



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 643 of 2012**

**HASSAN ABDUL HAFEDH ZUBEIDI.....PLAINITFF**

**VERSUS**

**EDERMANN PROPERTY LIMITED.....1<sup>ST</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**SEB ESTATES LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiff's Notice of Motion application dated and filed on 17<sup>th</sup> December 2012 has been brought under the provisions of Sections 1A, IB, 3 and 3A of the Civil Procedure Act Cap 21 (Laws of Kenya), Order 40 Rules 1, 2, 3 & 10, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The Plaintiff has sought twelve (12) orders. In broad and general terms, the Plaintiff is seeking orders:-

**a. THAT due to the urgency of the matter the provisions of Order 3 Rule 2 of the Civil Procedure Rules be dispensed with until the hearing and determination of this application inter partes.**

**b. THAT the 1<sup>st</sup> Defendant do transfer to the Plaintiff twenty (20) apartments which have been itemised therein on the property known as L.R. No 209/19835 Pangani, Nairobi.**

**c. THAT the 1<sup>st</sup> Defendant by itself, its employees, servants, agents, successors, assignees or any one acting or claiming through or under the Defendants be restrained by way of a temporary injunction from selling, disposing, alienating, transferring, wasting, damaging, going ahead with or completing, effecting any sale or transfer of nineteen (19) apartments itemised therein on the aforesaid property.**

**d. THAT in the alternative the 1<sup>st</sup> Defendant do deposit security of Kenya Kshs 255,500,000/= in court being the value of thirty nine (39) properties sold to the Plaintiff.**

**e. THAT Mr Zeyun Yang, the 1<sup>st</sup> Defendant's Chief Executive Officer do deposit his passport pending the hearing and disposal of this case.**

**f. THAT the 2<sup>nd</sup> Defendant either by himself, his agents, assignees or successors in titles be restrained by way of injunction from registering transfer of the thirty nine (39) apartments to any 3<sup>rd</sup> party other than the Plaintiff pending the hearing and determination of this application.**

**g. THAT 3<sup>rd</sup> Defendant either by itself, their agents, assignees or successors in titles be restrained by way of injunction from issuing and transferring shares of the 3<sup>rd</sup> Defendant in respect of the thirty nine (39) apartments pending the hearing and determination of this application.**

**h. THAT the 1<sup>st</sup> Defendant pay to the Plaintiff the rent it has collected for the twenty (20) apartments since September 2012.**

**i. THAT the 1<sup>st</sup> Defendant pay to the Plaintiff Kshs 10,000,000/= being the difference in value of the purchase price of the three bedroomed corner apartments which were sold to the Plaintiff but the 1<sup>st</sup> Defendant substituted with ordinary three bedroomed apartments.**

**j. THAT the 1<sup>st</sup> Defendant's transactions in respect of the thirty nine (39) apartments in the bank account number 200763009 at the Development Bank of Kenya Loita Street Branch, Nairobi be frozen pending the hearing and determination of this application.**

**k. THAT the costs of this suit be borne by the 1<sup>st</sup> Defendant.**

1. The grounds on which the Plaintiff's relied on in support of the application are contained in the face of the application. In broad and general terms, the grounds are that:-

a. The Plaintiff paid a sum of Kshs 80,000,000/= deposit as per the Letter of Offer dated 8<sup>th</sup> August 2012 for the purchase of thirty nine (39) apartments, which sum is not disputed, but that the 1<sup>st</sup> Defendant had failed to execute a mutually agreed agreement for sale and offered him thirty six (36) apartments contrary to the initial letter of offer. The 1<sup>st</sup> Defendant purported to amend the letter of offer and included onerous terms in the draft Sale Agreement.

b. That on 17<sup>th</sup> August 2012, the 1<sup>st</sup> Defendant advertised for sale the thirty nine (39) apartments when the Plaintiff was outside the country.

c. The 1<sup>st</sup> Defendant used the deposit paid by the Plaintiff to pay its loan obligations which had no connection with the thirty nine (39) apartments. The apartments are currently valued at Kshs 255,500,000/=.

d. The 1<sup>st</sup> Defendant is holding the sum of Kshs 80,000,000/=, a loan which the Plaintiff obtained and he is repaying substantial interest although he does not have the apartments.

e. Mr Zeyun Yang is a Chinese citizen who is likely to leave the jurisdiction of the court before the hearing and disposal of this application making it necessary for him to deposit his passport in this court.

f. On 17<sup>th</sup> October 2012, the court ordered the 1<sup>st</sup> Defendant from transferring twenty (20) apartments pending the hearing of the application on 29<sup>th</sup> October 2012.

