



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**  
**Civil Appeal 42 & 45 of 2008 (Consolidated)**

**KIRKDALE LIMITED.....APPELLANT**

**AND**

**MOUNT AGENCIES LIMITED.....1<sup>ST</sup> RESPONDENT**

**SIMLA KENYA LIMITED.....2<sup>ND</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI.....3<sup>RD</sup> RESPONDENT**

**THE PRINCIPAL REGISTRAR OF TITLES.....4<sup>TH</sup> RESPONDENT**

*(Appeal from the decisions/ruling of the High Court of Kenya*

*at Nairobi (Osiemo, J.) dated 6<sup>th</sup> day of June 2007*

**in**

**H.C.C.C No. 625 of 2006)**

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**JUDGMENT OF THE COURT**

On 16<sup>th</sup> June 2006 the 1<sup>st</sup> respondent herein, the plaintiff in the superior court, filed a suit to claim from the appellant and 3 others, namely, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents herein respectively, various reliefs; namely:-

- “(a) A permanent injunction to restrain the defendants either jointly and/or severally from interfering with the suit property by inter alia erecting any developments thereon or dealing with the suit property in any manner howsoever.**
- (b) An order of mandatory injunction to compel the 4<sup>th</sup> defendant to immediately and unconditionally cancel the purported transfer in favour of the 2<sup>nd</sup> defendant.**
- (c) Specific performance of contract.**

- (d) **General and punitive damages for breach of contract.**
- (e) **A declaration that the purported transfer is illegal null and void.**
- (f) **A declaration that the purported charge is illegal null and void.**
- (g) **Costs of the suit.”**

Simultaneously with the filing of the suit, the 1<sup>st</sup> respondent also filed an application by chamber summons under a certificate of urgency to seek the following orders; namely:-

“1. ....

2. **THAT pending the hearing and determination of this application interpartes, this Honourable Court be pleased to issue an order of Temporary injunction restraining the defendants jointly and severally either through themselves, servants or agents from interfering with the suit property by *inter alia* erecting any developments thereon or dealing with the suit property in any manner whatsoever.**

3. **THAT pending the hearing and determination of this suit, the Honourable court be pleased to issue an Order of Temporary Injunction restraining the defendants jointly and severally either through themselves, servants or agents from interfering with the suit property by *inter alia* erecting any developments thereon or dealing with the suit property in any manner howsoever;**

4. **THAT the plaintiff be granted the liberty to apply for any further orders as the circumstances of the case may permit.**

5. **THAT the costs of this application be provided for.”**

The application was founded on the grounds set out on the face thereof and also on the averments in the supporting affidavit of John Ngugi a director of the said 1<sup>st</sup> respondent. These grounds were as follows:-

“i. **THAT sometimes in March 2003 the 1<sup>st</sup> defendant offered its property L.R No. 209/4548 for sale to the plaintiff upon terms *inter alia* that the consideration for the sale of the property was Kshs.24,000,000/=.**

(ii) **THAT 8<sup>th</sup> April 2003 the plaintiff accepted the said offer and further tendered to the 1<sup>st</sup> defendant a cheque for Kshs.2,400,000/= representing 10% deposit for the purchase price which cheque was duly received and accepted by the 1<sup>st</sup> defendant.**

(iii) **THAT despite receiving and retaining the deposit and in blatant breach of the (sic) between the plaintiff and the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant failed, refused and had continued to refuse to perform its part of the bargain.**

(iv) **THAT on 20<sup>th</sup> June 2005, two years later the 1<sup>st</sup> defendant purported to cancel the sale agreement by purporting to refund the 10% deposit that had been paid and retained for over two years.**

(v) **THAT to the plaintiff’s consternation and surprise and without any notice whatsoever, the 1<sup>st</sup> defendant has unlawfully, illegally and fraudulently purported to transfer the suit property to the 2<sup>nd</sup> defendant.**

(vi) **THAT it is the plaintiff’s case that the purported transfer is illegal, fraudulent and null and**

void.

