



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 160 OF 2015**

**LAFEY CONSTRUCTION CO. LIMITED ..... PLAINTIFF**

**VERSUS**

**PRISM INVESTMENTS LIMITED ..... DEFENDANT**

**R U L I N G**

1. The Application herein is a Notice of Motion Application dated 26<sup>th</sup> March 2015, and filed in Court on 27<sup>th</sup> March, 2015. It is supported by the grounds on the face of it and the Affidavit sworn by **MAHAMUD KHALIF** dated 26<sup>th</sup> March 2015 and a further affidavit dated 13<sup>th</sup> November 2015.

2. The Application is seeking for orders that:

***This Application be certified urgent and heard ex parte in the first instance.***

***Pending the inter partes hearing and determination of this application;***

***The Defendant under penalty of perjury do file in Court within three (3) days of service of this order and undertaking under Seal and on oath/ affirmation confirming that the Defendant is holding any two (2) units of four (4) bed roomed houses/units on L.R. No. 7149/139 otherwise known as the Shaba Village Housing project in Trust for the Plaintiff and in accordance with clause 4 of the Agreement date 22<sup>nd</sup> September 2014.***

***In the alternative to (a) above and in the event that the Defendant has sold or otherwise disposed of the two (2) units of 4 bed roomed houses/units on L.R. No. 7149/139 otherwise known as the Shaba Village Housing project, the Defendant be and are hereby required to deposit in Court within ten (10) days of service of this order sum of Kenya Shillings Twenty Seven Million (Kshs.27,000,000 being the equivalent of the agreed value of the two (2) units of bed roomed houses/units on L.R. No. 7149/139 accordance with clause 4 of the Agreement dated 22<sup>nd</sup> September 2014.***

***In default, attachment before judgment do issue forthwith against the Defendant for the sum of Kenya Shillings Twenty Seven Million (Kshs.27,000,000)***

***That pending the hearing and determination of this suit:***

***An interim injunction do issue restraining the Defendant whether by itself, its directors, shareholders, servants and/or agents, from selling, transferring or alienating ownership of any two (2) units of 2 bed roomed houses/units on L.R. No. 7149/139 otherwise known as the Shaba Village Housing Project.***

***In the alternative to (a) above and in the event that the Defendant has sold or otherwise disposed of the two (2) of 4 bed roomed houses/units on L.R. No. 7149/139 otherwise known as the Shaba Village Housing Project the Defendant be and are hereby required to deposit in to a joint interest earning bank account in the names of Plaintiff and the Defendant and/or their respective nominated agents the sum of Kenya Shillings Twenty Seven Million (Kshs.27,000,000) being the equivalent of the agree value of the two (2) units of 4 bed roomed houses/units on L.R No. 7149/139, within ten (10) days.***

***That in default:***

***Attachment before judgment do issue forthwith against the Defendant for the sum of Kenya Shillings Twenty Seven Million (Kshs.27,000,000).***

***The Honourable Court be pleased to order the Defendant's principal director(s) (one Mr. KENNEDY LOSUK) who is a National of South Sudan to deposit his passport in Court pending the hearing and determination of this suit.***

***Such further or alternative relief as this Honourable Court may deem fit in the circumstance.***

***Costs of this application be provided for.***

3. The Applicant's case is that, by an Agreement dated 15<sup>th</sup> July 2014, the Defendant engaged the Plaintiff as its Principal contractor for development of a housing project commonly referred to as "**Shaba Village Housing Project**" on the property known as L.R. No. 7149/139 within Nairobi. Subsequently, by a valid and binding Agreement dated 22<sup>nd</sup> September 2014, the Plaintiff and Defendants, through its authorized agent, mutually negotiated and agreed to terminate the construction agreement date 15<sup>th</sup> July 2014 on the conditions that:

***The Defendant would pay the Plaintiff Kenya Shillings Twenty Five Million (Kshs.25,000,000) in consideration of early termination of the said agreement.***

***Of this sum, Kenya Shillings Twenty Million was payable immediately upon signing the agreement dated 22<sup>nd</sup> September 2014.***

***Kenya Shillings Five Million was to become due and payable at the end of November 2014.***

***The Defendant would, in addition, offer the Plaintiff two (2) units of four (4) bed rooms houses in the Shaba Village Housing Project, cumulatively valued at Kenya Shillings Twenty Seven Million (Kshs.27,000,000) as part settlement of retention moneys due to the Plaintiff.***

***The balance of the value of retention money, a sum of Kenya Shillings Ten Million (Kshs.10,000,000) would be paid to the Plaintiff on or before the end of January 2015.***

4. Upon finalization and payments made accordingly, each party would stand discharged from any and all liability under the agreement of 15<sup>th</sup> July 2014. In consideration of the same, the Plaintiff agreed and surrendered possession of the construction site to the Defendant. The

Defendant was to meet its obligations within the timeline agreed in the Agreement of 22<sup>nd</sup> September

2014.

