



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 1401 OF 2013

SHIMMERS PLAZA LTD.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA.....1ST DEFENDANT

CAPE SUPPLIERS LTD.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

AS CONSOLIDATED WITH

ELC CIVIL SUIT NO. 43 OF 2014

CAPE SUPPLIERS LIMITED.....PLAINTIFF

VERSUS

SHIMMERS PLAZA LIMITED..... DEFENDANT

RULING

Introduction

This ruling is on various applications by the Plaintiffs in the two consolidated suits. The first two applications are the Notices of Motion dated 19th November 2013 and 9th December 2013 filed by the Shimmers Plaza Ltd, which is the Plaintiff in ELC 1401 of 2013. The third Notice of Motion is dated 21st January 2014 and was filed by Cape Suppliers Ltd, which is the Plaintiff in ELC 43 of 2014 and 2nd Defendant in ELC 1401 of 2013. The last Notice of Motion was filed by Shimmers Plaza Ltd on 4th March 2014 in ELC 43 of 2014, in its capacity as the Defendant in that suit. The other parties affected by the applications are the National Bank of Kenya Ltd and the Chief Land Registrar who are the 1st and 3rd Defendants respectively in ELC 1401 of 2013.

A brief background to the said applications is necessary to appreciate the context in which the various applications are made. On 30th January, 1997, Shimmers Plaza Ltd executed a corporate guarantee and a charge instrument over its property on Title No. I.R 55525, L.R 1870/IX/1281 situated at Westlands in Nairobi, commonly known as Shimmers Plaza (hereinafter known as the suit property) in favour of the

National Bank of Kenya Ltd for *inter alia* a term loan of Kshs. 150 million. A dispute subsequently arose as between Shimmers Plaza Ltd and National Bank of Kenya Ltd leading to the filing of H.C.C.C No. 229 of 2001 and H.C.C.C 895 of 2009, in the Commercial Division of the High Court in Nairobi. The suits were filed by Shimmers Plaza Ltd against National Bank of Kenya Ltd. The two suits were subsequently consolidated.

Shimmers Plaza Ltd then filed an application in the said suits seeking to *inter alia*, restrain National Bank of Kenya Ltd from advertising, selling, charging, disposing off or offering for sale by private treaty or public auction or in any way alienating the suit property until hearing and determination of the suit. The said application was duly heard by Kimondo J. who delivered a ruling on 27th January, 2012 dismissing the application. Shimmers Plaza Ltd. being aggrieved by the said ruling, filed a Notice of Appeal and its Record of Appeal in the Court of Appeal, Nairobi as **Civil Appeal Number 33 of 2012- Shimmers Plaza limited –vs- National Bank of Kenya Limited.** The said Appeal was heard on 26th September 2013 and judgment reserved for 29th November 2013.

While the judgment in the said appeal was pending, Shimmers Plaza Ltd filed the suit in ELC 1401 Of 2013 in this Court on 19th November 2013 by way of a Plaint of the same date. It also filed a Notice of Motion in ELC 1401 Of 2013 on the same date, wherein it sought the following outstanding orders:

1. That the discharge of charge registered on 30th October, 2013 in clear violation of a court order be held and declared illegal, null and void.
2. That National Bank of Kenya Ltd and Cape Suppliers Ltd be restrained from advertising, selling, charging, disposing off or offering for sale or in any way alienating the suit property until hearing and determination of this suit.
3. That Cape Suppliers Ltd be restrained from taking over, entering, taking custody, occupying or taking possession of the suit property pending hearing and determination of this suit.
4. That the Chief Land Registrar be restrained from issuing any title deed for the suit property until hearing and determination of this suit.
5. That the National Bank of Kenya Ltd and Cape Suppliers Ltd be ordered to deliver a true and proper status of accounts, sale agreement, discharge of charge and transfer.
6. That the O.C.P.D Gilgiri Police Station and O.C.P.D Parklands Police Station do assist in serving any Court Order to avoid any breach of peace.

