**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 54 of 2006**

**METRA INVESTMENTS LIMITED…….....……PLAINTIFF**

**VERSUS**

**GAKWELI MOHAMED WARRAKAH …….....……..……DEFENDANT**

**RULING**

By its Chamber Summons of the 17.2.2006 the Applicant seeks the following orders:-

**2. A temporary injunction do issue restraining the Defendant either by himself, or by his servants or agents or advocates or otherwise howsoever or any person claiming title through him from evicting the Plaintiff from the Suit premises or in anyway interfering with the Plaintiff's quiet possession enjoyment and occupation of LR number 209/11609/8 Kileleshwa until this suit is heard and determined.**

4. The Defendant either by himself, or by his servants or agents or advocates or otherwise howsoever or any person claiming title through him be restrained by a temporary order of injunction from

5. In the event the Plaintiff will have been evicted from the suit property prior to or by the time this application is heard mandatory injunction orders do issue compelling the Defendant either by himself, or by his servants or agents or advocates or otherwise howsoever or any person claiming title through him or any of them to reinstate and allow the Plaintiff back on the premises.

The application is based on the grounds set out therein and the supporting affidavit of Rahab K. Mukiama and Joel Sabaya.

The Applicant's contention is that it is the purchaser of a property known as LR 209/11609/8 Kileleshwa (the suit property) from the Respondent. In support annexed to the affidavit of Rahab K. Mukiama are various documents.

In a letter of the 15.2.2005 written by the Respondent to the Mr. Sabaya of the Applicant he confirms that he is selling the suit property for Kshs.6.4 million. In a letter to the K-Rep bank the Respondent informs this bank that he is disposing of the suit property and the purchaser are the Applicants at a price of

Kshs.6.4 million. He says the purchaser's advocates are Gimose and Company and that he intends to retain Gitonga Kamiti & Company. He has instructed the purchaser to pay all the money to the bank.

On the 24.2.2004 Gitonga Kamiti Kairaria & Company wrote to Gimose & Company stating they had instructions to release the title documents of the suit property to Gimose & Company subject to the terms and condition set out.

On the 7.9.2005 Ong'anda & Associates wrote to the firm of Gitonga Kamiti Kairaria & Company saying they were now acting for the purchasers stating they had instruction to give the undertaking to pay Kshs.6.4 million after registration of the transfer in favour of the purchaser.

Thereafter, the correspondence shows that although the purchaser was anxious to complete the sale the applicant was having cold feet and as a result the question of how the purchase price was to be paid was not agreed.

The Applicant maintained that an agreement for sale had been prepared and signed but this was denied by the Respondent. However, no agreement for sale has been produced.

One further matter is that the Applicant appears to have taken possession of the suit property prior to completion. In paragraph 16 of the affidavit of Rahab K. Mukiama she depones that during the month of September the Plaintiff took possession of the suit property. It also constructed a road and installed connection to water supply. The Respondent in his replying affidavit joins issue with the contention of the Applicant that there was a signed agreement. He also states that he was not aware of what he calls the blatant nuisance and gross trespass to his property until 4th February, 2006 when he visited the suit property and found some people building on it.

Mr. Mungai for the Applicant submitted that there was a binding agreement between the parties and that there existed a signed agreement for sale although this had not been traced as Mr. Gimose was in the United States. He relied on the **Law of Real Property by Megarry & Wade 5th Edition page 623 and 62,4. Snell's Equity 29th Edition page 586.** also the case of **Openda v Ahn [1984] KLR page 208.**

Mr. Mburu for the Respondent opposed the application and submitted that there was no evidence of an agreement for sale and relied on Section 3(3) of the Law of Contract Act which states as follows:-

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

**(a) the contract upon which the suit is founded –**

**(i) is in writing;**

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

**(b) the signature of each party 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 in it affect the creation of a resulting, implied or constructive trust."**

It was his contention that the Applicant was a trespasser in the suit property and relying on a notice served on the Respondent by the City Council of Nairobi annexed to the Respondent's further affidavit of 24.3.2006 the Applicant had breached the provision of the Physical Planning Act (Cap 283).

In order to succeed the Applicant must show that it has a prima facie case with a probability of success and that damages would not be an adequate remedy.

The Plaint paragraph 4 relies on a written agreement made in February 2005 and also contained evidence (sic) in a letter dated 15.2.2005 between the Applicant and Respondent whereby the Respondent agreed to sell and the Applicant agreed to buy the suit property for Kshs.6.4 million.

It avers that the Respondent has purported to cancel the sale and this constitutes a breach of contract. The Applicant seeks inter alia specific performance of the sale agreement.

As the case is presented, there is no evidence that an agreement in writing exists signed by both parties and witnessed as is required by Section 3(3) of the Law of Contract Act.

In the absence of such agreement the section is clear that no suit shall be brought for the disposition of an interest in land.

The Applicant does not appear therefore, to have a prima facie case with a probability of success.

The relief formerly available under the doctrine of part performance no longer exists.

Further the Applicant has not acted in a manner which equity will countenance as by going into possession of the suit property and carrying out development therein it has breached the provisions of the Physical Planning Act thus putting the Respondent in jeopardy for being prosecuted for an offence.

In the result I dismiss this application with costs.

Dated and delivered at Nairobi this 25th day of May, 2006.

P. J. RANSLEY

JUDGE