REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

COMMERCIAL CASE NO. 04 OF 2019

BETWEEN

MOSES AGUMBA.....1ST PLAINTIFF/APPLICANT

BERNARD ONYANGO OMORE.....2ND PLAINTIFF/APPLICANT

AND

OGWEDHI PROPERTIES LIMITED.....1ST DEFENDANT/RESPONDENT

OLLERAI INVESTMENT LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

Background

1. The 1st Defendant/Respondent is the registered proprietor of all that property known as **Title No. KISUMU MUNICIPALITY/BLOCK 12/182** (hereinafter referred to as ***the suit property***).

2. By Sale Agreements dated 14.07.14 and 31.07.14, the 1st Defendant/Respondent agreed to sell apartment No. 102 and 105 on the suit property to the 1st Plaintiff/Applicant and 2nd Plaintiff/Applicant respectively for the sum of Kshs. 4,800,000/- together with additional costs of Kshs. 250,000/- for furnishing and Kshs. 200,000/- deposit for pre-operating expenses.

3. The Plaintiffs/Applicants paid Kshs. 2,400,000/- each leaving a balance of a similar sum and other charges which were payable upon completion date which was set as 12.01.15 or 30 days after the date of issue of Certificate of Occupation by the Municipal Council of Kisumu (***now Kisumu County Government***) whichever is later.

3. By a notice dated 18.02.19, the 2nd Defendant/Respondent issued the 1st Defendant/Respondent with a Notice of Sale under section 96 of the Land Act for non-payment of monies due to the 2nd Defendant/Respondent secured by a charge over ***the suit property***.

4. The said notice prompted the Plaintiffs/Applicants to move this court by way of a plaint filed on 09.05.19. They seek among other orders:

> **1) A declaration that the charge in favour of the 2nd Defendant registered against Title No. KISUMU MUNICIPALITY/BLOCK 12/182 is invalid, null ab initio and of no legal effect**
>
> **2) The 2nd Defendant be strictly enjoined and restrained whether by itself or by their servants, agents or otherwise howsoever from selling or otherwise disposing of or in any manner interfering with the 1st Defendant's possession of all that property known as Title No. KISUMU MUNICIPALITY/BLOCK 12/182**
>
> **3) The 1st Defendant do specifically perform its Agreements with the Plaintiffs dated 14.07.14 and 31.07.14**

Application

5. Instantaneously with the plaint, the Plaintiffs/Applicants on 09.05.19 filed a notice of motion dated 07.05.19 which is the subject of this ruling, seeking 5 orders 3 of which have been spent. The pending prayers are for orders **THAT**: -

a) Spent

b) Spent

c) Spent

d) Pending the hearing and determination of this suit, be strictly enjoined and restrained whether by itself or by their servants, agents or otherwise howsoever from selling or otherwise disposing of or in any manner interfering with the 1st Defendant's possession of all that property known as Title No. KISUMU MUNICIPALITY/BLOCK 12/182

e) Costs of this application be provided for

6. The application is based on the grounds among others that the 1st Defendant/Respondent has failed to perform any of its obligations under the sale agreements with the Plaintiffs/Applicants but also without the Plaintiffs' knowledge and consent, it granted a Charge in favour of the 2nd Defendant/Respondent, a Charge whose validity the Plaintiffs contest

7. The application is supported by two affidavits sworn by the Plaintiffs/Applicants on 07.05.19 in which they reiterate the grounds on the face of the application.

8. In response to the application, the 1st Defendant/Respondent on 03.10.19 filed a notice of preliminary objection dated 02.10.19 challenging the jurisdiction of this court to entertain this suit on the ground that Clause L of the Agreements for Sale dated 14.07.14 and 31.07.14 provides for reference of all claims and disputes arising from the agreements herein to arbitration.

