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

Civil Case 1105 of 2006

SUNRISE PROPERTIES LIMITED……..APPLICANT

VERSUS

FIFTY INVESTMENTS LTD & ANOTHER……..…..…RESPONDENT

RULING

The Plaintiff/Applicant has come to this Court by way of a plaint dated 18.10.2006 and filed the same date. The Plaint is accompanied by a Chamber Summons brought under Order XXXIX rules 1,2,2A, 3 7 and 9 of the Civil Procedure Rules. The interim application seeks an order to issue for an interim injunction to issue restraining the second defendant by itself its agents, employees and or servants from developing and or building any structures of any kind whatsoever, selling, transferring, charging and or mortgaging and or dealing in any manner whatsoever with all the parcel of land known as land Reference Number 1870/VIII/17 situate within Nairobi Area pending the hearing and determination of the suit herein. Alternatively and without prejudice to the aforesaid prayer, the honourable court do issue an order preserving all that parcel of land known as land reference number 1870/VIII/167 Nairobi area pending the hearing and determination of the suit herein.

The application is supported by the grounds in the body of the application, supporting affidavit, annextures and oral submissions in Court. The major grounds in support are a reiteration of the averments in the plaint and these are that:-

(1) There exists a valid agreement of sale between the plaintiff and the first defendant entered into in the year 1999 and which agreement was duly registered.

(2) The purchase price was Kshs 5,000,000.00 out of which 10% of the said amount to the tune` of Kshs 500,000.00 was paid out to the advocate then acting for the 1st defendant and which 10% payment has never been refunded to the applicant/plaintiff.

(3) That in pursuance of the conclusion of the said agreement the 1st defendant handed over the original title to the plaintiffs advocate to process and or facilitate the transfer of the said suit property from the 1st defendant to the plaintiff.

(4) The balance of the purchase price was to be paid upon transfer of the said suit property from the 1st defendant to the plaintiff.

(5) That upon payment of the said 10% purchase price the first defendant failed to take necessary steps to complete the transaction.

(6) Along the lines the first defendant allegedly falsely presented to police and the Ministry of Lands that the head title had gotten lost or stolen. But when the plaintiffs Counsel were contacted they confirmed that they still had the original title which they still have to the present day. That officials from the lands office also inquired from the said advocates about the existence of the said title to which inquiry the plaintiffs replied that they still had the original title with them.

(7) That despite this confirmation the 1st defendant colluded with the Ministry of Lands officials for issuance of a provisional land title to effect transfer of the suit property to the second defendant at higher amount of Kshs 23,000.000.00.

(8) That in the meantime the Plaintiff had placed a caveat on the said title claiming a purchaser's interest whose purpose was to prevent the said property finding its way into the hands of 3rd party.

(9) Despite presence of the said caveat the first defendant allegedly in collusion with officials from the lands registry caused the same to be removed without notice to the applicant as required by law and then transferred the said property to the second defendant.

(10) It is their contention that he said transfer to the 2nd defendant is tainted with illegality and so the same cannot stand.

(11) It is their contention that as at the time the said transfer was effected in favour of the 2nd defendant the plaintiff already had the beneficial interest of the suit property. He also had the original title which he still holds to the present day.

(12) It is their contention that time was never of the essence though it had been stated that the completion period was 90 days.

(13) That the period of limitation does not run in this case to affect the rights of the plaintiff because they have pleaded fraud.

(14) That as regards the papers filled by the Respondents, the same cannot hold because the Counsel for the second defendant filed papers before filing the notice of appointment. Where as Counsel for the 1st defendant filed papers but has not filed notice of appointment. That this being the case this court should treat the applicant's application as being un opposed and then proceeded to grant the reliefs sought.

In response, Counsel for the 1st defendant/respondent has opposed the application on the basis of the replying affidavit filed herein. The grounds stressed by them are that:-

(1) They entered appearance, filed defence and a replying affidavit and they are entitled to be heard on the said papers.

(2) That the application is premature as the same has been filed and is being agitated in the absence of the Attorney General who should have been brought on board on behalf of the land Registrar against whom improper transactions have been imputed but from whom no affidavits can be obtained to explain how some of these transactions were done. But which affidavits cannot be obtained as the proper channel through which to do so is through the Attorney General.

(3) As regards the proceedings herein they maintain that they have never entered into a sale agreement over the subject matter of these proceedings with the plaintiff and the agreement relied upon is a forgery.

(4) They have never been represented by an advocate called Gatumuta and this is confirmed by the fact that there is no confirmation from the said advocate that he so acted for them. Neither is there any document evidencing giving such instructions to the said Gatamuta.

(5) As regards the original title allegedly held by the plaintiff they contend that they never handed it

over to their alleged advocate for purposes of sale of the suit property. All they know is that the original title got lost when it was presented to the lands office for extension of a lease and when they could not trace it the matter was reported to the police station concerning the loss of the said title. It is not their business to make a follow up on the said investigation and know their outcome. All they know is that on failing to trace the original title they applied for a provisional title which fact was gazetted in the Kenya Gazette and at no time did the applicant come forward to say that he had the original title with him.

(6) They still maintain that they never sold the said property neither did they ever receive the alleged 10% payment as there is nothing from Gatumuta to show that the said money was ever forwarded to the 1st Respondent.

(7) Concerning the caveat they agree the applicant placed one but the correct procedure was followed in removing the same. The applicant was duly notified of the intention to have the same removed but he never came forward to show cause why the same should not be removed.

(8) Although they still stand with their contention that the agreement relied upon by the applicant/plaintiff is a forgery they nonetheless contend that the action is time barred. The Applicant is seeking specific performance which is an equitable remedy and in respect of which they contend is affected by the doctrine of laches and so equity cannot be called in to aid the applicant who had been indolent in pursuing his rights. No explanation has been given as to why he did not move to the court immediately to enforce the said agreement if at all it was genuine. They further contend that if there was any agreement the same lapsed at he expiry of the 90 days stipulated in the agreement.

(9) They contend that the applicant's plea of trust does not aid them because there is nothing to prove that the money paid by them reached the first defendant and secondly they were put on notice as early as 1999 when the sale agreement was disowned by the first applicant and yet they took no remedial action to enforce the said trust. Trust is also an equitable remedy and coming to court seven years later to claim the same cannot hold as it is caught up by the doctrine of laches. Further that the said plea of trust cannot hold as the validity of the contract as well as payment and receipt of the money forming the basis of the claim are disputed. On this basis the cases relied upon in support of trust cannot hold and are distinguishable. The peculiar circumstances herein are that there is nothing that Gatumuta was acting for the first defendant and secondly there is nothing to show that the first defendant benefited from that money. There is no affidavit from Gatumuta to show that that money reached the first defendant or that it was not refunded back in view of the fact that at one time Counsel acting for the plaintiff at one time demanded to have the said money refunded as the matter had become a police case.

(10) They contend the applicant has not brought himself within the principles governing the granting of the injunctions because the claim being based on contract was not brought within the statutory 6 year period firstly. Secondly it is a claim respecting land and since land is a commodity for sale the same can be quantified and paid for by way of monetary value.

