REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

LAND AND ENVIRONMENT DIVISION

ELC CASE NO. 398 OF 2013

AZAR MOHAMMED SHEIKH ....1ST PLAINTIFF

ABDULA SAID AHMED ....2ND PLAINTIFF

TASNIM ASHRAF SHABIR ....3RD PLAINTIFF

PRAFUL JAYANTIBHAI PATEL ....4TH PLAINTIFF

NEELESH SHASHIKNT SHAH...................................5TH PLAINTIFF

JHAVERKHAN JETHA SHAH.....................................6TH PLAINTIFF

MOHAMMED MUSTAQUE ISAAK..............................7TH PLAINTIFF

ARAFAT ABDULLA HASSAN ....8TH PLAINTIFF

DIPESH KANTILAL SHAH ....9TH PLAINTIFF

VERSUS

VELJI NARSHI SHAH..1ST DEFENDANT

RAJIN VELJI SHAH..2ND DEFENDANT

RULING

The application for determination is the Notice of motion dated 22nd March, 2013 brought under Order 40 Rule 1,2 & 4, Order 51 of the Civil Procedure Rules, Section 1,1A,3 and 3A of the Civil procedure Act seeking for orders that:-

1. **The defendants by themselves, their servants and/or agents be restrained by way of a temporary injunction from trespassing, wasting, alienating attempting to construct, constructing, dumping any building materials and/or interfering in any manner whatsoever with the suit premises known as LR No. 209/104/6 situated at Parklands, Nairobi pending the hearing and determination of this application.**
2. **That the defendant by himself, his and/pr agents be restrained by way of a "permanent Injunction" from trespassing, wasting alienating, attempting to construct, constructing,**

dumping any building materials and or interfering in any manner whatsoever with the suit premises known as LR No. 209/104/6 situated at Parklands, Nairobi

3. **That the defendants by themselves their agents and or servants be compelled to pull down, demolish and or remove any structure and or buildings put up on the suit property namely LR No. 209/104/6 in lieu of which the plaintiffs be at liberty to pull down, demolish and or abate the nuisance created by the defendants at the defendants costs.**
4. **That this court grants any other or further relief that it may deem fit and just.**
5. **That costs be provided for.**

This application is premised on the grounds set out on the face of the application and the supporting affidavit of Azar Mohamed Sheikh, who deposed his affidavit on 22nd March 2013. He avered that he has the authorization of the other plaintiffs to depose the affidavit, him being the 1st plaintiff in the suit. That the plaintiffs are the registered shareholders of Pride Power Properties Limited who is the registered owner of all that piece of land known as LR No. 209/104/6, 1st Parklands Avenue Nairobi. That Pride Power Properties Limited developed the said property by constructing 16 apartments on the said property and sold each apartment on the aforesaid piece of land to the plaintiffs among others. The leases for each apartment were registered against the title and the plaintiffs were given 125 shares each in Pride Power Properties Limited. That the initial Directors were Mersses Kantilal Narshi Shah and Mandik Chandulal Shah and thereafter Hiteshkumar Velji Shah also became a Director. He further deponed that he is not aware of any authorization that was written by the Directors that was issued to the 1st and 2nd Defendants either jointly or severally allowing the construction of additional flats on LR No. 209/104/6. That the plaintiffs/applicants then bought individual residential flats in the proposed sixteen residential flat Estate on the rationale that the entire estate was to comprise sixteen residential flats only and which applicants were made to understand was the optimum number of flats allowable in order to enhance the ambience and environmental wellbeing of the aforesaid estate since no individual flats were contemplated to be build on LR No. 209/104/6.

That further following the acquisition of their respective flats, the plaintiffs each acquired 125 fully paid shares each in Pride Power Properties. The 1st and 2nd Defendants were offered and issued with 747 and 125 shares respectively in the company. That in July, 2012 the 1st Defendant began bringing building materials to the property in order to construct additional premises on LR No. 209/104/6 ostensibly with the knowledge of the 2nd Defendant but without the approval of the requisite and lawful authorization of the majority plaintiffs shareholders of the said company. Further the 1st Defendant has unlawfully converted the area of the store in the common area of the said estate for his own exclusive use which is a breach of the lease agreement and the joint owners have been ignored during the commencement of the construction and have never conferred their approval for the said construction.

