REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 14 of 2012

ABDI AHMED JAMA :: **1ST PLAINTIFF**

MOHAMMED ALI JAMA ::: **2ND PLAINTIFF**

ABDI SHIRE WARSAME :: **3RD PLAINTIFF**

ABDI MOHAMMED JAMA ::: **4TH PLAINTIFF**

- VERSUS -

HALIMA HASSAN MOHAMMED ::: **1ST DEFENDANT**

MOHAMMED RASHID HUSSEIN ::: **2ND DEFENDANT**

BIRRE HUSSEIN MIRRE :: **3RD DEFENDANT**

PUMWANI DEVELOPMENT LTD. :: **4TH DEFENDANT**

SAHAL CONSTRUCTION CO. LTD. :::::::::::::::::::::::::::::::::::::: **5TH DEFENDANT**

R U L I N G

1. Before the Court are two Notice of Motion applications. The first one is dated **10th January 2012** while the second one is dated **24th January 2012**. The first application dated **10th January 2012** is filed under **Order 40, Rule 1, 2, 4** of the **Civil Procedure Rules, Section 1A, 1B, 3A** and **63** of the **Civil Procedure Act.** Theapplication initially sought 11 orders stated therein. However, at the time of hearing *inter-partes* of the application Mr. Muriithi counsel for the Applicants informed the court that he was withdrawing **prayers 4**, **5**, **6** and **7** of the application. The intention to withdraw these prayers was not opposed. However Mr. Masika counsel for the 2nd and 3rd Respondents observed that the withdrawal amounted to an abuse of the process of the court, an observation rejected by Mr. Muriithi. I have allowed the withdrawal of the said prayers. In effect the application now seeks the following orders namely:-

1. (spent)

2. Pending the hearing and determination of the suit herein, an injunction be issued to restrain the

Defendants whether by themselves, their agents, employees, assigns, advocates, servants or otherwise howsoever and any persons whatsoever be restrained from selling, disposing of, charging, sub-diving, processing subtitles or leases, dealing, interfering with and/or intermeddling in any manner whatsoever with the properties known as L.R. No. 209/4211 and L.R. No. 209/4212 located within Nairobi.

3. Pending the hearing and determination of the suit herein, an injunction be issued to restrain the Defendants whether by themselves, their agents, employees, assigns, advocates, servants or otherwise howsoever and any persons whatsoever be restrained from selling, disposing of, charging, sub-diving, processing subtitles or leases, pledging, dealing, interfering with and/or intermeddling in any manner whatsoever with the houses constructed on the properties known as L.R. No. 209/4211 and L.R. No. 209/4212 located within Nairobi.

4. (Spent)

5. (Spent)

6. (Spent)

7. (Spent)

8. Pending the hearing and determination of the suit herein, the 2nd, 3rd, 4th and 5th Defendants whether by themselves, their agents employees, assigns, advocates, servants or otherwise howsoever be restrained from paying any sum of money to the 1st Defendant.

9. Pending the hearing and determination of the suit herein, an order be issued directing that any and all money from the proceeds of the sale of the houses be deposited in an escrow account in the names of the Applicants' advocates and the Respondents' advocates.

10. (Spent)

11. Costs be in the cause.

2. The application is premised on 17 grounds namely:-

1. Between April 2006 and 9th April 2010, the Applicants (the "Applicants") entered into an agreement with the 1st Respondent which was both oral and in writing (the "Agreement") by which they agreed to undertake a partnership business for the construction of very valuable residential houses on properties known as L.R. No. 209/4211 and L.R. No. 209/4212 (the "Suit Property") located within Nairobi. The written agreement was made on 9th April 2010.

2. Pursuant to the Agreement, the Applicants advanced the sum of USD493887 (Kshs.45 million) to the 1st Respondent between 2006 and 2009 purely on trust and based on their friendship for purposes of the construction of the houses.

3. The money was also advanced on the representation from the 1st Respondent that:-

a. The 1st Respondent was a shareholder and a director of the 4th Respondent holding 30% share of the profit from the sale of the houses.

b. The money advanced would be invested by the 1st Respondent in the 4th Defendant pursuant to a Joint Venture Agreement between the 1st, 2nd and 3rd Respondents, described hereinafter.

c. The Applicants would be kept informed of the process of the construction of the houses and the sale of the same, including the proceeds of the sale.

d. On completion of the houses and the sale of the same, the money advanced by the Applicants would be repaid unconditionally.

e. The Applicants would be entitled to the 30% share of profits payable to the 1st Respondent on account of the Joint Venture Agreement described hereinafter.