1. The Plaintiff's application was supported by his Affidavit sworn on 17<sup>th</sup> December 2012 in which he reiterated the grounds set out in the body of the said application. He added that the 1<sup>st</sup> Defendant had sold some of the apartments at a huge profit and he had not benefitted from the same although he was still repaying the loan.

2. In response to the said application, Zeyun Yang swore the Replying Affidavit on 4<sup>th</sup> February 2012 on behalf of the 1<sup>st</sup> Defendant. He stated that the Plaintiff breached the express terms of the Letter of Offer dated 8<sup>th</sup> August 2012 when he failed to execute the Agreement for sale. The 1<sup>st</sup> Defendant did not deny ever having received a sum of Kshs 80,000,000/= and that in any event, it had not denied that the Plaintiff was entitled to a refund of 90% of the said sum upon resale of all the thirty nine (39) units as had been stipulated in clause 11 of the said Letter of Offer.

3. The deponent averred that the Plaintiff was offered twenty (20) flats after he failed to get

sufficient funds to purchase the thirty nine (39) units. Although the Plaintiff had also frustrated the sale of the twenty (20) flats, he was demanding a refund of the said sum of Kshs 80,000,000/= which was contrary to the terms of the said Letter of Offer.

4. The deponent deposed that the Plaintiff had not demonstrated any circumstance that would entitle him to be granted a mandatory injunction. Further, the granting of the injunctive orders herein would not serve any purpose as the 1<sup>st</sup> Defendant needed to sell the properties to enable it refund the Plaintiff.
5. Whilst the Defendant was ready and willing to give an undertaking to refund the Plaintiff his monies upon sale of the apartments, it argued that the deposit of the sum of Kshs 255,500,000/= would be tantamount to commencing legal proceedings by way of execution.
6. The 1<sup>st</sup> Defendant also argued that the sum in the Development Bank Ltd had already been utilised for the construction of the apartments and as a result the freezing of the 1<sup>st</sup> Defendant's account would not serve any purpose. In any event, the said account would adversely affect the operations of other third parties that the 1<sup>st</sup> Defendant had obligations towards.
7. It was the 1<sup>st</sup> Defendant's contention that the 3<sup>rd</sup> Defendant which was a private company had nothing to do with the subject matter of this suit. It was therefore not correct as the Plaintiff had alleged in paragraph 10 of his Supporting Affidavit that purchasers were entitled to shares in the 3<sup>rd</sup> Respondent company.
8. In addition to the Replying Affidavit, on 19<sup>th</sup> December 2012, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants also filed their Statement of Grounds of Opposition dated 18<sup>th</sup> December 2012 in which they relied on the following grounds:-

- 1. The Plaintiff's Application was unfounded, misconceived and void of any merit in view of the contents together with the Supporting Affidavit.**
- 2. The orders sought under the application were untenable and even if they were granted they would be in vain; the prayers sought under the application were based on a grave misconception of law and fact which is akin to fanciful adventure in the judicial system.**
- 3. The orders sought herein are unsustainable in view of the glaring matters contained in the Applicant's own pleadings and other documents filed in the case including the application itself.**
- 4. The application was self- defeating in view of the explicit abuse of process by the Applicant especially the Applicant's failure to prosecute a similar application dated 8<sup>th</sup> October 2012 and another one dated 17<sup>th</sup> October 2012.**
- 5. The application was tantamount to trifling the court and is an abuse of the court process of this Honourable Court. The Applicant was engaged in commencing multiple and concurrent applications in the suit which he later abandons in a demonstration of the extent of this blatant disrespect and inclination of the abuse of the process of this Honourable Court.**
- 6. The application was capricious, an effort to sabotage the 1<sup>st</sup> and 3<sup>rd</sup> Respondents; the application is substantially intended to delay and/or obstruct the court of justice.**

1. In his submissions dated and filed on 1<sup>st</sup> February 2013, the Plaintiff identified the following issues as those that this court could determine :-