5. The Defendant, then paid Kenya Shillings Twenty Million (Kshs.20,000,000) less withholding tax and ignored, failed and/or neglected to comply with the rest of the terms of the agreement, as stated above.

6. In further breach of the said Agreement, the Defendant failed to remit the actual withholding tax certificate to the Plaintiff's verification, failed to pay the Kenya Shillings Five Million (5,000,000) when due and payable at the end of November 2014, and failed to transfer the two units of houses referred herein, or in the alternative a sum of Kenya Shillings Twenty Seven Million (27,000,000) lieu of the two units, and the balance of the value of retention money Kenya Shillings Ten Million on or before the end of January 2015. On the 12<sup>th</sup> February 2015.

7. The Plaintiff then served upon the Defendant, a pre-action demand, whereupon, the Defendant paid the Plaintiff Kenya Shillings Fifteen Million (Kshs.15,000,000) on 19<sup>th</sup> February 2014 being a sum due in respect of the balance of the retention fee of Kenya Shillings Ten Million (Kshs.10,000,000) and Kenya Shillings Five Million (5,000,000) as a balance of the sum payable as settlement in dissolving the contract dated 15<sup>th</sup> July 2014. That in disregard of the Agreement the Defendant has in the process of selling, the housing units at Shaba Village Housing Project to a Third party namely Kenya Bankers Association. Hence, the Plaintiff is apprehensive that, unless restrained, the Defendant will dispose off all the housing units. That, the Defendant's Principal and majority shareholder one **MR KENNEDY LODUI** is a South Sudanese National with no known assets or fixed abode in Kenya, and therefore, any decree realized herein may not be satisfied. Hence, the suit herein.

8. The Application was opposed based on the Replying Affidavit sworn by David Lugwong. He deponed that on or about the 16<sup>th</sup> December 2011, the Plaintiff and the Defendant entered into an Agreement for the construction of the proposed Shaba Village consisting of fifty one (51) maisonnettes and eighty (80) Apartments and associated civil works. The said Agreement was contained in the Standard form Agreement prepared by the Joint Building Council of Kenya ("JBC") dated 16<sup>th</sup> December 2011 ("hereinafter the JBC" agreement). The Agreement incorporated in total the FIDIC condition of short form of contract, which is commonly referred to as the **Green Book** (hereinafter the FIDIC conditions").

9. That, in the course of the execution of the Agreement referred to herein, the Plaintiff repeatedly failed to meet its obligations under the said Agreement. In particular

(i) failed to complete rows I and 2 on or before 13<sup>th</sup> January 2014, but completed these rows in March 2014,

(ii) failed to deliver rows 3, 4 and 5 before 10<sup>th</sup> February 2014, failed to deliver rows 6 and 7 before the 10<sup>th</sup> March 2014

(iii) exhibited poor workmanship necessitating the project Architect to issue demand letters and warnings to the Plaintiff demanding payments from the Defendant prematurely (without valuations and certificates from the project architect),

(iv) threatening stoppage of works in default of payment

(v) failing to complete the external works by the 7<sup>th</sup> April 2014 and

(vi) reducing the work force on site from one seventy (170) persons to fifty (50) persons, therefore negatively affecting the Plaintiff's ability to deliver on timelines agreed upon.

10. That as a result of the aforesaid the project was delayed to the financial detriment of the Defendant particularly considering that the project was financed by a third party and on account of which the Defendant was required to make high monthly payments. Thus, the Defendant came to the realization that, the Plaintiff was not in a position to deliver on its obligation under the Agreement. Consequently,

the Plaintiff and the Defendant (through one of its director's) executed an agreement dated 22<sup>nd</sup> September 2014 dated the 15<sup>th</sup> July 2014 to end their Agreement. However, according to the Respondent, the execution of that Agreement was not sanctioned by the Board of the Defendant and the Defendant argues that the terms of that Agreement are not binding on it the Company. The Defendant further avers that the Agreement was fraudulently procured by the Plaintiff, in collusion with the director of the Defendant to the detriment of the Defendant as a Company. Without prejudice, the agreement entered into on 22<sup>nd</sup> September 2014, it was under **mistake** (rendering the Agreement void) as there was no basis in fact or in law in establishing the retention money due to the Plaintiff.

