



Ideal Insurance Brokers Limited v Shady Acres Limited & another (Miscellaneous Application E467 of 2022) [2023] KEHC 17361 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 17361 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E467 OF 2022
DO CHEPKWONY, J
APRIL 28, 2023**

BETWEEN

IDEAL INSURANCE BROKERS LIMITED APPLICANT

AND

SHADY ACRES LIMITED 1ST RESPONDENT

WEST POINTE REALITY LIMITED 2ND RESPONDENT

RULING

1. Before this court is the applicant's notice of motion application dated June 24, 2022 and filed in court on the even date. It is brought pursuant to order 40 rule 2, and order 51 rule 1, both of the [Civil Procedure Rules, 2010](#) and sections 1A, 1B & 3A, all of the [Civil Procedure Act](#). The applicant is mainly seeking the following orders:-
 - a. Spent;
 - b. An order for the injunction do issue restraining the respondent and or its agents and servants from causing any transfer or sale or any alterations whatsoever to all those housing units properties situated in Nairobi erected on LR Nos 209/20735 pending hearing and determination of this application.
 - c. An order for injunction do issue restraining the respondents and or their agents and servants from causing any transfer or sale or any way harassing, intimidating or interfering with the quiet enjoyment of the applicant whatsoever to all those housing units referenced as apartment Nos E3-8, E4-5, E6-10, E8-10, E1-08, E13-9, WO-6, W2-8, W0-8, W6-10, W7-7, W7-8, W7-9, W8-8, W9-1, W9-5, E6-4, W5-5 properties situated in Nairobi erected on LR



Nos 209/20735, under WestPointe Reality Limited and apartment 6.4 in the development known as Twin Oaks pending hearing and determination of this application *inter partes*.

- d. An order for injunction to issue restraining the respondents and or their agents and servants from causing any transfer or sale or any way harassing, intimidating or interfering with quiet enjoyment of the applicant whatsoever to all those housing units referenced as apartment Nos E3-8, E4-5, E6-10, E8-10, E1-08, E13-9, WO-6, W2-8, W0-8, W6-10, W7-7, W7-8, W7-9, W8-8, W9-1, W9-5, E6-4, W5-5 properties situated in Nairobi erected on LR Nos 209/20735, under WestPointe Reality Limited and apartment 6.4 in the development known as Twin Oaks pending hearing and determination of this application *inter partes*.
 - e. That the applicants be granted an order of specific performance in accordance with terms of the joint venture agreement dated May, 2012, and addendum... signed by the parties herein particularly compelling the defendant whether by themselves, its agents, servants, assignees and/or anybody claiming thereunder to execute and deliver up to the applicant or their advocate all completion documents necessary for registration of a transfer of the units referenced as apartments Nos E3-8, E4-5, E6-10, E8-10, E1-08, E13-9, WO-6, W2-8, W0-8, W6-10, W7-7, W7-8, W7-9, W8-8, W9-1, W9-5, E6-4, W5-5 properties situated in Nairobi erected on LR Nos 209/20735, under WestPointe Reality Limited and apartment 6.4 in the development known as Twin Oaks in the applicant's name within 30 days of the order hereof, and in default thereof, the Deputy Registrar of this court to execute the transfer and all the documents necessary for registration of a transfer of the interest in the properties hereof in the name of the applicant.
 - f. That the applicants be granted an order of specific performance in accordance with terms of the joint venture agreement dated May 24, 2012, and addendum signed by the parties therein.
 - g. That the respondent be compelled to give a verifiable account of all the income and profits of the sale of apartments erected on LR Nos 209/20735, under WestPointe Reality Limited.
 - h. That costs of this suit be incurred by the respondent herein.
2. The application is premised on grounds (a) - (h) on the face of the application. It is further supported by the supporting affidavit of Rose Muthoni Mwangi sworn on the date of the application.
 3. The 1st defendant/respondent opposed the application on the basis of the grounds advanced in its replying affidavit sworn on June 30, 2022 by its Managing Director, David Muriuki Mambo.
 4. The brief facts of this case are that the 1st respondent entered into a joint venture agreement (hereinafter referred to as 'JVA') dated May 24, 2012. Being the registered proprietors as lessees of the parcel of land situated in Nairobi being LR Nos 209/12329, 209/12330, 209/12514 and 209/20168 and the 1st respondent, the appellant, a Real Estate Development Company, were desirous of developing the aforementioned parcels and construct therein housing units for sale. The applicant and the 1st respondent then transferred the parcel of land into a special purpose vehicle (SPV) to enable the



