REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 314 OF 2010

SURAYA PROPERTY GROUP LTD ……..……...1ST PLAINTIFF

W & K DEVELOPERS LIMITED…….....……..…2ND PLAINTIFF

VERSUS

W & K ESTATES LTD ……..……...…….1ST DEFENDANT

ISAAC KAMAY NDIRANGU…….……..…….….2ND DEFENDANT

ELVIN WAMBUI KAMAU ……..……..…….3RD DEFENDANT

RULING

The application for consideration is the one dated 13th May, 2010 – brought under our former Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act. The same seeks for orders, inter alia, restraining the Defendants by themselves and/or servants/agents from interfering with constructions on or evicting the plaintiff from LR Nos. 12239 and 12240 NAIROBI (hereinafter "the suit properties") or breaching or in any way terminating the joint development contract between the 1st Plaintiff and the Defendants entered into on the 9th October, 2006 and 1st December 2007 pending the hearing and determination of the suit.

The Plaintiff's case as contained in the Plaint, the Supporting Affidavit of Peter Muraya sworn on 13/05/2010 and the submissions of Mr. Miller learned Counsel for the Plaintiff's is that the 2nd Defendant is the registered owner of the suit properties, that in the early 2006 the 1st Plaintiff approached the 2nd defendant with an idea of creation and development of a new residential and commercial suburb in the suit properties, that since the 1st Plaintiff did not have the financial capital for the development it presented a master plan which would have a financial backing whilst the 2nd Defendant was to contribute or avail the suit properties to the joint development, that the 2nd Defendant was to dispose off 11.5 acres of the suit properties for purposes of raising capital to commence the project.

That the 1st Plaintiff secured a purchaser who paid Kshs. 40 million out of the total purchase price for the 11.5 acres of Kshs. 80 million, the said sum was to be utilized to procure change of user which was obtained in November, 2006, and part of it was used to pay land rates, building plans were completed by the 1st Plaintiff and thereafter he requested the 2nd Defendant to pay for the approval thereof. On 07/06/07 the NEMA approval was obtained for the project, that phase 1 of the project was to cost Kshs.138 million of which Kshs.26 million comprised the 1st Plaintiff's professional fees and Kshs.

112M was to be raised from direct sales of housing units, that the 2nd Defendant was to transfer the said 11.5 acres to the 2nd Plaintiff, which was to act as security for a loan. That the sales for phase 1 commenced in February, 2009 but the 2nd Defendant started denying prospective buyers access to the property for viewing purposes, he refused to transfer the property to the 1st Defendant whereby the project stalled in or about June, 2008. That after negotiations the parties agreed to revive the project whereby the construction contract was awarded to a company known as Nipsan Construction Company Ltd for a sum of Kshs.335 million.

The Plaintiffs further contended that the 2nd Defendant has at all times been kept updated of the progress, that eight (8) sale agreements had been executed, that the 1st Plaintiff had approached co-operative Bank of Kenya for a loan facility of Kshs.250million whereby a letter of offer for the said facility was accepted by the 2nd Plaintiff, that although the necessary documents to create a charge over the property and registration of transfer had been executed, the 2nd Defendant had withheld the release of the title documents. That the 2nd Defendant has been paid a total of Kshs.23.88million pursuant to the contract. That the 2nd Defendant had in April, 2010 issued a notice of non-performance of the contract and also withdrawn LR No. 12239 from the project and had denied the Plaintiffs and the contractor access to the construction site. That the 2nd Defendant had reported the Plaintiffs to the Gigiri Police as trespassers and further dug trenches to block access to the suit properties.

The Plaintiffs therefore contended that there was no legal basis for the 2nd Defendant to attempt to annul the agreement properly executed by the parties, that the 2nd Defendant was estopped from resciling from the position he had previously taken. That the Defendants seek to annul agreements from which they have reaped benefits. The Plaintiff through counsel's submissions contended that while the first agreement was dated 1st December, 2007, the second agreement was contained in a letter dated 9/1/09 produced as "PM16". That in the premises, the Defendants were trying to unilaterally vary a contract whose terms were very clear. In the premises, the Plaintiff urged the court to grant the application.