(11) Lastly, that they are properly on record by virtue of having filed a memorandum of appearance.

As for the second respondents Counsel, they also opposed the applicant's application and the grounds relied on by them are that:

(1) They have opposed the application on the basis of both the Replying Affidavit and Grounds of Opposition as there is no bar in filing both.

(2) Objection to their papers holds no water as they have appeared severally and participated in the proceedings and there is no time the applicant raised any objection and the belated objection holds no water.

(3) This court has no jurisdiction to entertain the matter as the same being based on contract was filed out of time without leave of court. The action is therefore incompetent and it should be struck out

(4) That the second defendant is the current rightful registered owner of the suit property with both the beneficial and legal interest in the same. He rightfully acquired the said title after the caveat allegedly lodged by the applicant had long been removed.

(5) If there were any wrongs committed by the Registrar of titles in respect of the said title the 2nd Respondent is not responsible for that because he does not work in the Registrar of titles offices.

(6) They content the applicant has not satisfied the ingredients governing the granting of the reliefs sought as there are no facts showing a prima facie case with a high probability of success, the claim can be adequately satisfied by way of damages and the balance of convenience tilts in favour of the 2nd respondent who is the title holder.

(7) Associating themselves with the submissions of Counsel for the 1st respondent they contented that the application for injunction cannot stand because it is not properly anchored on the plaint as there is no prayer for an injunction in the plaint.

(ii) Concerning the alleged payment of the part purchase prices there is nothing to show that the said payment was made by the applicant, that it was for part payment of the purchase price and that the same reached the vendor.

(8) The right procedure was followed in obtaining the provisional title as the first Respondent signed a declaration which led to the gazetting of the loss of the title by the Registrar giving an opportunity for any interested party to come forward to oppose the issuance of the new titles. The applicant, who claims to be having the original title never showed up before the Registrar of Titles and told him that he has the original Title.

(9) The applicant cannot complain as they were alerted in 1999 that the agreement sought to be relied upon was not genuine.

(10) This court cannot be asked to rule that actions of the Registrar are wrong when the said Registrar has not been made a party to the proceedings.

(11) They contend the applicant does not merit the granting of an injunction as they have already quantified their claim which can be compensated for by way of damages. Further as stated earlier on the balance of convenience weighs heavier in favour of the 2nd Respondent than the plaintiff as it has not been proved that any of the Respondents has violated the rights of the plaintiff in relation to the subject.

(12) The conduct of the plaintiffs disentitles them to the exercise of the courts discretion in their favour as they entered into an agreement of sale 9 years ago, they sat and watched as the 90 days period within which the transaction was to be completed rolled on. They were put on the alert in the same year of 1999 that the agreement was a forgery but they took no action and only woke up to come to court to complain after the property had been passed on to the 2nd Respondent.

(13) The applicant has responded to the papers filed by the 2nd respondent and so they are estopped from asserting that the 2nd Respondent has no locus standi before court.

In response to the submission of both Counsels for the Respondents, the Counsel for the applicant reiterated his earlier submissions and stressed the following points:-

(1) That the claim and application is not premature due to non joinder of the Attorney General to these proceedings as order 1 rule 9 Civil Procedure Rules prohibits the suit from being defeated on account of joinder and or non-joinder of parties. For this reason the court is entitled to rule on the facts as presented on the parties named as disputants to the proceedings.

(2) Order 39 rule 1 (a) Civil Procedure Rules entitles a party to seek orders for preservation of property

in a suit even if the same is not pleaded in the plaint. The applicant has demonstrated that the property is in danger of being alienated and so they are entitled to the order sought.

(3) They still maintain that the 2nd Respondents Counsel should have filed notice of appointment before filing grounds of opposition and replying and since the converse is the position those papers are invalid.

(4) They maintain the agreement relied upon by them is not a forgery as nobody has ever been prosecuted in respect of the same.

(5) Allegation of loss of title, its being reported to the police and subsequent gazettment was calculated to suit the 1st respondents move to wriggle out of his obligation in the sale agreement between them and the applicant.

(6) Perusal of documentations emanating from the lands office show that the caveat was removed the same day the request was presented contrary to the statutory requirements that 45 days should elapse before removal. No explanation has been given by the Respondents as to why registration was done before the removal of the caveat. Presence of the caveat against the title is sufficient proof to show that the 2nd respondent had knowledge of the unregistered interest of the applicant.

(7) They maintain their application is properly before court and it cannot be faulted on the basis of want of form.

On the courts assessment of the facts herein it is clear that the applicant has raised objection to the papers filed by the Respondents in opposition to their application stating that these are in valid for reasons given. It is therefore imperative for this court to deal with the status of those papers before embarking on the determination of whether the plaintiff's application has merit or not.

Secondly should the court find any of the papers are invalid then it will have to go ahead and determine the fate of the representations made in respect of the respondents both on law and facts.

Thirdly, should the court rule that the Respondents papers are invalid then it will have to proceed to determine whether by virtue of that, representations on the law by the Respondents Counsels count in the assessment of facts in this application or not.

Fourthly, the court will go further to make a determination as to whether if the Respondents papers are faulted both on facts and law the applicants application is to be allowed on the basis of it being unopposed or despite lack of opposition the applicant is still required to satisfy the ingredients for granting of that relief.

The first to be considered are the papers filed by the first Respondent. A perusal of the record reveals the presence of a memorandum of appearance dated 25.10.2006 and filed on 30.10.2006. The memo of appearance is drawn in the name of the Counsel representing the first defendant. The court has been informed that a defence was also filed. A copy is missing from the court record. However, there is a reply to the said defence filed by the plaintiff dated 15.11.2006 and filed the same date. This court has not traced a notice of appointment by the Counsel for the 1st respondent.

The relevant provisions of law to be looked at is order 3 Civil Procedure Rules dealing with representation by Counsel. Order 111 rule 1 entities a party to proceedings before a court of law to enter appearance in person or by an advocate on his behalf. Order 3 rule 8 requires that where a party has commenced proceedings in person and then along the way appoints an advocate to act for him then that advocate has to file a notice of appointment. The rule provides "*where a party after having sued or defended in person, appoints any advocate to act in the cause or matter on his behalf he shall give notice of the appointment and the provisions of this order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications*". A proper construction of this rule shows clearly that since Counsel for the first defendant is the one who entered appearance and

filed defence he is not required to file a notice of appointment. It therefore follows that the Replying Affidavit filed by him on behalf of the first defendant is properly on record.

Turning to the Counsel for the second respondent. It is clear that the second respondent has not entered appearance or filed a defence at least none are on record. It is common ground that the replying affidavit and grounds of opposition were filed on 6.11.2006 where as the notice of appointment dated 16.11.2006 was filed on 20.11.2006. In the absence of memorandum of appearance and defence having been filed by the 2nd Respondent, entry into these proceedings could only be through order 50 rule 16(1) Civil Procedure Rules. Under this rule whoever wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition if any not less than three clear days before the date of the hearing. The operative word here is "shall". This makes the requirement mandatory. This rule entitles a party against whom an application has been served to file a replying affidavit or grounds of opposition even before entering appearance and filing of defence. The addressee of this rule is the party to the proceedings who is the second respondent in this case. It therefore follows that if there is any ground of opposition or replying affidavit filed by the company representative on behalf of the second respondent these would be valid subject to their passing the test of whether filing both is within the rule or outside it. Herein it is common ground that they were drawn and filed by Counsel now currently on record before he filed his letter of appointment in the matter. The argument of the plaintiff as pointed out earlier on is that by virtue of them being drawn and filed by Counsel before putting himself properly on the record they are invalid and cannot be relied upon.

