

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL CASE 1103 OF 2004**

GEORGE NJENGA KAGAI.....PLAINTIFF/APPLICANT

-versus-

SAMUEL KABI NJOROGE.....DEFENDANT/RESPONDENT

RULING

In the Chamber Summons application dated and filed on the 18th October 2004 the Plaintiff/Applicant seeks an injunction to restrain the Defendant/Respondent from (inter alia) transferring the suit property namely Title Number Dagoretti/Riruta/4170. The application is based on the several grounds set out therein and is supported by the affidavit of the Applicant made on the 18th October 2004.

It is common ground that the parties entered into an agreement dated the 29th July 2004 for the sale of the said property at the price or sum of Kshs. 2,100,000/- of which the sum of Kshs. Two million **shall be paid by instalments within the completion period until payment in full**". The Applicant, in part performance of the contract, made several payments thereunder, the last of which was in January 2004. It is also not in dispute that the Respondent executed an Instrument of Transfer in favour of the Applicant and that the consent of the relevant Land Control Board was obtained pursuant to the provisions of section 6 of the and Control Act [Cap. 302] and further that to protect his interest as purchaser, the Applicant registered a Caution against the title to the suit property on the 25th March 2004.

In submissions, Mr. Oyugi for the Applicant argued that as the said agreement for sale does not provide for a completion date, the sale should be completed within a reasonable period for which purpose a notice making time of the essence must be served upon the Applicant by the Respondent. He cited Halisbury's Laws of England volume 9 (4th edition) at paragraph 485 in support of his argument. Mr. Oyugi also submitted that whilst the legal estate in the suit property remains in the Respondent until the Instrument of Transfer is duly registered, the Applicant is entitled to orders of specific performance of the contract of sale as the equitable interest in the property passed to the Applicant immediately the said Agreement of Sale was executed. On this proposition of law, learned counsel relied on Cheshire's Modern Law of Real Property (11th edition) at pages 711 - 717. It was further contended for the Applicant, relying on Hanbury and Maudsley Modern Equity at page 40, that because "**each piece of land is unique, it is accepted as a general rule that an award of damages is not adequate compensation for the purchaser of lessee.**" Finally, Mr. Oyugi urged me to strike out the Replying affidavit of the Respondent made on the 25th October 2004 by reason of the failure of the Advocate who drew it to endorse his name and address thereon in accordance with section 35(1) of the Advocates Act (cap 16).

In opposing the application and relying on the Respondent's affidavit made on the 25th October 2004, Mr. Bor conceded that the said Caution is rightfully and lawfully registered in favour of the Applicant but argued that as the same forbids the registration of dealings and the making of entries in the register relating to the suit property the Applicant is not entitled to the orders sought in the application as he is already adequately protected by the Caution and as in any event, the Applicant has failed to complete the sale within the 120 days stipulated in an earlier Agreement for Sale between the parties dated the 26th July 2003 which provided "**that the completion dates is 90 - 120 days from the date of signing of this Agreement, but same will be extended, on agreement.**"

Mr. Bor conceded, however, that by accepting further payments on account of the purchase price after the expiry of the said period of 120 days, the Respondent had waived the condition that the sale be completed within that period.

Having considered the application in light of these submissions of counsel, I find and hold that the Respondent's said Replying affidavit made on the 25th October 2004 does not meet or satisfy the requirements of section 35 of the Advocates Act and accordingly order that the same be and is hereby struck out and expunged from the record.

I would also respectfully agree with the propositions of law advanced by Mr. Oyugi and enunciated in the authorities to which he has referred me. I am satisfied that the Applicant has well demonstrated and satisfied the requirements for the granting of the orders sought as settled in **Giella v. Cassman Brown & Co. Ltd.** (1973) E.A. 388.

The Chamber Summons application dated and filed on the 18th October 2004 is, therefore, hereby granted and orders accordingly in terms of prayer 3 thereof with costs to the Plaintiff/Applicant.

Dated and delivered at Nairobi this fifth day of November 2004.

P Kihara Kariuki

Ag Judge