The matter was first heard *ex parte* when interim orders were granted restraining Cape Suppliers Ltd from advertising, selling, charging, disposing off or offering for sale or in any way alienating the suit property. This Court (Gitumbi J.) on 29th November 2013 declined to extend the interim orders in the face of objection by National Bank of Kenya Ltd and Cape Suppliers Ltd. Shimmers Plaza Ltd then filed the second application dated 9th December 2013 in ELC 1401 Of 2013 in which it sought the following orders:

1. That this Court be pleased to review and or vary the orders made on 29th November 2013 declining to grant extension of interim orders.
2. That Cape Suppliers be restrained from advertising, disposing off, offering to sell, alienating or otherwise dealing with the suit property pending hearing and determination of the Notice of Motion application dated 19th November 2013.
3. That Cape Suppliers Ltd be restrained from taking over, entering, taking custody, occupying or managing the suit property pending hearing and determination of the Notice of Motion application dated 19th November 2013.

Cape Suppliers Ltd subsequently then filed the suit in ELC 43 of 2014 on 22nd January 2014 by way of a Plaint dated 21st January 2014, together with its Notice of Motion of the same date, wherein it is seeking the following orders:

1. That pending the hearing and determination of the said suit, a temporary injunction be issued

- restraining Shimmers Plaza Ltd from interfering, entering, trespassing, taking custody, collecting rent, occupying, taking and remaining in possession, deploying and/or stationing security guards and/or acting in any manner which interferes with the Plaintiff's ownership of the Property.
2. That pending the hearing and determination of the suit a mandatory injunction be issued against Shimmers Plaza Ltd compelling them to give up possession of the suit property to Cape Suppliers Ltd.
 3. That the Officer in Charge of Parklands Police Station do assist in the enforcement of any Court Order.

On 3rd February 2014 Gitumbi J. referred the two files to this court for directions as to their consolidation and transfer to the Commercial Division of the High Court at Nairobi. The two files were mentioned on 3rd March 2014 before this Court and it was directed that the files be placed before the Presiding Judge of the Commercial Division of the High Court for directions as to whether ELC 1401 of 2013 should be heard and determined together with HCCC 895 of 2009, which is still pending before the Commercial Division of the High Court. This Court also gave directions that the *status quo* to be maintained with regards to the suit property would be that Shimmers Plaza Ltd was not to interfere with the possession and control thereof, as well as collection of rent from the suit property by Cape Suppliers Ltd .

On 4th March 2014 Shimmers Plaza Ltd filed a Notice of Motion in ELC 43 of 2014 in which it sought the following substantive orders:

1. That this Court be pleased to review and/or set aside the directions and/or order issued on 3rd March, 2014 transferring **ELC Civil Case No. 1401 of 2013, Shimmers Plaza Ltd –vs- Cape Suppliers Ltd & 2 Others** to the Commercial Division of the High Court.
2. That this Court be pleased to review and/or set aside the orders of status quo issued on 3rd March, 2014.

The Presiding Judge of Commercial Division (Kimondo. J.) on 13th March 2013 referred the file for ELC 1401 of 2013 back to this Court, noting that in light of the nature of the reliefs sought in the said suit as well as the pending applications, it could not be transferred to the Commercial Division of the High Court. This Court on 3rd April 2014 consequently directed that the four pending applications be heard and determined together, as they are all dealing with possession of the suit property. I will now proceed to summarise the arguments made by the respective parties in the pleadings they filed in support and/or opposition of the various applications.

The Arguments by Shimmers Plaza Ltd

According to Shimmers Plaza Ltd, when Civil Appeal Number 33 of 2012 was heard on 26th September 2013, the Court of Appeal ordered that the *status quo* be maintained pending the delivery of judgment on 29th November, 2013. However, that during the pendency and subsistence of the court order given by the Court of Appeal on 26th September, 2013 it came to learn that National Bank of Kenya Ltd entered into a sale agreement with Cape Suppliers Ltd to sell to it the suit property by way of private treaty, and discharged the Charge dated 28th January, 1997 on 30th October, 2013.