11. It is void because, the final accounts for phase 1 were not prepared by the Quantity Survey and neither did, the Project Architect issue a practical completion certificate, and the snagging defects report was not prepared which report, engenders the Plaintiff to repair such snags prior to final payment of retention money, if any. A certificate of making good defects was not issued by the Project Architect, therefore the determination of retention money was premature.

12. The Respondent, avers that, the proceedings in this matter ought to be stayed pending the issuance of certificates referred to above and the finalization of taking accounts by both the Plaintiff and Defendant (which has in fact already been done). That, any further restraint on the Defendant in dealing with any other units in the project is extremely detrimental as the project is being financed by third parties and any margins are largely dependent on quick turnaround times.

13. The Respondent, further deponed that, the Applicant is clearly abusing the Court process by trying to coerce the Defendant to pay it additional sums with the threat of not only bringing the entire project to a standstill but also obtaining warrants of arrest against the chairman of the Defendant when the entity sued is a limited company. Thus, the intention is to intimidate the Defendant Company.

14. Similarly, the Respondent argued that, Applicant has come to Court with an unclean hands by inter alia failure to disclose to the Court the total payments made to them upon termination of its employment and failure to disclose to the Court that, a final account on the project had not been done to establish the amounts if any, due to either party.

15. The Respondent finally argued that, the Applicant has failed to prove that it has a *prima facie* case with a possibility of success, as established in the case of **Giella –vs- Cassman Brown & Company Limited 1973 E.A 358**. That, the Applicant will not suffer any irreparable damage if the orders sought are not granted, and monetary compensation will be sufficient, as the value of the two units is ascertainable. In any case the Defendant Company is solvent enough to pay the said sum.

16. At the hearing of the Application, the parties agreed to dispose off the Application through filing of written submission, and the Plaintiff filed their submissions on 13<sup>th</sup> November 2015 and the Defendants on 23<sup>rd</sup> November 2015 respectively. I have considered the said submissions and basically they reiterate the facts deponed to by the parties in the Supporting and Replying Affidavits.

17. The Applicant also relied on the case of **Giella –vs- Cassman Brown & Company Limited 1973 E.A 358** and submitted that, they had met all the principles laid therein for grant of an interlocutory injunction. They also relied on the case of **Mrao vs First American Bank of (K) Ltd and 2 others (2003) KLR, 125**, which defined what a prima facie case is. Their final prayer to the Court was to allow the Application as prayed with costs.

18. On the other hand, the Respondent reiterated the contents of the Replying Affidavit to the effect that, the Applicant has not established a prima facie case, and will not suffer any prejudice if the orders sought are not granted. Their final prayer was that, the Application be dismissed with costs to the Defendant as it has no merit.

19. I have considered the entire Application, the grounds, Affidavits in support thereof and the rivalry submissions filed. I find that, the main issue to consider is whether the Applicant has met the principles

laid down in the case of **Giella** for the grant of an interlocutory injunction.

20. The said principles which are clearly established, require that, the Applicant must prove that:

***He has a prima facie case with the probability of success upon trial;***

***In the event that he is refused an injunction and he were eventually to succeed, that damages would not adequately compensate him for any loss which he would have suffered; and***

***If the Court doubt on either of the two principles above then it should consider the Application on the balance of convenience.***

21. The question therefore is whether the Applicant established a prima facie case. In the case of **Mrao vs First American Bank of Kenya Limited & 2 Others 2003 KLR 125:**

***“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 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”.***

22. In this Instant case, the undisputed facts are that, the Applicant and the Respondent entered into an Agreement involving the construction of maisonnettes and Apartments, under the name of Shaba Village Housing Project. Subsequently, they entered into another agreement dated 22<sup>nd</sup> September 2014, which ended their relationship in relation to the said project.

23. According to the Applicant, the contract entered into on the 22<sup>nd</sup> September 2014, was mutually negotiated, however, according to the Respondent, the same was influenced by a mistake of fact, on the strength of misrepresentation on the part of the Plaintiff by third parties who were not a party to the construction contract between the Plaintiff and the Defendant, and was also entered into fraudulently and the approval of Board of the Defendant Company.

24. I have gone through the said agreement, annexed to the Supporting Affidavit of **Mahamud Khalif**, marked “MJJ 1”. I am live to the fact that, this case is still at interlocutory stage, and the Court should not engage into the issues that are subject of the main suit at this stage. Against that warning I find that, the first conditions of that agreement states that:

***“The parties agreed to terminate existing agreement dated 15<sup>th</sup> July 2014 in good faith and based on mutually agreed interest of the two companies”***

25. Thus, on the face value, the contents of the said Agreement are in agreement with the Applicant’s position. As to whether, it was not so mutually agreed, that will require viva voce evidence to be adduced at the main trial.

