REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT
ENVIRONMENT & LAND CASE 185 OF 2011

HUSSEIN ALIBHAI PIRBHAI……..……..……..1ST PLAINTIFF

ZOHER HUSEIN PIRBHAI……..2ND PLAINTIFF

VERSUS

NORTHWOOD DEVELOPMENT

COMPANY LIMITED……..1ST DEFENDANT

HOUSING FINANCE COMPANY OF

KENYA LIMITED ……..……..……..2ND DEFENDANT

RULING

The Application that is before this Court for consideration is one dated 3rd May 2011 filed by the Plaintiffs. The orders sought are that the 1st and 2nd Defendants by themselves or by their agents, servants or otherwise be restrained from advertising, offering for sale, leasing, mortgaging, charging, transferring other than to the Plaintiffs, or assigning and/or otherwise dealing with Townhouse numbers 8 and 7 on property L. R. No. 7336/44, Miotoni Lane, Karen, Nairobi pending the hearing of this suit.

The Plaintiffs' case is detailed out in the supporting affidavit and supplementary affidavit sworn by the 2nd Plaintiff on 3rd May 2011 and 13th June 2011 respectively, and is summarized as follows. The Plaintiffs claim to have entered into agreements for sale dated the 29th May, 2008 and the 8th February, 2010 to buy from the 1st Defendant Townhouses numbers 8 and 7 respectively, on property L. R. No. 7336/44, Miotoni Lane, Karen, Nairobi (hereinafter referred to as "Townhouse No. 8" and "Townhouse No. 7"). The said agreements are produced as evidence in the Plaintiffs' List and Bundle of documents dated 3rd May 2011 and filed on 4th May 2011. The agreement for the purchase of Townhouse No. 8 was between the Plaintiffs and 1st Defendant, while the agreement for the purchase of Townhouse No. 7 was between the 2nd Plaintiff and 1st Defendant.

The purchase price with respect to Townhouse No. 8 was Kshs 25,000,00/= and Plaintiffs avers that they have paid Kshs 15,000,000/= as part payment of the purchase price, and are ready and willing to pay the balance of Kshs 10,000,000/=, were it not for the 1st Defendant's failure to complete construction of the said Townhouse as per the sale agreement. According to the Plaintiffs, the construction of Townhouse No. 8 was to be completed within 60 weeks from 1st August, 2007 that is on 24th September, 2008, but the construction has not been completed, nor have the Plaintiffs been notified of the completion. Further that the certificate of occupation dated 17th March, 2011 exhibited by the 1st Defendant has not been

forwarded to the Plaintiffs, neither have they been asked to pay the balance of the purchase price despite having stated in a letter dated 31st March, 2011 to the Defendants that they are willing, ready and able to do the same.

The purchase price for Townhouse No. 7 was Kshs 22,000,000/= which the 2nd Plaintiff states he has paid in full. The 2nd Plaintiff state that the 1st Defendant is in breach of their agreement by demanding that the 2nd Plaintiff pays a further Khs.18,000,000/= towards the purchase price of Townhouse number 7 before the Defendants can execute the discharge of charge over the property and transfer, and give the 2nd Plaintiff vacant possession of the said townhouse.

The Plaintiffs case as against the 2nd Defendant, to whom the property on which the townhouses are situated is claimed to have been charged, is that it agreed to draw and execute a partial discharge of charge for the property, to enable the registration of the Lease of Townhouse number 7 to the 2nd Plaintiff. The Plaintiffs contend that 2nd Defendant consented to the agreement for sale of Townhouse No. 7 by receipt, acceptance and retention of the sum of Kshs.5,000,000/= deposited in the 1st Defendant's account operated with the 2nd Defendant on 29th September, 2009, and of the sum of Kshs.13,135,020/= deposited in the same account on 28th July, 2010.