That the Plaintiffs had initially sought to particularize their objection to the construction through answering a questionnaire relating to the said construction and have never conferred their approval for the said construction. That the Defendants have gone ahead and got up a Notice board near the exit of the property indicating to the general public that they intend to alter and or put up extensions thereon without the authorization of the majority shareholders and despite numerous verbal and formal pleas the Defendant have refused to give any heed to the raised concerns.

That the intended construction will reduce the space for car parking as well as that of green areas that are commensurate with the existing agreed amenities available on the property and a breach to the sale agreement and leases executed by the original developer and the plaintiffs regarding the presence of only a maximum of 16 residential units on LR No. 209/104/6.

The Plaintiffs will suffer irreparable harm not quantifiable if the orders sought are not granted as there will occur a lack of parking slots within the residential estate, breach of term by the Defendants and the continue illegal construction by the Defendants will irredeemably alter the ambience and environment wellbeing of the residential estate generally to the detriment of the plaintiffs. That the Plaintiffs have a good prima facie case with a probability of success and the Defendants shall not suffer any loss of prejudice if the orders sought are granted. That unless an injunction is granted the plaintiffs shall

unlawfully, illegally and irregularly loose the property right to the exclusive possession and enjoyment of their property.

This application is opposed. The Defendants through the 1st Defendants have filed a Replying Affidavit on 12th April, 2013 in which he depones that the application is defective, misconceived and an abuse of the court process and the same ought to be struck out with costs for the reasons that the application content nine Plaintiffs whereas the Plaint has eleven Plaintiffs. Further the deponent of the application does not have the authority of the 7th and 11th Plaintiffs to depone the affidavit on their behalf since the 7th Plaintiff died in 2001 and the 11th Plaintiff relocated from Kenya some years back. That the orders as sought are final in nature and cannot be granted at an interlocutory stage. That the application as filed is full of misrepresentations, deceptions falsehoods malice and clear manifestation of greed on the part of some of the applicants and as such this court cannot allow it. That the sold shares in Pride Power Properties Limited are 2250 and each flat unit was allocated 125 shares and the total flats envisaged on LR No. 209/104/6 were 18 flats and not 16 as alleged by the 1st Plaintiff. The Deponent further stated that the Directorate of City Planning had approved the construction of 18 flats but they constructed 16 flats thereby leaving 2 flats although it had sold the two unconstructed flats to the 2nd Defendant and the 11th Plaintiff. That there was an understanding between the company and the 2nd Defendant and 11th Plaintiff that they would develop their individual flats units at their own costs therefore the flat being constructed belongs to the 2nd Defendant who owns the title for the same. That the 2nd Defendant has obtained the approvals to develop his flat by following due procedures without any misrepresentation and the said approvals are still in force and have been renewed on several occasions which demonstrate that the 2nd defendant has been candid and transparent in all his dealings. That the process of obtaining approvals was participatory and all the concerned parties were involved. That despite spirited and misguided efforts by the 1st Plaintiff actuated by pure malice both the City Council of Nairobi and NEMA have been steadfast in upholding the rule of law therefore the Plaintiffs have no prima facie case with probability of success and will suffer no irreparable harm or loss incapable of being compensated by an award of damages since the Plaintiffs will continue living in their own flats. That the Plaintiffs' ambience has not been affected in any way since all the residents have adequate parking spaces around the compound .

