



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 815 OF 2013**

**EAST WEST HOLDINGS LTD.....PLAINTIFF**

**VERSUS**

**1. JEAN WANJIKU HUTCHISON**

**(SUED IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF**

**RAPHAEL ALFONSO HUTCHINSON (DECEASED)**

**AND ALSO AS BENEFICIARY OF SUCH ESTATE.....1<sup>ST</sup> DEFENDANT**

**2. ELIZABETH HUTCHINSON (SUED IN HER**

**CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF**

**RAPHAEL ALFONSO HUTCHINSON (DECEASED)**

**AND ALSO AS BENEFICIARY OF SUCH ESTATE.....2<sup>ND</sup> DEFENDANT**

**3. ALISON HUTCHINSON.....3<sup>RD</sup> DEFENDANT**

**4. ARLENE HUTCHISON.....4<sup>TH</sup> DEFENDANT**

**5. ROBERT ANDEW HUTCHINSON.....5<sup>TH</sup> DEFENDANT**

**6. JEAN ELIANOR ALBRITTON.....6<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

The Plaintiff's application by way of Notice of Motion dated 5<sup>th</sup> July 2013 is before this Court for determination. The Plaintiff is seeking an order of injunction against the Defendants to restrain them from selling, charging, letting, or parting with possession of L.R No. 21/1/39, which include parcels C and D, pending the hearing and determination of the suit. The application is premised on grounds that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the administrators of the estate of the late Raphael Alfonso Hutchinson who was the registered proprietors of L.R. No. 21/1/39, and that they entered into a contract with the Plaintiff on 24<sup>th</sup> January 2013 for the sale of two parcels described as C and D that were to be excised from L.R. No. 21/1/39. Further, that the said Defendants have entered into a sale agreement with another purchaser, a Mr. Shah, for the sale of the said parcels C and D at a consideration of Kshs. 61.5 Million. The Plaintiff avers that unless restrained, the Defendants will be in breach of the contract of sale of land made on 24<sup>th</sup>

January 2013.

### **The Plaintiff's Case**

Pushkar Jani, a director of the Plaintiff swore an affidavit on 4/7/2013 in support of the application. It was his disposition that the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered into a contract of sale on 24/1/2012 of two parcels described as C and D measuring 1.29 acres, to be excised from the said L.R No. 21/1/39 and for a purchase price of Kshs.32,500,000/-. The deponent stated that all the beneficiaries of the estate of the said Raphael Alfonso Hutchinson consented to the sale. Further, that pursuant to the said agreement, the Plaintiff through its advocates, deposited Kshs.3,250,000/- with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' advocates. Subsequently, that the process of excising the parcels C and D commenced. The deponent stated that on the Defendants' request, the Plaintiff consented to the release of Kshs.355,000/- on 31/1/2012, for the surveyor who was undertaking the excision process. Successively on 6/7/2012, upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' request, the Plaintiff consented to the release of Kshs.1,500,000/- from the deposit of the purchase price.

It was the deponent's averment that excision process took longer than expected and the subdivision certificate was not obtained within 120 days. However, that the Plaintiff decided to proceed with the sale, even though it had an option to abandon the sale. The deponent stated that if the excision process and issuance of the subdivision Certificate in respect of the parcels C and D had taken place within the estimated period of 120 days, the 14 day needed for completion would start to run from 26/5/2012. The deponent stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants confirmed to the Plaintiff through a letter dated 30/1/2013 that the subdivision had been completed. Further that in the said letter, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants informed the Plaintiff that they were not going to complete the sale because they then considered the bargain embodied in the sale agreement dated 24/1/2012 to be unfair, in that parcels C and D were worth Kshs.52,250,000/= and not Kshs.32,500,000/=.

The deponent stated the Defendants in essence purported to rescind the sale agreement dated 24/1/2012 stating that they were arranging to refund the deposit of Kshs.2,250,000/-. Further, that the Defendants purported to offer to the Plaintiff on a "without prejudice" basis, parcels C and D at a price of Kshs.52,250,000/-. It was the deponent's averment that following the making of a contract of sale of land, the vendor becomes a constructive trustee who holds the legal estate upon trust for the purchaser. Further, that after the making of the sale agreement on 24/1/2012, the Plaintiff became the beneficial owner of parcels C and D to be excised from L.R No. 21/1/39.

