



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, WARSAME & GATEMBU, JJA.A.)

CIVIL APPEAL NO. 165 “A” OF 2011

BETWEEN

WESTLANDS RESIDENTIAL RESORT LIMITED APPELLANT

AND

KAWAKANJA LIMITED 1ST RESPONDENT

JANE GATHONI MURAYA – KANYOTU 2ND RESPONDENT

MARGARET NYAKINYUA MURIGU 3RD RESPONDENT

(Being an appeal from the Ruling and Order of the High Court

of Kenya at Nairobi (A. O. Muchelule) dated 29th March, 2011

in

H.C.C.S NO. 512 OF 2010)

JUDGMENT OF THE COURT

1. This appeal arises from an order given on 29th March 2011 by the High Court of Kenya at Nairobi (the Honourable Mr. Justice A. O. Muchelule) striking out the appellant’s application seeking temporary orders to restrain the respondents from dealing or interfering with the property L.R. No. 11540/3 (hereafter referred to as the suit property) pending the hearing and determination of the suit in the High Court. By the same order, the High Court struck out the appellant’s suit with costs.

Background

2. On 27th October 2010, the appellant commenced suit in the High Court, being High Court Civil

Case No. ELC 512 of 2010, against the 1st respondent seeking an order, among other reliefs, to compel the 1st respondent to complete the sale of the suit property to the appellant.

3. The 2nd to 4th respondents are the interim administrators of the estate of James Kanyotu, deceased, who until his death was a shareholder and director of the 1st respondent. The 2nd to 4th respondents were joined in the suit in an amended plaint presented to the High Court by the appellant on 25th January 2011.
4. The appellant's case as pleaded is that under an executed but undated agreement for sale made in May 2010, the 1st respondent agreed to sell the suit property to the appellant for a price of Kshs. 775,550,000.00 on the terms that: a deposit of Kshs. 100,000,000.00 towards the purchase price would be paid after execution of the agreement; the balance of Kshs. 675, 550,000.00 would be paid within 14 days of successful registration of the transfer in favour of the appellant; completion would be within 180 days from the date of execution and that the property would be sold in vacant possession.
5. The appellant complained that on 18th June 2010 the 2nd respondent objected to the agreement for sale on the basis that the suit property was the subject of succession court proceedings in the matter of the estate of James Kanyotu, deceased.
6. The appellant contended that the 1st respondent was in breach of agreement for sale and that the appellant was apprehensive that the 1st respondent would, unless restrained by the court, continue in breach and may alienate the suit property to the detriment of the appellant. Accordingly, the appellant sought relief from the High Court including a prayer that the respondents *"be ordered to specifically perform the agreement for sale of property L.R. No. 11540/3, K.R. No. 109051"* in addition to other injunctive reliefs.
7. In its statement of defence the 1st respondent pleaded that the appellant is not entitled to the reliefs it sought on grounds that: whereas an intention was expressed in May 2010 for the appellant to purchase the suit property, no definite and valid transaction took place; that if the 1st respondent had intended to sell the suit property it would have sought the consent of the relevant Land Control Board; that the purported transaction is void as no land control board consent was obtained under the Land Control Act. In the same defence the 1st respondent intimated that it would at the earliest opportunity

"take out the relevant proceedings or objection to strike out the plaint and to dismiss the suit as frivolous and vexatious and an abuse of the process of the court."

8. The 2nd respondent in her statement of defence pleaded: that she is a stranger to the agreement for sale and became aware of it on 18th June 2010; that she objected to the transaction as the suit property was the subject of the succession proceedings in respect of the estate of James Kanyotu, deceased; that the High Court had issued interim orders restraining dealings in estate property including the suit property; that she, as well as other beneficiaries of the estate, had not approved the sale; that the 1st respondent did not have capacity to sell the suit property without involvement of the estate of James Kanyotu, deceased; that the directorship of the 1st respondent is illegal. The 2nd respondent prayed for the dismissal of the suit.
9. The 3rd respondent's defence is similar to that of the 2nd respondent save for the plea that she was ready to concede to the sale to the appellant provided she was included and subject to new terms and conditions being agreed upon.
10. The 4th respondent in her statement of defence pleaded that; she was a stranger to the agreement for sale and that she became aware of the agreement when her attention was drawn to it by the

appellant's advocates; that only the 1st respondent has capacity to the exclusion of the 2nd to 4th respondents, to transact with the suit property.