On 22nd April, 2013 Azar Mohamed Sheikh filed a further supporting affidavit in which he responded to the replying affidavit filed by the Respondent. He responded that the misjoining of the 7th and 11th Plaintiff in the Plaint is regretted and further stated that the authority to plead dated 22nd March, 2013 shows that the said 7th and 11th Plaintiff did not execute the said document. He denies that the Defendants possess the allegedly majority shareholding in Pride Power Properties Limited. He reiterated that the Defendants ownership of 7 flats out of the 16 flats represents an ownership of 47.75% of the total shareholding, and of the Plaintiffs who own 9th out of 16 flats represents an ownership of 56.25% of the total shareholding. The Defendants shareholding does not accord them any controlling interest whatsoever. Further annexture UNS3 should be expunged from pleadings it is a depiction of monies allegedly contributed by various owners in the company and not a depiction of the aggregate shareholding in the company. That the Defendants contention regarding the total initially envisaged flats on the suit land being 18 instead of 16 flats is untrue and is not supported by evidence since no lease documents emanating from Jatendra Amritlal Bhudia and Mrs. Priti Jatendra Bhundia was annexed.

The applicant stated that the agreement for sale between the company and Jatendra Amritlal Bhudihia and appearing as document 2 in the Plaintiffs list of Documents clearly shows the envisaged number of flats as being 16 and not 18 and that the transfer of lease of the 4th Plaintiff which was signed by the two Directors and the purchaser was altered to read LEASE and the number 16 altered to 18 and the signature of Mr. Kantilal Shah appears to be forged on the lease dated 27th July, 2007 which happened after the 1st Defendant handled the delivery of the lease document for both the 3rd and 4th Plaintiffs to be signed by the Company Director. That while annexture VNS6 is depicted as approval by the City Council of Nairobi the annexture does not bear stamps and or signatures of the Directorate of City Planning nor that of any of its official thereof. The applicant denies the contention that the 2nd Defendant has a legitimate

and legal entitlement to develop a non-existent flat B2-0.

THE ISSUES AND THE LAW

Whether the plaintiffs have made a case to warrant the exercise of the court's discretion under Order 40 Rule 1 of the Civil Procedure Rules. The applicant has approached this court seeking for reliefs under Order 40 being a temporary injunction pending the hearing and determination of this application and a permanent injunction.

This application will be determined on the basis of the threshold principles set out in **GIELLA v CASSMAN BROWN & CO LTD, (1973)EA 358,** where it was held for interlocutory injunction to issue the applicant must show that he has a prima facie case with probability of success, that if the injunction is not granted he is likely to suffer irreparable damage that cannot be adequately compensated in damages and if the court is in doubt to decide the case on balance of convenience. Have the applicants herein shown he has a prima facie case? In **MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR** the Court held, among other things, that a prima facie case means more than an arguable case, that the evidence must show an infringement of a right and the probability of success of the applicant's case at the trial. It states that:-

> **"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 opposite party as to call for an explanation or rebuttal from the latter"**

From the above holding it is clear that the plaintiffs have a prima facie case as they are shareholders of Pride Power Properties Limited in which the Plaintiffs have a 56.25% shares in the company in terms of the flats held. The fact that the Plaintiffs are shareholders of the company with good shareholding is prima facie enough. The actions of the Defendants will in one way or another affect the Plaintiffs. Would the Plaintiffs suffer loss which cannot be adequately be compensated in damages? The construction of the flats without the resolution of the shareholders that other flats should be constructed is enough to show that the Plaintiffs will suffer irreparable damages which cannot be compensated by damages as the two flats would confer undue benefit to the Defendants to the detriment of the Plaintiffs who may have bought the shares/flats knowing that the flats would remain as 16 and a maintained environment that is not congested.

On a balance of covenience, it is evident that the Defendants have began the construction of the Flats on the suit land without inclusion of the Plaintiffs as the shareholders. The 1st Defendant is also using the store that was meant for the whole company and also putting up a Notice Board indicating to the public that they intended to alter and put up extensions on the Flats. The balance of convenience tilts in favour of the plaintiffs. However the applicants have sought for a temporary injunction which is couched in a manner that after the delivery of this application, the order will automatically lapse as it is stated in prayer 3 in the last sentence that "pending the hearing and determination of this application." This prayer is therefore spent and I will not grant temporary injunction.