It was his further disposition that under Clause 4 of the sale agreement, there was no requirement that the subdivision be completed within 120 days and that all that which was mutually agreed was that in the event of the subdivision not being complete, the Plaintiff would have an option to either abandon or proceed with the sale. The deponent reiterated that the six defendants consented to the sale of L.R No. 21/1/39 were bound by it and could not, therefore, unilaterally vary the terms of the contract. The deponent also stated that the Defendants ought to have referred the dispute, if at all, to arbitration as per the terms of the sale agreement.

The deponent stated that the Plaintiff subsequently in a letter dated 6/2/2013 notified the Defendants that their action constituted a breach of contract, and confirmed that it was ready and willing to complete the sale. Further, that the Plaintiff also requested for a copy of the subdivision document to enable it to prepare a transfer and for 1<sup>st</sup> and 2<sup>nd</sup> Defendants to supply to it bank account details into which it was to deposit the balance of the purchase price as required under the sale agreement. The deponent stated that the Defendants on 30/1/2013 responded to the Plaintiff's letter reiterating their interpretation of the sale agreement.

The Plaintiff then by way of a letter dated 15/3/2013 forwarded to 1<sup>st</sup> and 2<sup>nd</sup> Defendants an undertaking dated 13/3/2013 from Prime Bank Ltd to pay the balance of the purchase price under Clause 5.3 of the agreement and demanded to be supplied with the completion documents. It was the deponent's disposition that the Plaintiff has endeavored on several occasions to register a caveat over L.R. No.

21/1/39 with no success.

He stated that on 23/5/2013, the Plaintiff conducted a search on L. R No. 21/1/39 and found that subsequent to the execution of the sale agreement, the six Defendants were now registered as proprietors and the area of property has reduced to 5.58 acres from 6.68 acres. The deponent also stated that the Plaintiff has just discovered that the Defendants have been in communication with a view to selling the parcels to a Mr. Shah for Kshs.61.5 million. It is the deponent's averments that the said parcels C and D are ideal situated for developing business premises, and therefore, unless the Defendants are restrained, the Plaintiff is likely to suffer loss if it is not allowed to exercise its option to complete the purchase. The deponent further avers that the Defendants have declined to have the matter adjudicated upon through arbitration despite numerous requests.

The deponent swore a Supplementary Affidavit on 15/8/2013 wherein he deponed that he holds shares in the Plaintiff as a nominee of the Rughani family, but that the day-to-day management of any business transacted by the Plaintiff is carried out by Rajesh Rughani assisted by Muhammadali Ayoub. It was his disposition that he and a co-director of the Plaintiff executed the Sale Agreement dated 24/1/2012. The deponent stated the filing of this suit has been authorized by Directors and Principals of the Plaintiff and that he is duly authorized by the company to swear the affidavit verifying the Plaintiff in this matter, together with the affidavit in support of the application for interim relief and this Replying affidavit. Further, that the facts deponed to in the said affidavits were brought to his attention by the management of the company, and that he is fully apprised of the default of the Defendants on the sale agreement prior to his swearing of the affidavits.

In support of the application, the deponent annexed the following documents in the Supporting Affidavit: a conveyance indicating that the property measuring 6.68 acres belongs to Raphael Alfonso Hutchinson; Agreement of Sale dated 24/1/2012 drawn by Waruhiu K'Owade & Ng'ang'a Advocates indicating the purchaser as EastWest Holdings Limited and Kshs. 32,500,000/- as the purchase price; correspondence between advocates on the request and subsequent release of Ksh. 355,000/- for the sub-division process, additional funds of Kshs. 1.5 Million; correspondence over the notice of rescission and an alternative offer to purchase the property at Kshs. 52,250,000/-; a letter forwarding the undertaking from Prime Bank Ltd; a bundle of applications for registration of a caveat over the property; correspondence on the subject of arbitration; and a copy of an official search revealing the present status of the property

The Plaintiff also filed additional affidavits in support of its application. The first was a supplementary affidavit sworn by Rajesh Rughani on 16/8/2013 wherein he deponed that he is a businessman, and together with his family purchases and develops properties in Kenya. It was his disposition that the Plaintiff was incorporated to hold properties and that Mr. Pushkar Jani is a duly and lawfully appointed Director and shareholder of the Plaintiff. The deponent further stated that he is responsible for the management of the company together with his Personal Assistant Muhammadali Ayoub.