Further, that National Bank of Kenya transferred the suit property herein by way of private treaty to Cape Suppliers Ltd on 15th October, 2013 which transfer was registered on 30th October, 2013. Shimmers Plaza Ltd annexed copies of the Certificate of Title, the said sale agreement dated 20th September, 2013 and the deed of transfer. It was further contended by Shimmers Plaza Ltd that on 15th November 2013, an agent of Cape Suppliers Ltd namely Property World Limited issued notices to all tenants on the suit property and alleged that ownership of the same had changed and that it was taking over as property manager of the suit property on behalf of Cape Suppliers Limited.

Shimmers Plaza Ltd further alleged that the Discharge of Charge registered against the suit property on 30th October, 2013 while there was a subsisting Order made by the Court of Appeal to maintain *status*

quo and was a nullity. It was argued that the action of the National Bank of Kenya Ltd in this regard was in contempt of court as it knew about the order of *status quo* by the Court of Appeal, and by caveat emptor notices published in the *Daily Nation* and the *Standard* newspapers issue of 2nd September, 2013. Further, that Cape Suppliers Ltd knew or ought to have known of the said notices. Shimmers Plaza Ltd also stated that it had commenced contempt of Court proceedings against National Bank of Kenya Ltd in **Civil Appeal No. 33 of 2012 -Shimmers Plaza Limited vs. National Bank of Kenya**

In further arguments made in support of its applications for review of the orders of this Court, Shimmers Plaza Ltd stated that on 19th November 2013 Gitumbi J. granted interim orders in its favour until 26th November 2013 which were later on extended to 29th November 2013 pending the judgment of the Court of Appeal in **Civil Appeal No. 33 of 2012 -Shimmers Plaza Limited vs. National Bank of Kenya**. However, that on 29th November, 2013 Gitumbi J. declined to grant extension of the interim orders on the basis that the National Bank of Kenya Ltd and Cape Suppliers Ltd had raised strong objections, without being aware that the said objections were baseless, false, misleading, contrary to law, malicious and a fraud upon the Court.

According to Shimmers Plaza Ltd, Cape Suppliers Ltd had failed to disclose that on 19th November, 2013 it sought vesting orders from the Nairobi Chief Magistrates Court in **CMCC No. 1191 of 2013**, seeking vesting orders and further, that as of 5th December 2013 the said orders had not been enforced. It was argued that the Court was therefore deceived on 26th November 2013 that Cape Suppliers Ltd was already in possession. Further, that the vesting orders in **CMCC No. 1191 of 2013** were made without jurisdiction and in blatant disregard of the Court of Appeal order and that Shimmers Plaza consequently sought to vacate the said orders.

It was further argued by Shimmers Plaza Ltd that this Court erroneously proceeded to grant final prayers in favour of Cape Suppliers Ltd despite the fact that the two applications were pending and that it has not been heard as required by Article 50(1) of the Constitution of Kenya. Further, that in disregard of the request by its counsel to appear before the court at another time, the Court proceeded to give substantive Directions on the matter transferring **ELC Civil Case No. 1401 of 2013- Shimmers Plaza Ltd vs- Cape Suppliers Ltd & 2 others** to the Commercial Division of the High Court, and granted orders of *status quo* granting possession of the suit property to Cape Suppliers Ltd without hearing from Shimmers Plaza Ltd.

Shimmers Plaza Ltd further argued that in seeking the orders of *status quo* from this Court, Cape Suppliers Ltd failed to disclose all material facts, and in particular that it was not in possession and/or custody of the suit property, and that the said orders of *status quo* have effectively and without a hearing extinguished the rights of Shimmers Plaza Ltd to the suit property. It was also its argument that the transfer of **ELC Civil Case No. 1401 of 2013- Shimmers Plaza Ltd vs-Cape Suppliers Ltd & 2 Others** to the Commercial Division of the High Court is unconstitutional and contravenes Articles 50(1), 162(2)(b) and 165(5)(b) of the Constitution, as the High Court lacks jurisdiction to hear and determine questions and/or issues arising out of acts done under the Land Act, 2012 as well as the Land Registration Act, 2012. Further, that the Order issued on 3rd March, 2014 was irregularly issued in violation of the provisions of Order 21, Rules 8(1), (2), (3) and (6) of the Civil Procedure Rules, 2010.