4. The representations from the 1st Respondent were further strengthened by a Joint Development Agreement dated 11th July 2006 (the "Joint Development Agreement") between the 1st, 2nd and 3rd Respondents by which they had undertaken to incorporate a special purpose vehicle for the construction of the houses, being the 4th Respondent.

5. It is pursuant to the Joint Development Agreement that the 1st Respondent was to contribute the money for construction of the houses, while the Suit Property would be transferred to the 4th Respondent by the 2nd Respondent

6. The Applicants therefore had a reasonable and legitimate economic expectation that the money advanced to the 1st Respondent would be repaid unconditionally, that they would unconditionally be entitled to a share of the profits from the sale of the houses and that the Respondents would disclose all information in respect of the sale of the houses.

7. The houses were constructed in two phases. Phase once comprises of 82 houses while phase two comprises of 40 houses and the houses comprise of flats and masionettes. The total money involved in the construction of the houses is in excess of Kshs.456 million. The Respondents are in the process of selling the houses with the phase one houses being sold for kshs.9 million and the phase two houses being sold for between kshs.7 million and 8million.

8. The Applicants were utterly shocked to discover that the Respondents jointly or either of them separately had started selling the houses through the 5th Respondent, Sahal Construction Company Limited which was an entity unknown to the Applicants and neither are its shareholders known to the Applicants. This arrangement for the sale of the houses through the 5th Respondent has never been communicated to the Applicants. In fact the Respondents especially the 1st Respondent, have declined to disclose any information in respect of the sale of the houses, and especially the proceeds from the sale of the houses.

9. The Applicants are apprehensive that, as a result of the arrangement by the Respondents to sell the houses through the 5th Respondent coupled with the failure by the Respondents to disclose the information and nature of and the extent of the arrangement will result in the proceeds of the sale of the houses being paid to the 5th Respondent and not the 4th Respondent as had been represented by the 1st Respondent and the Applicants will not be aware of the proceeds of the sale of the houses or the profits realized.

10. Upon realizing this arrangement, the Applicant orally requested the 1st Respondent to provide an account of how the money advanced had been utilized and to also give an account of the profits realized from the sale of the houses. However, the 1st Respondent knowingly neglected and refused to give any information or provide any accounts as requested. The other Respondents have also been un co-operative in disclosing the information *vis* a *vis* the request.

11. The matter was referred to respectable Somali Council of Elders for arbitration which was conducted in the months of March and April 2010 and was attended by the Applicants and the 1st Respondent. The 1st Respondent admitted having received the sum of US D493 887 form the Applicants for the construction of the houses. The Council of elders ordered the 1st Respondent to pay the money within one month from the date of their decision which was 1st April 2010. The 1st Respondent has however not paid the money as of the date of filing suit.

12. The actions of the Respondents and especially the 1st Respondent amount to a total breach of the trust and friendship that the Applicants had for the 1st Respondent and her business partners, being the 2nd and 3rd Respondents which formed the basis for the advancement of the money.

13. It is against the principles of equity for the Respondents jointly or either of them severally to use the money advanced by the Applicants to the 1st Respondent based on the representations made by the 1st Respondent and her business partners, and to thereafter refuse to pay the money advanced, refuse to give an account of how the money was utilized, refuse to give an account of the proceeds of the sale of the houses, refuse to disclose any information in respect of the sale of the houses and especially the arrangement to sell the houses through the 5th Respondent and also refuse to pay the Applicants their share of the profits from the sale of the houses.

14. The actions by the Respondents are in breach of the principles of equity and amount to unjust enrichment by the Respondents.

15. The Applicants are reasonably apprehensive that unless an order of injunction is issued by this court to restrain the Respondents, the Applicants will lose their initial investment of US D 493 887 (Kshs.45 million) and will also lose their share of profits from the sale of the houses they anticipate to be in the sum of kshs.300 million being the 30% payable to the 1st Respondent from the profit from the sale of the houses.

16. The Applicants are also reasonably apprehensive that unless an order of injunction is issued by the court to restrain the Respondents:-

a. The Respondents will sell, dispose of, charge, deal with, interfere with or intermeddle with the houses constructed on the suit property or take similar actions on the suit property in a manner prejudicial to the right and intentions of the Applicants.

b. The Respondents may alter the shareholding structure of the 4th Respondent to ensure that the 1st Respondent is no longer a shareholder of the 4th Respondent.

c. The Respondents may move with haste and withdraw any money in any accounts that they may have with any bank.