The deponent stated that at the initial meeting with the 3<sup>rd</sup> Defendant the purchase price of Kshs. 50 Million was discussed in principal and agreed, and that he made it clear that the purchase would be through a bank loan which was captured and the initial drafts of the sale agreement. He deponed that the lending interest rates started to go up and it became apparent that the purchase price of Kshs.50 million was not economically viable to the Plaintiff, and that he contacted the 3<sup>rd</sup> Defendant by telephone asking her to reconsider a purchase price of Kshs. 32,500,000/- with a 10% deposit.

The deponent stated that in a meeting between himself and the 3<sup>rd</sup> Defendant on 28/11/2011, they mutually agreed to proceed on the basis of a purchase price of Kshs.32,500,000/=. Further, that they also agreed that the Plaintiff will be granted an option to purchase other plots in the subdivision which term was included in the final agreement. The deponent refuted the claims made by the 3<sup>rd</sup> Defendant, and it was his disposition that the 3<sup>rd</sup> Defendant mentioned that there was a problem with the City Council over non-payment of rates, but that they had obtained money from other sources and had settled the rates. The deponent admitted that the 3<sup>rd</sup> Defendant told her of the difficulty she faced in communicating the new purchase price to her family, but that she affirmed that she would get the authority to proceed from them.

The deponent states that prior to the signing of the Sale Agreement the parties had a meeting, and that at no time did the Defendants or their Advocates express their discontent with the new terms which they did agree to incorporate in the final agreement.

The deponent stated that all requests for release of funds from the deposit were met positively and promptly. Further that despite the delays in the condition precedent contained in clause 4 of the sale agreement, he did not exercise the option to rescind the agreement. The deponent stated on the request of the 3<sup>rd</sup> Defendant, they had a meeting on 26/1/2013 at which the 3<sup>rd</sup> Defendant sought to re-open negotiations on the sale agreement, stating that the Defendants wished either to refund the deposit plus interest and pay the penalties as per the sale agreement, or that the Plaintiff agrees to increase the purchase price to Kshs.50 Million if it wished to proceed with the purchase. In response thereto, he informed her that they were bound by the Agreement but that in view of the delay, he was willing to pay a further Kshs.3.5 million. The deponent states that this offer was, however, not agreed upon nor reduced into writing, and that the neither the Defendant nor her lawyers mentioned that the agreement had lapsed. Further, that the meeting was followed by a letter from the 3<sup>rd</sup> Defendant's lawyers offering a refund of the deposit plus interest plus penalty. The deponent maintained that the Defendants are in breach of the sale.

Muhammadali Ayuob, the Personal Assistant of Rajesh Rughani swore the second Supplementary Affidavit on 15/8/2013 in support of the Plaintiff's application. The deponent stated the Plaintiff was incorporated to hold property for the Rughani family, prior to the transaction which is the subject matter of this suit. The deponent stated that he received a draft sale agreement prepared by the Defendants' advocates showing "Rajesh" as the purchaser and in response thereto, the Plaintiff's advocate forwarded a draft sale Agreement with highlighted tracked changes, including that the Plaintiff was the purchaser and not "Rajesh, and a change of the purchase amount from Kshs.50,000,000 to Kshs.32,500,000/=.

It was his disposition that prior to execution of the sale agreement by the parties a meeting was held in the Plaintiff's offices with Rajesh Rughani, and the 3<sup>rd</sup> and 5<sup>th</sup> Defendants were made aware of the new terms, and that they requested for time to consider the revised offer. Subsequently, that the Defendant's advocates wrote to the Plaintiff's advocates providing their bank details, and sought confirmation that the deposit would be used to defray the expenses incurred in the sub-division of the property. Afterwards, on 16/12/2011 the Defendants' advocate sent an amended sale agreement which included the sale price of Kshs.32,500,000/=.

The deponent stated that on 3/1/2012 Defendants' advocate wrote to their advocates enquiring whether the purchaser had signed the Sale Agreement. In response thereto, the executed sale agreement was forwarded to the said advocates vide a letter dated 5/1/2012 receipt of which was acknowledged and the transfer of the deposit requested. He deposed that soon thereafter, upon the request of the Defendants, Rajesh Rughani authorized the release of Kshs.355,000/= for the sub-division process. Further that on 6/7/2012, Rajesh authorized the release of Kshs. 1.5 Million to the Defendants.