- commencement of the project. The special purpose vehicle (SPV) created thereafter was the 2nd respondent herein, Westpointe Reality Limited.
5. The four (4) parcels being Nairobi LR Nos 209/12329, 209/12330, 209/12514 and 209/20168 were amalgamated to create LR Nos 209/20735, whereon the project envisaged under the joint venture agreement aforesaid was constructed.
 6. The parties herein anticipated 100 units and agreed that the profits of any units above the anticipated would be shared at the ratio of 40:60 in favor of the applicant and the respondent respectively.
 7. According to the applicant despite the project having a total of 254 units, hence 154 units being subject to the 40:60% profit distribution, the respondents have refused to oblige with the agreement and have threatened to take units from the applicant's control.
 8. It is further the applicant's case that despite the projects being complete and with the respondents in control of the 19 units, which it continues to manage and receive rent from, they have refused to effect transfer of the said units.
 9. The applicant has made reference to the 1st respondent's letter dated June 21, 2022, stating that it is apprehensive that the units it holds or controls might be offered for sale to innocent third parties. It is further the applicant's case that it may be at risk of losing the said units and that this may happen with total disregard to the joint venture agreement executed between the parties.
 10. The applicant is apprehensive that the respondents are hatching a scheme to unlawfully and unjustifiably dispose of the property currently under her possession without following due process of the law and with utter disregard to the joint venture agreement signed between the parties herein.
 11. On the other hand, the 1st respondent did not dispute the averments at paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of the supporting affidavit filed by the applicant. However, according to the 1st respondent, due to the financial outlay of the project, it was deemed necessary and agreed to by all the directors of the special purpose vehicle, the 2nd respondent herein, *vide* special resolution to pledge property LR No 209/20735 as security and secure the facility in the total sum of Kshs 385,000,000/=. This was supported by minutes of the board of directors of the 2nd respondent and the applicant which have been annexed and marked 'DMM-4'.
 12. The respondent avers that the loan was secured by personal guarantees and indemnities of two directors with each corporate guarantee and indemnitee of the applicant company executing and binding themselves to the tune of Kshs 1,000,000/=.
 13. It is the 1st respondent's case that the repayment of the loan was to be financed through sales of the apartments as undertaken by the borrower/chargee, the 2nd respondent herein.
 14. Further, the 1st respondent avers that the loan had to be rolled over and converted from an overdraft to a loan four (4) times with the express approval and active participation of the applicant and continues to attract substantial interest. The 1st respondent claims that due to the force majeure factor with the onset of covid-19 and closure of the lands office for digitization for a period of 2 years, factors beyond the control of the 1st respondent, sales of the units were adversely affected and constrained the servicing of the loan, registration of leases and charges for buyers financed by the bank, and rendering it inevitable to review the sharing or allocation ratio of the apartments which the parties would have otherwise been entitled to.



15. It is the 1st respondent's contention that following these unforeseen circumstances and in order to redeem the property and the entire project, it initiated a series of meetings with the applicant in which the applicant agreed to surrender 7 of the 19 units for sale to contribute towards the servicing of the loan and interest to save the property from auction by the bank.
16. It is the 1st respondent's case that the orders sought herein cannot issue as the existing charge on the property ranks in priority over any other interest, least of all the interest or claim by the applicant unless and until discharged. It also states that the applicant is aware of this reality as together with the respondents are all joined at the hip in every aspect attaching the property LR No 209/20735 and that the security (original title) of the property is held at the bank.
17. On August 2, 2022, the parties were directed to dispose of the application by way of written submissions. The applicant's submissions are dated October 16, 2019 and were filed in court on the July 12, 2022 whilst the 1st respondent's submissions are dated July 28, 2022.

Analysis and Determination

18. I have carefully read through the notice of motion application and supporting affidavit dated June 24, 2022, the replying affidavit in opposition thereof and the written submissions in support of the respective positions by either party as well as the authorities each has relied on. I find the issues arising for consideration therefrom are:-
 - a. Whether the applicant is entitled to the injunction as sought.
 - b. Whether an order for specific performance can issue in the circumstances of this case.
 - c. Whether the respondent should be compelled to give verifiable account of all the income and profits of the sale of apartments erected on LR Nos 209/20735 under Westpointe Realty Limited.
19. The application is based on order 40 rule 2 and order 51 rule 1 of the *Civil Procedure Rules*.
order 40 rule 2 provides that:-
Injunction to restrain breach of contract or other injury-
 1.
 2. The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.order 51 rule 1 provides that:-
“All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide”.
20. The principles upon which an injunction order may be granted were settled in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358, where Spry, V.P stated as follows:-
“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 be adequately compensated by an award of



damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.