Entry of Counsel into any proceedings brings to the fore the application of the provisions of order 111 rules 1 and 8 of the Civil Procedure Rules. A perusal of the same shows that these require that the Counsel do put himself properly on record by filing a letter of appointment before undertaking any transaction in the proceedings by filing any processes on behalf of his client.

In the case of KENYA

E STAFFF SAVINGS AND CREDIT CO-OPERATIVE LTD VERSUS KENSING AND PARTNERS CONSULTING ENGINEERS LTD [2002] 2 KLR 11, the applicant's advocates had filed a chamber summons before filing the notice of change of advocate. Khamoni J. at page 12 paragraph 35 said *"I have considered that objection. It is my humble view that the irregularity in filing this Chambers Summons before filing the notice of change of advocate is curable under Section 3 A of the Civil Procedure Act and was cured by the subsequent filing of that notice. The fact that M/S Khaminwa and Khaminwa had some difficulties in knowing where the court case file was is an added reason for rejecting the preliminary objection of the respondent is not being prejudiced in the hearing of the applicants application dated 11th September, 1998"*.

This decisions is a High Court decision and is therefore not binding on this court. It can follow it or distinguish it. The central theme in that paragraph which forms the core of holding 1 in the same is the invocation of the provisions of section 3A Civil Procedure Act and the issue of lack of prejudice to be suffered by the opposite party. The learned judge invoked section 3A of the Civil Procedure Act. The facts of the case are however scanty and it is not clear whether Section 3A Civil Procedure Act had been cited or not. This court is aware of the role Section 3A Civil Procedure Act plays in the civil process. It states "*nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"*. Its marginal notes spell out what it is used for. It is meant to open up avenues for engross and outgress for litigants whose situations are not catered for by any provision of law applicable to the civil process.

The circumstances in the cited case of **KENYA POLICE STAFF SAVINGS AND CREDIT CORPORATIVE LTD'S CASE SUPRA** favoured the invocation of this Section 3A Civil Procedure Act because the proceedings were already in existence. There was already an advocate on record from whom the in coming advocate was to take over the conduct of the case and the requirement of law that he files and serves a notice of change is for purposes of letting the opposite party know where to direct its processes for the future conduct of the case. The opposite party does not choose Counsel for his opponent or decide when such a change should occur hence the finding that no prejudice will be suffered by the

opposite party if the incoming advocate was allowed to regularize his position and proceed. In such a situation where the opposite party suffers nothing by virtue of representation of his opponent by either the outgoing Counsel or the incoming and at what point in time such changes are to take place is curable by Section 3A if a procedural step has been omitted limited to the entry point of the incoming Counsel.

The situation in our case is different as there was no prior entry into the proceedings by either the same Counsel or the party in person. In this instance the provisions of Order 111 rule 1 and 8 came into operation directly. They fore close the direct operation of Section 3A Civil Procedure Act and require the Counsel seeking to represent the party right from the commencement of the proceedings to comply with the provisions of Order 111 rules 1 and 8 Civil Procedure Rules. These rules required Counsel for the 2nd respondent to file his notice of appointment first before filing any processes on behalf of his client. Had they been drawn and filed in person the subsequent filing of the notice of appointment would have been proper as the incoming Counsel would have just been taking over the conduct of the matter from his client. Having been filed before those of appointment they are invalid. This objection is therefore valid and upheld as it offends clear provisions of law under order 111 rule 1 & 8 Civil Procedure Act. The invalidity stems from the date of filing and persists until the papers are expunged from the record.

The second objection was to the effect that it is irregular to have filed both processes and for this reason they also cannot stand order 50 rule 16(1) Civil Procedure Act is clear that a party wishing to oppose the application "*shall*" file and serve on the applicant a replying affidavit or a statement of grounds of opposition. A proper construction of this rule is that the intention of the legislature or the rules committee is that there be an election of filing only one. Had the intention been that both be filed then there should have been added the words "or both". It therefore follows that the 2nd respondents' filing of both processes is irregular. The irregularity affects both of them. There is no provision under which the court to which they are presented is given an election to strike out one and leave another when none has been withdrawn before commencement of the argument. A Court of concurrent jurisdiction was faced with the same scenario in the case of **NATIONAL INDUSTRIAL CREDIT BANK LTD VERSUS GITHUKU NGETHE GATHIKU MILIMANI HCCC.1628/00, OMBIJA J.** in this case held that there is an election to file either but not both and went ahead to strike out both processes. This Court in its own decision in Nairobi HCCC. 129 of 2007 **DAVID MWALILI AND 5 OTHERS VERSUS RUMA NDEGWA MWANGOMBE AND 2 OTHERS** revisited the provisions of Order 50 rule 16(1) and agreed with Justice Ombija J. that that was the correct construction of the rule. There is no reason to depart from that stand. The net result of this is that the papers filed by the second Respondents Counsel on record in the form of grounds of opposition and replying affidavit are struck out and expunged.

This expunging does not affect the notice of appointment. The presence of the notice of appointment brings the status of the second respondent under the operation of order 50 rule 16(3) Civil Procedure Rules. He is deemed not to have filed either grounds of opposition or a replying affidavit. Nonetheless failure to file papers not withstanding the court can still allow him to make representations to court. From judicial practice these are limited to points of law. It therefore follows that in assessing points for and against the application herein, the 2nd respondents Counsels' representations on facts are disregarded but those on points of law will be sustained and considered.

Having established the status of the papers filed by the Respondents now come to consider the merits of the application. In dealing with this, this court has to take extra care and avoid in depth discussion of the grounds raised by the applicant, the exhibits relied upon as these are in fact the basis of the averments in the plaint. Any in depth assessment of the grounds and exhibits is likely to lead to a pre-emptive trial of the suit prematurely.