9. The application was also opposed by the 2nd Defendant/Respondent by way of a replying affidavit sworn on 08.07.19 by its director Francis Owiti Ogutu (***Owiti***). He avers that the application is defective for not specifying the Orders of which it is grounded and for not having any relationship with the prayers sought in the Plaint. He further avers that by a Joint Venture and Shareholders Agreement dated 03.04.12, Oltepesi Properties Limited and Kisumu Parkview Resorts Limited incorporated the 1st Defendant/Respondent as the special purpose vehicle for development of the ***suit property***. He also avers that 2nd Defendant/Respondent by a Loan Note Instrument dated 26.01.16 took over the HFCK loan advanced to the 1st Defendant/Respondent, paid it off and HFCK discharged the charge it had registered in respect of the loan facility and subsequently the 2nd Defendant/Respondent issued a loan facility of Kshs. 154,545,455/- to assist the 1st Defendant/Respondent complete its development on the ***suit property*** that had stalled. The facility was repayable on 25.01.18 but the 1st Defendant/Respondent defaulted.

10. Owiti further avers that the 1st Plaintiff/ Applicant who is a director of Kisumu Parkview Resorts Limited as is evident from an extract of company records dated 27.06.19 and email correspondences between Oltepesi Properties Limited and Kisumu Parkview Resorts Limited regarding the facility has been aware of the default on the part of the 1st Defendant/Respondent for which the 2nd Defendant/Respondent has issued several Statutory Demands that have not been honoured as a result of which it has sought to exercise its rights under the charge to realise the Facility.

11. Further to the foregoing, ***Owiti*** avers that the Applicants/Plaintiffs are not owners of any units on the ***suit property*** due to their breach of the Sale Agreements by their failure to pay the balance of the purchase price by 12.01.15 or 30 days after 10.11.15 when a Certificate of Occupation was issued by the Municipal Council of Kisumu (now Kisumu County Government).

12. It has additionally been averred for the 2nd Defendant/Respondent that it is not true that the Applicants/Plaintiffs became aware of the facility advanced to the 1st Defendant/Respondent in or around the end of February, 2019 since on or about 05.07.16, they entered into a Share Subscription Agreement with the 1st Defendant/Respondent in which the Applicants/Plaintiffs at Clause E acknowledged that the 1st Defendant/Respondent was indebted to the 2nd Defendant/Respondent for the sum of Kshs. 154,545,454/-. In addition, it has been averred that the Applicants/Plaintiffs have been aware that the ***suit property*** is encumbered from as early as 20.05.16 since an official search of even date filed by the 1st Applicant/Plaintiff as ***MO2*** confirms that fact.

13. In response to Applicants/Plaintiffs' averments that the Defendants/Respondents did not seek their consent before entering into an agreement for the loan facility, the 2nd Defendant/Respondent avers that it was under no obligation in law to seek the consent of or to notify the buyers of units of the ***suit property*** and further that its registered right ranks in priority to the unregistered rights of the Applicants/Plaintiffs.

14. The 2nd Defendant/Respondent likewise challenged the jurisdiction of this court to entertain this suit on the ground that Clause L of the Agreements for Sale dated 14.07.14 and 31.07.14 provides for reference of all claims and disputes arising from those agreements to arbitration.

15. To conclude, it has been averred on behalf of the 2nd Defendant/Respondent that the Applicants/Plaintiffs have no basis to restrain the 2nd Defendant/Respondent as the latter has no contractual relationship with them.

16. I have carefully considered the application in the light of the affidavits on record, the preliminary objection and the submission by

counsel for the parties concerning the following two main issues for determination as stated hereunder.

1. Whether this court has jurisdiction to entertain this suit

17. The Plaintiffs/Applicants acknowledge that Clause L of the Agreements for Sale dated 14.07.14 and 31.07.14 between them and the 1st Defendant/Respondent provide for reference of all claims and disputes arising from those agreements to arbitration. The Plaintiffs/Applicants however assert that 1st Defendant/Respondent forfeited its right to apply for and have these proceedings stayed or the matter referred for arbitration for the reason that it has entered appearance, filed pleadings and participated in the proceedings. In support of this contention, the Plaintiffs/Applicants have placed reliance on the Arbitration Act No. 4 of 1995 which provides at Section 6 that:

> **(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters an appearance or files any pleading or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds -**
>
> **(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or**
>
> **(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."**

18. I have considered the Court of Appeal decision in the case of **Charles Njogu Lofty v Bedouin Enterprises Ltd [2005] eKLR** where it concurred with the views of Githinji J in **Civil Case No. 1756 of 2000, Bedouin Enterprises Ltd–vs- Charles Njogu Lofty and Joseph Mungai Gikonyo T/A Garam Investments *Civil Case No. 1756 of 2000***, and stated that:

> **"We respectfully agree with these views so that even if the conditions set out in paragraph (a) and (b) of section 6(1) are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof for arbitration if the application to do so is not made at the time of entering an appearance, or if no appearance is entered, at the time of filing any pleading or at the time of taking any step in the proceedings"**

19. From the foregoing, I am persuaded that the Respondents/Defendants contention that the proceedings in this matter ought to be stayed and the case referred for arbitration does not lie for the reason that that right was forfeited when the Defendants/Respondents entered appearance, filed pleadings and participated in the proceedings.

20. The holding in **Diocese of Marsabit Registered Trustees v Technotrade Pavilion Ltd [2014] eKLR** concerning the application of Article 159(2) (d) of the Constitution and Section 59 C (1) of the Civil Procedure Act (Cap 21 Laws of Kenya) cannot come to the aid of the 1st Defendant/Respondent for the reason that a party desirous of taking advantage of an arbitration clause in a contract has a duty to promptly apply for stay of proceedings and make a request to have the matter referred to arbitration. A party such as the 1st Defendant/Respondent who fails to adhere to the law as specified under the provisions of section 6(1) of the Arbitration Act forfeits his right to apply for and have the proceedings stayed or matter referred to arbitration.

21. Further to the foregoing, the 2nd Defendant/Respondent is not a party to the Agreements for Sale dated 14.07.14 and 31.07.14 which provide for reference of all claims and disputes arising from those agreements to arbitration and there is no dispute between it and the Plaintiffs/Applicants with regard to the matters agreed to be referred to arbitration.

22. Consequently, this court declines to grant the indolent Defendants/Respondents an opportunity to circumvent the desire and right of the Plaintiffs/Applicants of availing themselves of the judicial process of the court. The Preliminary Objection is accordingly overruled.

2. Whether an injunction ought to issue against the Defendants/Respondents

23. Before I delve into any discussion on this issue, I have considered 2nd Defendant/Respondent contention that the orders sought at paragraph (d) of the application are incapable of being granted since it is sought against unknown parties over unknown properties. I have considered the decisions in **Sheikh Ali Mohamed Mwinzagu v Abdulkadir Hassa Abdulaziz [2019] eKRL** and **Alken Connections Limited V Safaricom Limited & 2 Others [2013] eKLR** where the court cited **De Leu vs. Muteshi [1995-1998] 1 EA 25** and **Gatharia K Mutitika vs. Baharini Farm Ltd [1982-88] 1 KAR 863** which emphasized that "**in so far as possible, a person should know with complete precision what it is they are required to do or abstain from doing and should be as definite, clear and precise in its terms as possible, so that there may be no reason or excuse for misunderstanding or disobeying it; and when practicable, it should plainly indicate to the defendant all of the acts which he is restrained from doing, without calling on him for inferences about which persons may well differ"**.

24. Whereas it is true that the orders sought at paragraph (d) of the application are sought against unknown parties, I have no doubt in my mind that that was a typographical error and that the prayers are directed at the Defendants/Respondents herein.