On behalf of the Defendants several Replying Affidavits were filed as follows:-

a) 1st Defendant's Replying Affidavit of Isaac Kamau Ndirangu sworn on 25th June, 2010.

b)2nd Defendant's Replying Affidavit of Isaac Kamau Ndirangu sworn on 25th June, 2010.

c) Replying Affidavit of Elvin Wambui Kamau sworn on 25th June, 2010

The Defendants also filed written submissions which were highlighted by their Counsel. In those lengthy Affidavits, the Defendants denied the Plaintiff's claim and challenged the 1st Plaintiffs locus standi to sue on the agreement of 1st December, 2007 in which it was not a party, that there was only one agreement between one Peter Muraya referred to as consultant/architect and the 2nd Defendant which set out various obligations of the parties therein, that the 1st Plaintiff had failed to perform its obligations under the contract, that it had failed to pay the sum of Kshs.138 million to the 2nd Defendant for the transfer of 11.5 acres of the suit property, that the monthly access fees of Kshs. 1 million payable to the 2nd Defendant had not been met, the 1st Plaintiff had not provided all the necessary finance as agreed, a separate account in the name of the 2nd Plaintiff in which the 2nd Defendant was to be a mandatory signatory had not been opened. That while those were the 1st Plaintiffs breaches of the contract, the 2nd Defendant had performed his part of the contract and had prepared Deed plans for the entire 11.5 acres ready for transfer when required.

It was the Defendants further contention that the suit by the 2nd Defendant was incompetent as there was no resolution to authorize the filing of the suit, that the letter of 9/1/09 was an attempt to vary the terms of the contract of 1/12/07 that was binding upon the parties, that the buildings being constructed were different from the ones in the approved building plans thereby exposing the 2nd Defendant to possible law

suits, that no allegations had been made against the 3rd Defendant as she was never an owner of the 11.5. acres in question, that the 1st Plaintiff had failed to involve the 2nd Defendant in the running of the project, that only Kshs.6.35 million had been paid to the 2nd Defendant, that the Plaintiffs had not disclosed how much they had collected from the sales and therefore they had come to court seeking equitable remedies with unclean hands.

The Defendants swore that there would be no irreparable loss to be suffered were the injunction sought to be denied and that in any event the balance of convenience tilts in favour of refusing the injunction. They urged the court to dismiss the application with costs.
I have considered the Affidavits on record. The written submissions and the oral hi-lights of learned Counsel I have also considered the authorities referred to and relied by the respective parties. I will refer to them as and when necessary.

This is an injunction application and the principles applicable are well known as enunciated in the **Giella -vs- Cassman Brown Case (1973) EA.** the Plaintiff must establish a prima facie case with a probability of success, that damages are not an adequate remedy and if in doubt the court is to decide the matter on a balance of convenience.

Prima facie case has been defined by the Court of Appeal in the famous case of **Mrao Limited –vs- First American Bank of Kenya Ltd & 2 others (2003) KLR 124** to mean more than an arguable case, that the evidence must show an infringement of a right and the probability of success of the applicants case at the trial. Have the Plaintiffs met this threshold in the application before me?

Firstly, I need to deal with the positions of the 2nd Plaintiff and the 3rd Defendant in this suit.

The shareholders of the 2nd Plaintiff are a company known as Suraya properties Ltd (as contended by the Defendants) or the 1st Plaintiff (as contended by the Plaintiffs) and the 1st Defendant in the ratio of 33% to 67%. As the case may be, there are only two (2) shareholders. Its directors are the directors of the said Suraya Properties Ltd or the 1st Plaintiff and the directors of the 1st Defendant, respectively. It would seem that the 2nd Plaintiff has sued not only its majority shareholder, the 1st Defendant but also one of its directors the 2nd Defendant. In such circumstances, a company requires a resolution to bring such proceedings. The 1st and 2nd Defendants have contended in their Affidavits that there was no resolution authorizing the 2nd Plaintiff to bring the present suit. Although the Plaintiffs had a chance to controvert that fact, in their Further Affidavit sworn by Peter Muraya on 21st July, 2010, that fact was not denied. In **Affordable Homes Africa Ltd –vs- Henderson & 2 others (2004) I KLR,** Hon. Njagi J held that a company can only take decision through the agency of its organs which are primarily the board of directors or the general meeting of its shareholders. None happened in the case of the 2nd Plaintiff before the filing of this suit. The suit was therefore filed without authority. On that basis alone, the 2nd Plaintiff cannot maintain the present suit as against the Defendants.

As regards the case against the 3rd Defendant, I have not seen any allegation either in the Plaint or the Affidavits that have been made against the 3rd Defendant. She denied having any interest either in the suit properties or in the 2nd Plaintiff. Her involvement was only limited to her being the wife of the 2nd Defendant and a director of the 1st Defendant. This fact was never challenged by the Plaintiffs. Her position as asserted by her does not warrant her being dragged to these proceedings. That being the case, I am of the prima facie view that the case against her collapses in limine and no orders can be made against her.

