IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 171 OF 1994

JOSEPH MUCHINA KAMAU……..……...…….....…….APPELLANT

AND

NATIONAL HOUSING CORPORATION LIMITED….....….RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Pall, J.) delivered at Nairobi on 1st September, 1994

in

H.C.C.C. NO. 1801 OF 1994)

****

JUDGMENT OF THE COURT

This is an appeal from the ruling of the High Court of Kenya at Nairobi (Pall, J. as he then was) delivered on the 1st September, 1994. In the ruling, the learned judge declined to grant an interim injunction sought by the appellant to restrain the respondent from evicting or removing him or in any way interfering with his quiet occupation of the premises known as Nairobi/Block 72/2002 (hereinafter referred as "the suit premises") until final disposal of the suit.

The averments in the plaint dated 13th May, 1994 and in the affidavit in support of the application for the interim injunction were to the effect that on or about 26th November, 1991 the appellant entered into a sale agreement with the respondent for the purchase by the appellant of the suit premises. He paid the requisite deposit and the balance was to be paid in agreed monthly instalments. Upon payment of the deposit the appellant went into occupation but it transpired that the suit premises needed replacement of some missing items which he replaced at his own cost on the express understanding that the same would be deducted from the purchase price. The appellant, however, has neither enumerated what items were missing and replaced by him nor the cost of replacing them.

It is further averred in the plaint that in blatant disregard of the agreement of sale and subsequent correspondence authorising the appellant to occupy the suit premises, the respondent threatened his eviction therefrom on 29th April, 1994 by causing a demand letter to be written to him. The appellant asserted that the threatened eviction against him was unlawful since he went into possession of the suit premises pursuant to an agreement of sale and not otherwise and had all along been ready and willing to complete the sale transaction but the respondent had unreasonably refused to complete the same. Prior to filing suit he had tendered payment of the balance of the purchase price to the respondent but it declined to accept it.

In the plaint the appellant prayed for an order of injunction against his eviction and restoration to the suit premises. He has also sought special and general damages and an order for specific performance of the agreement of sale.

In our view, the only issue of importance in this appeal is: was the learned judge right in refusing the appellant's plea for temporary injunction? The appellant has urged us that the learned judge erred and the main ground of appeal upon which his ruling has been assailed is that he ought to have found that the appellant had shown a prima facie case before him to entitle him to a temporary injunction.

With regard to the specific exercise of discretion in relation to temporary injunction the tests laid down in the rule-making case of GIELLA v CASSMAN BROWN & CO. LTS (1973) EA p. 358 are firstly, the applicant must show a prima facie case with a probability of success, secondly, an interlocutory injunction would not normally be granted unless the applicant might suffer irreparable injury. Thirdly, the court, if in doubt, must decide the application on a balance of convenience. The record of the proceedings shows that the learned judge was not unaware of the above guidelines and did indeed apply the principles enunciated therein in the determination of the application presented before him.

The so-called agreement of sale in this suit was never signed by the respondent and the parties, therefore, cannot be said to have been manifestly in agreement to afford a ground to the appellant to enforce the contract relating to the sale of the suit premises to him.

On the appellant's own admission he never paid anything after the initial deposit of shs.42,000/= but had enjoyed occupation of the suit premises for well – nigh 3 years from 26th November, 1991 and though he had been requested to complete the sale he has failed to perform his part of the agreement. It is apparent, therefore, that the appellant had not shown a prima facie case with a probability of success.

The learned judge further found that the appellant had not gone to court with clean hands and had not shown good faith to entitle him to the relief sought. These findings are, in our view, correct considering the fact that the appellant had, without the knowledge of the respondent, rented out the suit premises to a tenant at an undisclosed monthly payment and did obtain an ex parte injunction by misrepresentation to forestall his imminent eviction and yet he was no longer in occupation.

We are satisfied that the learned judge correctly exercise his judicial discretion in refusing to grant the injunction sought. The appellant had in fact miserably failed to show a prima facie case with a probability of success. We think, on the whole, that there are no grounds for us to differ from the ruling of the learned judge.

This appeal is wholly without merit and must fail. It is ordered dismissed with costs.

Dated and delivered at Nairobi this 12th day of November, 1996.

R. S. C. OMOLO

……..

JUDGE OF APPEAL

P. K. TUNOI

…….

JUDGE OF APPEAL

S. E. O. BOSIRE

……..

Ag. JUDGE OF APPEAL.