Lastly, Shimmers Plaza Ltd conceded that whereas it is true that by a judgment delivered on 20th December, 2013 the Court of Appeal dismissed its Appeal, the Appeal was only limited to Kimondo J.'s ruling delivered on 27th January, 2012 on the its application for interim injunction, and that the substantive suit is still pending before the Commercial Division of the High Court. On the other hand, that the substratum of the **ELC Civil Case No. 1401 of 2013 - Shimmers Plaza Ltd vs Cape Suppliers Ltd & 2 Others** is the challenge to the transaction and/or steps taken by the Cape Suppliers Ltd with the National Bank of Kenya Ltd in violation of the order of the Court of Appeal issued on 26th September 2013, and which acts were done pursuant to the provisions of the Land Act, 2012 and the land Registration Act 2012.

The Arguments by National Bank of Kenya Ltd

National Bank of Kenya Ltd argued that on 15th March 2013, the Court of Appeal dismissed an application by Shimmers Plaza Ltd dated the 8th day of February 2012 praying for an injunction pending appeal in relation to the suit property. Further, that as at 20th June 2013 the amount outstanding in their books of account in relation to the debt secured by Shimmers Plaza Ltd was Kshs.1,485,707,749.65, and that National Bank of Kenya Ltd opted to realize the security charged in its favour and to exercise its statutory power of sale of the suit property by private treaty.

National Bank of Kenya Ltd stated that it accordingly advised its advocates of the amount due and instructed them to proceed to issue the requisite 40 days' Notice to sell under the Land Act. That thereafter, it entered into and executed a sale agreement with Cape Suppliers Limited dated 20th September 2013. A copy of the said Agreement for sale was exhibited. It was National Bank of Kenya Ltd's argument that by the execution of the said agreement for sale, and since at the time there were no court orders restraining it from doing so, the right of redemption of Shimmers Plaza Ltd was effectively extinguished, and that the only remedy available to it at this stage lies in damages as per section 99 of the Land Act.

It was also argued by National Bank of Kenya Ltd that in any event the issue of compliance and/or non-compliance with any alleged *status quo* orders purportedly issued by the Court of Appeal on the 26th day of September 2013 is one which only the Court of Appeal has jurisdiction of, and is being heard and determined through an application that has already been filed by the Shimmers Plaza Ltd at the Court of Appeal.

The Arguments by Cape Suppliers Ltd

Cape Suppliers Ltd argued that it is the registered owner of the suit property. It contended that it became aware in 2013 that National Bank of Kenya Limited, as chargee of the suit property, was looking for prospective buyers of the property, and that it made a formal offer to buy the property. Further, that National Bank of Kenya Ltd accepted the offer and that the two parties entered into an agreement for sale dated 20th September, 2013 for the purchase of the suit property for a sum of Kshs.400,000,000/= . Cape Suppliers Ltd annexed a copy of the said Agreement for sale.

Cape Suppliers Ltd stated that it paid a deposit of Kshs.40,000,000/= being 10% of the purchase price to National Bank of Kenya Limited on execution of the Agreement for Sale, and that the balance of Kshs.360,000,000/= was paid using a loan facility from Diamond Trust Bank Kenya Limited. Further, that the suit property was charged in favour of Diamond Trust Bank Kenya Limited as security, and that Cape Suppliers Ltd also executed a Deed of Rental Assignment dated 11th November 2013, committing that that all rental income from the suit property was to be paid to the said Bank in repayment of the loan and the accruing interest,

It is Cape Suppliers Ltd's case that a deed of transfer with respect to the suit property was executed by it and National Bank of Kenya Ltd on 15th October, 2013 which was thereafter registered on 30th October 2013, thereby effectively making Cape Suppliers Ltd the registered, lawful and legitimate owner of the suit property. Cape Suppliers Ltd annexed various documents in support of its arguments including the letter of offer for the loan facility, the charge, the Deed of Rental Assignment and the registered Deed of Transfer.