The Plaintiffs have produced evidence of the payments they have made. Evidence of the payments made in respect of Townhouse No. 8 is produced in pages 15 to 54 of the Plaintiffs' List and Bundle of Documents, and from a perusal of the copies of cheques produced totals to Kshs 10,000,000/=. With respect to Townhouse No. 7, there is acknowledgment of payment of a deposit of Kshs 5,000,000/= on 29th September 2009, and a further deposit Kshs 375,000/=paid on 7th November 2009 by the 2nd Plaintiff in the Schedule to the agreement dated 8th February 2010. Evidence is produced of a cheque dated 29th September 2009 for Ksh 5,000,000/= in page 71 of the Plaintiffs' List and Bundle of Documents. There is also evidence of various payments by cheque to the 1st Defendant made pursuant to addenda to the agreement for Townhouse 7, and letters to the 2nd Plaintiff requesting for the said payments from the 1st Defendant, in pages 91 to 111 of the Plaintiffs' List and Bundle of Documents. The payments total to Kshs 3,489,980/=. Finally, the 2nd Plaintiff has also produced evidence of an electronic payment to the 2nd Defendant's account on 28th July 2010 of Kshs 13,135,020/=. The total payments shown to have been made by the 2nd Plaintiff with respect to Townhouse No. 7 are Kshs 22,000,000/=.

The 1st Defendant's response is contained in a replying affidavit sworn by its Director, one Anthony Mbau on 13th May 2011. The 1st Defendant admits that it entered into an agreement dated 29th of May 2008 to sell to the Plaintiffs Townhouse No. 8, but that the suit filed herein is immature as the 1st Defendant intends to perform its obligations under that agreement and has at no time indicated that it does not wish to complete the sale. The 1st Defendant also states that completion under the agreement for the sale of Townhouse No. 8, was expressly provided to be 30 days after the 1st Defendant transmitting to the Plaintiffs a letter confirming that authority to occupy the house had been given by the City Council of Nairobi. Further, that the said Certificate of Occupation had only just been issued, and a copy of the said certificate dated 17th March 2011 was produced as evidence by the 1st Defendant.

The 1st Defendant also argues that the Plaintiffs are in breach of the very agreement that they seek to enforce and therefore undeserving of an injunctive relief, since they admit that they are still holding Kshs.10,000,000/= in respect of the purchase price for Townhouse No. 8, which action is inconsistent with the agreement for sale, which requires the Plaintiffs to have made full payment prior to demanding for the registration of the property in their favour.

With respect to Townhouse No 7, the 1st Defendant contends that the purported agreement entered into on the 8th of February, 2010 does not conform to the mandatory requirements of the Law of Contract Act (Cap 21), and is therefore void *ab initio* as a contract for the disposition of an interest in land. Further, the

agreement expressly contemplated that it required the consent of the 2nd Defendant, and the said consent has not been endorsed on the agreement. The 1st Defendant also argues that the addenda that is produced as evidence predate the agreement and as they have not been executed, do not conform to the mandatory requirements of the Law of Contract Act and are therefore void.

The 1st Defendant in addition avers that the 2nd Plaintiff did not pay Kshs.16,625,000/= on the 31st of January, 2010 which was the completion date, as per the prior understanding contained in the Plaintiffs' Advocates letter dated 29th of September 2009, which position is also reiterated in the purported sale agreement for Townhouse No 7. The 1st Defendant states that it cannot also proceed with the sale on account of the aforesaid breach, as the sale price was heavily discounted on condition that payments would be made on strict timelines.

Finally, the 1st Defendant claims that the Plaintiffs' have not shown that an award for damages would not adequately compensate them if they failed to get the orders sought in the application filed herein. The 1st Defendant also raises the issue of misjoinder of claims and causes of action in this suit that warrants its forthwith dismissal. All the above facts and arguments were reiterated in written submissions by the 1st Defendant's Counsel dated 1st November 2011, and in oral submissions made at the hearing of the application on 8th December 2011.

The 2nd Defendant responded by filing a Replying Affidavit sworn by its Assistant Manager Litigation, Mr. Migui Mungai on 6th June 2011. The 2nd Defendant states that an offer contained in a letter dated 11th September 2007, it agreed to advance to the 1st Defendant a Construction Loan Facility of Kshs.125,000,000/= for the construction of residential units on the property registered as LR NO. 7336/44 Miotoni Karen. Further, that the 1st Defendant accepted the offer and the terms stipulated therein, including agreeing that an Escrow Account would be opened with the 2nd Defendant to deposit all proceeds from the sale of the units and interest servicing during project construction. The 1st Defendant thereupon charged the said property to secure the loan for Kshs.125,000,000/= by a Charge dated 11th October 2007 in favour of the 2nd Defendant. Copies of the said letter of offer and of the Charge are produced by the 2nd Defendant as evidence.

