



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

**CIVIL CASE 65 OF 2005**

**ALBRIGHT HOLDINGS LTD. ....PLAINTIFF**

**VERSUS**

**NATIONAL SOCIAL SECURITY FUND BOARD TRUSTEES .....DEFENDANT**

**RULING**

By its application of the 8.9.2005 the Applicant seeks to extend the life of the caveats set out in prayer 3 pursuant to the provisions of O 36 rule 3B and Sec 57(8) of the Registration of Titles Act.

In order to succeed the Applicant must show it has an interest in the land to which the caveats relate.

In this case the Applicant claims that there is a binding agreement between itself and the Respondent to sell and purchase the land respectively.

At this stage the order should be granted unless the Applicant has no chance of success. See *Wagichiengo vs Gerrard (1982) KLR page 336*.

The Applicant relied on the affidavits sworn by the parties' representatives and a bundle of documents in connection with the offer made by the Applicant to purchase the suit premises. Unfortunately the letters are not all in sequence but can mostly be found in the affidavit.

The Respondent advertised the suit premises seeking offers for their purchase.

The Applicant made an offer of shs.42,500,000/=. Correspondence then took place between S. Gichuki Waigwa and Robson Harris & co. advocates for the Applicant and Respondent respectively. A letter dated the 3.2.2004 was written by the Respondent's advocates which states as follows:-

*"We are under instructions from our Client to write to you and request your clients to make an initial 10% deposit of Kshs.4,250,000/= for the entire 15 plots as a sign of your client's commitment in the above transaction. Upon receipt of the same, our client shall proceed and review the position and see how the entire 15 plots can be sold to you altogether. Should our client not receive the said sum within the next FOURTEEN (14) days of this letter, it shall proceed to sell the same to interested individuals.*

*This letter should be construed as a firm offer to sell the entire 15 plots to your clients. The same shall be confirmed upon finalization of the cancellation of other 4 offers of sale to third parties, details of which you are aware of. We look forward to your earliest response."*

This letter is marked “subject to contract”.

Thereafter the Respondent wrote to the Applicant’s advocates on the 19.3.2004 referring to an offer made to the Applicant on the 28.1.2004. No evidence of this offer is contained in the documents put in evidence. However, it appears that the Respondent was willing to treat with the Applicant as it gave the Applicant until the 29.3.2004 to pay a deposit of 10%. The amount is not specified nor the purchase price but it is presumably shs.4,250,000.00 as this is the sum forwarded by the Applicant’s advocates to the Respondent on the 29.3.2005 in their letter of that date. This letter referred to agreements in triplicate, which had been executed by the Applicants.

On the 2.9.2004 the Applicant’s advocate wrote noting with concern that the receipt for the deposit dated 30.3.2004 referred to plots 2 – 10 and not 2 (-8) to 17.

It also referred to “a rectification as all along the offer by yourselves (the Respondent) and acceptance by my client was for plots 2(-8) to 17.

On the 6.4.2004 the respondent wrote the following letter;

*“M/S Robson Harris & Company*

*Advocates,*

*Transnational Plaza,*

*P. O. Box 67845-00200*

*Nairobi.*

*(Attn: Mrs. Jane S. Mwangi)*

*Dear Sir,*

*RE: SALE OF L.R. NO.209/11609/2-17 – KILELESHWA NAIROBI – NSSF TO ALBRIGHT HOLDINGS LIMITED*

*“The purchaser’s Advocates have confirmed that the Cheque for Kshs.4,250,000.00 has been paid. Kindly process and apply for the necessary consents and clearance certificates.*

*You should also notify all the other purchasers that National Social Security Fund decided to sell the property as a block since selling the plot separately was not economical.*

*Kindly move with speed so as to have the matter finalized.*

*Yours faithfully,*

*Said Chitembwe*

*Consolidated Bank House, 2<sup>nd</sup> Floor,*

*P. O. Box 49496,*

*Nairobi.*

*Ref:CON-77-2004*

*n.o.o. (We acknowledge receipt of your letter dated 2<sup>nd</sup> March, 2004. We do confirm that it is all the*

*plots involved in the transaction and not 2-10 only).*”

On the 7.4.2004 the Respondent’s advocates wrote to the Applicant’s advocates referring to the Applicant’s advocate’s letter of the 6.4.2004 (stating it required the draft agreement if it needed no adjustment to be executed by the Applicant and Respondent) asking for the Agreement for Sale with or without amendments for their further action. On the 14.4.2004 the Respondent sent an engrossed Agreement for Sale in triplicate for execution. On the 26.4.2004 the Applicant’s advocates returned the engrossed Agreement for sale duly executed.

On the 11.6.2004 the Respondent’s advocates on instruction from their clients forwarded a cheque for shs.4,250,000/= (the deposit) stating their client was unable to proceed ahead with the transaction.

Whether or not there was a concluded agreement for sale cannot be determined at this stage, however, it is clear that the parties proceeded on the basis that there was an agreement in existence.

The agreement contained on the letters might all have been subject to contract had the Respondents not written on the 19.3.2004 stating that if the 10% deposit was not paid on the 29<sup>th</sup> March, 2004 there must be no further dealings.

Again when the cheque for the deposit was sent on the 29.3.2005 a receipt dated the 30.3.2004 was issued by the Respondent instead of returning the cheque and stating it was paid late. Questions arise as to whether the condition for payment by the 29.3.2004 was waived or not.

Where a contract is “subject to contract” no agreement arises until a formal contract is signed. See

(1) *Triventon Estates vs. Wearwell (Ltd) (1974) 1 All ER*

*Lord Denning MR at page 217 had this to say;*

*“..... for over a hundred years, the courts have held that the effect of the words “subject to contract” is that the matter remains in negotiation until a formal contract is executed”.*

(2) *Halsbury Laws of England – 4<sup>th</sup> Edition Paragraph 265 page 145*

*“where an agreement is made in the above mentioned circumstances (subject to contract), even a signed written offer cannot be accepted so as to conclude a binding contract, the reason being that the offeror clearly does not intend to be bound at this stage”.*

In this matter I cannot say that the Applicant did not have an agreement to purchase free from a condition that it was subject to contract.

This matter must go for hearing to enable the court to determine whether there was contract or not.

The applicant having shown that it might well have an enforceable contract, I grant the application as prayed with costs in the cause. The matter should be heard in full within the course of this Term.

Dated and delivered at Nairobi this 12<sup>th</sup> day of October, 2005.

**P. J. RANSLEY**

**JUDGE**