



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA  
OF KISII**

**Civil Case 41 of 2008**

**1. ELISHA AKECH CHIENG )**

**2. PHOEBE ADHIAMBO SOTIY ) ..... PLAINTIFFS**

**both suing on behalf of 35 Tenants**

**VERSUS**

**NATIONAL HOUSING CORPORATION..... DEFENDANT**

**RULING**

The 37 plaintiffs are tenants of the defendant in various residential houses in Homa Bay. On 16<sup>th</sup> March, 2007 the defendant published a notice to the public in local newspapers under the heading – “**NHC PROVINCIAL SCHEMES FOR SALE**”. The notice indicated, *inter alia*, that the defendant’s houses at Homa Bay were being offered for sale on the following terms and conditions.

***“1. The sale is open to both members of the public***

***and the tenants currently in occupation.***

***2. Interested Kenyans are expected to complete an application form, which is available at the respective NHC Regional Offices at a non-refundable fee of Kshs.1,000/=.***

***3. The application form together with a minimum deposit of 10% of the selling price should be returned within 21 days from the date of this advert.***

***4. The balance of the selling price should be paid by the successful applicants within ninety (90) days from the date of offer.***

***5. All payments to be made in Bankers Cheque only, payable to National Housing Corporation.***

***6. Sitting tenants with rent arrears will automatically be disqualified from allocation.***

***7. National Housing Corporation will not offer any financial arrangement. Successful applicants will be expected to arrange for their own financing.***

***8. Unsuccessful applicants will be refunded deposits without interest.***

**9. *Allocation Criteria will be based on first come first serve basis and on fulfillment of the above conditions.***

The plaintiffs filled application forms, paid the non-refundable fee of Kshs.1000/- and the required 10% deposit within the stipulated period of time. The deposits ranged from Kshs.30,000/= to Kshs.120,000/= depending on the size of the house applied for.

On 22<sup>nd</sup> March, 2007 the plaintiffs wrote to the defendant a joint letter through the District Commissioner, Homa Bay, requesting the defendant to allow room for negotiating the sale but the defendant did not respond to the said letter.

On various dates in March, 2008 each of the plaintiff received a letter of offer from the defendant. The letter read as follows:

***“Dear Sir/Madam***

***RE: OFFER FOR SALE – HOUSE NO (as per the house applied for) HOMA BAY SCHEME.***

***Further to your application for a house in the above development, we are pleased to inform you that you have been provisionally allocated House No. (as per the house applied for.)***

***Terms and conditions.***

- (a) The property allocated is House No. (specified) being a (specified) bedroomed unit.***
- (b) The purchase price shall be Kshs. (amount specified).***
- (c) You had paid a down payment of Kshs. (specified).***
- (d) The balance thereof shall be paid within ninety (90) days from the date hereof.***
- (e) The sale transaction is subject to the Corporation obtaining all necessary assents and consents to vest title in the purchaser.***
- (f) In the event that the purchaser withdraws, fails to meet set payment deadlines or is unable to complete this sale transaction within the stipulated time for any other reason whatsoever other than on account of default on the part of the corporation, this agreement will determine and the Corporation will have the right to re-allocate the subject property to an alternative deserving party without any further reference to the purchaser. The down payment will thereafter be refunded without any interest less liquidated damages incurred by the Corporation.***
- (g) In the event the Corporation fails to do all that is necessary to vest title with the purchaser, the purchaser will be at liberty to rescind the sale whereupon the Corporation shall refund the purchase price without deduction or interest whatsoever.***
- (h) The property is sold subject to:-***
  - All subsisting easements, quasi easements, right of way etc.***

*Acts, reservations, stipulations and conditions contained or implied in the title thereto.*

*(i) The Corporation undertakes to execute transfer in favour of the purchaser and the purchaser shall be responsible for survey, subdivision and title processing costs, legal registration and transfer fees, stamp duty and other incidental costs for transaction of the sale.*