Application for temporary injunction in the High Court

11. In a bid to safeguard the suit property on an interim basis pending the hearing and determination of the suit, the appellant presented an application to the High Court dated 21st October 2010 under the provisions of the then Order 39 of the Civil Procedure Rules seeking orders to restrain the respondents from dealing with the suit property.
12. That application was based on the grounds appearing on the face of the application and was supported by the affidavit of Stanley Kinyanjui a director of the appellant in which he deposed that: the parties entered into an agreement for sale under which the appellant agreed to buy the suit property from the 1st respondent for Kshs. 775,550,000.00; that the appellant was ready and willing to pay the purchase price in accordance with the agreement for sale; that the 1st respondent refused to accept the deposit payable under the agreement and had, in breach of the agreement, offered to sell the suit property to another party namely, C & P Shoe Industries Limited; that the transaction should not be affected by succession proceedings relating to James Kanyotu.
13. On 27th October 2010 the appellant obtained a temporary measure of protection when the High Court restrained the 1st respondent from advertising, offering for sale or otherwise dealing with the suit property pending the determination of the application.
14. The 1st respondent does not appear to have filed a replying affidavit in answer to the appellant's application dated 21st October 2010. However, on 10th November 2010, the 1st respondent filed grounds of objection and a notice of preliminary objection, which was essentially in the same terms as the grounds of objection by which the 1st respondent indicated that it would oppose the application for temporary injunction on grounds that the appellant did not have locus standi to institute the suit as the appellant did not pay the deposit of the purchase price as stipulated under the agreement for sale; that the non-payment of the deposit of the purchase price disentitled the appellant of any right under the agreement for sale; that the agreement for sale is undated and is consequently invalid; that the appellant's suit is not sustainable in the absence of consent of the relevant Land Control Board under the Land Control Act; that the appellant has no cause of action due to lack of consideration; that the suit and application are frivolous and vexatious and an abuse of the process of the Court.
15. On her part, the 2nd respondent filed a replying affidavit sworn on 23rd February 2011 by which she deposed that: she is one of the administrators of the estate of James Kanyotu, deceased alongside the 3rd and 4th respondents; that the High Court did authorize the administrators of the estate of the deceased to sell the suit property in consultation with the beneficiaries of the estate; that she is not opposed to the sale of the suit property provided it is supervised by the court to ensure protection of the interests of the beneficiaries.
16. The 3rd respondent in her replying affidavit filed on 25th February 2011 deposed that a fresh agreement for sale with terms and conditions to be agreed upon between the parties should be concluded. The terms of the fresh agreement should include provision for payment of a deposit of 20% of the purchase price, completion within 90 days from the date of the agreement and that all the interim administrators of the estate of James Kanyotu deceased should be privy to the necessary documents; that the administrators of the estate of James Kanyotu did not consent to the agreement for sale and that the authority of the 1st respondent is contested as the directors who purported to act for the company were illegally and irregularly appointed and had no mandate to transact for the company and that the court should supervise the sale to its conclusion.
17. The 4th respondent in a replying affidavit sworn on 3rd March 2011 deposed that the 1st

respondent entered into the agreement for sale with the appellant with respect to the suit property but the appellant failed to pay the deposit towards the purchase price in accordance with the agreement; that on account of the appellant's breach of the agreement it is not entitled to specific performance and that the appellant had not established a prima facie case for purposes of obtaining a temporary injunction.