Cape Suppliers Ltd further stated that on 15th November 2013 through its agents, Property World Limited, it informed all the tenants of Shimmers Plaza Ltd that ownership of the suit property had changed on 30th October 2013. Further, that it proceeded to obtain vesting Orders on 19th November 2013 from the Chief Magistrate's court in **Miscellaneous Case No. 1191 of 2013**, which ordered the Officer Commanding Police Station to provide it with security to enter into the suit property, change the security guards and introduce themselves to the existing tenants. However, that these orders were set aside on

20th December 2013 as the Chief Magistrate Court held that it lacked jurisdiction to handle the matter.

The Issues and Determination

The parties herein were directed to file and serve written submissions on the pending applications. The Advocates for Shimmers Plaza filed submissions dated 24th July 2014, while the Advocates for Cape Suppliers Ltd and National Bank of Kenya Ltd filed submissions dated 23rd July 2014 and 28th July 2014 respectively. The parties highlighted their respective submissions at a hearing held on 6th August 2014.

I have read and carefully considered the pleadings, annexed evidence and submissions made. I will make two observations and findings at the very outset. The first is that the orders seeking review of this Court's orders to transfer ELC 1401 of 2013 to the Commercial Division of the High Court are spent, as the said suit was referred back to this Court by Kimondo J.. Likewise, the arguments made as to this Court's jurisdiction in this regard are no longer in issue.

Secondly, arising from the ruling by Kimondo J. delivered on 27th January, 2012, and the Court of Appeal's judgment delivered on 20th December 2013 dismissing the application and appeal by Shimmers Plaza Ltd seeking to restrain the National Bank of Kenya Ltd from dealing with the suit property, any similar prayers sought by Shimmers Plaza Ltd in the pending applications before this Court against the National Bank of Kenya are accordingly *res judicata*, and this Court will not rule on the said prayers.

The outstanding prayers that are left for consideration by this Court on the part of Shimmers Plaza Ltd are therefore the mandatory injunctions sought as regards the discharge of charge and rendering of accounts, the temporary injunctions it seeks as against Cape Suppliers Ltd, and the prayers for review and/or setting aside of the orders of this court. On the part of Cape Suppliers the outstanding prayers are its prayers for temporary and mandatory injunction as against Shimmers Plaza Ltd.

The issues therefore are firstly, whether this Court's orders are amenable to review, secondly, whether Shimmers Plaza Ltd has met the threshold for the grant of the temporary and mandatory injunctions sought, and thirdly, whether Cape Suppliers Ltd has met the threshold for the grant of the temporary and mandatory injunctions it seeks.

On the first issue before the Court, the applicable law on setting aside of orders is in the provisions of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, which avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. Order 45 Rule 1 (b) of the Civil Procedure Rules in addition spells out conditions that must be met in an application for review of a decree or order as follows:

- c. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,
- d. mistake or error apparent on the face of the record,
- e. or for any other sufficient reason,
- f. the application must be made without unreasonable delay.

Shimmers Plaza Ltd's main arguments in its pleadings were that the orders of this court vacating its interim orders and on the *status quo* to be maintained should be set aside on the grounds that there was material non-disclosure on the part of Cape Suppliers Ltd and National Bank of Kenya Ltd that they were in possession leading to the issuance of the said orders, and that Shimmers Plaza Ltd was not given an opportunity to be heard. Cape Suppliers Ltd argued that the orders of the Court were made after being informed that the property is actually registered in its name and charged to Diamond Trust Bank Kenya Limited, while National Bank of Kenya Ltd submitted that no valid ground for review of the orders had been established.

I have perused the court record, and note that the orders of Gitumbi J. made on 29th November 2011 were

given after the parties had made lengthy arguments before the learned Judge at *inter partes* hearing of the application by Shimmers Plaza Ltd on 26th November 2011, and after Shimmers Plaza Ltd also addressed the court on 29th November 2011. The learned Judge then ruled as follows:

“After considering all the circumstances of the case together with the submissions of the counsel for the Plaintiff noting that these submissions are being made in the absence of the Defendants who have earlier posted strong objection to the extension of interim orders in this case, I decline to award the extension of interim orders in this case.”

The learned Judge had also earlier extended the interim orders on 26th November 2013 until 29th November 2013, to await the decision of the Court of Appeal in **Civil Appeal No. 33 of 2012** which was to be delivered on the latter date.