*(j) The purchaser hereof has notice of identity of the subject property and its actual state and condition and takes it subject to such state and condition and the vendor shall not be called upon to repair any beacons, redecorate or improve it in any manner whatsoever.*

*(k) Each party shall be responsible for its own legal expenses/costs.*

*(l) The vendor undertakes to pay any outstanding outgoings as at the time of completion of the sale transaction. The purchaser will be responsible for statutory payments and any other outgoings from the date of sale.*

*(m) The parties undertake to abide to (sic) the terms and conditions of this offer.*

**NB: This offer is subject to formalization by way of**

***Sale Agreement.”***

The plaintiffs filed an application seeking an order of injunction to restrain the defendant from putting into effect **clause (f)** of the aforesaid terms and conditions of offer until a suit, which they had filed against the defendant, is heard and determined. In that suit, the plaintiffs stated, **inter alia**, that the terms of the proposed sale of the houses were exploitative and calculated to prevent them as people of humble economic stature from purchasing the said houses.

The aforesaid application was supported by an affidavit sworn by the first plaintiff.

The plaintiffs stated that they found the said clause (f) unfair and oppressive because most of them had procured their deposits through loans from banks and had to pay interest thereof. It was therefore inequitable for the defendant to retain the deposits for about a year and refund the same without interest and even deduct liquidated damages. The plaintiffs also complained that they had been given a rather short period of time to complete payment of the purchase price. In their view, that was designed to prevent them from acquiring the properties and was therefore discriminatory and unconstitutional.

The defendant filed a replying affidavit through Mr. W.K.B. Keitany, its Senior Legal Officer. He explained that further to the letter of provisional allocation, which was sent to each of the plaintiffs, each one of them signed and returned to the defendant an acceptance letter with their respective copies of identity card and Personal Identification Number (PIN) Certificates attached thereto. The said officer further deposed that the 90 days period was to run from the date the offer was made and accepted by the plaintiffs. He added that the delay in forwarding the provisional allocation letters after receipt of the application forms and the deposits from the plaintiffs was caused by the many complaints that were raised by other applicants who wanted to be given an opportunity to purchase the houses but the defendant decided to give priority to its tenants.

Regarding the plaintiffs' complaints as stated in their application, Mr. Keitany pointed out the houses were being sold on a willing seller willing buyer basis without any coercion at all and since the plaintiffs had expressly accepted the offers made to them, they could not be heard to complain that clause (f) was oppressive. The plaintiffs had the option to rescind the agreements

if they so wished, he added.

In his submissions, Mr. Okoth for the plaintiff stated that the defendant's advertisement in the newspaper on 16<sup>th</sup> March 2007 was a letter of offer because the plaintiffs acted on it and paid 10% of the purchase price. As a result, a contract came into being. After that the plaintiffs were waiting for terms of completion of the transaction. The provisional letters of allocation and the terms stated therein were tantamount to an attempt by the defendant to unilaterally alter the terms of a contract. In his view, there was a common mistake made by both parties in the way in which they dealt with one another with regard to the advertisement of 16<sup>th</sup> March, 2007. He referred to "**THE LAW OF CONTRACT**" 8<sup>th</sup> Edition by G. C. Cheshire, C. H. Fifoot and M. P. Furmston Page 202. The learned authors state that:

***“ In common mistake, both parties make  
the same mistake. Each knows the intention  
of the other and accepts it, but each is mistaken  
about some underlying and fundamental fact.  
The parties, for example, are unaware that the  
subject-matter of the contract has already  
perished.”***

Mr. Okoth further submitted that it was inequitable for the defendant to hold the plaintiffs' deposits for nearly a year and then purport to alter the contract by introducing harsh conditions with a view to causing the plaintiffs to be unable to purchase the houses.

Mr. Omangi for the defendant submitted that the advertisement of 16<sup>th</sup> March, 2007 was an invitation to treat and not an offer made to the plaintiffs. He cited the case of **LADOPHARMA COMPANY LIMITED VS NATIONAL HOSPITAL INSURANCE FUND** [2005] eKLR where Emukule, J, distinguished an invitation to treat from an offer.