- a. **Whether the Letter of Offer dated 8<sup>th</sup> August 2012 was a binding contract within the confines of Section 3 of the Law of Contract Act for the 1<sup>st</sup> Defendant to purport to rely on it to forfeit the sum of Kshs 8,000,000/= being 10% of the total deposit?**
- b. **Without prejudice to (a) above, whether the 1<sup>st</sup> Defendant is justified to withhold a total sum of Kshs 80,000,000/=.**

1. The Plaintiff submitted that any disposition of an interest in land must be in writing as stipulated in the Law of Contract Act Cap 23 (Laws of Kenya). He contended that the only document that was executed by the parties was the said Letter of Offer. He relied on the case of **Muriuki M'Imara vs Kobia M'Kanake [2012] eKLR** in which the court held had reiterated the legal position of dispositions of interests in land. The Plaintiff urged this court to find that the said Letter of Offer was merely an invitation to purchase and as such the said letter was not an agreement for sale for a disposition of an interest in land. This is because clause 9 of the draft Agreement for Sale provided as follows:-

**“The Vendor’s advocates shall prepare the Agreement for Sale and the Purchaser hereby agrees to execute the same within seven (7) days of receipt thereof and the said Agreement. The same shall supersede this letter of offer on execution by both parties.”**

1. The Plaintiff therefore prayed for the granting of the prayers to cushion him from any loss pending the hearing and determination of the main suit for the reason that the 1<sup>st</sup> Defendant company was owned by foreigners who could leave the jurisdiction of this court to evade the matter and thereby occasion him irreparable damage.
2. On their part, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the Plaintiff had a pending application seeking similar orders as those sought in the application herein. The said Defendants termed the same as an abuse of the court process.
3. It was the Defendants case that the Plaintiff had not satisfied the principles set out in the case of **Geilla vs Cassman (1973) EA 358** which provides that an applicant must first show a prima facie case, that he will suffer irreparable loss if the order is not granted and that he would otherwise suffer irreparable loss that would not be adequately compensated by an award of damages. If the court is in doubt, it will decide such an application in a balance of convenience.
4. The Defendants also argued that the Plaintiff had not demonstrated that he was entitled to a mandatory injunction as had been laid down in the case of **Locabail International Finance Limited vs Agro-Export & Another [1986] 1ALL ER 901** as follows:-

**“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”**

1. The Defendants contended that the Plaintiff was not entitled to the prayer for security as it was the Plaintiff who was preventing the 1<sup>st</sup> Defendant from discharging its obligation so as to pay him the refundable portion.
2. Further, the depositing of the deponent’s passport in court would contravene Article 39 of the Constitution which declares that each person has freedom of movement and residence.
3. The Defendants submitted that the Plaintiff could not renege on the Letter of Offer at his convenience. They relied on the case of **Savings and Loans Kenya Limited vs Mayfair Holdings Limited [2012] eKLR** where the court held that”-

**“The object of construction of terms of a written agreement is to establish therefrom the intention of the parties to the Agreement which must be approached objectively...The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what is stated in the agreement...” , -**

1. When the matter came up for highlighting of the written submissions on 6<sup>th</sup> February 2012, both the Plaintiff and the Defendants counsels requested that the court proceeds to give its ruling based on the said submissions without hearing any oral submissions on their part. This was in accordance with Order 51 Rule 16 of the Civil Procedure Rules Cap 21 ( of the laws of Kenya) which provides as follows:-

**“The Court may, in its discretion, limit the time for oral submissions by the parties or their advocates or allow written submissions.”**

The ruling herein is therefore on the basis on the said written submissions.

1. On 19<sup>th</sup> December 2012, Mutava J gave orders for preservation of the properties pending *interpartes* hearing of the Plaintiff’s application dated 17<sup>th</sup> December 2012 on 21<sup>st</sup> January 2013. The interim orders were again extended on 21<sup>st</sup> January 2013 pending the hearing and determination of the said application. The effect of the orders restrained the 1<sup>st</sup> Defendant from disposing any of the twenty (20) apartments listed in the Letter of Offer dated 8<sup>th</sup> August 2012. The said letter of offer was duly executed both by the Plaintiff and the 1<sup>st</sup> Defendant.
2. Clause 11 of the Letter of Offer dated 8<sup>th</sup> August 2012 provided as follows:-

**“In the event that this transaction is frustrated by the purchaser either not signing the sale agreement (as stipulated in clause 9 above) or purchaser not fulfilling clause 5 after been given 14 days from the due date of the defaulted commitment, the sale will be cancelled, the same house will be sold to someone else and the 10% of the total paid up to date will be forfeited as administrative charges. The refund shall be paid when the unit is sold.**