26. I now turn to the other issues of mistake, misrepresentation and fraud, alleged by the Respondents in relation to the said Agreement. Mistake and misrepresentation are factors that vitiate a contract. However, my understanding of the law of contract is that, it is not every mistake or simple error that will have an effect on a contract. There are three types of mistakes; common mistake which occurs when both parties make the same mistake about some fundamental fact; mutual mistake which occurs when the parties misunderstand each other and neither party realizes the mistake of the other; and unilateral mistake which occurs when one party is mistaken as to the fundamental character of the contract and the other party knows of the mistake.

27. Misrepresentation on the other hand, is an untrue statement made by one party to the other, before or at the time of contracting which induces, the other to enter into a contract. There are three types of misrepresentation: Innocent misrepresentation which is a statement by one party of material facts that are

untrue but which he/she believes to be true; negligent misrepresentation which occur if there is a special relationship between the parties (e.g a duty of care is owed by an agent to his/her principal) and the misrepresentation is made negligently; then fraudulent misrepresentation which occurs when a party knowingly makes a false statement and the other party acts upon this misrepresentation to his or her prejudice.

28. The redress in the circumstances may, in general be of two kinds; either to avoid the contract altogether or obtain damages for the conduct of the other party. An aggrieved party who is pursuing a remedy through the Courts must choose between an action for damages to enforce or obtain the benefit of the contract or an action for rescission, he or she cannot have both. As aforesaid, it will require evidence at the trial to prove the allegations of mistake and/or misrepresentation. In addition, the Respondent, will have to clearly state the particulars of the alleged fraud.

29. However I find that, the Agreement dated 22<sup>nd</sup> September 2014 set down the terms and conditions of termination of the Agreement of 15<sup>th</sup> July 2014. I have already reproduced those terms herein and as matter stand now, conditions 2, 3 and 5 seems to have been fully satisfied, save for an allegation of "Withholding Tax" relating to the payment of Kenya Shillings Twenty Million (Kshs.20,000,000). But Condition four (4) has not been satisfied hence this suit. In that regard, and unless otherwise proved at the trial, the Applicant can be deemed to have a prima facie case as stated in the case of Mrao.

30. Can the Applicant be compensated in monetary terms. The answer is yes, based on several factors. Since the parties have agreed on the amount of lieu of the 2 units, as Kenya Shillings Twenty Seven Million (Kshs.27,000,000), then that sum being ascertainable can be compensated in monetary terms. However, that was not what the parties agreed on and is not the role of the Court to re-write a contract between the parties, and unless good reasons are advanced, to vary the terms of the contract between the parties, the Court is hesitating to do so. In the agreement between the parties dated 22<sup>nd</sup> September 2014 it's clearly stated:

***"Prisma Investment Ltd, shall offer Lafey Construction Company two units of 4 bedroom maisonnettes in its Shaba Village Housing***

***Project valued at Kenya Shillings Twenty Seven Million (Kshs.27,000,000) as partial settlement of retention due to Lafey Construction Company"***

31. In that regard, the Applicant is simply enforcing the terms of that contract. If anything, the said units are still available. It would not be in the interest of justice, to let the Defendant dispose them off, while the case is on-going simply because, the Applicant will be compensated with damages. On the balance of convenience I find that it tilts in favour of the Applicant to preserve, the two units under dispute.

32. I therefore find that unless and until the allegation of mistake, fraud and/or fraud alleged by the Respondent are proved. It is in the interest of justice to grant the following orders that pending the hearing and determination of this suit:-

***An interim injunction do issue restraining the Defendants, whether by itself, it's directors, shareholders, servants and/or agents from selling, transferring or alienating ownership of any two (2) units of four (4) bed roomed house on L. . 7149/139 otherwise known as the Shaba Village Housing Project.***

***In the alternative the Defendant to deposit in an interest earning account in a bank in joint names of the parties nominated and or authorized agents a sum of Kenya Shillings Twenty Seven Million within fifteen (15) days of this order.***

***Costs of the Application to the Applicant.***

Orders accordingly.

**DATED AND DELIVERED IN AN OPEN COURT ON THIS 18TH DAY OF AUGUST 2016 AT NAIROBI.**

**G.L. NZIOKA**

**JUDGE**

**Ruling Read in open court in the Presence of:**

Andano for Ngecha for Applicant

Nyaribo for Respondents

Teresia - Court Clerk

**G.L. NZIOKA**

**JUDGE**