



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO 321 OF 2001**

**WAITHAKA.....PLAINTIFF**

**VERSUS**

**INDUSTRIAL AND COMMERCIAL**

**DEVELOPMENT CORPORATION(ICDC)..... DEFENDANT**

**RULING**

Industrial and Commercial Development Corporation (ICDC), the defendant herein, in exercise of its statutory power of sale instructed an auctioneer to sell by public auction the property known as LR No 209/ 1459/11 Nairobi. The sale was advertised for 20.11.2000. According to the advertisement, a deposit of 25% was to be paid at the fall of the hammer and the balance within 30 days. The plaintiff attended the said auction and her bid in the sum of Kshs 4 million was the highest. The property was knocked down to her. Upon acceptance of the bid and the conclusion of the auction, she executed a memorandum of sale and paid to the defendant through the auctioneer Kshs 1 million being the 25% deposit. The plaintiff swears that the defendant wanted to give her thirty (30) days to complete the auction but when the auctioneer informed the defendant's legal officer on phone that she was borrowing funds to meet the balance of the purchase price of Kshs 3 million on the strength of the security of the same property and hence she would require more time to complete the sale, the completion date was agreed upon and set as ninety (90) days from the date of the auction sale, that is the 6th March, 2001. Indeed that understanding and accommodation is reflected in both the particulars of property and the conditions of sale thereof and the memorandum of sale executed on 6.12.2000 by the auctioneer, as agent of the defendant, and the plaintiff. The plaintiff agreed to pay the balance of the purchase price to the defendant on or before 6th March, 2001 and time was made to be of the essence of the contract.

The plaintiff turned to Housing Finance Company of Kenya (HFCK) for the balance of the purchase price. Her loan application was approved on 16th February, 2001 in the sum of Kshs 2,890,520.00 on the basis that she would charge the auction property and another property of hers known as Title No Nairobi/Block 72/1290 to secure the aforesaid loan. In the meantime, the plaintiff had on 5.12.2000 deposited with her advocate who was also the advocate of the Housing Finance Company of Kenya, the sum of Kshs 276,407.00 to cater for the amount over and above the expected advance from Housing Finance Company of Kenya, the stamp duties and the registration fees. So all was set for completion of the sale. On 7.2.2001 the plaintiff's advocates wrote to the defendant asking the defendant to release the title documents of the auction property to them upon their professional undertaking to pay to them the balance of the purchase price within 14 days of the registration of the transfer by the defendant in favour of the plaintiff. The defendant's principal legal officer replied to that letter on 14.2.2001. The reply was short and clear. It reads:-

“The sale herein was by auction, the terms which were clearly set out, the title documents are released upon payment of the purchase price. The contract clearly stated the time period as ninety days from 6.12.2000. Kindly note that if your client is unable to proceed as per the auction sale agreement we shall have no option but to consider the contract as broken.”

There after an exchange of correspondence ensued whereby the plaintiff’s advocates who, as indicated earlier, were also the financier’s advocates reiterated their professional undertaking and pointed out that a financier can only release the balance of the purchase price upon registration of a charge in its favour. They even forwarded the transfer documents for execution by the defendant and pointed out that the plaintiff could still complete the sale within the stipulated time. The defendant rejected the undertaking as the terms of the auction sale were clearly spelt out. They returned the transfer unexecuted as the same had not been accompanied by the balance of the purchase price. That was on 26.2.2001. In a last ditch effort, the plaintiff’s advocates wrote to the defendant once again on 28.2.2001. This interesting letter complains that the auction sale agreement does not stipulate that the release of the title documents cannot be secured by a professional undertaking as regards the payment of the balance of the purchase price. It also implores the defendant to agree that as the purchaser is being financed, the financier cannot release the finance prior to the registration of its charge and that was the reason an undertaking had been given. The plaintiff’s advocates finally told the defendant that if it was unable to accept the terms of their undertaking, it should set down its own terms of undertaking for their confirmation so that the defendant may release the title documents. They expressed hope for a prompt response. They got the prompt reply on the 28.2.2001. The defendant’s principal legal officer reiterated that the title documents would be released upon receipt of the balance of the purchase price within 90 days from the 6.12.2001.