The 2nd Defendant states it was not privy to, and its written consent was not sought prior to the execution of the Agreement for Sale dated 29th May, 2008 between the Plaintiffs and the 1st Defendant for the purported Sale of Town House No. 8, and of the Agreement for Sale dated 8th February 2010 between the 2nd Plaintiff and the 1st Defendant with respect to the Sale of Town House No. 7. Further, that a partial Discharge of Charge was also not one of the Completion Documents in the said Agreements for Sale, and the said agreements were in breach of the express terms of the Charge created in favour of the 2nd Defendant and therefore conferred no valid proprietary interest in favour of the Plaintiffs.

The 2nd Defendant contends that Plaintiffs therefore have no cause of action in law against it for the orders of specific performance, or for an order of injunction to restrain it from exercising its statutory power of sale with respect to the Townhouses developed on the charged property. Further, that the Plaintiffs only cause of action is for a refund or damages for breach of contract as against the 1st Defendant. The 2nd Defendants arguments are also restated in its Advocates written submission dated 19th July 2011, and oral submissions made at the hearing of the application, to show that no *prima facie* case had been established by the Plaintiffs. The 2nd Defendant's Advocate in his submissions relied on the Court of Appeal authority of **Mrao Limited v First American Bank Limited (2003) KLR 235** to show that no rights of the Plaintiffs had been infringed, and on the cases of **Agricultural Finance Corporation v Lengetia Ltd (1985) KLR 765** and **Taylor v Ellis & Another (1960) 1 all ER 549** with regard to the arguments he madeon the issues of privity of contract and prior consent to the sale agreements respectively.

I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. I will proceed with the determination of the application on the basis of the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358,** and as elaborated upon in **Benir Investments Ltd v Commissioner General & Anor (2010) eKLR** . The main issue therefore is whether the Plaintiffs have shown a *prima face* case to entitle them to the injunctions sought. The Plaintiffs' claim is that 1st and 2nd Defendants have refused and/or failed perform their obligations under the agreements for sale to execute discharges of charge of the property, and to transfer to and give to the Plaintiffs vacant possession of Townhouses Numbers 7 and 8.

The Plaintiffs' Advocate in written submissions dated 3rd May 2011 and oral submissions made at the hearing of the application argued that from the facts and evidence exhibited the Plaintiffs have shown a *prima facie* case. The Plaintiffs' Advocate also argued, relying on **Ami Development Services Ltd v The Trustees of Kenya Local Government & 2 others, (2005) eKLR** that there is no misjoinder of causes of action in this suit because the causes of action arising are those in which the Plaintiffs are jointly interested against the same Defendants. I will deal with the issue of misjoinder at this stage and I agree with the Plaintiffs' Advocate submission, which is also the position as provided in Order 1 Rule 1 and Rule 3 of the Civil Procedure Rules.

The Plaintiffs' Advocate also submitted that unsigned documents can be sufficient memoranda to a contract and relied on the Court of Appeal decisions in **Wagiciengo v Gerrard (1982) KLR 336**, and **Mumias Sugar Company Ltd v Freight Forwarders (K) Ltd (2005) eKLR.** Submissions were also made by the Plaintiffs' Advocate relying on various authorities on their entitlement to place a caveat on the suit property, that they should not be compelled to accept damages and on the need to administer justice without undue regard to procedural technicalities.

I will firstly detail my findings as regards the Plaintiffs case against the 1st Defendant. I find that evidence has been produced by the Plaintiffs of executed agreements of sale in writing, entered into by both the Plaintiffs and the 1st Defendant for the sale of Townhouses No. 8 and No. 7, and of payments made by the Plaintiffs pursuant to the said agreements as described in the foregoing. The validity or otherwise of the said agreements, or of the addenda to the agreement with respect to Townhouse 7, is an issue to be determined at the main trial and not at this stage. I will therefore now only proceed to deal with the sufficiency of the evidence produced, and will address this issue separately for each of the Townhouses.

With regard to Townhouse No 8, the evidence does show part payment by the Plaintiffs of Kshs 15,000,000/= pursuant to the sale agreement, which payment is not disputed by the 1st Defendant. However the evidence produced by the 1st Defendant shows that the completion date under the agreement for the sale of Townhouse No. 8 was expressly provided in Clause 17 of the said agreement, to be 30 days after the 1st Defendant transmitting to the Plaintiffs a letter confirming that authority to occupy the house had been given by the City Council of Nairobi. The Plaintiff therefore has not shown a *prima facie* case in relation to breach of the said agreement, or in relation to the transfer and discharge or charge in relation to Townhouse No. 8.