The first to be dealt with is whether the application is properly brought by way of a Chamber Summons. The same is brought under Order XXXIX rules 1,2, 2A, 3, 7(1) and 9 of the Civil Procedure Rules. To resolve this the court has to go back to the same provisions of law under which the application is brought to determine whether the correct procedure has been followed in invoking that procedure or not order 39 rule a Civil Procedure Rules provides that, applications under 9 rules 1 and 2 shall be by summons in chambers. By virtue of this provision the other rules cited namely 2A, 3 and 7(1) require that reliefs under them be brought by way of notice of motion. Further guidance is found in order 50 rule 1 of the

Civil Procedure Rules which states that all applications to the court save where otherwise provided for shall be by motion and shall be heard in open court. Order 50 does not thus provide an answer for a situation where like in this case the applicant has presented an application seeking reliefs which ought to be sought by way of a Chamber Summons and others which ought to be sought by way of Notice of Motion all in one baggage. Order 50 rule 12 Civil Procedure Rules which prohibits the faulting of an application for failure to cite rules under which it is brought does not help as the rules to be relied upon by the applicant have been cited. Order 6 rule 12 Civil Procedure Rules on the other hand refers to pleadings as it prohibits the faulting of a pleading on technical grounds. By definition a pleading as defined in Section 2 Civil Procedure Act is defined to include a petition, summons, statement of claim or demand of the plaintiff and defendants and reply to defence and counterclaim. By virtue of the class of processes referred to above it is obvious that these do not include the interlocutory processes. In the absence of a specific provision to fall on this court has no alternative but to fall on to the inherent powers of the court. To justify this, it has to turn to case law.

In the case of **SALUME NAMUKASA VERSUS YOSEF BUKYA [1966] E.A 433** an applicant sought a relief by way of chamber summons as opposed to having it brought by way of Notice of Motion which was the correct procedure. Objection was raised. The court's inherent jurisdiction was invoked under Section 101 of the Uganda Civil Procedure Act whose wording was similar to the Kenyan Section 3A Civil Procedure Act. At page 435 paragraph 1 Sir UDO UDOMA C.J. as he then was had this to say "*Counsel must understand that the Rules of this court were not made in vain. They are intended to regulate the practice of the Court. Of late a practice seems to have developed of Counsel instituting proceedings in this court without paying due regard to the rules. Such a practice must be discouraged. In a matter of this kind might the need of justice not be better served by this defective disorderly and incompetent application being struck out?"* On the basis of that reasoning the learned C.J. as he then was declined to invoke the inherent powers of the Court and held that the application was not properly before the court as the applicant had failed to comply with the provisions of order 48 rule 1 and must be struck out. Further that the provisions of S.101 of the Ugandan Civil Procedure Order (Civil Procedure Ordinance), could only be invoked if the proceedings have been brought before the court in the proper way in terms of the procedure prescribed by the Civil Procedure Rules.

In the case of **MAWJI VERSUS ARUSHA GENERAL STORE [1970] E.A. 137** it was argued that the application presented under Order 39 was misconceived as it should have been presented under Section 89 Civil Procedure Code (Civil Procedure Code) by way of a civil suit and could not be obtained in exercise of the inherent jurisdiction of the Court. Sir Charles New bold, P. as he then was at page 139 paragraph D set out the provisions of Section 95 Tanganyika whose wording is similar to the Kenyan Section 3A Civil Procedure Act had this to say at paragraph E "*I am satisfied that, that Section means that a court should not be precluded by anything Incidentally set out in the code or in the rules made under the code from giving effect to its decision, and giving effect in a way which will result immediately in justice between the parties and in the saving of unnecessary proceedings" On account of that reasoning it was held inter alia that although the procedure adopted was not the proper procedure to have been adopted, irregularity in relation to the rules of procedure do not vitiate the proceedings if no injustice has been done to the parties."*

In the case of **NDEGWA WACHIRA VERSUS RICARDAS WANJIKU NDANJERU [1982 –88] 1 KAR 1062** the Court of Appeal explored the effect of non compliance with rules in relation to the need for the Court to lean to substantive justice. At page1065 Apaloo J.A. as he then was made the following observations. (3rd line from the bottom). *"At all events it seems to me the appellant is merely standing on bear technicalities. Nobody has a vested right in procedure and a Court, must at least at the present day, strive to do substantial justice to the parties undeterred by technical procedure rules. As is often said, rules of procedure are good servants but bad masters. These rules have their origin in England and the philosophy there is to move from form to substance. Lord Denning the celebrated English Judge has said "**ad nau seem,** that technicalities are a blot in the administration of justice. English courts have on numerous occasions refused to set aside processes for technical irregularities*". At page 1068 paragraph 2 quoting from the case of *Re Coles and Ravenshear [1907] 1 KB1 said "Although I agree that a court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of hand maid rather than mistress and the court ought not to be*

so far bound and tied by rules, which are after all intended as general rules of procedure as to be compelled to do what will cause injustice in the particular case". On the basis of the foregoing reasoning it was held inter alia that where a breach of the rules is not fundamental the proceedings will not be set aside.

In the case of **SARAH HERSI ALI VERSUS KENYA COMMERCIAL BANK LTD C.A. NAI 165/1999 (KSM 14/99)** Akiwumi J.A as he then was at page 2 line 5 from the top stated "Rules are hand maidens of this court but we must be careful that hand maidens do not become harsh mistresses". In the case of Lt. Colonial **JOSEPH MWATERI IGWETA VERSUS MUKIRA M. ETHARE AND ATTORNEY GENERAL NAI CIVIL APPEAL NO.270 OF 2001 A.P. Shah J.A.** as he then was made the following observations "*If I were to dismiss this application there would be one bona fide litigant who will blame the system for relying on procedural technicalities to deny him justice. Whilst I do not condone errors on part of Counsel, I must consider the interest of a Kenyan seeking justice in our courts. He is bewildered at the twists and turns the hearing of appeals take ….…"*

In the case of **CONSOLATA NDINDA OWIRA AND 4 OTHERS VERSUS BANUEL BORIS OMAMBIA NAIROBI HCCC NO. 2050 OF 1993, Kubo J.** quoting from the Court of Appeal decisions made the following observations "*I am of the same persuasion as the above two judges of appeal. This is not to say that procedural errors or omissions should always enjoy clemency, far from it court procedures are made for a purpose i.e. to ensure orderly, effective and predictable management of cases. But there will from time to time be cases where substantive justice demands priority over technicalities of procedure"*

The net result of the foregoing assessment is that since the decision in 1966 of **SALUME NAMUKASA VERSUS YOSEF BUKYA supra** there is a marked shift from glorification of procedural technicalities to glorification of substantive justice to weigh heavily over technicalities where these have not caused any mis-carriage of justice to the party complaining about them. Applying this to the facts of this application it is the finding of this court that shutting out the applicant from the seat of justice for opting to use a chamber summons as opposed to a notice of motion to bring an action seeking reliefs falling under both process will be tantamount to promoting injustice. It is not the fault of the applicant that there is no provision under which such releifs could be regularly brought to court without attracting pointing fingers and labels of irregularity. Mutilation of the reliefs sought in order to make those falling under the chamber summons procedure comply to that procedure and those falling under the notice of motion procedure also to comply to that procedure will result is unnecessary prolonged proceedings and unnecessary increasing of litigation costs. Not to forget that it will result in promoting litigation by installments.

In addiction to the above such an objection although permitted by law to be raised at any stage of the proceedings, preferably it should be raised at the initial stages of the proceedings. Such a move would go along way to save on precious but meager judicial time. Further it would have put the applicant on the alert and given him an election to amend and opt for one set of reliefs as opposed to presenting them as they did. Having argued the application it is better to have a ruling on merit on all the issues raised bearing in mind the fact that despite pointing out the irregularity the defence has not pointed out any prejudice suffered by them as a result of the said irregularities. If participation in proceedings can be termed an injustice that can be compensated for by way of costs.