- (vii) **THAT the defendants have committed diverse acts of fraud as more particularly set out in the plaint as to vitiate the purported transfer.**
- (viii) **THAT 2<sup>nd</sup> defendant has sought and obtained the approval of the 3<sup>rd</sup> defendant to proceed with the development of the suit property and the plaintiff is apprehensive that works may commence sooner or later.**
- (ix) **THAT by reason of accepting and retaining the deposit cheque, a constructive trust was created vide which the 1<sup>st</sup> defendant held and holds this property in trust for the plaintiff.**
- (x) **THAT in the totality of the circumstances, the 1<sup>st</sup> defendant is estopped from renegating, on this agreement to the plaintiff's detriment.**
- (xi) **THAT the plaintiff's stands to suffer irreparable loss and damage unless an injunctive order is issued by this Honourable court.**
- (xii) **THAT in any event the plaintiff has now established that the 2<sup>nd</sup> defendant does not exist in law."**

The averments contained in the supporting affidavit are nearly similar to the grounds set out on the face of the application except addition in paragraphs 15, 16 and 17 thereof that according to a search at the companies registry **"the 2<sup>nd</sup> defendant does not exist in law, that the 2<sup>nd</sup> defendant had registered a charge of the suit property in favour of Investments and Mortgages Bank Limited and that approval for building plans applied for by the 2<sup>nd</sup> respondent over the same property had been granted by the 3<sup>rd</sup> respondent."**

The dispute between the appellant and the 1<sup>st</sup> respondent relate to property, L.R 209/4548 measuring 0.0992 of an acre situated on Tom Mboya Street within the City of Nairobi which was previously owned by the appellant. Initially the appellant had offered to sell this property to the 1<sup>st</sup> respondent at the price of Kshs.24,000,000/= (Shillings Twenty Four Million). The 1<sup>st</sup> respondent accepted this offer and sent to the appellant a cheque for Kshs.2,400,000/= (Shillings two million four hundred thousand) representing 10% of the purchase price. Correspondence in this respect were exchanged between the parties. The 1<sup>st</sup> respondent even sent to the appellant a sale agreement for the property which it required the said appellant to execute. This was not done but instead the appellant attempted to return the deposit cheque to the 1<sup>st</sup> respondent which the latter declined to accept but instead requested for specific performance of the contract on the ground that the appellant had held onto the deposit cheque for over one year. The parties failed to agree on the best way forward and this is why the 1<sup>st</sup> respondent filed the suit in the superior court as herein before stated.

On the orders of injunction sought in the superior court by the 1<sup>st</sup> respondent, the learned Judge (Osiero, J.) heard counsel for the parties submit before him on 12<sup>th</sup> July 2006, 23<sup>rd</sup> July 2006, 30<sup>th</sup> October 2006, 5<sup>th</sup> December 2006 and 26<sup>th</sup> March 2007 and was satisfied it, the said 1<sup>st</sup> respondent had satisfied the conditions required for granting an interim injunction which on 6<sup>th</sup> June 2007 he allowed in terms of prayers 2,3 and 4 of the chamber summons dated 15<sup>th</sup> June 2006. The appellant was aggrieved by this ruling and now appeals against it to this court in a memorandum of appeal dated 18<sup>th</sup> March and lodged in this court on 20<sup>th</sup> March 2008. The memorandum lists 14 grounds of appeal, namely:-

**1. The learned Judge erred in holding that the first respondent had made out a case at all for the grant of an injunction as sought by it against the appellant and erred in not holding that the First Respondent had no case in law or on facts against the appellant.**