18. Prior to the hearing of the application in the High Court the 1st and 4th respondents filed notice of supplementary preliminary objection and notice of preliminary objection respectively challenging the admissibility of the agreement for sale on the basis that the agreement was not stamped under the provisions of section 19 of the Stamp Duty Act.
19. The Honourable Mr. Justice Muchelule heard the application on 4th March 2011. The appellant and 4th respondent relied on written submissions in addition to oral arguments. The 2nd and 3rd respondents' counsel made oral submissions.
20. Although a consent order recorded on 11th November 2010 provided that the application and the preliminary objections would be argued together with the respondent having the right to begin, that consent order does not appear to have been heeded during the hearing of the application. The record shows that Mr. Havi learned counsel for the appellant prosecuted the application and the matters that were the subject of the preliminary objections were integrated into the arguments in support and in opposition to the application.
21. The High Court considered the application and delivered its ruling on 29th March 2011 striking out the application. By the same ruling, the High Court struck out the suit. That order has given rise to the present appeal.

The appeal and submissions by counsel

22. The grounds on which the order given on 29th March 2011 has been challenged are that the learned High Court Judge erred in law in failing to hold that the appellant met the conditions for the grant of an injunction; that the learned Judge erred in law in holding that the agreement for sale on which the suit was founded, was void and unenforceable for want of the consent of the Land Control Board; that the learned Judge erred in law in failing to consider that the 1st Respondent had the obligation to apply for the land control board consent; that the learned Judge erred in holding that the agreement for sale was not admissible for want of payment of stamp duty notwithstanding the fact that the obligation to pay stamp duty lay upon the 1st Respondent; that the learned Judge erred in law in ordering that costs of the struck out suit be paid by the appellant.
23. At the hearing of the appeal before us, Mr. Ahmednassir Abdullahi, learned Senior Counsel, appeared with Mr. Havi for the appellant. Learned counsel for the appellant submitted that the learned judge in the High Court erred in that he did not, as he was obliged to do, deal with the application for temporary injunction that was before him; that the judge did not consider or apply the time-tested principles in **Giella vs. Cassman Brown [1973] E.A. 358** on the basis of which he should have granted or declined the application. Instead, counsel submitted, the learned judge took a different course and wrongly dismissed the suit. Counsel submitted that had the judge properly applied himself and considered the application and material before him he would have allowed the application.
24. Counsel submitted that the appellant did establish before the High Court a prima facie case with a probability of success. In that regard counsel submitted that there is a signed contract between the parties that accords with the Law of Contract Act and which is capable of specific performance. Counsel referred us to **Cheshire and Burn's Modern Law of Real Property**, by E H Burn, 16th edition at page 130 for the proposition that if a contract for sale is capable of specific performance,

- an immediate equitable interest in land passes to the purchaser and an order for specific performance can be decreed on that basis.
25. Counsel for the appellant further submitted that even though the deposit of Kshs. 100,000,000.00 payable under the agreement for sale was not paid, that does not mean, as contended by the 1st respondent, that there was no consideration. Counsel went on to say that there is an immediately binding contract between the parties even though payment was to be effected in the future and in that regard referred us to a passage in paragraph 3-008 at page 219 of volume 1 of the 29th edition of **Chitty on Contracts**.
 26. Relying on the holding in **Mohamed vs. Bakari & 2 others (2008) 3 K L R (EP) 54** that “*no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man*”, counsel submitted that the 1st respondent frustrated payment of the deposit and the 1st respondent cannot therefore rely on its own wrong to defeat the appellant’s claim.
 27. Turning to the finding by the learned judge of the High Court that the agreement for sale between the parties is void for lack of consent of the land control board, counsel submitted that the judge was wrong. Under Section 8(1) of the Land Control Act, Cap 302 application for consent in respect of a controlled transaction is required to be made within six months of making of the agreement for the controlled transaction. As the agreement for sale in this case was not dated, counsel submitted, time for purposes of making an application for consent under section 8(1) did not begin to run.
 28. In any case, counsel submitted, the appellant could, under the proviso to section 8(1) of that Act, apply to the High Court for extension of time notwithstanding that the period of six months may have expired. Further, it was the 1st respondent’s obligation under Clause 5 and the Agreement for Sale and under the conditions of sale of the Law Society of Kenya, to obtain all necessary consents and it was wrong for the High Court to transfer that responsibility to the appellant. Citing the Privy Council decision in **Reginald Ernest Vere Denning v David Geoffrey Edwardes and Another [1960] EA 755** counsel submitted that there was nothing wrong in entering into the agreement for sale before the consent was granted as consent could be obtained subsequently.
 29. Further, on the authority of this Court’s decision in **Russell v Principal Registrar of Titles [1972] 1 EA 249**, the consent required under the Land Control Act, is “*aimed at transactions, not documents.*” The parties had not gone that far. Only the initial steps in the transaction had been taken and consent would have been obtained before completion of the transaction.
 30. On the determination by the judge that the agreement for sale is not admissible for want of stamping under the Stamp Duty Act, counsel submitted that the fact that an instrument is not stamped cannot be the basis for striking out the suit or for declining the injunction sought. The objective behind the provisions of section 19 of the Stamp Duty Act, Chapter 480, he submitted, is to ensure that parties should not avoid payment of stamp duty. It can be paid at any stage and there is always a penalty under Section 19(5). Neither does section 19 extend to interlocutory proceedings but refers to a full trial where evidence is tendered. In the circumstances, counsel submitted that the learned judge wrongly terminated the life of the suit.
 31. On the order for the payment of costs of the suit, counsel submitted that the learned judge erred in condemning the appellant to meet the costs of the suit having denied the appellant the opportunity to ventilate its case.
 32. Mr. J. Nyiha, learned counsel, appeared for the 4th respondent and also held brief for counsel for the 2nd and 3rd respondents. Mr. Nyiha submitted that the learned judge of the High Court was right in striking out the appellant’s application and suit as the respondents took preliminary objections which, with the agreement of counsel, were addressed in the course of the arguments with the understanding that if the objections were upheld they would dispose of the substratum of