25. Now back to the 2nd issue for determination, any discussion on temporary injunctions is not complete without a reiteration of the requirements for grant of injunction as set-out in **Giella v Cassman Brown & Co. Ltd 1973 E.A. 358** 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."**

26. The principles on which the courts will grant an injunction were restated by the Court of Appeal in **Nguruman Limited V. Jan Bonde Nielsen & 2 Others, Ca No. 77 Of 2012**, together with the mode of their application as follows:

> **"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**
>
> **(a) establish his case only at a prima facie level,**
>
> **(b) demonstrate irreparable injury if a temporary injunction is not granted, and**
>
> **(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.**

27. These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86**).

28. In support of the application for injunction, the Plaintiffs/Applicants contend that they have paid, to the 1st Defendant/Respondent, a substantial consideration for the purchase of the apartments and that it was unconscionable for the Defendants/Respondents not to notify them of their intention to create a security over the suit property prior to the creation of any such charge when they knew of the Plaintiffs/Applicants' beneficial interest.

29. On those grounds, the Plaintiffs/Applicants contend that they have established a *primafacie* case that there exists a right which has been infringed by the Defendants/Respondents and in support have placed reliance on **Mrao Ltd Vs First American Bank of Kenya and 2 others [2003] eKLR.** Reliance has also been placed on **American Cyanamid vs Ethicon Limited [1975] AC 396** where Lord Diplock stated that "**an application for an interlocutory injunction is to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right".**

30. Plaintiffs/Applicants further contend that having established a *primafacie* case, they need not prove the other elements in **Giella versus Cassman Brown** (above) and have relied on **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society** (above) where the Court of Appeal held at page 89 as hereunder:

> **"The sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt, it will decide the application on a balance of convenience……These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt, then the third condition can be addressed."**

31. The 2nd Defendant/Respondent on the other hand submitted that the orders sought in the application do not mirror the main prayers in the Plaint and ought to be rejected. In support thereof, reliance was placed on **Sebastian Asembo Opaka v Vijaykumar Shamji Patel & 2 others [2013] eKLR**.

32. Concerning the merits of the application, 2nd Defendant/Respondent contended that the Plaintiffs/Applicants had not met the conditions for granting an injunction in **Giella –vs- Cassman Brown** (above) and more specifically a *primafacie* case with a probability of success and in support thereof relied on **Mrao Ltd Vs First American Bank of Kenya and 2 others** (above); **Kenya Commercial Finance Co. Ltd V. Afraha Education Society**(above); **American Cyanamid vs Ethicon Limited** (above) and **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR.**

33. The Court of appeal in the **Mrao Limited case** (above) interpreted the condition as to prima facie case. It held:

> **"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case". It is a case which on the material presented to court; a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the other party as to call for an explanation or rebuttal from the latter."**

34. In this case, there's undisputed evidence that the Plaintiffs/Applicants paid to the 1st Defendant/Respondent Kshs. 2,400,000/- each leaving a balance of a similar sum and other charges which were payable upon the completion date which was set as 12.01.15 or 30 days after 10.11.15 when a Certificate of Occupation was issued by the Municipal Council of Kisumu (***now Kisumu County Government***).

35. The evidence on record discloses that to date, 4 years since Certificate of Occupation was issued by the Municipal Council of Kisumu (***now Kisumu County Government***), the Plaintiffs/Applicants have not paid the balance of the purchase price and other agreed charges. They are truly indebted to the 1st Defendant/Respondent and evidently in breach of the Agreements for Sale.

36. On the material presented to court therefore, the Plaintiffs/Applicants have not been demonstrated a *prima facie* case with a probability of success.

37. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. But just in case I am

wrong, I have taken the trouble to consider these two requirements. The 2nd Defendant/Respondent asserts that the Plaintiffs/Applicants have not demonstrated that any loss that they are likely to suffer cannot not be compensated by an award for damages and reliance was placed on **Nguruman Limited v Jan Bonde Nielsen & 2 Others**(above) where the Court of Appeal held that:

> **If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage.**

38. Further submission on this point was based on the decision in **Nedim Mohamed Ibrahim v Ancient Inland Seas Limited & 2 others [2019] eKLR** where the court held that disposal of properties held in trust would not cause irreparable loss since the said properties have a value attached to them and an award of damages would compensate for any loss suffered.