2. The learned Judge erred in not appreciating sufficiently or at all that the First Respondent in prayer (c) of its plaint dated 15<sup>th</sup> June 2006 was seeking specific performance of the contract, (d) General and Punitive damages for breach of contract (c) Permanent restraining injunction, a Mandatory Injunction and a Declaration that the purported charge was illegal, null and void but there was no prayer seeking a declaration that there was a constructive trust in its favour.
3. The learned Judge erred in not appreciating sufficiently or at all that when seeking an equitable remedy of specific performance it was essential for the First Respondent to plead in its plaint that it was ready willing and able to perform its part as a purchaser that it had tendered the balance of the full purchase price to the Appellant as (sic) also a conveyance/transfer for execution. These averments not having been pleaded, the plaint was deficient and on which specific performance could be decreed.
4. The learned Judge erred in not finding that no binding agreement of sale in writing as required by statute ever came into existence of which specific performance as sought by the First Respondent in its plaint could be ordered.
5. The learned Judge erred in not appreciating sufficiently or at all that in Kenya (unlike the United Kingdom) a mere contract, or constructive trust relating to land without requisite writing is incapable of creating any estate or interest in land. The learned Judge further erred in not appreciating that on the facts before him no such constructive or resulting trust could arise.
6. The learned Judge erred in not finding that the deposit of 10% (ten percent) of the purchase price viz Shs.2,400,000/= was accepted only conditionally and “subject to contract,” in the cause of negotiations; the draft sale agreement tendered was never agreed engrossed or executed and the deposit eventually refunded but the First Respondent wrongly refused to accept it.
7. The learned Judge erred in not finding that the balance of 90% (ninety percent) of the purchase price viz Shs.21,600,000/= (shillings Twenty One Million Six Hundred Thousand) was never ever tendered by the First Respondent to the Appellant and that consequently there could be no binding agreement of sale.
8. The learned Judge having stated in his ruling “it is conceded (by the First Respondent) that the contract between it and the appellant was not signed by the parties, nor attested by, the witnesses” then erred in holding “the case at had is that the plaintiff (Appellant) – entered into a sale agreement with the first respondent (Appellant); the agreement was reduced into writing ... but the fist respondent (appellant) evaded to sign the sale agreement” and nevertheless then proceeded to grant a temporary injunction of restraint against all the defendants jointly and severally.
9. The learned Judge erred in finding a constructive trust on the erroneous finding of acceptance of the deposit of ten percent (10%) of the purchase price contrary to written evidence which showed clearly it was accepted conditionally “subject to contract” which never came into existence and was later refunded.
10. The learned Judge erred in finding fraud on the part of the appellant and the 2<sup>nd</sup> respondent on no-existent facts. He further erred in an illusory finding that the appellant had taken advantage of its own wrong and in not appreciating sufficiently or at all the appellants contention that it had not entered into any binding contract of sale with the First Respondent the deposit having been accepted conditionally and subject to contract and then refunded prior to the institution of the suit by the First Respondent.
11. The First Respondent having pleaded in paragraph 3 of its plaint that the Second Respondent is a limited liability company incorporated and registered in Kenya followed by Production in court of its certificate of incorporation the learned Judge erred in seemingly allowing his mind to be influenced adversely against the appellant and the second respondent by a mere

**letter from the Register (sic) of companies which was clearly inadmissible to invalidate the certificate of Incorporation issued by himself.**

**12. The learned Judge erred wholly despite uncontradicted fact of approval of the building Plans by the 3<sup>rd</sup> respondent (city Council of Nairobi) in finding without any basis in law or in fact that prior registration of the land was a prerequisite to the approval. Likewise the learned Judge totally misdirected himself in drawing adverse inference from the fact of registration of the transfer and charge thereon being registered simultaneously, which is normal conveyancing practice.**

**13. The learned Judge's ruling is vitiated by a clear bias and misdirections in his ruling as against the appellant and the second respondent to whom the appellant lawfully and properly sold the suit land.**

**14. The learned Judge erred in failing to appreciate that the appellant having lawfully transferred the ownership and handed over possession of the suit land to the second respondent, was clearly unable to comply with the injunction sought by the First Respondent and ordered by the learned Judge against all the Respondents jointly and severally."**