**The offer shall be validated by payment of the deposit stated in clause “5” above and subject to the availability of the apartment.”**

1. The issue of whether the letter of offer dated 8<sup>th</sup> August 2012 was a binding contract within the confines of Section 3 of the Law of Contract Act for the 1<sup>st</sup> Defendant to purport to rely on it to forfeit the sum of Kshs 8,000,000/= being 10% of the total deposit as raised by the Plaintiff is relevant.
2. According to the said Letter of Offer, the Agreement for Sale was to be signed within seven (7) days of receipt and it was to supersede the said Letter of Offer. It is evident that the transaction between the Plaintiff and the 1<sup>st</sup> Defendant did not materialise. This is borne by the letters exchanged between the parties’ advocates annexed in the 1<sup>st</sup> Defendant’s Replying Affidavit from pp 17-20.
3. The unexecuted Agreement for Sale is attached on pp 6-16 of the said Replying Affidavit. In his submissions, the Plaintiff argued that the terms of the Agreement for Sale were unconscionable by insisting the transfers to be registered by the 1<sup>st</sup> Defendant’s advocates amongst others.
4. There appears to have been other negotiations between the Plaintiff and the 1<sup>st</sup> Defendant in which it was agreed that he would purchase the apartments contained in the Letter of Offer dated 3<sup>rd</sup> September 2012. The Plaintiff did not execute this second Letter of Offer.
5. The Plaintiff’s argument that the Letter of Offer of 8<sup>th</sup> August 2012 was a mere invitation to purchase and cannot therefore be said to have been a disposition of an interest in land that was in writing is, in view, not the correct position in law. The moment parties put their pen to paper containing certain terms and conditions, they signified their acceptance to be bound. The said letter was duly signed by the Plaintiff and the 1<sup>st</sup> Defendant. Save for that Letter of Offer, the Plaintiff and the 1<sup>st</sup> Defendant did not sign any other document signifying their intentions. In the absence of any such agreement, the court has no option back to fall back on any written intention by the parties expressed in the said Letter of Offer.
6. The Plaintiff has not furnished this court with any evidence to show that he was coerced into signing the said Letter of Offer, that there was undue influence, there was a mistake, misrepresentation, duress or that the same was illegal or fraudulent. If that were the case, which is not the case in this matter, the burden would be upon the Plaintiff as the party who alleges the vitiating factors to prove the same so as to avoid the obligations under such a contract. It is for that reason that I find that I wholly concur with the 1<sup>st</sup> Defendant’s submissions and hold that the Letter of Offer constituted a valid and binding contract between the Plaintiff and the 1<sup>st</sup> Defendant. The issue of whether the Letter of Offer was a binding contract within the confines of

Section 3 of the Law of Contract Cap 23 (of the laws of Kenya) is not relevant for the purposes of this application as the parties were not engaged in issues of disposition of an interest of land.