Next to be dealt with is objection to the effect that the interim relief sought cannot be granted because it is not properly anchored in the plaint. Turning to the plaint reading through paragraphs 18 and 19 where the claims are set out there is no mention of a permanent injunction. Paragraph 18 reads "*The Plaintiffs claim against the defendant and subsequent transfer of all that parcel of land known as land reference number 1870/VIII/167. In favour of the 2nd defendant, an order for specific performance compelling the 1st defendant to complete the sale agreement dated 5th May 1999, general damages, costs and interest".* Paragraph 19 "*in the alternative and without prejudice to the aforesaid prayers, the plaintiffs claim against the 1st defendant is for a full refund of all the monies received pursuant to the terms of the sale agreement with interest at thirty (30%) percent per annum with effect from 5th May 1999 until full and find payment, general damages against the defendants jointly and severally, costs and interest".*

Paragraph 22 of the plaint contains the following prayers.

(a) An order declaring the sale by the first defendant and subsequent transfer of all that parcel of land known as land Reference Number 1870/VIII/167 in favour of the 2nd defendant null and void.

(b) An order directing the Registrar of Titles to cancel the transfer in favour of the 2nd defendant in respect of all that parcel of land known as land reference number 1870/V111/167.

(c) An order for specific performance compelling the 1st defendant to complete the sale agreement dated 5th May 1999.

(d) General damages

(e) In the alternative and without prejudice and without prejudice to the aforesaid prayers a full refund of all the monies paid to the 1st defendant together with interest at thirty 30% percent per annum with effect from 5th May 1999, until full and final payment.

(f) Costs of this suit

(g) Interest on (d) and (f).

The interim application which is by law supposed to be cemented on the plaint seeks the following releifs.

(c) *"An interim injunction restraining the 2nd defendant by itself, agents, employees and or servants from developing and building any structure of any kind whatsoever, selling, transferring, charging and or mortgaging and or dealing in any manner whatsoever with all that parcel of land known as land Reference Number 1870/VIII/167 situate within Nairobi area pending the hearing and determination of the suit herein.*

(d) In the alternative and without prejudice to the aforesaid prayer, the Honourable Court do issue an order preserving all that parcel of land known as land Reference number 1870/VIII/167 situate within Nairobi Area pending the hearing and determination of the suit herein"

From the above contents prayer (c) seeks injunctive orders where as prayer (d) seeks preservation orders. When related to the prayers in paragraph 18 and 19 containing the statement of claim, it is clear they do not contain an injunctive prayer or a preservative prayer. The claims in paragraph 18 is for an order declaring the sale null and void, cancellation of the title registered in the name of the 2nd defendant and specific performance compelling the 1st Defendant to complete the sale agreement dated 5th may 1999, general damages, costs and interest. While the claim in paragraph 19 is for a full refund of fall the monies received pursuant to the terms of the sale agreement with interest at thirty (30%) per cent per annum with effect from 5th may 1999 until full and final payment, general damages against the defendants jointly and severally costs and interest.

According to the defence, failure to anchor these two interim reliefs in the statement of claim disentitles the applicant of the same.

In support of their stand the defence the placed reliance on the decision in the case of **KIHARA VERSUS BARCLAYS BANK LTD [2001] 2 E.A. 420** in which one of the issues for determination was whether it is necessary that the releifs sought in the underlying suit in which the interim injunction is sought should include a prayer for a permanent injunction and what are the consequences for failure to do so. At page 423 paragraph b-c Ringera J. as he then was set out the argument in that case which is similar to the one herein "*on the competence of the application the defendants argument is that as the plaint filed herein does not pray for any relief in the nature of a permanent injunction, an injunctive relief cannot be granted as to do so would be to grant it in vacuo…… The plaintiff's argument was that it was not*

necessary to have a prayer for a permanent injunction in a suit before a court could grant an interlocutory injunction. At paragraph d,e,f,g,h the learned judge as he then was reviewed the authorities on the subject both by the high court and court of appeal and the relevant provisions of order 39 rules 1(a) (b) and rule 2. He then came to the conclusion that "under rule 1(a) (b) there is no requirement that the suit in which the temporary injunction is sought must be one which itself seeks any restraining orders. On the other hand where the application for injunction sounds under Order XXX1X rules 2 it is an express requirement of the rule that the suit in which the temporary injunction is sought must be one for restraining the defendant from committing a breach of contractor committing the tort in question." At page 424 paragraph 9 the learned judge found that "*though rule 1,2 and 3 had been quoted the application did not sound under rule 1(a) or (b) at all for the property subject matter of the injunction was neither mentioned in the suit as being in dispute nor is it in danger of alienation to defeat any decree. It falls under sub rule 2 which requires the application to be made in a suit where in the relief of a permanent injunction is sought."* On the basis of the foregoing reasoning the learned judge held inter alia that whether interlocutory injunctive relief can or cannot issue depends on the nature of the suit instituted and the procedural rules on which the application for interlocutory relief is grounded. When the application is brought under any of the sub rules of order 39, rule 1 of the Civil Procedure Rules, there is no requirement that the suit in which the temporary injunction is sought must be one which itself seeks any restraining orders. Where the application is under order 39, rule 2, of the Civil Procedure Rules, it is an express requirement that the suit in which the temporary injunction is sought must be one for restraining the defendant from committing a breach of contract or committing the tort complained of. As the plaintiffs application for interlocutory relief did not sound under rules 1(a) or (b) at all though both rules had been invoked but fell squarely under rule 2, the application for an interim injunction was incompetent as the plaintiff did not seek any relief in the form of a permanent injunction in the plaint and the application was dismissed.

This reasoning was applied and followed by the same Justice Ringera as he then was in the case of **MORRIS AND CO. LTD VERSUS KENYA COMMERCIAL BANK LTD AND OTHERS [2003] 2 E.A. 605** where it was held inter alia that even though the Plaintiffs application for injunction was expressed to be grounded under rules' 1(a) and (b) and 2 it falls under rule 2 only. That being so no prayer for a permanent injunction appearing in the plaint the plaintiff's application for interlocutory injunction was incompetent and was struck out.

The application under review is expressed to have been brought under order 39 rules 1,2, 2A, 3, 7(1) and 9 of the Civil Procedure Rules. Applying the reasoning of the cited authorities rule 1(a) (b) does not apply because the property in dispute is not in danger of being wasted, damaged, alienated or wrongfully sold in execution of a decree. Neither is it threatened with removal of the same to obstruct an intended decree. The central theme in the claim as set out in paragraph 18 and 19 of the plaint shows clearly that what is in issue is a breach of a contract and the intended injunctive relief is meant to reverse that breach as it is evident from the pleading that there is already a transfer registered in favour of the 2nd defendant. The injunctive order is meant to preserve the status quo until the suit is heard and finally determined. By its very nature the interlocutory application sought falls squarely under sub rule 2. This being the case as per the reasoning in the cited cases, it was mandatory for the relief to be anchored on a claim of a permanent injunction set out in the plaint. As explained earlier on this was not done and this is fatal to the application. Though the decisions set out above are High Court decisions, this court has gone through them and found that Ringera J. as he then was extracted those principles from Court of Appeal decisions as shown by the reasoning in the case of **KIHARA VERSUS BARCLAYS BANK SUPRA** and so there is no reason for this Court to depart from the same as they state the correct position in law. The finding of this court on prayer (c) is that failure to anchor it in a statement of claim in the plaint is fatal to the claim for that relief.