At the hearing in this Court on 13<sup>th</sup> December 2008 *Civil Appeal Nos. 42 and 45 of 2008* were consolidated because they arose from the same ruling. Mr. Satish Gautama learned counsel for the appellant in **Civil Appeal No. 45 of 2008** on one hand submitted that facts of the case before the superior court were that the 1<sup>st</sup> respondent agreed to buy land from the appellant but no valid contract for this transaction was entered into while on the other hand the 1<sup>st</sup> respondent contended that an offer was made by the appellant which the 1<sup>st</sup> respondent accepted thus creating a valid contract. Counsel for the appellant urged that no valid contract was entered into by and between the parties because the correspondence exchanged between them on the matter were subject to contract. According to him, the fact that the 1<sup>st</sup> respondent paid Kshs.2,400,000/= representing 10% of the purchase price did not give rise to a concluded contract of sale nor did it give rise to a constructive trust. He stated that once the deposit sum was returned to the 1<sup>st</sup> respondent its lawyers knew the transaction had been called off or that the offer was not acceptable to the appellant. Counsel stated that there was no concluded agreement because the agreement was not signed by the parties and the deposit which was accepted, "*subject to contract,*" was refunded. He submitted that the 1<sup>st</sup> respondent never tendered the balance of the purchase price and there was no conveyance to conclude the contract. Counsel stated further that though after the agreement aborted between the appellant and the 1<sup>st</sup> respondent the suit property was sold to the 2<sup>nd</sup> respondent, the parties cannot move because of the order of injunction issued by the superior court.

Mr. Katitu learned counsel for the appellant in Civil Appeal No. 42 of 2008 associated himself with Mr. Gautama's sentiments. Although his client, the 2<sup>nd</sup> respondent, had purchased the suit property from the appellant and created a charge over it in favour of a third party, Investment and Mortgages Bank Limited, for a loan advanced, it continues paying interest on that loan while the injunction stays. He stated that his client cannot step onto the property or carry out any developments thereon. On the allegation of fraud against his client, counsel submitted that the mere transfer of the suit property to the 2<sup>nd</sup> respondent cannot be construed as evidence of fraud. According to him, there was no basis upon which an injunction order was issued against his client.

Mr. Mburu, learned counsel for the 3<sup>rd</sup> respondent also associated himself with the submissions of counsel for the appellants in **Civil Appeal Nos. 42 and 45 of 2008** respectively and said though the 1<sup>st</sup> respondent's case was based on constructive trust, there was no case made on such trust before the superior court. According to him the only case cited against the 2<sup>nd</sup> respondent was that it had approved building plans but there was no finding that the 3<sup>rd</sup> respondent had offended any provisions of the law. There was even no reason why the 3<sup>rd</sup> respondent was joined to the suit subject to this appeal as no case was made out against it. Miss Migiro learned counsel for the first respondent opposed the appeal and submitted that the superior court ruling was in exercise of its discretionary powers which this court cannot interfere with save in few exceptions which have not been shown to exist. According to her, the first

respondent satisfied the conditions for the grant of an interlocutory injunction. She stated that grounds 4,5,6,8 and 9 of the memorandum of appeal show the existence of a constructive trust and that because the appellant accepted Kshs.2.4 million representing 10% of the purchase price from the 1<sup>st</sup> respondent, a specific enforceable contract was entered into by the parties. In her opinion the appellant's attempt to refund the said deposit after over 2 years of payment did not revoke the contract. She stated that by the appellant holding the 10% deposit on behalf of the 1<sup>st</sup> respondent for such long period construed him as a constructive trustee of the suit property for the 1<sup>st</sup> respondent and, that, in that regard it could not transfer the same to the 2<sup>nd</sup> respondent and that it acted in breach of its constructive trust when it purported to sell the suit property to the 2<sup>nd</sup> respondent. She submitted further that the 1<sup>st</sup> respondent could not tender the balance of the purchase price when the conduct of the appellant indicated that such tender was impossible.

In reply, learned counsel for the appellant reiterated that enormous damage had been done by the order of injunction granted by the superior court. He said that the offer made by the 1<sup>st</sup> respondent was not acceptable and that a trust cannot be applied to upset the statute.