The provisional allotment letters were the letters of offer and the plaintiffs had accepted them.

He further submitted that the plaintiffs had not established a prima facie case with a likelihood of success. They had also not demonstrated that they would suffer irreparable loss in the event that the orders sought were not granted.

I have considered the above submissions.

The advertisement that was placed by the defendant in the local newspapers on 16<sup>th</sup>, 2007 was addressed to all members of the public. The sale of the houses was open to both ordinary members of the public and the tenants who were in occupation thereof. The defendant, in its sole discretion, set terms and conditions which had to be complied with by the applicants. One of those conditions was payment of a deposit of 10% of the selling price within 21 days from the date of the advertisement. The advertisement also notified interested applicants that those who would be successful will be required to pay the balance of the purchase price within ninety (90) days from the date of offer. Was that advertisement an offer or an invitation to treat? What was the relationship between the plaintiffs or any other applicant and the defendant upon completion of the application form and payment of the stipulated deposit?

**“CHITTY ON CONTRACTS”** Volume 1 defines an offer in the following words:

***“The offer is an expression of willingness to contract made with the intention (actual or or apparent) that it is to become binding on the person making it as soon as it is accepted by the person to whom it is addressed.”*** See para 2-002 at page 90.

In the same book, an invitation to treat is defined as:

***“Communication by which a party is invited to make an offer.”*** See para 2-007 at page 93.

Such an invitation is distinguishable from an offer primarily on the ground that it is not made with the intention that it is to become binding as soon as the person to whom it is addressed simply communicates his assent to its terms. There are many preliminary communications that may pass between parties before a definite offer is made.

It is true that at times the distinction between an offer and an invitation to treat is hard to draw but the intention of the person making the statement under consideration must be considered.

From the above definitions, it is clear that the defendant's advertisement was an invitation to treat and not an offer. The advertisement was made to the general public. Surely the defendant could not have intended to contract with as many people as would complete the application form, pay the non-refundable fee of Kshs.1,000/= and the deposit of 10% of the purchase price. The defendant has a limited number of houses at Homa Bay and could not offer more than it could deliver. It is trite law that a newspaper advertisement for property on sale is not an offer but an invitation to treat, unless otherwise stated. I do not agree with Mr. Okoth that there was a mutual mistake by both the plaintiffs and the defendant. The advertisement was clear, just as the terms and conditions contained in the provisional letter of offer.

When the plaintiffs were making their applications, they were aware of the preliminary terms and conditions that had been set by the defendant. I believe in requiring payment of 10% deposit of the purchase price, the defendant wanted to limit the number of non-committed applicants and be left with only serious applicants for consideration. This is not an uncommon pre-qualification practice in modern business transactions.

The defendant's letters of offer were sent out to the plaintiffs around the 25<sup>th</sup> of March, 2008. Each of the defendants accepted the offer in writing, see annexure WLB IV in the defendant's replying affidavit. The time to raise issues about any of the terms in the letter of offer was before acceptance of the same and not long after. A court of law cannot interfere with the freedom of contract exercised by the parties herein. The plaintiffs were aware of the default clause which they are now complaining about before they accepted the defendant's offer. Default clauses are normal in every contract.

Have the plaintiffs established a **prima facie** case to warrant grant of an injunction? The answer is obviously in the negative. A **prima facie** case, as per Bosire, JA, in **MRAO LTD VS FIRST AMERICAN BANK**, is

***“--- more than an arguable case. It is not***

*sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."*

The plaintiffs have not shown that they have a right that is being or is about to be infringed upon by the defendant. I find no merit in the plaintiffs' application and I dismiss the same with costs.

**DATED, SIGNED and DELIVERED at KISII this 26<sup>th</sup> day of September, 2008.**

**D. MUSINGA.**

**JUDGE.**

Delivered in the open court in the presence of:

Mr. Okoth for the Plaintiffs

N/A for the Defendants

**D. MUSINGA.**

**JUDGE**