As for the alternative claim for a preservation order, sub rule 7 (1) has been cited and it is the presumption of this court that this is the rule that the preservation relief is brought under. This sub rule deals with the detention, preservation or inspection of any property in dispute, authorization for entry in the same property and the taking of samples. When applied to the issues under inquiry herein it is clear that what the court is faced with is not preservation for purposes of inspection or taking samples, but preservation for purposes of giving effect to an ultimate order for specific performance to enforce terms of a contract.

In this respect the preservation intended cannot be considered in isolation with the move to prevent breach of an alleged contract. By virtue of this it is the finding of this court that the relief in prayer (d) cannot stand alone. It springs from the contract. The facts which support it are woven around the contract. The two are therefore intertwined. Separation of the two for separate consideration will amount to nothing but mutilation of the reliefs. It should be noted that this preservation order too is not stated in the plaint. Being inter twined with the claim in prayer C, the alternative prayer is also found to be falling under sub rule 2. It therefore requires that the same be anchored in the statement of claim in the plaint and where this has not been done this disentitles the applicant to this relief.

The net effect of the findings on prayer (c) and (d) of the interlocutory application is that the entire application has been knocked out. There appears to be no need to inquire into issues of whether the applicant had satisfied the ingredients for granting of injunctive reliefs or not. However since arguments were presented on the same. It is better to rule on the same in order to finally adjudicate over all the issues raised in the arguments for and against the application.

On satisfaction of ingredients for granting of injunctive releifs, it is now trite law that the yardstick for determining whether the applicant has brought himself within the ambit of the principles for granting of injunctions or not is by application of the ingredients set out in the landmark case of **GIELLA VERSUS CASSMAN BROWN & CO.LTD [1973] E.A. 358.** These are set out in holding iv, v and vi of the said case and these are:-

(1) An applicant must show a prima facie case with a probability of success.

(2) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

(3) When the court is in doubt it will decide the application on the balance of convenience.

These principles have been applied, followed or distinguished in a number of authorities, the criteria being that each case depends on its own set of facts. Some of these have been cited to this court by counsels while others the court has managed to trace on its own. For purposes of using these principles for discussion herein the court will extract and set out facts of a few of these cases. In the case of **MUREITHI VERSUS CITY COUNCIL [1981] KLR 332** on an application to restrain demolition of a kiosk it was held inter alia that the power to grant or deny an injunctive relief is within the discretion of the court which discretion is fettered by the requirement, that it has to be exercised judiciously. To entitle one of the relief one has to show existence of probability of success, likelihood of irreparable harm which would not be adequately compensated for by damages and balance of convenience. An injunction cannot be granted where damages would be an adequate remedy. In the case of **AMRITLAL VERSUS CITY CONCIL OF NAIROBI [1982] KLR 75,** on an application for an injunction it was held that where there was no probability of issuance of an order for specific performance, due to inability of the City Council to fulfill its part of the contract, the only prima facie case shown is one of the alternative claim for damages. In the case of **ALKMAN VERSUS MUCHOKI [1984] KLR 353.** In this case the superior court refused the grant of an injunction in favour of Receivers and managers as against the owners of the property. Receivers had been rightfully and lawfully appointed by the Debenture holder. On appeal to the Court of Appeal, it was held inter alia that the superior Court had correctly considered the conditions for the grant of interlocutory injunction which are the probability of success of the applicants claim, the likelihood of irreparable harm which would not be compensated for by damages, if in doubt the court should decide the matter on the balance of convenience. But the superior court had wrongly applied them because as the appellants being lawfully in possession of the two estates, under authority of the debenture holder had shown a clear and overwhelming prima facie case with probability of success, and 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. Further that the position taken by the superior Court that any 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. Further the judge was wrong in his

observation that because liability was in dispute, granting an injunction would be unfair for being based on a contingent liability yet to be certain. Interlocutory injunction can be properly granted where liability has not yet been ascertained. In the case of **WAITHAKA VERSUS INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION [2001] KLR 374** where the applicant sought an injunction to restrain the defendants from adversely dealing with the property in circumstances where the defendant had failed to release title documents to the applicants advocates to enable her secure release of the final purchase price from a financier to complete the contract of sale between them, it was held *inter alia* by Ringera J. that it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should not issue. If the adversary has been shown to be high handed or oppressive in its dealing with the applicant this may move a court of equity to hold that one cannot violate another citizens rights only at the pain of damages.

Turning to the arguments herein, the issues to be dealt with when determining whether the applicant has satisfied the ingredients for establishing a prima facie case among others are namely: claims of the contract being Statutorily time barred, time of completion, effects of the contract document being a forgery, effects of alleged non receipt of the alleged consideration by the 1st defendant.

The contract subject of these proceedings annexture MC 1 annexed to the supporting affidavit is stated to have been executed on the 5th day of May 1999. It is in respect of a contract of sale of the suit property. Being a contract of sale, in order to pass the eligibility test of showing a prima facie case it has to be shown that it is within the period of time permitted by law as showing the life span of a contract. Section 4(1) (a) of the Limitation of Actions Act provides "*The following action may not be brought after the end of six years from the date on which the cause of action accrued-*

(a) action founded on contract." It is the contention of the Respondents that since the applicant has taken more than seven years to come to court to enforce the contract the action in time barred and the same cannot lie in the absence of an order for leave to file the same out of time. The use of the ward "may" in section 4(1) (a) of Cap 22 is an indicator that where 6 years have elapsed an affected party can apply to court for leave to present his claim out of time. This court takes judicial notice of the fact that of its own knowledge this relief is available in law depending on valid reasons being furnished to the court seized of the matter.

Reliance was placed on Chitty on Contracts, the 26th Edition Volume 1. **LONDON SWEET & MAXWELL 1989 page 1294 paragraph 2007** Titled Limitation of Equity. Here it is sated that Equity developed the doctrine of laches and acquiescence under which the plaintiff was barred from equitable relief if he had not shown reasonable diligence in prosecuting his claim or appeared to have waived his rights. Further reliance was placed on Harlisbury Laws of England 4th Edition Volume 28, **BUTTERWORTHS** page 267 paragraph 607 Titled effect of laches or acquiescence where it is stated that "*nothing in the Limitation Act 1939 affects any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise. The consequences of this saving is that in certain cases a claim to relief may be barred on the equitable grounds of acquiescence or laches"*. At paragraph 662 it is stated that "*In an action for a breach of contract the cause of action is the breach. Accordingly such an action must be brought within six years of the breach."*

Although time may be extended for reason subsequently stated it is not extended merely by the fact that the breach has not been discovered or that damage has not resulted until after the expiry of six years".