The applicant has also sought a mandatory injunction in prayer 4. There is, no general rule of law that final orders cannot be granted in an interlocutory application. However it is only in rare cases when such orders can be granted. Generally the paramount consideration before a court can grant a mandatory injunction at interlocutory stage is whether there is existence of special circumstances, and in clear cases. The principles governing the grant of mandatory injunction are stated in the passage **of Halsbury's Laws of England volume 24 paragraphs 948** which states:-

> **"A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a match on the plaintiff, such as where on receipt of notices**

that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application."

The Defendants herein allegedly acted in bad faith by putting up two additional Flats without approval of the Plaintiffs. The Defendants denied the allegations. That is therefore not a clear case. Again the case of **LOCABAIL INTERNATIONAL FINANCE LTD V AGRO-EXPORT AND ANOTHER [1986] 1ALL ER 901** sets out the principles applicable in cases of mandatory injunction. It states 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 match 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."**

Where a prima facie case is established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case. However I find in the instance are, justice would be served well if parties are given their day in court. The case of **DOHERTY v ALLMAN** 3 App. Cas 79,710,720, may apply in its full vigour ....

> **"Where a mandatory order is ought the court must consider whether in the circumstances as they exist after the breach a mandatory order, and if so, what kind of mandatory order, will produce a fair result. In this connection the court must, in my judgement, take into consideration amongst other relevant circumstances the benefit which the order will confer on the plaintiff and the detriment which it will cause the defendant. A plaintiff should not, of course, be deprived of relief to which it is entitled merely because it would be disadvantageous to the defendant. On the other had, he should not be permitted to insist on a form of relief which will confer no appreciable benefit on himself and will be materially detrimental to the defendant."**

This was expounded in the case of **SHEPHERD HOMES LTD v SANDAHM [1971] 1 ch. 34,** where it stated in part

> **".......... it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation. If, of course, the defendant has rushed on with his work in order to defeat the Plaintiff's attempts to stop him, then upon the plaintiff promptly resorting to the court for assistance, that assistance is likely to be available; for this will in substance be restoring the status quo and the plaintiff's promptitude is a badge of the seriousness of his complaint.**

From the foregoing it is my considered view that the prayer sought by the applicants for mandatory injunction should not be granted as the granting of such mandatory injunction should only be on the clearest of cases. The Applicants' case is not as clear and the explanations given cannot in any way be done through affidavit evidence but rather the same should be canvassed during the main hearing. Both parties have gone to great length to bring evidence on the issue of whether or not there was consensus/resolution by the shareholders to have 16 or 18 flats in the company, which can only be subjected to detailed examination during trial and not at this stage.

The prayers sought are also the same prayers sought by the Plaintiffs in their Plaint dated 22nd March, 2013 and granting these orders would in effect dispose off this suit without giving the Defendants their day in court which will be against the spirit of Article 50 of the Constitution. It is my humble opinion that it is judicious to order that the status quo be maintained in following terms, pending the hearing and determination of this suit.

1. The Plaintiffs and Defendants are restrained from dealing in any way be it trespass, dumping or building material, alienating, constructing, fencing off and interfering in any manner whatsoever with the suit premises LR No. 209/104/6 situated on Parklands Avenue, Nairobi by themselves and or through their agents and servants pending the hearing and determination of this suit.
2. The Defendants either by themselves or through their representatives, agents or servants not to interfere with the Plaintiffs occupation and possession of the suit premises until the main suit is determined.

Finally the Defendants' advocate brought up the issue of whether this suit should be determined in the Commercial Division or the ELC Division. Having looked at the pleadings filed in court, the issues seem to be a dispute on shareholding of the shareholders rather than the dispute on the land. I find that in this suit land is secondary to shareholders dispute. In the instant case, the court has to look at the shareholding first and then on the basis of the shares the court would thereafter determine the ownership of land and therefore this court has the liberty to move this case to the Commercial division.

The court finds that this case would best he handled at the commercial Division and I therefore order the same to be moved to the Commercial Division.

It is so ordered.

Dated, signed and delivered at Nairobi this 20th day of August, 2013

L. N. GACHERU,

JUDGE

20.8.2013

Before Gacheru, J

Anne Court clerk

Nganga for Plaintiff's

No appearance for Defendant though notified

L. N. GACHERU,

JUDGE

20.8.2013