These actions will definitely cause irreparable loss, prejudice and damage which cannot be compensated by way of damages.

17. In the above circumstances, it is aptly clear that it is only an order of injunction that can restrain the Respondents from continuing with the unlawful actions being perpetrated against the Applicants by the Respondents. It is therefore imperative and in the interest of justice that the orders sought be granted as prayed.

3. The application is opposed by the Defendants. The 1st Respondent filed a replying affidavit on **23rd January 2012** while the 2nd and 3rd Defendants also did the same on **23rd January 2012**. The 5th Defendant also opposes the application and has filed two replying affidavits sworn by **ISSACK IBRAHIM** on **24th January** and **8th February 2012**. The 5th Defendant has also filed a Notice of Motion application (the second application herein) dated **24th January 2012**. There is no indication on the record that any papers or documents have been filed in respect of the 4th Defendant.

4. This application first came to court *ex-parte* on **12th January 2012** when it was certified urgent and an interim injunction was issued in terms of prayer 10 of the application, which amounted to the grant of various interim injunctions in terms of **prayers 2, 3, 4, 5, 6, 7, 8** and **9** of the application.

5. The second Notice of Motion application is dated **24th January 2012** filed under **Section 3** and **3A** of

the **Civil Procedure Act**, **Order 40 Rule 4** and **7** of the **Civil Procedure Act**, **Order 40 Rule 4** and **7** of the **Civil Procedure Rules**. This application is filed by the 5th Defendant. It seeks to have the interim *ex-parte* orders issued on **12th January 2012** set aside, discharged and/or varied. The application is premised on the grounds set therein and is supported by the affidavit of **MOHAMED RASHID HUSSEIN** sworn and dated on **23rd January 2012**. In opposing this application the 2nd Plaintiff has field 2 replying affidavits on behalf of all the Plaintiffs. Both affidavits are dated **31st January 2012**.

6. The second application is in direct contradiction to the 1st application in relation to the 5th Defendant. On **24th January 2012** when it was heard by the court, no *ex-parte* orders were issued. The application has never been heard and the parties agreed to have it determined together with the 1st application.

7. The brief history of the application is as follows. On **12th January 2012**, the Plaintiff filed a suit and at the same time filed the 1st application herein and secured the interim orders already mentioned. From the pleadings, it is clear that between **April 2006** and **9th April 2010**, the Plaintiffs entered into an agreement with the 1st Defendant ("**Ms. Halima**") which was both oral and in writing. In as far as it was in writing the agreement was comprised in an agreement dated **9th April 2010** and in as far as it was oral, it was comprised in discussion and negotiations between the Plaintiffs and Ms. Halima.

By the agreement, the Plaintiffs and Ms. Halima agreed to undertake a partnership business for the construction of residential houses on properties known as **L.R. No. 209/4211** and **L.R. No. 209/4212** (the "**Suit property**") located within Nairobi. The partnership business was based on a model where the Plaintiffs would advance money to Ms. Halima who would invest the money in the construction of the houses on the suit property which was also another partnership business between Ms. Halima, the 2nd Defendant ("**Mr. Rashid**") and the 3rd Defendant ("**Mr. Birre**") at least as it was represented to the Plaintiffs by Ms. Halima.

Pursuant to the Agreement, the Plaintiffs advanced the sum of **US D 493 887** to Ms. Halima between the years **2006** and **2009** purely on trust and based on their friendship for purposes of the construction of the houses. The Plaintiffs advanced the money based on the representations by Ms. Halima that:-

a) Ms. Halima was a shareholder and a director of the 4th Defendant Pumwani Development Limited holding a 30% shareholding in the 4th Defendant and was entitled to a 30% share of the profit from the sale of the houses.

b) The money advanced would be invested by Ms. Halima in the 4th Defendant pursuant to a Joint Venture Agreement between the Ms. Halima, Mr. Rashid and Mr. Birre.

c) The Plaintiffs would be kept informed of the process of the construction of the houses and the sale of the same, including the proceeds of the sale.

d) On completion of the houses and the sale of the same, the money advanced by the Plaintiff would be repaid unconditionally.

e) The Plaintiffs would be entitled to the 30% share of profits payable to Ms. Halima of account of the Joint Venture Agreement described hereinafter.