The applicant has countered the argument on laches and acquiescence and being barred by statute of limitation by arguing that they have pleaded fraud and forgery. Section 26 of the Limitation of Actions Act Cap.22 Laws of Kenya stipulates that where fraud is relied upon, time does not start running until discovery of fraud or until when the same could have been reasonably discovered when the ingredient of prima facie is applied to the argument on laches and acquiescence it is clear that until determined by the court it is not easy for this court to say, that laches and acquiescence exist or do not exist.

On the completion date clause 9 of MC1 states that this was to be 90 days from the date of execution. The Respondents arguments is that the agreement lapsed after the expiry of the 90 days. MC1 did not say

what was to become of the agreement when the 90 days period lapses. Reliance was placed on the case of **GREEN VERSUS GREEN 1879 CHANCERY DIVISION VOLUME XIII page 589** whose central legal point is that when time is not originally made of the essence of a contract for the sale of land one of the parties is not entitled afterwards by notice to make it of the essence unless there has been some default or unreasonable delay by the other party"

The applicant has maintained that either party was required to give notice before the 90 days stipulated could start running. Whereas the defence maintain that no such notice was required as the period is clearly stated. This is a matter that requires adduction of evidence and administration of cross examination before ruling on the current position. Going into an in depth scrutiny of those issues will amount to pre-empting the trial exercise.

On forgery exhibit 2MCI is the central document that the court is being called upon to use to protect the applicants' interest. This court is not in a position to determine whether the signatures are a forgery or not until expert's evidence is called to that effect notwithstanding the fact that the defendants reporting to the police about loss of title was not investigated or that results of the same have not been disclosed. Until the issue of forgery is sorted out, the applicants' right in so far as they stem from that document are concerned cannot be said to have crystallized into a prima facie case.

On the payment of consideration and the creation of a trust which entitles the applicant to protection of his interests by this Court, the applicant has relied on MC 2, 3, 4 and 5 to show that consideration of 500,000.00 changed hands for the benefit of the 1st Respondent through an advocate called Gatumuta and this money has not been refunded to the applicant. That by virtue of this the contract is kept alive in the form of a trust created in favour of the applicant. The applicant relies among others on the case of **LYSAGHT VERSUS EDWARDS [1876] 2 Ch.D499** Jessel M Rat page 406 had this to say "*The doctrine is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold and the beneficial ownership passes to the purchaser. The vender having a right to the purchase money, a charge or lien on the estate for the security of that purchase money and a right to retain possession of the estate until the purchase money is paid in the absence of expired contract as to the time of delivering possession"* At page 507 the he proceeds to define what a valid contract is line 2 from the top states "*a valid contract means in every case a contract* sufficient in form and in substance so that there is no ground whatsoever for setting it aside as between the vender and purchaser. A contract binding on both sides ……..The vendor must be in a position to make a title according to the contract and the contract will not be valid unless he has either made out his title according to the contract or the purchaser has accepted the title"

The foregoing principle was applied in the case of **MUSSEL WHITE AND ANOTHER VERSUS C.H. MUSSEL WHITE AND SON LTD AND OTHERS [1962] 1A E.R.201.** At page 207 Russel J. as he then was at paragraph G stated that "*when the owner of an estate contracts with a purchaser for the immediate sale out of the owner of the estate is in equity transferred by that contract"* ……..…..at page 208 line 2 from the top "*it is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money a charge or lien on the estate for the security of that purchase money and a right to retain possession of the estate until the purchase money is paid in the absence of express contract as to the time of delivering possession"*

The Respondents while accepting that the statement of law is correct distinguished those in the cited cases on the basis that the contract herein is disputed and so there is no valid contract that is capable of being protected or enforced on the face of the record. Secondly that the consideration is lacking as there is no proof that the same reached the vendor or his authorized agent.

On the basis of the foregoing assessment of the facts either proving or negafiving the existence of a *prima facie case* with a probability of success, it is the finding of this court that this ingredient has not been proved because all the points relied upon by the applicant to prove it namely"-

(a) Existence of fraud negafiving the running of the period of limitation,

(b) Existence of a valid contract not tainted with forgery,

(c) Creation of a beneficial trust based on payment of part consideration,

(d) And time not being of the essence for the conclusion of the contract do require to be proved through adduction of evidence. For this reason the claim cannot be said to be prima facie (obvious) on the face of the record.

As regards the second ingredient of otherwise suffering irreparable damage which cannot be compensated for by way of damages. It is common ground that the subject matter of the proceedings is specific performance of a contract for sale of land. In paragraph 19 of the plaint the plaintiff/applicant has averred that in the alternative and without prejudice to the aforesaid prayers, they claim against the 1st defendant a full refund of all the monies received pursuant to the terms of the sale agreement with interest at thirty (30%) p.a. with effect from 5th May 1999, until full and final payment, general damages against the defendants jointly and severally costs and interest. This averment forms prayer (e) in the main prayers.

Despite this averment in paragraph 19 of the plaint at the interlocutory stage the applicant maintains that they want the land. They rely on **HANBURY AND MAUDSLEY ON MODERN EQUITY TENTH EDITION BY LONDON STEVENS AND SONS LTD PAGE 40** paragraph A where it is stated "*contracts for the sale of land. The decree of specific performance is readily granted to enforce a contract to create or convey a legal estate on land (for example to sell land or to grant a lease) unless some special consideration arises to prevent it. It cannot however be said that the plaintiff is entitled to a decree, because the issue of a decree is always subject to the discretion of the Court.*

Each piece of land is unique and it is accepted as a general rule that an award of damages is adequate compensation for the purchaser or the lessee. The court treating each party equally will also give specific performance to the vendor or lessor although a managers payment would in most circumstances be adequate compensation."

The Respondents stand on the other hand is that there is nothing unique about the land transaction subject of these proceedings. The land subject of these proceedings is just a commodity for sale just like other land. Its value can be computed and paid for in terms of damages. Emotional attachment and uniqueness does not arise as the applicant has never been in possession and use of the same. Neither has he made any improvements on the same.

The Courts findings on this ingredient is that payment of damages is an alternative remedy to specific performance where circumstances warrant it. In the circumstances of this case by pleading damages as an alternative, the applicant took cognizance of the fact that the same was capable of being awarded should it be proved and should the plea for specific performance fail. The Court agrees with the stand of the respondents that the issue of sentimental attachment and value to the land cannot arise as the same had not been passed on to the applicant in pursuance the alleged contract. The only circumstances in which the applicant can be considered an appropriate client and beneficiary of an injunctive relief where damages are awardable are situations like those displayed in the ruling of **ALKMAN VERSUS MUCHOKI [1984] K.L.R. 353** where damages though available an injunctive relief was issued because the Respondents had acted in flagrant defiance of the law and equity could not allow them to benefit from their wrong. And also in the case of **WAITHAKI VERSUS INDUSTRIAL AND COMMERCIAL DEVELOPMENT COPRORATION [2001] KLR 373** where an injunctive relief also issued although damages were awardable because the Respondents had acted in a high handed and oppressive manner to the applicant. In the circumstances displayed herein, issue of acting in a high handed manner or in flagrant disregard of the law does not arise because the first defendant put the applicant on the alert at the earliest opportune time in fact in the same year of 1999 that they were disputing the alleged contract of sale document on the grounds that the same was a forgery. They also alerted the applicant that they were disputing receipt of the alleged part payment of the purchase price because the alleged Gatumuta Advocates was not their agent, he was not acting on their behalf and had neither received the said part consideration on their behalf nor passed it over to them. They had also disputed handing over the said title to any body and claimed that the same had been stolen from the lands office where it had been taken

for purposes of extension of the lease and had in fact reported the matter to the police for investigation.