Now moving to the other areas of the application, the Plaintiffs' case is pegged on three (3) agreements. An informal agreement of 6th October, 2006, a formal agreement of 1st December, 2007 and another "agreement" of 9th January, 2009. The Defendants deny that there were such three (3) agreements and insist that they only recognize the agreement of 1st December, 2007. The Defendants refer the agreement of 9th October, 2006 as an introductory letter.

I have considered all the three documents which the Plaintiffs rely on as agreements produced as "PM2" "PM11" and "PM16" respectively. In the "agreement" of 9th October, 2006, which is a letter by the 1st Plaintiff to the 2nd Defendant, in the body thereof, it was indicated that "***a proper detailed agreement will be prepared by the advocates and executed."*** In my view therefore, I agree with the Defendants that the said letter of 9th October 2006 constituted only a letter setting out the terms under which the parties were to enter into a subsequent agreement. The "Agreement" of 9th October, 2006, was therefore subsequently subsummed in the Agreement of 1st December, 2007 wherein all the terms and conditions of the contract between the parties was set out.

As regards the Agreement of 1st December, 2007, it is difficult to discern who the actual parties thereto are, and even if they are discerned, a question arised as to whether those parties would have the capacity to undertake the obligations set out therein. The confusion is as follows:-

a) At the front page of the agreement, W & K Estate Ltd, the 1st Defendant, is shown as the "Land owner" while Suraya Property Group Limited is shown as the "Consultant Architect,"

b)On the recitals at page 1 of the agreement, the "land owner" is defined as the Land LR No. 12239 and 12240 is owned by Isaac Kamau trading as W & K Estate Ltd whilst the "consultant/Architect is Mr. Peter Muraya of Suraya Property Group Limited.

c) The agreement is executed by W & K Estate Ltd and Suraya Property Group Ltd.

In the above scenario, where the land is admittedly owned by Mr. Isaac Kamau, can W & K Estates Ltd purport to execute an agreement touching on the said properties yet there is no requirement that the said properties were to be transferred to it? Would W & K Estates Limited legally commit itself to carry out the obligations of the land owner set out in the agreement yet it was not the registered owner and at no point in time the land would be transferred or be owned by it? I doubt. It is on this ground that Mr. Gichuru learned Counsel for the Defendant submitted that the 1st Plaintiff had no locus standi, to sue on the agreement of 1st December, 2007 in which it was not a party to. The Plaintiffs did not clarify this issue and it was left to the court to speculate on.

As regards the "Agreement" of 9th January 2009, the Plaintiffs case was that since the project had stalled and was only kick started after negotiations that resulted in the letter dated 9th January, 2009, that constituted a concluded agreement. The Plaintiffs' further contended that the Defendants could not rescile from the said agreement as the 2nd Defendant had received monies under the same. The Defendants would not hear any of that. They contended that the document "PM16" was only a letter signed by the director of the 1st Plaintiff. That the Defendants never signed it, never replied to or accepted the terms of that letter.

I have perused the letter dated 9th January, 2009. The pertinent portion of that letter or "agreement" reads:-

"We refer to the various discussions held between yourself, Mrs., Wambui Kamau and the undersigned regarding the way forward on the above project.

We appreciate that the project stalled last year due to the fact that Mr. Kamau had chased away buyers who had visited the site on their own.

We therefore prepare the following as the way forward to enable us to immediately commence phase one comprising 20 units only in the area previously referred to as "Malachite Gardens". The following is therefore the basis of this first phase of development.

(i) The original agreement signed between them on 1st December, 2007 is still valid but to fast track the construction of phase 1 comprising twenty (20) units the following is necessary.

(ii) The phase 1 development of "W & K" project is on a total of 11.5 acres and shall incorporate twenty (20) residential housing units. The project name to be changed from "MALACHITE GARDENS" to "PEARL HEIGHTS" therefore the management company will be registered as "PEARL HEIGHTS MANAGEMENT LIMITED."