The deponent stated that the Plaintiff's advocates on two occasions asked the Defendants' advocates on the progress of the sub-division process in view of the completion date, whereby the latter responded that they were waiting for the Surveyor to complete sub-division and that the final approval had been delayed as the deed file was missing at the Lands Office. The deponent contended that this communication was given weeks after the purported lapse of the completion date, and further that the Defendants' email sought their indulgence for the delay in the transaction. Following this communication, the deponent stated that the Plaintiff wrote to the Defendants on 6/7/2012 suggesting that the completion date be forwarded to 15/8/2012, when the matter would be revisited, which was acknowledged and the suggestion agreed to by the Defendants' advocates through a letter dated 6/7/2012.

The deponent stated that the matter was revisited on 28/8/2012 when the Plaintiff's advocates wrote to the Defendants enquiring on the position of the sub-division, who responded on 17/10/2012 confirming that they were proceeding with the processing of the deed plans. The deponent stated that they received a letter dated 30/1/2013 purporting to rescind the sale agreement which was responded to on 5/2/2013. Subsequently, that on 15/3/2013, they forwarded to the Defendants a completion notice together with a

bank guarantee dated 13/3/2013. The deponent contends that at no time in communication with their advocates did the Defendants or their advocates express any concerns with regard to the terms of the agreement.

### **The Defendants' Response**

Alice Hutchinson, the 3<sup>rd</sup> Defendant, swore a Replying Affidavit on 23/7/2013 in response to the application. She deponed that she is the daughter of Raphael Alfonso Hutchison (Deceased) and Jean Wanjiku Hutchinson the 1<sup>st</sup> Defendant, and also a beneficiary of the Deceased's Estate. She confirmed the contents of Plaintiff's Supporting Affidavit as essentially correct, but wished to make dispositions pertaining to the conclusion of the agreement for sale in issue. The 3<sup>rd</sup> Defendant deponed that sometime in 2011, her family made a unanimous decision to sub-divide the suit property so as to pay off the Deceased's estate debts and cater for medical bills for their ailing mother.

She further deponed that following this decision, one Mr. Mohamed acting on instructions of one Rajesh Rughani inspected the property in October 2011, and promised to make a written offer on behalf of the said Rajesh Rughani. Further, that Mr. Mohamed further requested for a draft of the sale agreement and copies of the title documents to be sent to Mr. Rughani's Advocates. The 3<sup>rd</sup> Defendant stated that a draft copy of the sale agreement was forwarded to the said advocate through an e-mail dated 17/10/2011 showing a consideration of Kshs.50 million for the two plots, with a requirement of a deposit of Kshs.15 million. The deponent stated that in response to this e-mail, the Plaintiff's advocate through a letter dated 3/11/2011 stated that they were reviewing the draft agreement and requested for the outstanding amount of rates at City Council of Nairobi, and the sub-division costs.

The 3<sup>rd</sup> Defendant further stated that her advocates responded to the Plaintiff's inquiries through a letter dated 4/11/2011 confirming that a sum of Kshs.7,500,000/= was owed to the City Council of Nairobi as well as penalties, hence the request for a deposit of Kshs.15 Million to clear outstanding debts as there was a looming threat that the council will auction the property. The 3<sup>rd</sup> Defendant deponed that she then received an e-mail on 29/11/2012 from Mohammed forwarding a letter by Rajesh Rughani reducing the offer for the two plots to Kshs.32,500,000/= from the sum of Kshs.50,000,000/= that had previously been offered and mutually agreed upon.

The deponent explained that she instructed her advocates to accept the amendments proposed by the Plaintiff because of the threat of auction of the suit property by the Nairobi City Council and the Defendants' medical bills. Further, that these were her instructions despite the advice given to her by the advocates. The deponent stated that she accepted the changes even when she was made aware that they could not be able to utilize the 10% deposit of the purchase price.

The 3<sup>rd</sup> Defendant further explained that she accepted the amendments therein in the hope that Rajesh Rughani would allow them to use part of the deposit to pay outstanding bills. The deponent stated that she forwarded soft copies of the amended agreement to her siblings the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants, who executed the sale agreement in the said hope.