21. It is therefore trite law that for the applicant to be granted an interim order of injunction, the applicant has to show that he has a *prima-facie* case with the chances of success; that it is likely to suffer irreparable loss that cannot be compensated by way of damages, and if the court is in doubt of the above-stated principles, it then ought to decide the case on a balance of convenience. The three requisites must be established in a sequential manner, but more importantly, an applicant must establish that a *prima-facie* case with a probability of success has been demonstrated as this is the one which underscores the consideration of the other two conditions. (See the case of *Nguruman Ltd v Jan Bonde Nielsen & 2 others* [2019]eKLR)
22. A *prima facie* case was clearly set out in the case of *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003]KLR 125, that:-

“In civil cases, a *prima facie* is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but 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.”
23. In interrogating the pleadings and submissions filed by the parties in this case to establish whether the applicant has demonstrated a *prima facie* case with a probability of success, I find that it is not in dispute that the applicant was the registered proprietor s lessees of all those parcels of land situated in Nairobi being parcels known as LR No 209/12329, LR No 209/12330, LR No 209/12514 and LR No 209/20168 while the 1st respondent was a company engaged in Real Estate Development. It is also not in dispute that the applicant and 1st respondent entered into a joint venture agreement (JVA) for purposes of developing the said parcels of land into Apartments which would later be disposed off and the profits/proceeds shared between them. It is further not in dispute that to execute the joint venture agreement, the said parcels of land were amalgamated to form LR No 20/20735 which was then transferred to a special purpose vehicle (SPV) known as West Ponte Realty Limited, the 2nd respondent herein. That it was agreed that the applicants would be given shareholding of 950 shares whilst the directors of the respondent were given directorship having control of the company and its operations.
24. It is the applicants’ case that the project was anticipated to comprise of 100 but it ended up having 254 units which were over and above the anticipated units by 154 units. According to the applicant, it was entitled to 40% profits from the units that were over and above the anticipated units but the respondent has unlawfully refused to enforce and implement the clause in respect of this in the joint venture agreement despite being issued with demand and notices to this effect. That instead, the 1st respondent *vide* a letter dated June 16, 2022, unilaterally directed the applicant to relinquish a total of seven (7) units to them and later *vide* another letter dated June 21, 2022 notified the applicant that it would move to offer for sale the said seven (7) units, which is against the executed agreements between the parties.
25. It is the applicants submissions that the aforementioned properties and apartments whose original title deeds and company instruments are at great risk of being disposed off without according it the rights accruing from the joint venture agreement, hence the need for the court to order or prohibit



the disposal of any of the properties pending the hearing and determination of the suit. Also, that the respondent's cations do not conform and are in utter abuse of the joint venture agreement.

26. The 1st respondent on the other hand, while not disputing that the property LR No 209/20735 is registered in the name of the 2nd respondent, in which both the directors of the applicant and the 1st respondent are director and passed special resolutions and executed both personal and corporate guarantees to charge the property to the bank to secure financing of the project, has submitted that the loan has been rolled over and converted from an overdraft to loan four (4) times with the active participation of the applicant and they cannot feign ignorance of the charge over the property LR No 209/20735 registered in the name of the 2nd respondent as exhibited by letters dated April 24, 2017, December 22, 2017, August 31, 2018, August 4, 2020 and February 28, 2022, which were approved of and executed by the applicant, and both respondents herein.
27. It is the respondents' further submissions that the applicant consented to the release of 7 units out of the 19 units (see letter annexed as 'Dmn 9'). The respondents therefore contend that the applicant having been aware of every development and the status of the project, it would be prejudicial not only to the respondents but to 3rd parties such as the bank whose charge ranks in priority over any interest or claim to issue blanket order restraining them from the sales.
28. In considering the arguments by the parties, this court acknowledge the existence of joint venture agreement as between the parties herein, a copy of which has been adduced as evidence herein, marked as 'Dmm-6'. It is therefore the parties obligation to be bound by the terms of the said agreement as per the clauses set out therein. In this respect, this court associates with the holding in the case of [Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd](#) [2017]eKLR, where the court stated that:-

“We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contract between parties. They are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded.”
29. Therefore, the questions of whether or not the terms of the agreement between the parties herein have been breached and the risk of loss to be suffered by each party are issues that request further interrogation by the court. This can only happen if the parties avail evidence before court to enable a proper interpretation of their intentions in the joint venture agreement and or further addendums or communication between them.
30. In the case of [Savings and Loans \(Kenya\) Limited v Mayfair Holdings Limited](#) [2012]eKLR, the court stated that:-

“...therefore the intention of the parties should be construed with reference to the object and the terms of the agreement. If the words used in the agreement are clear they should be construed in their ordinary meaning so as to establish the intention of the parties”.
31. On the issue of there being a likelihood of the applicant suffering irreparable loss if the injunction sought is not granted, it is this court's view that a *prima facie* case having been established on the basis of the joint venture agreement between them which is yet to be complied with, it is this court's view that any subsequent actions a plausible risks to the applicant who is owed a duty of care and good faith by the respondent.
32. Having established that the applicant has demonstrated a *prima facie* case with a probability of success and the risks it is likely to suffer if an injunction is not granted, this court takes the liberty to find that the



balance of convenience in this case has with granting the injunction sought. This is because the same is based on an agreement between the parties which then makes it a strong and straightforward case.

