



REPUBLIC OF KENYA



**Chirag Builders Ltd v Greenview Developers Ltd (Civil Case E391 of 2020)
[2021] KEHC 84 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 84 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E391 OF 2020
MW MUIGAI, J
SEPTEMBER 23, 2021**

BETWEEN

CHIRAG BUILDERS LTD APPLICANT

AND

GREENVIEW DEVELOPERS LTD RESPONDENT

RULING

PLAINTIFF'S CASE

1. The Plaintiff's claim is that the Defendant engaged the Plaintiff to carry out construction and development of 11 residential town houses on suit property 1870/VIII/268 Nairobi Peponi, Villa 64 Residential Apartments.
2. The Plaintiff/Applicant engaged subcontractors to carry out certain works on the building in performance of its contractual obligations arising out of agreement between Defendant and Plaintiff.
3. The Plaintiff/Applicant handed over the site after completion of the construction of 11 residential Apartments and they were handed over to the Defendant /Respondent as per the attached Valuation by the Quantity Surveyor and as confirmed by the Architect.
4. The Project Architect, M/S Castles Architecture Co Ltd & Project Quantity Surveyor M/S Tower Cost Consultants valued the works and issued Final Accounts Ksh10, 533,657.78/-
5. Despite demands for settlement of the outstanding amount, the Defendant/Respondent failed to remit the outstanding amount to the Plaintiffs.
6. The Plaintiff/Applicant's financial means or free assets that are attachable are unknown other than LR 1870/VIII/268 that comprises of 11 Villas dubbed Peponi Villa 64 Residential Apartments. The Plaintiff/Applicant learnt that the Defendant is in the process of disposing the said Apartments and



intends to sell Apartment No 10 while the Defendant has allocated Apartments Nos 1,3 & 11 to Directors of the Company and disregarded the Plaintiff/Applicant's claim.

7. Therefore, the plaintiff sought interim injunction to withhold the sale or transfer of Units/Apartments Nos 1, 3, 10 & 11 until hearing and determination of the suit inter partes.

DEFENDANT'S CASE

8. The Defendant filed Replying Affidavit and opposed the application on the following grounds;
9. The Defendant confirmed ownership of suit property IR 204926 LR 1870/VIII/268 Peponi View Villas and deposed that the Plaintiff Company deals with development of real estate and selling Apartments for profit.
10. One of Directors, Mr. Suresh Fatania, is Director in both Plaintiff & Defendant Companies. The Plaintiff & Defendant have worked together over many years. However, the Plaintiff's directors, Mr. Suresh Fatania, forcefully occupied Unit/Villa/House No 1 of the suit property.
11. In an attempt to evict him, the Defendant/Respondent filed HCCOM No 370 of 2020- Greenview Developers Ltd vs Suresh Mohanlal Fatania which was pending Ruling on 15th March 2021.
12. The Plaintiff herein instituted this suit to defeat justice and was/is malicious and the Court should be a Court of justice and should not be used to settle personal scores. If the Court upholds the interim orders granted it will violate the Respondent's right to property as the House No 1 is for sale.
13. The Respondent disputes wholly the debt as claimed by the Plaintiff.
14. The outstanding amount if proven will be paid by the Defendant Company as it is on sound financial status.
15. The Defendant needs to sell the said house so that the Respondent remains afloat in these harsh economic times.

DETERMINATION

16. The Court considered written submissions by both Plaintiff and Defendant. The issue for determination is whether the Temporary injunction granted on 2nd October 2020 should be set aside or vacated?
17. The principles of granting an injunction are settled in the celebrated case of *Giella –vs- Cassman Brown and Co. Ltd* the court set out the principles for Interlocutory Injunctions; these principles are:-
 - i. The Plaintiff must establish that he has a prima facie case with high chances of success;
 - ii. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;
 - iii. If the court is in doubt, it will decide on a balance of convenience.
18. Also, In the case of *Mrao Limited –vs- First American Bank of Kenya Limited*, the court stated as follows;

“A prima facie case 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 the applicant's case upon trial. That is clearly a standard which is higher than that of an arguable case.”



19. The Plaintiff/Applicant's case is that there is money owed by and from the Defendant from construction and development of 11 Units on 1870/VIII/268 Peponi View Villas which were completed and handed over to the defendant. The Plaintiff annexed copy Final Account of proposed Residential Houses on Plot LR No 1870 /VIII/120 PEPONI for GREENVIW DEVELOPERS LTD BY QUANTITY SURVEYORS as at February 2017 showing breakdown of the outstanding amount.
20. The outstanding debt was certified through the Final Certificate signed by Quantity Surveyor and Project Architect is Ksh101,533,314.92/-
21. On the other hand , the Respondent disputes the outstanding debt and demands that the dispute be determined upon hearing of the suit *inter partes*.
22. The Units have been sold and there are the 4 Units remaining , the Plaintiff does not know of any other assets of the Defendant, that can be attached,. The Defendant confirms that the Housing project was completed and handed over by the Plaintiff to the Defendant. The Security for Costs application cannot be considered at this stage in the proceedings. To safeguard its right to payment of outstanding debt by the Defendant, the Defendant prefers a lien over the remaining Units by provision of an Injunction.
23. The Defendant/Respondent does not dispute that the project 11Units are complete handed over to the Company by the Plaintiff and is in the process of disposing the Units by sale. Apart from denying the debt wholly, the Defendant does allude as to the reasons ,why, the amount outstanding is denied all or any part of it that is admitted and why the rest is contested. No attempts have been made to rope in the Architect to clarify the amount approved for payment nor the Quantity Surveyor to indicate why the amount was certified. The Defendant cannot merely deny the debt without further action.
24. From the 2 versions above, the court finds that there is need to preserve/keep and restore the 4 Units 1, 3, 10 & 11 so as to retain the subject-matter of the dispute pending hearing and determination of the suit *inter partes*. Therefore, the injunctive order is necessary as pending the outcome of the Court proceedings, the Plaintiff shall have no remedy if all Units are sold and proceeds are utilized if it is found or /held after Trial that the monies are owed to the Plaintiff.

DISPOSITION

1. The injunction granted on 2nd October 2020 is extended and to remain in force pending hearing and determination of the suit *inter partes*.
2. The Parties/Counsel to pursue CMC before DR Commercial & Tax within 30 days
3. Thereafter, the matter may be heard in Any Court within the Division as this Court is on Transfer.
4. The matter shall be heard with HCCOM No 370 of 2020- Greenview Developers Ltd vs Suresh Mohanlal Fatania
5. Each party to bear own Costs

DELIVERED SIGNED & DATED IN OPEN COURT ON 23RD SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE



**CHELANGA ADVOCATE-APPLICANT
K. MBERIA PARTNERS-DEFENDANT
COURT ASSISTANT - TUPET**