The deponent stated that upon execution of the agreement, Rajesh Rughani authorized the Plaintiff's lawyers to pay the 10% deposit to their lawyers with strict instructions to hold the same as stakeholders until completion of the sale transaction, save for the money required by the surveyor for the sub-division process. It was her disposition that the restriction to access the deposit completely defeated the purpose for which the Defendants agreed to enter into an onerous sale agreement, forcing her family to look for other means to settle the outstanding rates at the Nairobi City Council. The deponent stated that after pleading with the Rajesh Rughani, he authorized the release of only Kshs.1,500,000/= with a condition that the completion date be extended to 15/8/2012.

As regards the sub-division process, the deponent stated that the same was delayed because of bureaucratic procedures at the Nairobi City Council and Ministry of Lands, and completed in early January 2013 by which time the sale agreement dated 24/1/2012 had lapsed for reasons that there was a

condition precedent which had not been fulfilled. The 3<sup>rd</sup> Defendant deponed that notwithstanding the lapse, she still wanted to continue with the sale on condition that the Plaintiff reverted back to the original offer of Kshs. 50 Million. It was her disposition that Rajesh Rughani rejected this request and gave a counter-offer that he would only agree to increase the purchase price with a nominal sum of Kshs.3,500,000/= to make it Kshs.36,000,000/=-, and on condition that the Defendants offered to sell to him the rest of the land leaving only half an acre on where the family residence is located. Subsequently, that the Defendants' advocates, acting on instructions wrote to the Plaintiff communicating their offer of Kshs.52,500,000/- and pointing out that the Agreement dated 24/1/2012 had already lapsed.

In response to the affidavit sworn by Pushkar Jani, the 3<sup>rd</sup> Defendant stated that the said deponent is unknown to her as she had at all material times been dealing with Rajesh Rughani as the principal purchaser for the Plaintiff. It was her disposition that this was a fraudulent misrepresentation by the Plaintiff's advocates and by Rajesh Rughani, which completely vitiates the sale agreement dated 24<sup>th</sup> January 2011. The deponent stated that a search at the Companies Registry contain no records whatsoever indicating any registration of a company known as East West Holdings Limited, and thus the purported agreement of sale is null and void, having been obtained through fraudulent misrepresentation.

Further, that the Plaintiff has not annexed a copy of a resolution under seal authorizing the institution of the suit, thereby setting reasonable grounds to believe that it does not exist as a registered limited liability company. She deposed that even if the Agreement were lawfully entered into, the same lapsed on 26/5/2012 or 16/8/2012 in the event that the extension to the latter date could be deemed effective, since the Plaintiff failed to communicate its election to proceed with the agreement after expiry of the extension period. It was her disposition that sale agreement having lapsed, the same cannot constitute a basis for arbitration proceedings or even action for specific performance. The deponent denied receipt of the undertaking by Prime Bank Limited allegedly sent by the Plaintiff, which to the deponent signified the Plaintiff's inability to complete the purchase.

The 3<sup>rd</sup> Defendant annexed the following documents to her Replying Affidavit: correspondence in respect of the mutual agreement of the purchase price of Kshs. 50 Million; a letter from Rajesh Rughani reducing the offer to 32,500,000/-; correspondence on the subject of the accrued rates; and correspondence between the Defendants and their advocates over the sale transaction.

### **Submissions**

By consent of both parties, this application was canvassed by way of written submissions. The counsel for the Plaintiff, Schofield Advocates, filed submissions dated 16/8/2013 whereby they reiterated the contents of the application and affidavits in support. In respect of the lapse of the sale agreement, counsel restated the conditions precedent captured under clause 4 of the sale agreement, submitting that the same were not fulfilled within the 120 days but that the Plaintiff did not exercise its option not to proceed with the sale. Further, that there is nothing therein that gives the Defendants any discretion to rescind the sale. Counsel referred the Court to Clause 9 thereof which gave the Plaintiff an option to rescind the sale in the event of breach by the Defendant, which they were not.

On the allegation that the contract is harsh, unfair and unconscionable, counsel submitted that the law does not allow a party to a contract to re-open a bargain which it has made, because, long after the contract was executed it considers that it should have made better bargain. Counsel submitted that the courts will not make contracts for the parties but shall give effect to the clear intentions of the parties, and cited the case of **Osman v Mulanga (1995 – 98) EA 275** in this regard. It was counsel's submission that the function of the court is to enforce the bargain which the parties have made, which is embodied in the sale agreement dated 24/1/2012. Counsel relied on the case of **Kyangavo v Kenya Commercial Bank Limited & Another (2004) 1 KLR 126** in this respect.