I will have to decide the prayer sought with respect to the said townhouse on a balance of convenience. I find that the balance does tilt in favour of the Plaintiffs for two reasons. Firstly, they have expended a considerable amount of money on the said Townhouse as part payment, and their reasons for not paying the balance are not disputed by the 1st Defendants. Secondly, for reasons of the failure by the 1st Defendant to expeditiously transmit the letter of authority to occupy the house, despite admitting that it was issued on 17th March 2011 and not having disputed receiving the Plaintiffs' request made on 30th March 2011 for completion.

With regard to Townhouse No 7, the evidence does show payment of the entire purchase price by the 2nd Plaintiff pursuant to the sale agreement, and also pursuant to the addenda and letters from the 1st Defendant. The said five letters are dated 12th February 201o, 22nd March 2010, 7th April 2010, 2nd May 2010, and all are written after the completion date of 30th January 2010. All the letters request the 2nd

Plaintiff to make payments to the 1st Defendant, and indicate that the amount paid would be deducted from the balance of the purchase price. It is therefore clear that there was a waiver of the said completion date by the 1st Defendant. The 2nd Plaintiff in my view has established that the 1st Defendant is in breach of the agreement with regards to its completion, and has thereby established a *prima facie* case. Damages will not be an adequate remedy in the circumstances since it is alleged by the Plaintiffs that the 1st Defendant is facing financial constraints, and to a certain extent this has been admitted by the 1st Defendant in their averments. The court also takes cognizance of the market realities and dynamics, and there is a possibility that even if compensated in monetary terms, the 2nd Plaintiff may not be able to purchase the same or a similar townhouse at the current market value.

As regards the Plaintiffs' case against the 2nd Defendant, my findings are that firstly, the jurisdiction of interlocutory injunctions under Order 40 Rule 1 of the Civil Procedure Rules is not conferred as a method of protecting established rights, but as the most convenient method of preserving the *status quo* while rights are established. That is why the orders under Order 40 Rule 1 are available as against any party to the suit. The issue of whether the Plaintiffs have established a cause of action against the 2nd Defendant will have to be determined during the main trial.

Secondly, it is indeed the position as stated by the Court of Appeal in **Mrao Limited v First American Bank Limited (2003) KLR 235** that for one to show a *prima facie* case, one must show the existence of a right that has been infringed. The right that is to be protected by an injunction can be one known to law or equity, and it is not only legal rights that are capable of protection by injunctions but equitable rights as well. The parties in the cited case were the chargee and chargor, and it was found in the circumstances of the case that the mortgagee could not be restrained from exercising their power of sale. In the present application I find that the legal relationship between the Plaintiffs and the 2nd Defendant is different, and the Plaintiffs have equitable rights as *bona fide* purchasers for value that need to be protected.

The Plaintiffs have also brought evidence to show that the 2nd Defendant have received money pursuant to the sale agreements entered into with the 1st Defendant, and the 2nd Defendant have admitted to the creation of an escrow account for proceeds of the sale of the townhouses constructed by the 1st Defendant. The 2nd Defendants cannot therefore deny knowledge of the sale agreements and the findings with regard to the said sale agreements as between the 1 Defendant and Plaintiffs will be equally binding on it. Finally, the 2nd Plaintiff also brought evidence of correspondence between himself and the 2nd Defendant on the partial discharge of charge with respect to Townhouse No. 7 in pages 112 to 125 of thePlaintiffs' List and Bundle of Documents.

In light of the reasons given in the foregoing, I hereby order as follows:-

1. The 1st and 2nd Defendants by themselves or by their agents, servants or otherwise be restrained from advertising, offering for sale, leasing, mortgaging, charging, transferring other than to the Plaintiffs, or assigning and/or otherwise dealing with Townhouse Number 8 on property L. R. No. 7336/44, Miotoni Lane, Karen, Nairobi, only on condition that the Plaintiffs deposit in Court within 14 days the sum of Kshs 10,000,000/= pending the hearing and determination of the suit filed herein, or until further orders.

2. The 1st and 2nd Defendants by themselves or by their agents, servants or otherwise be restrained from advertising, offering for sale, leasing, mortgaging, charging, transferring other than to the 2nd Plaintiff, or assigning and/or otherwise dealing with Townhouse Number 7 on property L. R. No. 7336/44, Miotoni Lane, Karen, pending the hearing and determination of the suit filed herein, or until further orders.

The costs of the application dated 3rd May 2011 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____23rd_____ day of ____February_____, 2012.

P. NYAMWEYA

JUDGE