The transaction between the appellant and the 1<sup>st</sup> respondent was a simple and straightforward sale agreement over L.R 209/4548 situated on Tom Mboya Street Nairobi. The record does not show the form the negotiations took. But what is clear is that the first respondent offered to purchase this property from the appellant in its letter dated 8<sup>th</sup> April 2003. The letter was in the following terms:

**“8<sup>th</sup> April 2003**

**S.S. Jowhal**

**Wentworth Apartments**

**Githunguri Road**

**Kileleshwa**

**P.O. Box 42296 – 00100 GPO**

**NAIROBI.**

**Dear Sirs,**

**RE: PURCHASE OF L.R. NO. 209/4548 PLOT ON TOM MBOYA STREET – NAIROBI**

**Our Client: Mount Agency Limited**

**We refer to this matter,**

**We enclose herewith our client's cheque of Kshs.2,400,000/= (Two Million four Hundred Thousand only) and a sale agreement for your client's execution.**

**Kindly acknowledge receipt and let us have a copy of the duly executed sale agreement.**

**Do also confirm that you shall not sell the property to any other person except our client.**

**Yours faithfully,**

**Signed**

**KARIUKI MAIGUA & CO. ADVOCATES**

**c.c. Client**

**Encl.**

- 1. Cheque**
- 2. Sale agreement.”**

A reply to the above letter by the appellant through its lawyers was as follows:-

**“9<sup>th</sup> April, 2008**

**Messrs. Kariuki Maigua & Co**

**Advocates**

**Pioneer Assurance House SUBJECT TO CONTRACT**

**3<sup>rd</sup> Floor, Moi Avenue**

**NAIROBI.**

**Dear Sirs,**

**RE: PURCHASE OF PLOT NO. L.R. 209/4548 – TOM MBOYA STREET, NAIROBI**

**KIRKDALE LIMITED TO MOUNT KENYA AGENCY LIMITED**

**We are in receipt of your letter of 8<sup>th</sup> instant together with the (sic) your cheque for Shs.2,400,000/= which we are accepting subject to contract to the vendor passing a resolution to sell.**

**Obviously, we cannot give you the confirmation sought by you in the final paragraph of your letter under reply as there is no option or right of first refusal to your client.**

**Our official receipt is enclosed herewith. If the transaction does not materialize, you have our professional undertaking to refund the proceeds of your cheque.**

**Yours faithfully**

**For S.S. JOWHAL**

**Encl**

**c.c. Client.”**

After about two months the 1<sup>st</sup> respondent wrote another letter to the appellant. The letter was dated 10<sup>th</sup> July 2003. Its material particulars were as follows:-

**“We refer to previous correspondence in this matter. Urgently let us have the duly executed sale agreement to enable us move forward.”**

It was signed by its counsel; Messrs Kariuki Maigua & Co. Advocates. Other letters with similar contents were addressed to counsel for the 1<sup>st</sup> respondent on 27<sup>th</sup> August 2003 and 30<sup>th</sup> September 2003. Then on 16<sup>th</sup> October 2003 counsel for the first respondent addressed another letter to counsel for the appellant which stated:-

**“We refer to our previous correspondence of this matter. Our client is expressing concern at the delay in finalizing this transaction. Kindly let us have the sale agreement duly executed by our client for our further action.”**

There was other correspondences from counsel for the 1<sup>st</sup> respondent to counsel for the appellant on 7<sup>th</sup> November 2003, 15<sup>th</sup> December 2003, 29<sup>th</sup> January, 2004, 14<sup>th</sup> February 2004, 16<sup>th</sup> April 2004, 22<sup>nd</sup> June 2004 and 14<sup>th</sup> July 2004 respectively for the expedition of a duly executed sale agreement from the former to the latter but there were no replies to any of them from the appellant. Then on 20<sup>th</sup> June 2005 the appellant’s counsel Mr. S.S. Jowhal wrote to counsel for the 1<sup>st</sup> respondent and stated that:-

**“Further to our letter of 01.11.2004, we have firm instructions from our client, and as per our professional undertaking herein given to you vide our letter of 09.04.2003 to refund to you the proceeds of your client’s cheque.**

**Accordingly we enclose herewith our cheque for shs.2,400,000/= receipt of which please acknowledge.**

**Kindly confirm that we are released from all our undertakings herein.**

**Yours faithfully;**

**Signed**

**For S.S. Jowhal & Co.”**

The letter of 01.11.2004 referred to in the letter above was not included in the record. An attempt by the 1<sup>st</sup> respondent through its counsel to return the cheque to the appellant through a letter dated 21<sup>st</sup> June 2005 on a “*without prejudice*” basis, whatever this meant, was thwarted when the appellant sent back the cheque with the clerk who was sent to return it as the letter from the applicant dated 21<sup>st</sup> June 2005 indicates. This is how the case subject to this appeal ended up in the superior court.