33. The next question is whether orders of specific performance can issue at interlocutory stage. The applicant has sought for an order of specific performance on the basis of the terms of the joint venture agreement dated May 24, 2012 and the further addendums signed by the parties herein. The applicant has also submitted that the prayer is justified in view of the admission by the respondent that Kshs 385,000,000/= was advanced as a loan facility and that indeed 254 units were constructed and so far 219 units have been sold to 3rd parties meaning they have been paid the monies and ought to have settled the loan acquired fully.
34. In opposing this, the respondents have submitted that if such order issues at this stage, then the case will have been determined without interrogating the legal obligation imposed by the charge in favour of the bank which is still in force. They have also submitted that both parties stand to suffer substantial loss and frustration if the objective of the joint venture agreement between them.
35. This court has considered the submissions filed by both the applicant and the respondents and placed reliance on the case of *Reliable Electronical Engineering Ltd v Mantrac Kenya Limited* [2006]eKLR, where Justice Maraga (as he then was) stated that:-

“specific performance like any other equitable remedy is discretionary and the court will only grant it on well laid principle.... The jurisdiction of specific performance is based on the existence of a valid enforcement contract”.
36. Courts have time and again cautioned themselves against granting orders of specific performance at an interlocutory stage because like a mandatory injunction, such order has the effect of determining a case with finality. (see case of *Rafique Ebrahim v William Ochanda T/A Ochanda & Company Advocates* [2013]eKLR).
37. The parties herein do not deny that they entered into a joint venture agreement between themselves for the construction and development of off-plan property. They also do not dispute any contents therein thereby giving the court express authority to rely on the end contract. In their submissions, the respondents have argued that there is a pending loan which is yet to be paid and produced letters in support thereof. However, it is worth-noting that despite the outstanding loan, the letters produced as evidence herein are not comprehensive evidence to prove the claims by either of the parties herein. There is need for further evidence to be adduced by the parties in this case so as to determine the issues between them conclusively and with finality.
38. In light of the aforesaid having carefully analysed and considered, the material presented by either party in this case, the following orders issue:-
 - a. The notice of motion application dated June 24, 2022 be and is hereby allowed in terms of prayers:-
 - i. That pending the hearing and determination of this matter, an order for injunction be and is hereby issued restraining the respondent and or its agents and servants from causing any transfer or sale or any alterations whatsoever to all those housing units properties situate in Nairobi erected on LR Nos 209/20735.
 - ii. That pending hearing and determination of this matter, an order of injunction be and is hereby issued restraining the respondents and or their agents and servant from causing any transfer or sale or any way harassing, intimidating or interfering with the



quiet enjoyment of the applicant whatsoever to all those housing units referenced as apartments Nos E3-8, E4-5, E6-10, E8-10, E1-08, E13-9, WO-6, W2-8, W0-8, W6-10, W7-7, W7-8, W7-9, W8-8, W9-1, W9-5, E6-4, W5-5 properties situated in Nairobi erected on LR Nos 209/20735, under WestPointe Reality Limited and apartment 6.4 in the development known as Twin Oaks

iii. That pending hearing and determination of this matter, an order of injunction be and is hereby issued restraining the respondents and or their agents and servant from causing any transfer or sale or any way harassing, intimidating or interfering with the quiet enjoyment of the applicant whatsoever to all those housing units referenced as apartments Nos E3-8, E4-5, E6-10, E8-10, E1-08, E13-9, WO-6, W2-8, W0-8, W6-10, W7-7, W7-8, W7-9, W8-8, W9-1, W9-5, E6-4, W5-5 properties situated in Nairobi erected on LR Nos 209/20735, under WestPointe Reality Limited and apartment 6.4 in the development known as Twin Oaks

b. The notice of motion application dated June 24, 2022 be and is hereby declined in terms of prayers Nos (6), (7) and (8) therein.

c. Costs of the application to be in the cause.

39 It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS28TH ... DAY OF ...APRIL... 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

M/S Mukobi holding brief for Mr. Waruiru for Applicant

Mr. Wanyaga holding brief for Mr. Onduso for Defendant

Court Assistant – Mwenda/Sakina