The defendant thereafter moved to Court on 5.3.2001. She filed a plaint whereby she averred that the defendant’s conduct of refusing to release the title documents on her advocate’s professional undertaking to pay the balance of the purchase price on registration of title documents is a fetter to her right to complete the sale and the same amounts to a breach of the terms of the auction sale agreement which breach amounts to an illegality. She further avers in the said plaint that unless the defendant releases the title documents and the executed transfer in respect of the auction property to her advocates, the defendant will proceed to terminate the sale agreement and the plaintiff will suffer loss and damage which includes loss of bargain in respect of the auction purchase, loss of deposit paid at the auction and loss of the expenses and the legal charges incurred by the plaintiff in procuring the loan from the financier. She therefore prays for a permanent injunction restraining the defendant from breach of the sale agreement dated 6.12.2000 or otherwise dealing with the suit property in any manner prejudicial to the plaintiff’s interest as the auction purchaser. She also seeks for specific performance of the sale agreement as against the defendant. Simultaneously with the filing of the plaint, the plaintiff took out a chamber summons praying for interlocutory relief in the following terms –

“(2) That the defendant herein be restrained by way of temporary injunction from terminating the sale agreement dated 6th December, 2000 or selling, transferring, discharging to a third party or dealing in any manner whatsoever prejudicial to the plaintiff’s right and interests as the auction purchaser of the property known as LR No 209/1459/11 pending the hearing and determination of this suit.

(3) That the defendant herein do release the title documents to the plaintiff’s advocates M/s Kimani Waweru & Co Advocates together with a duly executed transfer document in favour of the plaintiff in respect of the property known as LR No 209/1459/11 – Nairobi pursuant to the plaintiff’s advocates professional undertaking dated 16th February, 2001 to the defendant to pay the balance of the purchase price upon the registration the charges in favour of Housing Finance Company of Kenya Limited.

(4) That this Honourable Court in exercise of its inherent discretion does grant the plaintiff a period of two (2) months from the date of the Court order to complete the registration exercise in respect of the transfer and the charges in favour of Housing Finance Company of Kenya Limited.”

On the same date, this Court granted to the plaintiff an *ex parte* interlocutory injunction in terms of prayer (2) above and set the matter down for interparties hearing on 13.3.2001. The matter was duly heard and I am now called upon to pronounce a ruling in respect thereof.

At the hearing, the plaintiff essentially reiterated the matters I have set out herein above and submitted she had made out a *prima facie* case with a probability of success, that she would suffer considerable loss if an injunction were not granted and that even the balance of convenience tilted in her favour in all the circumstances of this case.

The application is opposed. There is a replying affidavit by one I B Mogaka. It is not disclosed whom the deponent is in the defendant corporation and in what capacity or by whose authority he is swearing the affidavit. Be that it may, the deponent swears in paragraph 17 of the said affidavit that what is stated therein is true to the best of his knowledge, information and belief.

Now although the plaintiff did not object to this affidavit, it is so patently defective that this Court cannot in good conscience ignore the matter.

Order XVIII rule 3(1) is quite clear. It reads:-

“3 (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the Court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

The replying affidavit herein violates the above clear rule. Without identifying the deponent it is impossible for the Court to accept that any matter deponed to is within the deponent's knowledge. Moreover, such an affidavit is worthless. It does not indicate which matters are deponed to as a result of information and the sources of such information and which matters are based on belief and the grounds of such belief. These omissions are in my view so fundamental that I am constrained to totally disregard this affidavit in my consideration of the case for interlocutory relief against the defendant. If the replying affidavit is disregarded, as I have held it must, the defendant's opposition to the application on purely legal grounds is this. When the plaintiff's advocate asked the defendant to release to them the documents of title on 7.2.2001 on the undertaking to pay to the defendant the balance of the purchase price within 14 days of the registration of the transfer by the defendant in favour of the plaintiff, they varied the period within which the balance of the purchase price had to be paid. They thus introduced a new condition which had the effect of terminating the original contract. Had the plaintiff's advocate's undertaking been framed within the terms of the conditions of sale, the same would have been acceptable. The case of *Industrial and Commercial Development Corporation vs Daber Enterprises Limited* [Civil Appeal No 41 of 2000] was cited in support of that submission. In the above case the respondent was the highest bidder at an auction. The auction property which was being sold by the appellant in the exercise of its statutory power sale was knocked down to it. The conditions of the auction sale were that the highest bidder shall be declared the purchaser and pay immediately a deposit of 25% of the sale price and the balance to be paid within 30 days from the date of sale. The respondent made a down payment of 25%. Six days later the respondent wrote to the appellant asking for title documents upon their undertaking to release the balance of the purchase price within seven days of registering the transfer, or within 60 days from the date of receipt. The respondent stated that the 60 days were required to enable them organize the finance necessary. The appellant was not impressed and took the view that this was a counter-offer unacceptable to them. They returned the deposit. The appellant brought an action for breach of contract. The appellant entered appearance and filed defence. Upon an application for summary judgment, the trial judge entered judgment in favour of the respondent. On appeal the Court of Appeal allowed the appeal on the ground that the respondent's letter could have been construed as a counter-offer the non-acceptance of which by the appellant terminated the original offer and thus vitiating the contract of sale and accordingly the defence raised a triable issue. Counsel for the applicant sought to distinguish this case on the basis that the applicant in the instant case had not introduced new conditions to the contract as there was no indication that completion would not be within the 90 days contractual period and further that the respondent herein had not terminated the contract by refund of the deposit.