These representations were further strengthened by a Joint Development Agreement dated **11th July 2006** (the "**Joint Development Agreement**") between Ms. Halima, Mr. Rashid and Mr. Birre by which they had undertaken to incorporate a special purpose vehicle for the construction of the houses, being the 4th Defendant. It is pursuant to the Joint Development Agreement that Ms. Halima was to contribute the money for construction of the houses, while the Suit Property would be transferred to Pumwani Development Limited by Mr. Rashid.

It now appears that Pumwani Development Limited was never incorporated as confirmed by Ms. Halima, Mr. Rashid and Mr. Birre.

The houses were constructed in two phases. Phase one comprises of 82 houses while phase two comprises of 40 houses and the houses comprise of flats and masionnetes. The Defendants are alleged to be in the process of selling the houses with the phase one houses being sold at **Kshs.9 million** and the phase two houses being sold at between **Kshs.7 million** and **8 million**.

The Plaintiffs allege that they were utterly shocked to discover that the Defendants jointly or either of them separately had started selling the houses through the 5th Defendant, Sahal Construction Company Limited ("**Sahal**") which was an entity not known to the Plaintiffs and neither are its shareholders known to the Plaintiffs. This arrangement for the sale of the houses through Sahal it is alleged, has never been communicated to the Plaintiffs.

Upon realizing this arrangement, the Plaintiffs orally requested Ms. Halima to provide an account of how the money advanced had been utilized and to also give an account of the profits realized from the sale of the houses, a request which she is alleged to have declined. The other Defendants have also allegedly been un co-operative in disclosing the information.

The matter was referred to Somali Council of Elders for mediation which was conducted in the months of **March** and **April 2010** and was attended by the Plaintiffs and Ms. Halima. Ms. Halima admitted having received the sum of **US D 493 887** from the Plaintiffs for the construction of the houses. The Council of Elders ordered Ms. Halima to pay the money within one month from the date of their decision which was **1st April 2010**. Ms. Halima has denied this.

8. The above is the brief history of the dispute that is now before this court. Parties filed separate defences to the suit and also replied separately to the application. The above brief history is not entirely acclaimed by all the parties. In fact the 5th Defendant in its defence filed in court on **14th March 2012** totally denies any privity of contract with the Plaintiffs and claims to be a total stranger to these proceedings. Similarly the 2nd and 3rd Defendants aver in their defence filed in court on **27th March 2012** that even if there was an agreement between the Plaintiff and the 1st Defendant, the terms and conditions thereof are not binding upon the 2nd and 3rd Defendants by dint of the lack of privity of contract between them and the parties thereto and that consequently, the 2nd and 3rd Defendants are not bound by any terms of such agreements. By the time of writing this Ruling the court record did not show if the 1st Defendant had filed a defence. I did not find this omission obstructive since all other responses to the application by the 1st Defendant were on record.

9. It is the Plaintiffs' case that the money was advanced purely on trust, friendship and the representations by Ms. Halima in cahoots with the Defendants and also based on the Somali culture of advancing money where money advanced does not attract interest but attracts a "*profit*" from the investment of the money. It is submitted that the actions of the Defendants and especially Ms. Halima amount to a total breach of the trust and friendship and also to misrepresentation, and amount to a mechanism for unjust enrichment by the Defendants at the expense of the Plaintiffs.

It is also the Plaintiffs' case that as a result of the arrangement by the Defendant to sell the houses through Sahal coupled with the failure by the Defendant to disclose the information and nature of and the extent of the arrangement, the Plaintiffs will not be aware of the proceeds of the sale of the houses or the profits realized.

It is also the Plaintiff's case that they had a reasonable and legitimate economic expectation that the money advanced to Ms. Halima would be repaid unconditionally, the money would be invested in the 4th Defendant, that they would unconditionally be entitled to a share of the profits from the sale of the houses and that the Defendants would disclose all information in respect of the sale of the houses and especially the sale proceeds.

The Plaintiffs submitted that it is against the principles of equity for the Defendants jointly or either of them severally to use the money advanced by the Plaintiffs to Ms. Halima based on the representation made by Ms. Halima and the trust and friendship of the Plaintiffs to Ms. Halilma and her business partners in construction of the houses and to thereafter refuse to pay the money advanced, refuse to give an account of how the money was utilized, refuse to give an account of the proceeds of the sale of the houses, refuse to disclose any information in respect of the sale of the houses (and especially the arrangement to sell the houses though Sahal) and also refuse to pay the Plaintiffs their share of the profits from the sale of the houses.