On the *status quo* orders that are sought to be reviewed, all the parties first addressed this Court on 23rd December 2013 before being referred to Gitumbi J. for further directions, which arguments were on the court record. On 3rd March 2014 all the parties were represented in court and this Court in giving the *status quo* orders noted as follows:

“In the meantime the status quo to be maintained with regard to the parcel of and known as LR No 1870/IX/1281 situated at Westlands and known as Shimmers Plaza, and particularly in light of the judgment of the Court of Appeal in Civil Appeal No. 33 of 2012 delivered on 20th December 2013 denying the injunction sought by Shimmers Plaza Ltd shall be as follows:

- a. **Shimmers Plaza Ltd shall not in any manner interfere with the possession by Cape Suppliers of the property known as LR No. 1870/IX/1281 known as Shimmers Plaza and shall remove all their guards stationed at the said property.**
- b. **Shimmers Plaza Ltd shall not in any manner interfere with the taking of custody, collection of rent from and occupation by Cape Suppliers of the premises situated on the property known as Shimmers Plaza located on LR Number 1870/IX/1281.**
- c. **The Cape Suppliers Ltd shall serve these orders on the Officer in Charge of Parklands Police Station who shall assist in their enforcement.”**

It is thus my view that not only were the parties able and given the opportunity to canvass their respective positions before the said orders were made which are clearly on the court record, but also that the main reason and determinant for the said decisions was the decision of the Court of Appeal in **Civil Appeal No. 33 of 2012**. This decision is not disputed by any of the parties, and no evidence has been brought to show that the said decision of the Court of Appeal has been reviewed or overturned.

It is also noteworthy that the issue of misrepresentation of facts by Cape Suppliers Ltd and National Bank of Kenya Ltd was one of the issues canvassed before the Court on 23rd December 2013 before the two orders sought to be reviewed were given, and the arguments by all the parties on this issue are on the court record. I therefore find that no sufficient ground has been shown for the review of the orders of 29th November 2013 and 3rd March 2014.

On the second and third issues for determination, the principles for the grant of temporary and mandatory injunctions are settled. The requirements for the grant of temporary injunctions are stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, and that these are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

For the grant of mandatory injunctions, the principles were set out by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** wherein it was held that that there must be special circumstances shown over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter

ought to be decided at once.

Lastly, as to what constitutes a *prima facie* case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others**[2003] eKLR stated as follows:

“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.”

Shimmers Plaza Ltd in this regard relied on its argument and submissions that Cape Suppliers Ltd and National Bank of Kenya Ltd violated the orders of the Court of Appeal issued on 26th September 2013 on maintaining of the *status quo*. Its counsel submitted in great detail on what is meant by an order of *status quo* relying on the **Black’s Law Dictionary** and the decisions in **Republic vs National Environment Tribunal & Another (2013) e KLR** and **Mucuha vs Ripples Ltd (1990-1994) EA 388**. It was his submissions that a *status quo* order is an order that maintains the state of affairs existing at the time of giving of the order. According to Shimmers Plaza Ltd, the status of affairs existing on 26th September 2006 was that it was the registered owner of the suit property, and in possession thereof. Further, that after the issuance of the *status quo* order

Cape Suppliers Ltd and National Bank of Kenya Ltd proceeded to discharge the charge over the suit property and execute and register a transfer of the said property thereby disturbing the *status quo*.

It was further submitted by Shimmers Plaza Ltd that where a party acts in violation of a court order, the party’s actions are null, void and illegal, and the said party cannot derive any benefit from the said violation. He cited various decisions in support of this position, including **Mapis Investment Ltd vs Kenya Railways Corporation Ltd, (2006) eKLR**, and **Judicial Service Commission vs The Speaker of the National Assembly & Another, High Court Petition No 518 of 2013**

Lastly, Shimmers Plaza contended that Cape Suppliers Ltd was aware of the proceedings in the Court of Appeal and that its sale agreement with National Bank of Kenya Ltd was predicated and contingent on the pending proceedings between Shimmers Plaza Ltd and National Bank of Kenya Ltd under Special Condition F thereof. Therefore, that Cape Suppliers was aware of the *status quo* orders and cannot rely on the argument that it was an innocent purchaser for value, as the sale of the suit property was in breach of the said orders.