Counsel further submitted that the executed sale agreement and the payment of the 10 % deposit of the purchase price and authorization of the release of the sum of Kshs. 1,855,000/- to the Defendants, demonstrate that the Plaintiffs have established a *prima facie* case with chances of success. Further, that the request for the Plaintiff to furnish bank details and the forwarding of the undertaking from Prime

Bank Limited show that the Plaintiff was and is still willing, able and ready to complete the purchase. Counsel submitted that the Plaintiff stands to suffer irreparable loss that cannot be compensated by an award of damages should the suit property be disposed off prior to the determination of the suit, more so if the court is inclined to grant the order of specific performance as prayed for in the Plaint. Counsel also submitted that the balance of convenience tilts in favour of granting an injunction as the suit will be nothing more than an academic exercise should the Defendant have an opportunity to dispose of the property.

The counsel for the Defendants, Waruhiu K'owade & Ng'anga Advocates, filed submissions dated 3/10/2013 wherein it was submitted that the basis for the suit is that the Plaintiff is in breach of the sale agreement, for failing to complete under clause 5 of the Agreement within 14 days of obtaining subdivision certificate and registered deed plans. It was counsel's submission that the interpretation of Clause 5 is such that if the conditions precedent were not fulfilled within 120 days then the sale would definitely lapse. Counsel cited the authority of **Aberfoyle Plantations Limited v Cheng (1959) 3 All ER 910**, by the House of Lords that dates fixed by a contract within which conditions are to be fulfilled must be strictly adhered to.

Counsel submitted that the substantive parties to the agreement are the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and therefore the 3<sup>rd</sup> – 6<sup>th</sup> Defendants cannot be amenable to an order of specific performance as sought in the main suit. Counsel additionally submitted that the suit property has already been transferred to the 3<sup>rd</sup> – 6<sup>th</sup> Defendants by way of Assent to Beneficiaries in terms of the Grant. Thus, that it would be impossible for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to comply with an order for specific performance to transfer a property that they no longer have title to. Counsel submitted further that the completion date provided in the sale agreement is uncertain and therefore an order of specific performance cannot issue. In support of this submission, counsel cited the case of **Alfred M.O. Michira vs Gesima Power Mills Limited, CA 197/2001**.

On the admissibility of negotiations prior to reducing the terms into an agreement, counsel submitted that there is an exception to the provisions of section 97 and 98 of the Evidence Act, and therefore the evidence by the 3<sup>rd</sup> Defendant is admissible under section 98 (i) in order to prove fraud, intimidation and want of failure consideration. Counsel relied on the decision of the Court of Appeal in the case of **Lammers v Kamunge (1991) KLR 345** in this regard.

It was counsel's submission that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were selling the property in their capacity as trustees and personal representatives of the beneficiaries of the deceased's estate. Therefore, that they were under a fiduciary duty, as is required under section 82(d) of the Law of Succession Act, to obtain a market value of the suit property failing which the transaction can be set aside as fraud against the said beneficiaries. Counsel further submitted that there is misrepresentation on the part of the Plaintiff which vitiates the sale agreement. It was counsel's submission that it is clear that Rajesh Rugani is neither a shareholder nor director of the Plaintiff, and therefore their advocates presenting Rajesh Rugani as the principal of the Plaintiff was misleading to the Defendants.

Counsel submitted further that there is no evidence to support the averments by Pushkar Jani that he holds shares in the Plaintiff in trust as a nominee for the Rughani family and that this was an afterthought invoked to perpetrate a fraudulent misrepresentation. Counsel submitted that these actions demonstrate that the Plaintiffs have come to court with unclean hands, and are therefore undeserving of the equitable remedies.

As regards the verifying affidavit, counsel submitted that Order 4 Rule 1(4) of the Civil Procedure Rules which provides that the verifying affidavit of a Plaintiff which is a corporation shall be sworn by an officer of the company duly authorized under the seal of the company is preemptory and mandatory and brook no exception. Therefore, there being no proper verifying affidavit, the suit should be struck out. Counsel relied on the case of **A.J. Limited & Anor. v Catering Levy Trustees & 3 Others, Nairobi HCCC No. 1488/2000 (2005) eKLR**, for this position.

