REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 2567 OF 1977

A. ASSANAND.....PLAINTIFF

VERSUS

R.W. PETTITT.....DEFENDANT

RULING

.June 12, 1978, **Simpson J** delivered the following Ruling.

The defendant in this suit is applying for an order under section 57(5) of the Registration of Titles Act (Cap 281) for the plaintiff to show cause why a caveat registered by him should not be withdrawn.

Mr Deverell for the applicant contended as a preliminary point that since Harris J had already held in refusing an interim injunction that the plaintiff had not shown a *prima facie* case with a probability of success and that he could not be adequately compensated by an award of damages on the principle of *res judicata* it was not open to Mr Satish Gautama for the plaintiff/caveator to argue these matters again in the present application.

> Section 7 of the Civil Procedure Act (Cap 21) provides: "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

Mr Deverall referred to the following passage in *Mulla's Code of Civil Procedure 12th* edition at p 93 under the heading interlocutory orders –

> "In *Ram Kirpal v Rup Kuari* (1883) 11 1A 37) the Privy Council said that upon general principles of law an interlocutory judgment in a suit is binding upon the parties in every proceeding in the suit."

I have not seen the Privy Council decision but from the extract it appears that *res judicata* in the opinion of the Privy Council is applicable not only to suits but also to interlocutory proceedings in the same suit.

In *Mohamed v Haidara* [1972] EA 166, Spry VP (as he then was) saw no reason to apply as regards the extension of a caveat principles different from those to be applied in an application for an interlocutory injunction. Mustafa JA preferred to leave the question to a future occasion. Despite the strong persuasive

authority of the view expressed by Spry VP I am not entirely convinced that these principles should be applied in all cases.However assuming them to be applicable I am not persuaded that opinions as to the probability of success in a suit for specific performance and the adequacy of compensation for damages expressed by a Judge in refusing an application for an interim injunction against the sale of the property in question represent final decision on my issues in an application for the removal of a caveat. The question of issue estoppel was not fully argued but my view is that since the decision is not a final one there is no estoppel.

I now turn to the substance of the application. The plaintiff and the defendant entered into an agreement for the sale of the defendant's house and furniture to the plaintiff. "Heads of agreement" as they were called were drawn up by the defendant and signed by both parties. There is no doubt that they both intended to make a binding agreement. The defendant however changed his mind and refuses to complete the sale. The plaintiff is now suing *inter alia* for specific performance. A caveat was lodged and it is this caveat that the defendant seeks to have withdrawn.

Mr Gautama conceded that it was for him to satisfy the court that it should not be removed.

There are two documents, one relating to the defendant's house, the other to the furniture. Mr Gautama contended that they contained all the elements required to make a binding contract – the identity of the parties, the identity of the subject matter and the price. The provision "Occupancy date to be agreed" he said was a subordinate and ancillary matter which does not detract from the certainty and unambiguous nature of the contract. If the parties were unable to agree section 55(1) (f) of the Transfer of Property Act supplied the omission.

Section 52 of the Transfer of Property Act he submitted prohibited the vendor from transferring the property during the pendency of the suit. The court could grant leave but act without compelling reasons.

Mr Gautama also emphasized the fact that this is not the trial and evidence might emerge at the trial in support of the plaintiff's claim for specific performance.

The circumstances in which the agreement was entered into are relevant. The defendant had received notification of his impending transfer from Kenya to England. He wished to sell his house in Nairobi together with the contents and the date of occupancy presumably had to await a firm date for his departure. The plaintiff rented (and still wants) the house for his own occupation.

I am very conscious of the fact that a decision against the caveator will in effect be a final decision on the main prayer in the suit. The principle that a *prima facie* case must be shown with a probability of success seems to have been generally accepted in Kenya but account must also be taken of the provisions of section 52 of the Transfer of Property Act the implication of which to my mind is that good reason must be shown to the court before it will authorize the transfer of or other dealing with immovable property the subject of a pending suit. I agree with respect with the views expressed by Madan J (as he then was) in HCCC 512 of 1976 *Baber Mawji v United States International University* –

> "Until the court is able to determine the issue both justice and equities in the case demand that the status quo be preserved so that if the plaintiff succeeds he will not be left with an empty victory the just fruits of which he cannot realize. And justice would be defeated. I am therefore of the opinion that it would not be right to vacate the caveat."

Elsewhere in his judgment Madan J referred to the judgment of Lord Denning in *Tikerten Estates Ltd v Wearwell Ltd* [1974] 1 All ER 209 in which he said –

> "In some circumstances it would not be right to vacate the caution. For instance, if the cautioner had a substantial point in his favour, and it would be unfair to him to vacate it."

He then went to say that in such circumstances the cautioner might be asked to give an undertaking as to

damages. This was indeed the course adopted by Madan J who allowed the caveat to stand subject to a deposit in court.

In the present case the caveator and the caveatee entered into an agreement which was clearly intended to be binding and to have business efficacy. The caveator, a layman, drew up a memorandum of the agreement which contains three essential terms – the parties, the subject and the price. It left the date of occupation to be agreed. The court hearing the suit will be asked to make the defendant fulfil his obligations. It may perhaps conclude that possession was not an essential ingredient of the contract. It may take the view that the date of occupancy can be ascertained from the evidence before it or can be otherwise determined. In order to reach its decision it will have to interpret the heads of agreement in the light of all the admissible evidence. There are undoubtedly authorities which support the contentions of counsel for the defendant that this is an incomplete contract and there is no room for implied terms but each case must be determined by a consideration of its own particular contract. I think it would be wrong for me at this stage to order the removal of the caveat unless I am satisfied that the plaintiff cannot succeed.

The courts usually take the view in suits for specific performance of a contract for the sale of immovable property that damages is not an adequate remedy and in this case Mr Gautama has indicated a number of reasons why the plaintiff requires this particular house. I find that damages would not be an adequate remedy.

I am prepared to allow the plaintiff's caveat to stand against the title subject to an undertaking by the plaintiff to compensate the defendant for any

damage he might suffer from being unable to deal with the property pending the determination of the suit.

June 12, 1978

SIMPSON J