the suit.

33. Mr. Nyiha further submitted that the respondents were able to demonstrate to the High Court that the suit did not lie and in those circumstances there was no need for a systematic analysis of the principles in **Giella vs. Cassman Brown** (supra) as the suit was dead from the beginning; that in the absence of land control board consent the whole transaction is void and unenforceable; that it did not matter that the agreement for sale was not dated as the critical consideration is when the agreement was made, which in this case was 6th May 2010 based on the pleadings and the transaction became void six months thereafter under the Land Control Act;
34. Counsel submitted that the appellant is a victim of its own indolence in that it should have applied for extension of time under Land Control Act but did not do so and instead sat on its rights; that under Section 8 of the Land Control Act Cap 302, any party may apply for consent and if the vendor delayed in applying for consent, then the appellant as purchaser could apply for consent; that even if the agreement for sale created an equitable right in favour of the appellant, that did not mean that section 6 of the Land Control Act ceased to apply as the transaction is void by virtue of that provision; that any acts done in furtherance of a void transaction under section 6 are criminalized under section 22 of that Act and to give effect to the transaction would have been tantamount to legitimizing criminal acts.
35. In support of the submission that the learned judge was right in upholding the plea that the transaction is void under section 6 of the Land Control Act and that the suit was therefore not maintainable, Mr. Nyiha referred us to many authorities including the case of **Kiungani Farmers Co Ltd v Mbugua [1989] KLR432; Richard Kamiri Gachwe Kahia v Edward Kamau Nganga [2004] eKLR; Joseph Boro Ngera v Wanjiru Kamau Kaime and another Civil Appeal [2010] eKLR.**
36. On the question of stamp duty and inadmissibility of agreement for sale Mr. Nyiha drew our attention to Section 5 of Stamp Duty Act which imposes an obligation for payment of stamp duty on specified instruments including sale agreements. He also referred us to section 19 which provides for non-admissibility of unstamped instruments in evidence. He submitted that the appellant could have easily gone to Kenya Revenue Authority and bought revenue stamps for affixing on the agreement for sale. Alternatively the appellant could have given its undertaking to pay the stamp duty payable but did not do so. In the circumstances the learned Judge had no choice but to dismiss the suit on the face of a void transaction and an inadmissible agreement for sale. Counsel referred us to the case of **Glencore Grain Limited v TSS Grain Millers Ltd [2002] 1 KLR 606** on the application of section 19 of the Stamp Duty Act.
37. With regard to the contention by the appellant that the learned judge erred in awarding costs of the suit to the respondents, counsel submitted that the judge was right, as the award of costs is consistent with the principle that costs follow the event. Mr. Nyiha urged us to dismiss the appeal with costs.
38. Mr. O. M. T. Adala learned counsel for the 1st respondent associated himself fully with the submissions made by Mr. Nyiha and further submitted that the 1st respondent is a limited liability company, which relies on its officers to carry out its duties; that the appellant is aware of the succession dispute over the estate of James Kanyotu as a result of which certain acts, which required to be performed were not performed; that the respondent did not willfully fail to perform its obligations under the agreement for sale and relied on its directors who were quarrelling amongst themselves; that the 1st respondent cannot be faulted for failing to perform its obligations under the agreement for sale when its directors were wrangling and that in the circumstances the failure by the 1st respondent to perform its obligations under the agreement for sale is excusable.
39. Mr. Adala submitted that the appellant should have applied to stamp the agreement for sale and to obtain the necessary consents. By failing to do so, counsel submitted, the appellant violated the provisions of Land Control Act and the appellant's suit was not maintainable.