Despite learning of the matter having been reported to the police station the applicant did not present the said title to the police as proof of the falsehoods of the alleged loss. The first respondent went further and had the loss of title advertised for purposes of showing of an intention to be issued with a provisional title. The applicant did not confront either the first Respondent or the land Registrar with the original title to stop the Title of the provisional title. The said applicant has not also confronted the first Respondent in this court by annexing the said original title. The copy annexed is the provisional issuance as it contains the entries of removal of the caveat and transfer to the 2nd Respondent which features would definitely be missing from the original title. The first respondent waited for the removal of the caveat procedures to be exhausted before effecting transfer in favour of the second Respondent. This court is alive to allegations of speedy processing of the title in favour of the second Respondent which can only amount to a defiance of the law and acting in a high handed manner if it can be proved that this was contrary to the normal way of conducting transactions in the lands office which evidence is not displayed. Further on this dispute the applicant being alerted at the earliest opportunity of problems surrounding his claim and yet chose to come to Court at the time he. Come to Court after title had passed to the 2nd Respondent. As to whether the said transfer to the second respondent is to stand or not is a matter to be gone into at the trial of the case.

As regards the ingredient of balance of convenience, it is the finding of this court that the same does not tilt in favour of the applicant because nearly all points relied upon by them to support their claim require proof at the trial and as such they do not have a clear and prima facie case in their favour. Instead it tilts in favour of the Respondents because they disowned the contract of sale and receipts of part payment of the purchase price in the same year the contract is allegedly to have been entered into. Upon reporting that the original title was lost they took procedural steps which apparently are within the law until declared otherwise by a court of competent jurisdiction, to process a provisional title. The intention was duly gazetted and when no objection was forth coming a new title deed was issued in their favour thus enabling them to transfer the property to the second Respondent. They first respondent have received the full purchase price and have therefore benefited from the said transaction and so are entitled to protect the interests of the second Respondent.

The balance of convenience also tilts in favour of the second Respondent because the plea of purchaser for value without notice stands until faulted. The title is now registered in their names. The said title is now subject to the provisions of Section 23 of the registration of Titles Act Cap.281 Laws of Kenya which provides "23(1) the certificate of Title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indifisible owner there of subject to the encumbrances, easements restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

(2) A certified copy of any registered instrument signed by the registrar and sealed with his seal of office shall be received in evidence in the same manner as the original."

The operative words in Section 23(1) are "*fraud to which he is proved to have been party*". Until fraud attributed to the second respondent is proved against them their title is good and the balance of convenience continues to tilt in their favour more so when their consideration is higher than that of the applicant and as at the time the applicant came to court, they had already commenced developments on the land.

In conclusion and for the reasons given this court makes the following findings:-

(1). The objection raised against the papers filed by counsel for the first Respondent is rejected because the advocate entered appearance and filed defence in his own name and as such there was no need for him to file notice of appointment in compliance with order 111 rule 1 and 8 Civil Procedure Rules which arises only where the client initiates the proceedings and then engages the service of counsel subsequently

to come and act for him.

(2). As regards objection to the papers filed by Counsel for the second respondent, the same is upheld firstly because the ground of opposition and replying affidavit were drawn and filed by the Counsel and not the party. This meant that the Counsel had already taken over the representation of the matter from the client. And since the second defendant had not entered appearance and or filed defence through the said counsel, before filing these papers, with order 111 rules 1 and 8 Civil Procedure Rule was mandatory. The Counsel should have filed a notice of appointment first before filing those papers. Since notice of appointment came after the papers were already on the file there is no provision where by it can act retrospectively to cover the papers filed before it. The said papers were therefore filed un procedurally and cannot be allowed to stand. On this ground the same are struck out.

(3). As regards the 2nd objection on the grounds of opposition and replying affidavit filed by the Counsel for the 2nd defendants, the same is upheld because as explained in the body of the ruling a proper construction of order 50 rule 16 (1) Civil Procedure Rule is that a party wishing to oppose any application filed against him has an election to file either grounds of opposition or replying affidavit but not both. Had there been no election to do so the rules committee would have added the words 'or both" in the same rule. As ruled by courts of the same jurisdiction and as properly construed by this court the correct position in law is that where both processes are filed there is no jurisdiction to save them and dismiss one and leave the other. They stand or fall together. Being a nullity they have to be struck out.

(4). The striking out of the 2nd respondents papers do not render null and void their submissions to court on the application. This affects submissions on facts. Submissions on points of law are allowed to stand under sub rule 3 of the same rules and same have been considered in the assessment subject of this ruling.

Turning to the objections to the application.

(5). The objection relating to the incompetence attributed to the application having been brought by way of chamber summons as opposed to the some being brought by way of notice of motion the court found that same reliefs fell under the chamber summons procedure while others fell under the Notice of Motion procedure. As shown by the trend of the Court decisions on this aspect both by the high court and the court of appeal the leaning is towards bending towards substantial justice as opposed to technicalities. On this basis the application is sustained because substantial justice demands so and the same has been sustained and considered on merit.

(6). As regards the objection that the relief in prayer (c) and (d) are not properly anchored on the plaint, the authorities relied upon together with a proper construction of rule 2 shows clearly that the sound of those reliefs is based on sub rule 2. Both are intertwined and in separable as they stem from one contract agreement. The alternative prayer flows from the main prayer in prayer C. It cannot fit in the reliefs set out in sub rule 7 (1). Failure to anchor them in the plaint disentitles, the applicant of the same.

(7). As for satisfaction of the ingredients for granting injunctive reliefs the court has found that none of the requisite ingredients have been satisfied for the following reasons:-

(i) The ingredient of establishing a prima facie case with a probability of success has not been satisfied because all the points raised by applicant as supporting it require proof and thus they do not reveal a clear and obvious case.

(ii) The ingredient of suffering irreparable loss has not been proved because as per the pleading in paragraph 19 of the plaint the value of the subject matter can be computed and paid for by way of damages. The facts displayed do not come within the exception to the rule where by though damages are available nonetheless an injunctive relief is granted instead as there is no evidence of deliberate defiance of the law and a deliberate acting in a high handed and oppressive manner on the part of the respondents.

(iii) On the balance of convenience the same tilts in favour of the respondents for the reasons given.

The interim application dated 18.l.2006 be and is hereby refused with costs to the Respondents.

DATED, READ AND DELIVERED AT NAIROBI THIS 3RD DAY OF JULY, 2007.

R.N. NAMBUYE

JUDGE