It is now time to consider the application in light of the admissible evidence and the submissions of counsel thereon. The conditions for grant of interlocutory injunctive relief as laid down by the East African Court of Appeal in *Giella vs Cassman Brown & Co* [1973] EA 358 and reiterated severally in

subsequent appellate decisions are first, that the applicant must show a *prima facie* case with a probability of success; secondly, that normally an injunction will not issue where the injury complained of would be adequately compensated in damages; and thirdly, if the Court is in doubt it should decide the matter on a balance of convenience. I discern the “doubt” in the third condition as referring to the existence or otherwise of a *prima facie* case. The Court should also be alive to the fact that at the interlocutory stage it would be improper to decide with finality the rival facts if they are complicated and disputed. And of course an injunction is a discretionary equitable remedy and accordingly the conduct of the parties and particularly the conduct of the supplicant to relief is a material consideration.

In the application before me I consider that the plaintiff has demonstrated an arguable case that were it not for the defendant’s recalcitrance in not releasing the title documents to the auction property upon her lawyer’s professional undertaking to pay the balance of the purchase price within 14 days of the registration of transfer in favour of the plaintiff, the sale could have been concluded within the 90 days contractual completion period. This is particularly so considering that when the undertaking was given there were a clear 19 days to go before the expiration of the contractual completion period. The defendant’s insistence that it could only release the title documents on payment of the balance of the purchase price when it knew all along right from the date of the auction that the plaintiff was being financed in respect of the balance of the purchase price ran contrary to well established conveyancing practice that in financed sales, title documents are released on the basis of professional undertakings by advocates to pay the balance of the purchase price on registration of transfer and charge. On the other hand, the defendant’s submission that as framed, the plaintiff’s advocate’s professional undertaking amounted to a counter-offer which the defendant was entitled to reject, and did reject, terminating the contract of sale, is a probable construction of the letter of 7th February, 2001. I am of the view that the construction of the correspondence herein is a complicated matter of law best canvassed and determined at the trial. Being of that persuasion, I must say I am in doubt as to the showing or otherwise of a *prima facie* case with a probability of success by the plaintiff.

As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy.

By using the word “normally” the Court was recognizing that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not enjoined. I think some of the considerations to be borne in mind is the strength or otherwise of the applicant’s case for a violation or threatened violation of its legal rights and the conduct of the parties. If the adversary has been shown to be high-handed or oppressive in its dealings with the applicant this may move a Court of equity to say:

“money is not everything at all times and in all circumstances and don’t you think you can violate another citizen’s rights only at the pain of damages.” In the instant case although I have found myself in doubt as to the existence of the *prima facie* case I have said enough to show that the plaintiff has an arguable case and that the defendant’s conduct may be regarded as high handed and probably unfounded in law. All in all I think this is one case which should be outside the normal rule of no interlocutory injunction if damages will be adequate recompense. It now remains to weigh the balance of convenience.

Whereas the plaintiff has sworn that unless an injunction is issued, she will suffer loss of deposit, loss of bargain and loss of money paid to the financier and these matters are not controverted by the defendant, the defendant has not so much as attempted to show what loss or hardship it would suffer if the injunction is issued in favour of the plaintiff. In this state of affairs I am persuaded that the balance of convenience weighs in favour of granting the plaintiff interlocutory injunctive relief.

The justice of the case requires the preservation of the *status quo* pending trial. A prohibitory interlocutory injunction will therefore issue as per prayer (2) of this application. What of prayers (3) and

(4)? They are in my view inappropriate at the interlocutory stage. If granted, a trial would be unnecessary and this Court could properly be accused of usurping the role of the trial judge. However, if the parties themselves are for whatever reason inclined to settle this action out of Court, they may very well decide to do so on the basis articulated in those prayers.

Finally, I ask myself on what terms the injunction should issue. In all fairness to the defendant, the price of an injunction should be a tight undertaking as to damages. I shall require the same of the plaintiff herein. In the result, I order that a temporary injunction do issue restraining the defendant from terminating the sale agreement dated 6.12.2000 or selling, transferring, discharging to a third party or dealing in any manner whatsoever prejudicial to the plaintiff's right and interest as the auction purchaser of the property known as LR 209/1459/11 pending the hearing and determination of this suit. The said injunction will be conditional on the defendant filing an undertaking on oath to pay damages, if any, to the defendant in the event that it is found at the trial that the injunction ought not to have been issued. The said undertaking to be filed within 7 days of today. The plaintiff will have the costs of this application.

Dated and delivered at Nairobi this 7<sup>th</sup> day of May, 2001

**A. G. RINGERA**

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**JUDGE**