40. As to whether the High Court was right in striking out the suit

Mr. Adala submitted that the court was right to do so as the respondents expressly sought orders for dismissal of the suit with costs in the notices of preliminary objections. Mr. Adala urged us to dismiss the appeal with costs.

41. In his brief reply Mr. Abdullahi submitted that the respondents' objections to the suit on grounds that the transaction is void under section 6 of the Land Control Act and that the agreement for sale is not admissible under section 19 of the Stamp Duty Act is not pleaded in any of the defences and further that the object behind the requirement for obtaining land control board consent is aimed at the transaction and not documents per se and that the transaction was in its early stages and the issues raised could have been addressed at the hearing of the suit. Further that in light of Article 159 of the Constitution this Court should aspire to render substantive justice and not to determine disputes on basis of technicalities.

42. Mr. Abdullahi went on to say that in light of the confession by Mr. Adala that directors of the 1st respondent were quarrelling there is clearly a dereliction of duty on the part of the 1st respondent in performance of its obligations under the agreement for sale. He reiterated that the learned judge of the High Court did not deal with the application for injunction that was before him and urged us to allow the appeal with costs.

Our Decision

43. In our view, the critical issues that arise for determination in this appeal are firstly, whether the learned High Court judge was right to strike out, in limine, the appellant's application for injunction under Order 39 of the Civil Procedure Rule as well as the appellant's suit on the grounds that the underlying transaction is void under section 6 of the Land Control Act and that the agreement for sale is inadmissible under section 19 of the Stamp Duty Act. Secondly, whether the judge erred in striking out the suit, when what was before him was an application for injunction and thirdly, whether the learned judge considered the application before him and if not whether he erred in failing to do so.

44. Although what was before the judge was an application for injunction under Order 39 of the Civil Procedure Rules, we take it that in striking out the application and the suit, the judge proceeded, without expressly saying so, under the provisions of Order 6 rule 13 of the Civil Procedure Rules under which the court may at any stage of the proceedings order any pleading to be struck out. This Court also recognizes that a matter can, in a proper case be finally dealt with on the basis of a preliminary objection where, on uncontested facts, a matter or issue can finally be disposed of on a point of law. This Court said so in **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd [1969] EA 696** where at page 700 Law, JA stated:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

Sir Charles Newbold, P in the same case at page 701 put it this way:

“A preliminary objection is in the nature of what used to be a demurrer. It arises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

45. The learned judge of the High Court was therefore right in our view, in considering the respondents' objection to the application for injunction on the basis that it was contended that the agreement for sale is void for want of land control board consent. Having said that, the grant or refusal of an application for injunction under Order 39 of the Civil Procedure Rules and the grant

or refusal of an application to strike out pleadings under Order 6 rule 13 of the Civil Procedure Rules is an exercise of judicial discretion.

46. An appellate court is always slow to tamper with the exercise of judicial discretion. In **Mbogo & Another vs. Shah [1968] E.A. 93** at page 96, Sir Charles Newbold P. stated:

‘.....a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice....’