The superior court case is still pending. The appeal before this Court is against the ruling of the learned Judge granting an injunction pending the hearing and determination that case. When the learned Judge wrote and delivered his ruling he had in mind the principles or conditions to be considered before an application under **Order XXXIX rules 1, 2, 3 and 9** of the Civil Procedure Rules is granted, and as enunciated in the case of **Giella v Cassman Brown & Company Limited [1973] EA 35**. They are (a) the probability of success of the main case, (2) irreparable harm which would otherwise not be adequately compensated for by an award of damages and (3) if there is any doubt then decide the issue on a balance of convenience. These principles were quoted with approval in the case of **Abel Salim and**

**Others v. Okong'o and Others [1976] KLR 32** at p.48. This was a land transaction and what was canvassed before the trial judge was whether the transaction was valid or whether it existed at all. On this type of transaction, **Section 3(3)** of the Law of Contract Act Chapter 23 Laws of Kenya provides:-

**“3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless**

**(a) the contract upon which the suit is founded**

**(i) is in writing;**

**(ii) is signed by all the parties thereto, and**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party;**

**Provided that this subsection shall not apply to a contract made in the cause of a public auction by an auctioneer within the meaning of the Auctioneers Act nor shall anything affect the creation of a resulting, implied or constructive trust.”**

We are not persuaded this provision of the law was complied with in relation to the transaction subject to this dispute. It was clear from the first day the appellant wrote to the 1<sup>st</sup> respondent the letter dated 9.4.2003 that it was accepting the 10% deposit **“subject to contract to the vendor passing a resolution to sell.”** The letter itself was also headed *“subject to contract.”* In that letter, the appellant declined to confirm that it would sell the property to none else but the appellant as sought in the latter’s letter of 8<sup>th</sup> April 2003. Apart from this, the sale agreement enclosed in the letter dated 8<sup>th</sup> April 2003 for execution by the appellant was not returned by the appellant executed as required or at all inspite of various reminders.

The letter of 1<sup>st</sup> November 2004 referred to by counsel for the appellant in its letter to the 1<sup>st</sup> respondent dated 20<sup>th</sup> June 2005 does not appear on the court records and we are unable to tell what its contents were. The 1<sup>st</sup> respondent does not deny the existence of that letter and has not convinced us that the appellant retained the Kshs.2.4 million deposit for over 2 years without letting it – the 1<sup>st</sup> respondent know the position. With this in mind, we are unable to agree that the 1<sup>st</sup> respondent established a prima facie case with the probability of success. And as this was a sale agreement in its initial stage which never went beyond the 1<sup>st</sup> respondent depositing a sum of Kshs.2.4 million with the appellant and which money was refunded, we are not sure the said first respondent has a basis for insisting that it entered into a valid sale agreement with the appellant over the sale of L.R No. 209/4548 situated in Nairobi. The draft agreement the 1<sup>st</sup> respondent sent to the appellant for execution was not returned executed as required. And because the statutory requirements for the land sale transaction were not complied with, the 1<sup>st</sup> respondent cannot fall back to a constructive trust for a remedy in a case of this nature.

As to whether the 1<sup>st</sup> respondent will suffer irreparable harm if an order of injunction sought herein is not granted, this is a straightforward and clear case where any damages suffered by it can be quantified and sought and/or paid in form of damages. In fact this is why the 1<sup>st</sup> respondent sought general and punitive damages for breach of contract in prayer (d) of the prayers. Given all these considerations, the case before the superior court was not a suitable one for the grant of an order of a temporary injunction. We allow this appeal and set aside the order of the learned Judge and order the 1<sup>st</sup> respondent to pay the costs of this appeal as well as costs of the application in the superior court. Parties are at liberty to pursue their case in the superior court.

**Delivered and dated at Nairobi this 8<sup>th</sup> day of May, 2009.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**