Cape Suppliers Ltd on its part submitted that it has a legitimate title to the suit property which is absolute and indefeasible under section 26(1) of the Land Registration Act, and that it was not party or privy to the dispute between Shimmers Plaza Ltd and National Bank of Kenya Ltd. Further, that it had already charged the suit property to another Bank and will be the one that will suffer irreparably if the orders it seeks are not sought. Lastly, Cape Suppliers submitted that it was an innocent purchaser for value of the suit property, and that if Shimmers Plaza Ltd has a case the only remedy it can get is damages and not a reversal of the sale transaction. Cape Suppliers Ltd relied on various judicial authorities for its arguments including **Janet Mboli & Another vs Nairobi City Council (2014) e KLR**, **Kent Libiso & Another vs Cirkon Trust Co Ltd & 2 Others (2013) e KLR** and **Captain Patrick Kanyagia & Another vs Damaris Wangechi & 2 Others (1995) eKLR**.

National Bank of Kenya Ltd on its part submitted that Shimmers Plaza Ltd is seeking an equitable remedy against an action that is a direct result of its own wrong, and is guilty of unconscionable conduct by failing to make any attempts to redeem its loan after having been given time to do so. Further, that its application has been overtaken by events as the suit property has already been transferred to Cape Suppliers Ltd in a sale agreement executed on 20th September 2013, after National Bank of Kenya Ltd took all the necessary steps required in exercise of its statutory power of sale.

National Bank of Kenya Ltd also submitted that Shimmers Plaza Ltd had failed to show that it would suffer irreparable harm that cannot be remedied by damages, and that section 99(4) of the Land Act outlines that the recourse available to parties aggrieved by the exercise of a statutory power of sale to be damages.

On whether the sale of the suit property can be reversed, National Bank of Kenya Ltd submitted that the order for preservation of *status quo* orders by the Court of Appeal was made after it had executed a valid sale agreement with Cape Suppliers Ltd in pursuit of its power of sale, and that the said sale was valid under law and the suit property passed to Cape Suppliers Ltd. Lastly, it was submitted by National Bank of Kenya Ltd that the issue of whether it was in contempt of court is in any event currently before the Court of Appeal, which is the proper court that has the jurisdiction to deal with the same. National Bank of Kenya Ltd cited various judicial authorities in support of its arguments including **Andrew Ouko vs Kenya Commercial Bank & 3 Others (2006) e KLR** and **John Miringu Kariuki vs Equity Building Society & 3 Others (2006) e KLR**.

Applying the tests for the grant of temporary and mandatory injunctions as explained in the foregoing I note that the claim by Shimmers Plaza Ltd to the suit property is based solely on the argument that the sale and transfer of the same to Cape Suppliers Ltd was made in contravention of the *status quo* orders by the Court of Appeal. This position is contested by the National Bank of Kenya Ltd. In addition, the Court of Appeal has since given judgment allowing the sale of the suit property.

More importantly, this Court has no jurisdiction to decide if the sale of the suit property by National Bank of Kenya Ltd to Cape Suppliers Ltd was in contravention of the *status quo* orders. This is for the reason that the *status quo* orders alleged to have been disobeyed were granted by the Court of Appeal, and it was stated in **Judicial Service Commission vs The Speaker of the National Assembly & Another, High Court Petition No 518 of 2013** that the natural consequence when an allegation that a court order has been disobeyed is “**to commence contempt of court proceedings in which case the Court will determine whether a contempt of court has in actual fact being committed and will therefore mete out the appropriate punishment to the contemnor in accordance with the law**”.

As to which Court shall make this determination, the Judicature Act at section 5 states that the High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts. The power to punish for contempt can only be exercised by the Court which has granted the orders that are alleged to have been disobeyed, or if the said orders have been granted by a subordinate court. This Court therefore has no jurisdiction to determine if the orders by the Court of Appeal on maintenance of *status quo* were disobeyed by the actions of Cape Suppliers Ltd and National Bank of Kenya Ltd.