47. There is no doubt, that the learned judge of the High Court was alive to the fact that he was taking a drastic step in striking out the application and the suit. He expressed himself as follows:

“I am aware that striking out a suit or pleading is a summary remedy that should only be done in clear and obvious cases and with great caution (D.T. Dobie & Co. (K) Ltd – Vs- Muchina [1982] KLR 1) The Court should aim at sustaining rather than terminating a suit; and has to be sure that the suit is beyond redemption and cannot be cured by amendment, before it can strike out.”

48. The general rule is that a suit or pleading shall not be dismissed unless it is absolutely necessary to do so. In **D T Dobie & Co Ltd vs. Muchina [1982] K L R 1** to which the learned judge referred it was held that that:

“As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.”

Madan JA as he then was had this to say:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra)). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right. If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

49. Did the learned judge, in the circumstance of this case properly exercise his discretion to strike out the application and the suit?

50. There was the contention by the appellant that under the terms of the agreement for sale and under the Law Society of Kenya Conditions of Sale that were incorporated into the agreement, it was the obligation of the 1st respondent to obtain the necessary consents and the 1st respondent was in effect seeking to rely on its own wrong to defeat the appellant's claim contrary to the principle in **Mohamed vs. Bakari & 2 others** (supra) that “*no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man.*”
51. There was also the contention by the appellant that consent of the Land Control Board under the Land Control Act is required in relation to the controlled transaction as opposed to the document and that the transaction was not completed and that in any event there is provision under the proviso to Section 8 of the Land Control Act which remained available to the appellant to apply to the High Court to extend time within which consent of the relevant control board would be sought.
52. On the question that the agreement for sale lacked consideration as the deposit was not paid there was the contention, hinged on passages from **Chitty on Contracts**, and that even if the appellant was yet to pay the deposit “*the consideration for a promise may consist of ... a promise to render performance...*” which includes cases, such as the present one in which “*each party makes a promise to the other, but neither party has yet rendered any performance.*”
53. Regarding the contention the agreement for sale was inadmissible under Section 19 of the Stamp Duty Act, sub section 3 of section 19 stipulates the procedure for handling such a document. Section 19(3) provides for steps to be taken by the Court which has received an unstamped instrument.
54. The appellant says that it was open to it to avail itself of those provisions in order to regularize the agreement and at worst would have been liable to pay a penalty of Kenya Shilling ten.
55. These matters did not receive due consideration by the learned judge. We think these are all matters that are worthy of ventilation at a trial and the appellant was deprived of the opportunity to fully canvass them when the suit was in our view, prematurely struck out by the learned judge. We are in the circumstances satisfied that the learned judge did not in the circumstances properly exercise his discretion in striking out the suit in that he failed to take into account those considerations into account.
56. Having struck out the suit, the learned judge did not have an opportunity to consider whether the appellant had met the conditions for the grant of a temporary injunction. We must therefore apply our minds to the material that was before the High Court to determine whether the appellant meets the conditions for grant of a temporary injunction. The test to which we have already referred is captured in the often-cited passage from the judgment of Spry, VP in **Giella vs. Cassman Brown** (supra) where he stated:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, (1972) E.A. 420.)”

57. In the case of **Charter House Investments Ltd vs. Simon K. Sang and others, Civil Appeal No. 315 of 2004**, this Court (Omolo, Githinji & Visram JJA) stated that:

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It

is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the Giella case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”

58. Although the 1st respondent in its statement of defence pleaded the absence of a “**definite and valid and legal transaction**” it is common course that sometime in May 2010 the 1st respondent as owner of the suit property entered into an undated agreement for sale, which was exhibited before the High Court under an affidavit, under which it agreed to sell the suit property to the appellant for Kshs.775, 550,000 on the terms, inter alia, that a deposit of Kshs. 100,000,000.00 would be paid by the appellant after execution of the agreement to a bank account that was to be notified in writing; that the transaction would be completed within 180 days of execution of the agreement; and that the balance of the purchase price in the sum of Kshs. 675, 550,000 would be paid within 14 days of the registration of the transfer of the suit property in favour of appellant.