My reading of the above letter does not appear to connote a concluded scenario. To me, the same appears to be suggestions being put forward by the writer to the recipient on how best to proceed with the matter. The letter is suggestive and not declaratory on what had been discussed and agreed upon by the parties. Furthermore, there is no evidence that the 2nd Defendant ever agreed to its contents. The letter of 9th January, 2009, seems to make several amendments or variations to the agreement of 1st December, 2007. The question therefore is, with such variations, can the letter of 9th January, 2009 be taken to be an agreement between the parties? The Defendants have denied that fact and have contended that such an eventuality would amount to an attempt to unilaterally vary the terms and conditions of a duly executed formal contract of 1st December 2007. I agree with the Defendants that once parties have entered into an agreement that has been reduced into writing, the same can only be varied by a similar agreement in writing executed by both parties. In the case before me, the letter of 9th January, 2009, was only executed by a director of the 1st Plaintiff and there is no evidence on record to show that the terms thereof were accepted by the Defendants.

The Plaintiffs have contended that the 2nd Defendant was paid a total sum of Kshs. 23.88million pursuant to that letter. There is no evidence on record to show that those payments were made pursuant to the "letter" of 9th January, 2009 and not the agreement of 1st December, 2007. My reading of the agreement of 1st December, 2007 show that the 2nd Defendant was entitled to receive funds either from the 1st Plaintiff or Peter Muraya, whoever was the Consultant/ Architect. Accordingly, there being no express and direct evidence to link the funds received by the 2nd Defendant to the "letter" of 9th January, 2009, I am not prepared to hold that the sum of Kshs. 6.35million admitted by the 2nd Defendant to have been received by him from the project to have been so paid pursuant to the letter of 9th January, 2009. In my view, therefore, the operative agreement is the one dated 1st December, 2007.

I am fortified in holding as aforesaid because the terms contained in the letter of 9th January, 2009 seem to be contrary to those in agreement of 1st December, 2007. Since those terms seem to vary the agreement of 1st December, 2007 which was in writing, it was imperative that for it to be operative, it should have been signed by the parties to be bound thereby.

The orders sought are of an equitable nature. The adage maxim that he who comes to equity must do equity is applicable to all who seek equity. The Defendants complained in their Affidavits that Peter Muraya of the 1st Plaintiff was undertaking the project in a secretive manner, that the monies so far received under the contract had neither been released to the 2nd Defendant nor banked in an account in the name of the 2nd Plaintiff in which the 2nd Defendant was to be a mandatory signatory. The Plaintiffs have not disclosed to the court either in the statement of claim or Supporting or Further Affidavits the total sums so far collected by them and how the same has been applied. They have admitted that they had secured a buyer who had paid Kshs.40million out of the possible Kshs.80million for the 2nd Defendants 11.5. acres required for the 1st phase of the project. They were contented by producing "PM25" as the prepayments to the 2nd Defendant. The 2nd Defendant admits having received only Kshs. 6.35 million as opposed to the total sum of Kshs.22,190,157/50 shown in "PM25". I have noted that the petty cash vouchers exhibited contain different signatures of the recipients of the amounts therein. In my view, the Defendants having raised the issue of the whereabouts of the funds received from the project as one of the reasons of backing away from the contract, it was imperative for the Plaintiffs to make full disclosure of the sums so far received and how they have been applied. This they failed to do and in my opinion it amounts to seeking equity with dirty hands.

The defendants contended that the Plaintiffs were in breach of all their obligations under the agreement of

1st December, 2007 including the failure to open an account in the name of the 2nd Plaintiff in which the 2nd defendant was to be a mandatory signatory. These were not denied and no plausible explanation was forthcoming from the Plaintiffs. I have perused that agreement of 1st December, 2007 and I have noted the various obligations of the 1st Plaintiff thereon including the obligation of paying the 2nd Defendant for his property. None of it seems to have been accomplished by the Plaintiffs.

In view of the foregoing, has any right of the Plaintiffs been infringed and is there any probability of a success of the Plaintiffs' case at the trial? I entertain doubt. From what I have set out above, I am not satisfied that the Plaintiffs have established any prima facie case with any probability of success.

As regards the second limb of **Giella –vs- Cassman Brown** case, the Plaintiffs have sworn that if the prayers sought are not granted they stand to suffer irreparable harm. That may be so. But I have already found on a prima facie basis, that that state of affairs have been brought by the actions of the 1st Plaintiff for having been in breach of its obligations under the contract. In any event, the 2nd Defendant has sworn that he has property exceeding Kshs. 3Billion and can compensate the Plaintiffs for any loss and damage that may be suffered.

Having come to the foregoing conclusion, I need not deal with the 3rd limb of **Giella –vs- Cassman Brown** but if my view was required I would state that even the balance of convenience tilts in favour of declining the injunction.

Accordingly, the Plaintiffs application dated 13th May 2010 is without merit and is dismissed with costs.

DATED at Nairobi this **25th** day of **January 2012.**

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A. MABEYA
JUDGE