Indeed It is also noteworthy that in **Judicial Service Commission vs The Speaker of the National Assembly & Another, (supra)** the Court did not delve into any investigation or make any finding as to the disobedience of the court orders alleged to have been disobeyed, but made observations on the need and importance of obeying court orders, which observations this Court is in complete agreement with.

In addition, Shimmers Plaza Ltd has already commenced contempt of court proceedings in the Court of Appeal in **Civil Appeal No 33 of 2013**, and this Court is therefore further barred from considering any issue arising from the alleged disobedience of the orders of *status quo*, which is the subject of the contempt proceedings in the Court of Appeal, as to do so would be *sub judice*. In this regard it is for the Court of Appeal to determine whether there was disobedience of the *status quo* order, and if so what are the appropriate remedies to mete out, including the orders Shimmers Plaza Ltd seeks with regard to the reversal of the sale and possession of the suit property.

It is for the foregoing reasons that I therefore find that Shimmers Plaza Ltd has not shown a *prima facie* case, and cannot therefore be granted the temporary and mandatory injunctions it is seeking.

Coming to the orders sought by Cape Suppliers Ltd, evidence was brought to show that the suit property is

registered in its name. Cape Suppliers Ltd and National Bank of Kenya Ltd explained the processes that resulted in the sale and transfer of the suit property to Cape Suppliers Ltd. This Court has already found that it has no jurisdiction to reverse the said processes on the ground put forward by Shimmers Plaza Ltd, and finds therefore that the current position unless and until it is changed by the Court of Appeal is that it is Cape Suppliers Ltd which is the registered owner of the suit property.

In the circumstances this Court finds that Cape Suppliers Ltd has demonstrated a *prima facie* case, and in light of the loan facility that is to be repaid from the suit property, it will suffer irreparable harm if the temporary injunction it seeks is not granted. In addition, it is my view that this is a clear case for the mandatory injunction sought of possession of the suit property to issue for two reasons. Firstly, as registered owner of the suit property Cape Suppliers Ltd is entitled to possession of the same.

Secondly, in the event that the sale of the suit property to Cape Suppliers Ltd is found to have been irregular, the law is clear that the only remedy available to Shimmers Plaza Ltd in the circumstances is damages. The effect of an irregular sale and transfer by a mortgagee, and the position of a purchaser who has bought land sold in exercise of that statutory power of sale is in this regard provided in section 99 of the Land Act of 2012 as follows:

“(1) This section applies to—

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”

Shimmers Plaza Ltd can therefore not only be adequately compensated by way of damages, it is also the only remedy currently available to it under the law.

I accordingly order as follows arising from the foregoing:

1. That Shimmers Plaza Ltd shall forthwith give possession of the property on Title No. I.R 55525, L.R 1870/IX/1281 situated in Westlands, Nairobi commonly known as Shimmers Plaza, to Cape Suppliers Ltd pending hearing and determination of the consolidated suits herein or until further orders.

2. That Shimmers Plaza Ltd be and is hereby restrained from interfering, with, entering, trespassing on, taking custody of, collecting rent from, occupying, taking and remaining in possession, deploying and/or stationing security guards on and/or acting in any manner which interferes with the occupation and possession by Cape Suppliers Ltd of the property on Title No. I.R 55525, L.R 1870/IX/1281 situated in Westlands, Nairobi commonly known as Shimmers Plaza, pending hearing and determination of the consolidated suits herein or until further orders.
3. That the prayers in the Notices of Motion filed by Shimmers Plaza Ltd in ELC 1401 of 2013 dated 19th November 2013 and 9th December 2013 and in ELC 43 of 2014 dated 4th March 2014 are hereby denied.
4. That the Officer in Charge of Parklands Police Station shall assist in the enforcement of, and ensure compliance of the orders given herein.
5. That The costs of the Notices of Motion filed by Shimmers Plaza Ltd in ELC 1401 of 2013 dated 19th November 2013 and 9th December 2013 and in ELC 43 of 2014 dated 4th March 2014 and by Cape Suppliers Ltd in ELC 43 of 2014 dated 21st January 2014 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 11th day of December, 2014.

P. NYAMWEYA

JUDGE