In respect to the undertaking from Prime Bank Ltd allegedly sent to the Defendants, counsel referred the Court to clause 5.3 of the Sale Agreement and submitted that the said undertaking violated the provisions therein, in that there is nothing to confirm that the form was acceptable, and secondly, it was addressed directly to the vendors and not its advocates contrary to the express terms of the agreement. Counsel further submitted that there was no evidence, such as a certificate of postage, to confirm that the undertaking was indeed posted to and received by the addressees.

Counsel cited the cases of **Shah v Padamshi (1984) KLR 531** and **Nyangilo Ochieng & Anor. V Fanuel B. Ochieng & 2 Others (1996) e KLR** where the Courts held that a presumption that a letter sent would reach its addressee in due course would only raise in the case of a letter sent by registered post. Counsel also submitted that clause 5.3 expressly stated that time is of essence, therefore, such an undertaking would be due from the purchaser within 14 days from the date of the Defendants' advocates letter of 30/1/2013 hence not later than 14/2/2013.

Counsel submitted that from the foregoing, it is evident that the Plaintiff has not established a *prima facie* case with chances of success nor have they demonstrated that they shall suffer irreparable loss. Counsel referred the court to clause 4.3 of the agreement submitting that damages is an adequate remedy herein and that the same is quantifiable. Counsel also submitted that the balance of convenience tilts in favour of the Defendants, in view of the unconscionable bargain to which they were tied to.

### **The Issues and Determination**

I have carefully read and considered the pleadings and arguments made by the parties herein. The issue for determination is whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. This Court is also guided in this respect by the description in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** as follows:

**“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

With these principles in mind, and the description of a *prima facie* case, the first question to be determined is whether the Plaintiff has established that it has *prima facie* case with chances of success. The undisputed fact is that the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered into a Sale Agreement on 24/1/2013 in respect of parcels C and D of L.R. No. 21/1/39 at a purchase price of Kshs. 32,500,000/-. It is also not disputed that the Plaintiff paid the 10% deposit of the purchase price to the Defendants' advocates part of which was used to meet the surveyor's fees and another part used to settle the Defendants' mother's medical bills.

There are various issues in contention raised by the parties herein with respect to the purchase price for the subject parcels and the interpretation of the terms of agreement and on which elaborate submissions were made. The Defendants contend that the sale agreement has lapsed. Further that they entered into an unconscionable bargain by the Plaintiff to sell the property at Kshs. 32,500,000/- instead of the initial negotiated price of Kshs. 50 Million. They also contend that the sale agreement is vitiated by misrepresentation.

The Plaintiff has also responded to these allegations as articulated on the foregoing. The issues raised are however issues of fact on which this Court can only make a proper determination upon full trial where both parties are afforded a chance to present evidence, and test the veracity of the evidence adduced

through cross-examination. Indeed, at this stage of the proceedings, the Court is not expected to delve into the merits of the case by each party, or even make conclusions of fact or law. All the Court is required to do is determine whether the test applied before the grant of injunction has been met as enunciated in the case of **Giella v Cassman Brown & Co. Ltd (1973) EA 358**.

It is thus my finding that the Applicant has established a *prima facie* case with chances of success for the foregoing reasons. On the second limb, on whether it stands to suffer irreparable loss which cannot be compensated by way of damages, the Plaintiff submitted that the Defendants are in the process of closing a deal for the sale of the said parcels at an amount of Ksh. 61.5 Million. In support of this allegation, the Plaintiff annexed e-mail correspondence between the Defendants and the potential buyers over the subject matter. The Defendants have not admitted these allegations, neither have they expressly denied the same. The Plaintiff further avers that the situation of the parcels C and D is prime and best suited for a business premises, thereby they risk losing an opportunity to purchase of the Defendants are not restrained.

The Defendants have not indicated that they would be in a position to pay the damages that the Plaintiff would incur in this respect, and I therefore find for these reasons that this is a case where an injunction ought to issue. Lastly, I also find that the balance of convenience tilts in favour of the Plaintiff as it has already paid a deposit of Kshs 3,500,000/= towards the purchase price of the two parcels of land that are the subject matter of this suit.

The Plaintiff's Notice of Motion dated 5<sup>th</sup> July 2013 is accordingly allowed, and the Defendants whether by themselves, their servants and agents are hereby restrained from selling, charging, letting, or parting with possession of L.R No. 21/1/39 which include parcels C and D until the determination of the suit filed herein and/or further orders of this Court.

The costs of the said motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_4<sup>th</sup>\_\_\_\_ day of \_\_\_\_March\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**