7. Having found that the said Letter of Offer was a valid and binding contract between the Plaintiff and the 1<sup>st</sup> Defendant, it is incumbent upon the court to look at the terms and conditions therein as far as refund of the monies was concerned. Clause 11 of the said Letter of Offer was clear that the deposit less 10% for administrative charges would be refunded to the Purchaser in the event he did not sign the Agreement for Sale or did not comply with Clause 5 which stipulated the payment terms.
8. The intention of the parties can be discerned from the terms and conditions of the said Letter of Offer. The Plaintiff cannot renege on the terms of the contract when it is convenient for him to do so. In other words, he cannot be permitted to approbate and reprobate to suit his claim. His application appears to want to avoid the binding nature of the said Letter of Offer so as to claim the full refund of Kshs 80,000,000/= that he had initially paid as a deposit and afterwards converted as the full purchase price for twenty (20) apartments. A refund in this matter can only be made in accordance with Clause 11 of the said Letter of Offer. This effectively deals with the second issue raised in the Plaintiff's submissions.
9. The said Letter of Offer does also not provide for transfer of apartments. It was incumbent upon the Plaintiff to lay basis as to why the thirty nine (39) apartments should be transferred to him. There is no agreement showing that parties had agreed to such an arrangement. In any event, assuming the court was to accept the Plaintiff's assertions that there was no agreement in writing between the parties, then it is clear that his claims for such transfer or providing security have no leg to stand on and as such claims cannot be entertained.
10. For that reason, the Plaintiff cannot base his claim for the transfer of the apartments itemised in his application. His claim for Kshs 255,500,000/= must be based on some sort of valuation. He has not provided any such proof for consideration by the court. He has also not demonstrated why security of the sum of Kshs 255,500,000/= should be made by the 1<sup>st</sup> Defendant.
11. The prayer for payment of the balance of Kshs 10,000,000/= being the value of the purchase price of the three bed roomed corner apartments and which the 1<sup>st</sup> Defendant is said to have substituted with ordinary three bed roomed apartments is also speculative as there is no proof to back this assertion. It is not an order that this court can grant in the absence of any evidence adduced by the Plaintiff.
12. The prayer seeking the freezing of the 1<sup>st</sup> Defendant's account no 200763009 at Development House, Loita Street Nairobi pending the hearing is spent as the said order had not been granted by the time pending the hearing and determination of the application herein. I am therefore in total agreement with the 1<sup>st</sup> Defendant's submissions that the said prayer had been overtaken by events and the court need not make a finding on the same.
13. Although the prayer for mandatory injunction was being sought by the Plaintiff, he did not appear to have submitted on it. Having found that there was no agreement relating to the transfer of the thirty nine (39) apartments, this court cannot therefore order for mandatory injunction. As has rightly been pointed out by in the 1<sup>st</sup> and 3<sup>rd</sup> Defendants' submissions, the Plaintiff does not qualify to be granted such prayers. Mandatory injunctions should only be granted in the clearest of cases where it would save the court judicial time to grant them in the interlocutory stage as opposed to proceeding for full trial and granting the same. A party must prove that he is entitled to a mandatory injunction on a higher level than he would have been expected to prove in prohibitory injunctions. This is because of the final nature of such orders.
14. In this regard, I am in agreement with the holding in **Re Locabail International Ltd case** and wholly concur with the 1<sup>st</sup> and 3<sup>rd</sup> Defendant's submissions that the Plaintiff has not reached the threshold required for the granting of mandatory injunctions.
15. For the reasons aforesaid, I find no justification in ordering Zeyun Yang, the 1<sup>st</sup> Defendant's Chief Executive Officer depositing his passport in court. I am also in agreement with the 1<sup>st</sup> and 3<sup>rd</sup> Defendants submissions that granting such an order would be a violation of his fundamental right of movement enshrined in Article 39 of the Constitution of Kenya, 2010.
16. It is evident from correspondence exchanged between the parties and attached to the 1<sup>st</sup> Defendant's Replying Affidavit that the purchase of the apartments by the Plaintiff did not materialise. Courts should be very slow to interfere with contracts because they do not have any

- jurisdiction or authority to re-write contracts entered into by parties. Interfering with contracts would essentially render the need for parties to enter into contract voluntarily a waste of time.
17. The interim injunctive orders have restrained the 1<sup>st</sup> Defendant from disposing of the apartments so as to refund the Plaintiff his money. He had in fact demanded for the refund of the same within twenty four (24) hours as seen on page 26 of the 1<sup>st</sup> Defendant's said Replying Affidavit. The court must not be an impediment to terms and conditions agreed upon by parties. The least that this court can do is to release the parties to be governed by such terms and conditions. To that extent, the interim orders initially granted by Mutava J on 17<sup>th</sup> October 2012 are, for the avoidance of doubt, hereby discharged.
  18. The Plaintiff appears to have abandoned prayer no (a) of his said application. Neither he nor the 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted on the same. It is not clear to the court why the Plaintiff wanted the provisions of Order 3 Rule 2 of the Civil Procedure Rules, 2010 dispensed with. I will therefore not engage myself on the merits of the same. Suffice it to state that the said rule is couched in mandatory terms and consequently, the court has a duty to ensure compliance of the same.
  19. Accordingly, I find that the Plaintiff's Notice of Motion dated 17<sup>th</sup> December 2012 is not merited. The Plaintiff had failed to make out a good case for the granting of the orders sought therein. In the circumstances, the same is hereby dismissed with costs to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.
  20. Orders accordingly.

**DATED and DELIVERED at NAIROBI** this 30<sup>th</sup> day of April 2013

**J. KAMAU**

**JUDGE**