39. As duly pointed hereinabove, the Plaintiffs/Applicants paid to the 1st Defendant/Respondent Kshs. 2,400,000/- each. The value of the apartments that are the subject of the Agreements for Sale between them and the 1st Defendant/Respondent is quantifiable and they are therefore unlikely to suffer any loss that damages cannot compensate.

40. Concerning the balance of convenience, the 2nd Defendant/Respondent submitted that the harm caused to it through an injunction far outweighs the harm which the Plaintiffs/Applicants would suffer for the reason that the overriding interests at Section 28 of the Land Registration Act No. 3 of 2012 are not available to the Plaintiffs/Applicants and further that the 2nd Defendant's /Respondent's right which has been duly registered and secured by the charge ranks in priority to the Plaintiffs/Applicants interests. Reliance was placed on **Phaedra Maritime S.A. & Another V the Owners of the Motor Vessel "Star 7" & Another [2010] eKLR** where the court cited a passage from ***Halsbury's Laws of England***, 4th ed. (1983), Vol. 43, at para.143: **THAT**

> **"The rights of unregistered mortgagees are postponed to those of registered mortgagees, even though the date of the unregistered mortgage is antecedent to that of the registered mortgage, and even though the existence of the unregistered mortgage was known to the registered mortgagee when he took his mortgage. The rights of the unregistered mortgagee are also postponed to those of a purchaser in good faith for value without notice from the legal owner, and to those of all persons with prior equities".**

41. The 1st Plaintiff/ Applicant has not denied that he is a director of Kisumu Parkview Resorts Limited as this is evident from an extract of company records dated 27.06.19. He has similarly neither denied being aware of the email correspondences between Oltepesi Properties Limited and Kisumu Parkview Resorts Limited regarding the Facility nor has he denied that he has been aware of the default on the part of the 1st Defendant/Respondent for which the 2nd Defendant/Respondent has issued several Statutory Demands that have not been honoured as a result of which it has sought to exercise its rights under the charge to realize the Facility.

42. Further to the foregoing, there is undisputed evidence that Applicants/Plaintiffs have been aware that the ***suit property*** is encumbered from as early as 20.05.16 since an official search of even date they filed as ***MO2*** confirms that fact. Additionally, the Applicants/Plaintiffs on or about 05.07.16 entered into a Share Subscription Agreement with the 1st Defendant/Respondent in which the Applicants/Plaintiffs at Clause E acknowledged that the 1st Defendant/Respondent was indebted to the 2nd Defendant/Respondent for the sum of Kshs. 154,545,454/-.

43. Without doubt, the Applicants/Plaintiffs assertion that they became aware of the charge over the ***suit property*** in favour of the 2nd Defendant/Respondent in or around February 2019 is not factual. The Applicants/Plaintiffs have certainly come to the court with unclean hands and by their conduct, I find that they are undeserving of an equitable remedy.

44. As regards the Applicants/Plaintiffs' averments that the Defendants/Respondents did not seek their consent before entering into an agreement for the loan facility, I am in agreement with the 2nd Defendant/Respondent that it was under no obligation in law to seek the consent of or to notify the Applicants/Plaintiffs who are buyers of units and not owners of the ***suit property***.

45. And for the reason that the registered right of the 2nd Defendant/Respondent ranks in priority to the rights of the Plaintiffs/Applicants, I am persuaded that the balance of convenience tilts in favour of not granting an order to restrain the 2nd Defendant/Respondent from exercising its rights under the charge to realize the ***suit property***.

DISPOSITION

46. From the foregoing analysis, I have come to the conclusion that the Plaintiffs/Applicants have not raised any arguable point on which they would be entitled to this court's exercise of discretion in their favor. In the end, the notice of motion dated 07.05.19 filed on 09.05.19 fails and is dismissed with costs to the Defendants/Respondents.

DELIVERED AND SIGNED IN KISUMU THIS 28th DAY OF January, 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistants - Amondi/Okodoi

For Plaintiffs/Applicants - N/A

For 1st Defendant/Respondent - Ms. Kemboi hb for Ms. Kimenchu

For 2nd Defendant/Respondent - Ms. Omondi hb for Mr. Omondi