59. In our view, the agreement for sale did set out the terms of contract sufficiently including the parties to the contract; the property to be sold; the contract price; the time for completion; the obligations of the parties as well as incorporating by reference the terms and conditions contained in the standard Law Society of Kenya Conditions of Sale.

60. It seems to us that it is on that basis that the appellant considered itself entitled to maintain a suit and did file suit for specific performance. Fry L J in his work **Specific Performance** as quoted in Chitty on Contracts wrote:

“If a contract be made and one party to it make default in performance, there appears to result to the other party a right at his election either to insist on the actual performance of the contract, or to obtain satisfaction for the non-performance of it.”

61. In answer to the appellant’s claim for specific performance the 1st respondent pleaded in its statement of defence that “**any dealings or purported dealings in the land are void for all purposes since no relevant Land Control Board consent was obtained under the Land Control Act**” and went to contend that the appellant is not entitled to “**specific performance or at all on a void and undated agreement.**”

62. The 1st respondent also took issue that as the appellant had not paid the Kshs. 100,000,000.00 deposit that was to be paid under the agreement for sale the contract lacked consideration.

63. The editors of **Chitty on Contract**, 30th edition, volume one at paragraph 27-003 observe that:

“The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract...it will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.”

64. We have taken the view, that in the circumstances of this case, the question whether the agreement for sale, which on the face of it appears valid and enforceable, suffers from some defect, which would render it, invalid or unenforceable, is a matter for the trial court.

65. We consider, therefore, that the appellant has, prima facie, made out a case for specific performance of the agreement for sale with some probability of success.

66. The contention by the appellant that the suit property is of unique value and that damages would

not afford an adequate remedy is however doubtful.

67. On the whole we are mindful that there is on the face of it a contract for sale between the appellant and the 1st respondent; that the 1st respondent appears to have deliberately thwarted the progress of the transaction based on its pleading in its statement of defence that “ *if the defendant had wanted to sell the property it would have sought the consent of the relevant Land Control Board which it has never done*” suggesting therefore that it may have deliberately refrained from seeking the consent it was obliged to seek under the terms of the agreement for sale; that the 1st respondent concedes that there were wrangles between its directors, which appear to have made the appellant cautious and frustrated the transaction from proceeding. We think that the balance of convenience tilts in favour of the appellant.

68. The appellant is therefore entitled to an order in terms of prayer 3 of the notice of motion dated 21st October 2010 but subject to terms and on conditions, firstly that the appellant shall, within 45 days from the date of delivery of this judgment, deposit the sum of Kenya Shillings One Hundred Million [Kshs. 100,000,000.00] only in an interest earning bank account in the joint names of the appellant’s advocates and the 1st respondent’s advocates to be held pending the hearing and determination of the suit or until further orders. Secondly, that the appellant shall within 60 days of delivery of this judgment complete preparation of its case for hearing in the High Court including preparation of its bundle of documents and witness statements in readiness for fixing a hearing date for the suit in the High Court.

Conclusion

69. In conclusion the whole of the order of the High Court given on 29th March 2011 striking out the appellant’s application dated 21st October 2010 and the suit with costs is hereby set aside. In substitution thereof we order that the respondents be and are hereby restrained by order of temporary injunction from advertising, offering for sale, leasing, mortgaging, charging or transferring other than to the appellant, the property known as L R NO. 11540/3 IR NO. 109051 pending the hearing and determination on terms that the appellant shall, within 45 days from the date of delivery of this judgment, deposit the sum of Kenya Shillings One Hundred Million [Kshs. 100,000,000.00] only in an interest earning bank account in the joint names of the appellant’s advocates and the 1st respondent’s advocates to be held pending the hearing and determination of the suit or until further orders and on the further condition that the appellant shall within 60 days of delivery of this judgment complete preparation of its case for hearing in the High Court including preparation of its bundle of documents and witness statements in readiness for fixing a hearing date for the suit in the High Court.

70. The costs of the appeal shall abide the outcome of the suit in the High Court.

Dated at Nairobi this 19th day of July 2013.

J. W. MWERA

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JUDGE OF APPEAL

M. A. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR