 2006, 5th December 2006 and 26th February 2007 by Mr. Odera

for the Plaintiff. Mr. Gautama for the 1st Defendant, Mr. Taibjee for the 2nd Defendant and Mr. Mburu for the 3rd Defendant. The issues canvassed by the learned counsels centred on the validity of the Sale Agreements between the Plaintiff and the 1st Defendant and the 1st Defendant and the 2nd Defendant in the light of the provisions of Section 3 (3) of the Law of Contract Act which provides-

“3(3) 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 signing has been attested by a witness who is present when the contract was signed by such 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 Auctioneers Act nor shall anything affect the creation of a resulting implied or constructive trust.

It is conceded that the contract between the Plaintiff and the 1st Defendant was not signed by the parties nor attested by a witness.

Mr. Odera counsel for the Plaintiff submitted that the 1st Defendant having offered his property for sale and having negotiated the purchase price and having accepted and retained Shs.2,400,000/= which was the 10% deposit for 2 years a constructive trust was created. He further submitted that where the contract for sale is specifically enforceable the equitable doctrine of conversion looks on that as done which ought to be done. The equity looks at the purchaser as the owner of the property the subject of the contract i.e. specific real property and the vendor as the owner of the purchase money. However the vendor retains the legal title to the property until full performance of the contract. By operation of the law the vendor then holds the property on constructive trust for the purchaser. 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 pre-existing proprietary right.

There is however scope for the court to impose a remedial constructive trust with prospective effect only particularly to protect innocent third parties and especially where the circumstances are similar to those generating a claim of flexible equitable proprietary estoppel principles.

In his submissions Mr. Gautama counsel for the 1st Defendant relied upon the grounds of opposition dated 28th June 2006 and filed in court the same day. He also relied on the averments in the defence by the 1st Defendant and also the replying affidavit sworn by Harbans Singh Amrit on 27th June 2006 and filed the same day as well as the list of authorities drawn by him but filed by Jowhal. He submitted that there never was a concluded contract between the Plaintiff and the 1st Defendant over the suit property. There was no sale agreement signed by both the seller and the purchaser as provided under Section 3 (3) of the Law of Contract. It is not for no reason that the law insists on written Sale Agreement signed by both the seller and the purchaser and attested by a witness. There was only a draft sale agreement and it is conceded by the Plaintiff that there was no written sale agreement. Before a trust can be created there must be payment for the full purchase price. He further submitted that the prayers sought by the Plaintiff are not tenable. To seek specific performance of a contract one must perform his part of the contract, hence full payment of the purchase price and in this case only 10% of the purchase price had been paid and the Plaintiff never tendered the balance of the purchase price. The deposit was accepted conditionally subject to a contract which has never been entered into. In conclusion he submitted that this is a clear case where injunction should not be granted and urged the court to discharge the ex parte injunction with costs.

Mr. Taibjee counsel for the 2nd Defendant in his submission also relied on the replying affidavit sworn by P.K. Shah on 25th June 2006 and the list of authorities filed herein. He further submitted that the 2nd Defendant is a bona fide purchaser of the suit property for value from the 1st Defendant who was introduced to it by selling agents. And since that time the main file in respect of the suit property was missing from the Lands Office Registry and a provisional file was opened for the transactions of registration. Approval of the building plans was granted by the 3rd Defendant and it secured a loan and started to develop the suit premises. He further submitted that the only accusation against the 2nd Defendant is that the transfer and charge were dated and filed simultaneously and the building plans were approved before the suit premises were transferred and registered in the name of the 2nd Defendant and that has been alleged as fraud against the 2nd Defendant but there is no evidence of the alleged fraud. The issue raised against the 2nd Defendant is that it is non-existent as per the records of the Registrar of Companies and therefore incapable of transacting a contract. He submitted the 2nd Defendant is registered and issued with a certificate of incorporation and that a mere letter from the Registrar of Companies denying its existence is not enough to prove non-existence of the 2nd Defendant.

While Mr. Mburu counsel for the 3rd Defendant submitted that none of the orders sought will affect the 3rd Defendant and that the only allegation against the 3rd Defendant is that it approved the Building Plans for the 2nd defendant before the suit property was transferred and registered in the name of the 2nd Defendant.

But to this he submitted that the approval was procedurally done and that there is no law that prohibits approval of building plans before the property is transferred and registered in the name of the Applicant. With due respect to counsel, for the approval of the building plans to commence development, the applicant should be the proprietor of the land and interest in land is only transferred by registration so that before one is registered he cannot apply for the approval of building plans to commence development.

I have carefully considered the Plaintiff's application in light of the affidavits on record and the arguments by the Plaintiff and the Defendants. I bear 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 *GUELLA VS. CASSMAN BROWN & CO. LTD* [1973] 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 that stage to decide the merits of the case with finality. And of course if a party's conduct is shown not to meet the approval of equity an injunction ought not to issue in his favour irrespective of the other merits.

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 with violation by unlawful acts of the Defendants.

The case at hand is that the Plaintiff entered into a sale agreement with the 1st Defendant for the purchase of the suit land. The agreement was reduced into writing. The purchase price was agreed at Shs.24,000,000/= and the Plaintiff paid Shs.2,400,000/= being the 10% deposits but the 1st Defendant evaded to sign the Sale Agreement. It accepted and retained the deposit for 2 years when it purported to refund the deposit to the Plaintiff who declined to take it back arguing that the 1st Defendant having accepted and retained the Shs.2,400,000/= deposit for 2 years a constructive trust had been created and

therefore the 1st Defendant was holding the suit land in trust for the Plaintiff.

The 1st Defendant argued that there was no contract between it and the Plaintiff since it had not signed the Sale Agreement as provided under Section 3 (3) of the Contract Act. But the Plaintiff submitted that the acceptance and retaining of the deposit created a constructive trust and therefore the transaction fell under the proviso to Section 3 (3) of the Law of Contract Act.

My own understanding of the statute is that it was not meant to aid a party in furtherance of his fraudulent acts. So that one cannot advertise his land for sale negotiate the purchase price accept the 10% deposit retain it for 2 years and turn round to state that there was no contract because the statute says the Sale Agreement must be signed by both parties.

Further, the first Defendant admitted in paragraph 6 of the replying affidavit that when it entered into the Sale Agreement with the Plaintiff and accepted the Shs.2,400,000/= deposit the 1st Defendant had not passed a resolution to sell the suit property to the Plaintiff. The 1st Defendant having admitted its wrong doing, the Sale Agreement was an exercise in deception in which it had partaken, and which alone in my view makes it undeserving any judgment in its favour.

According to BROOMS LEGAL MAXIMS at page 191:

“It is a maxim of law, recognized and established that no man shall take advantage of his own wrong; and the maxim which is based on elementary principles is fully recognized in courts of law and equity and indeed admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest”

“I may observe that a man shall not take advantage of his own wrong to gain favourable interpretation of the law.

It has been applied to promote justice in various and similar circumstances.....and applies also with peculiar force to that extensive class of cases in which fraud has been committed by one party to a transaction as is relied upon as a defence by the other..... I may state the principle upon which the court of equity invariably acted, namely that the author of a wrong who has put a person in a position in which he has no right to put him, shall not take advantage of his own illegal act or in other words shall not avail himself of his own wrong.

Mr. Taibjee submitted that the 2nd Defendant is an innocent purchaser. 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. There is however scope for the court to impose remedial constructive trust with prospective effect only, particularly to protect innocent third parties and especially where the circumstances are similar to those generating a claim of flexible equitable proprietary estoppel principles.

But the existence of the 2nd Defendant having been challenged and this coupled with the fact that the building plans were approved and the loan obtained before the suit property was transferred and registered in the name of the 2nd defendant and the transfer and the charge having been registered the same date, the innocence of the 2nd Defendant is yet to be proved and equity never acts in vain.

All in all I am satisfied that the Plaintiff has met the conditions of granting an injunction and I therefore allow the application in terms of Prayers 2, 3 and 4 of the chamber Summons dated 15th June 2006. Costs will be costs in the suit

Dated and delivered at Nairobi this 6th day of May 2007.

J.L.A. OSIEMO

JUDGE