The Plaintiffs are apprehensive that the actions by the Defendants will definitely cause irreparable loss, prejudice and damage which cannot be compensated by way of damages and in the circumstances only orders of injunction can prevent their loss.

10. In reply the 1st Defendant maintained that the Plaintiff's claim as against her is in respect of sums of money advanced to her for the construction of houses on **LR. No. 209/4211** and **L.R. No. 209/4212**. It is submitted for the 1st Defendant that the sum of **Kshs.18 million** (read eighteen million kenya shillings) was advanced to her by the Plaintiffs for the aforesaid purpose and that at best, the Plaintiffs can only claim a debt of **18 million** shillings owed to them by the 1st Defendant pursuant to the terms of the written agreement between the parties herein dated **9th April 2010**.

It is further submitted that the written agreement between the 1st Defendant and the Plaintiffs provided for a contingency in the repayment of the sums advanced to the 1st Defendant thus at Clause 4:-

". . . once the construction is over, the parties and the shareholder will agree on what shares to be allotted to the partners and the shareholder as a consideration of work done by the parties."

The 1st Defendant submits that only upon completion of the project and sale of all the houses in the project was the 1st Defendant obligated to repay the Plaintiffs the sums advanced in the amount of **Kshs.18 million** and that the rate of return on that sum would be agreed upon by the parties upon completion of the project. It is further submitted that the said construction project had not been completed as at the time of filing of the Plaintiffs' application and it therefore follows that the obligations of the 1st Defendant under the written agreement dated **9th April 2010** have yet to accrue. Therefore, no cause of action arose as against the 1st Defendant as to enable the Plaintiffs to show a *prima facie* case with a probability of success.

The Plaintiff's Notice of Motion application dated **10th January 2012** which at paragraph 3(d) recognized that "*on completion of the houses and the sale of the same, the money advanced by the Applicants would be repaid unconditionally*" is clear indication that the claim by the Plaintiffs was premature.

The 1st Defendant submitted that the Plaintiffs by means of their application dated **10th January 2012** had jumped the gun and raced ahead to seek restraining orders in respect of a construction project that had not reached completion as provided for under contract and upon which consensus on the profits therefrom had not been reached as provided for contractually because maturation of the project was still pending.

In **MRAO LTD. VS FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR 125**, the Court of Appeal stated that a *prima facie* case within the meaning of **Giella – Vs Cassman Brown** and Co. Ltd. in civil cases 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."

It is submitted that the 1st Defendant could not possibly have infringed the Plaintiff's right as her

contractual obligations to them were yet to accrue. It is trite law that the court's discretionary powers to grant injunction as enunciated by Spry V.P. in Giella Vs – Cassman Brown & co. Ltd arise to protect a legal or equitable right of the claimant. On the facts of the present dispute, such rights had not accrued to the Plaintiffs. Accordingly, the restraining orders issued against the 1st Defendant do not properly lie against her and the same orders should be discharged.

Submitting that the Plaintiff cannot suffer irreparable damage, the 1st Defendant stated that the Plaintiffs' only claim is that of a simple debt owed by the 1st Defendant notwithstanding the dispute over the exact sum of money advanced to the 1st Defendant by the Plaintiffs. The value of the Plaintiffs' claim is a liquidated amount capable of being ascertained at trial and one which could not have formed the basis of an injunction on the basis of the second principle established in Giella – Vs Cassman Brown & Co. Ltd. Mr. Masike supported this position by citing the case of **MASUMBUKO YERRI KOMBE & ANOTHER - VS – DIAMOND TRUST BANK & ANOTHER [2011] eKLR, ANDREW OUKO - VS - KENYA COMMERCIAL BANK & 3 OTHERS [2005] eKLR**:-

". . . Turning to the second condition for the grant of an interlocutory injunction the record of this matter shows that both sides to the dispute put a valuation to the suit property. It therefore follows that the Plaintiff could be adequately compensated in damages. The suit property was charged to the Defendant for a known sum. It has also been sold to the 2nd Defendant for a specific sum. Accordingly, the Plaintiff's application would fail on this second test also."

Mr. Masika submitted that the third and final limb of consideration before grant of an interlocutory injunction is that where the court is in doubt, it should have regard to where the balance of convenience falls on the facts of the case, and that in this matter it favours the 1st Defendant.

11. Similarly the 2nd and 3rd Defendant's relying on the above case of **GIELLA – VS – CASSMAN BROWN & CO. LTD**., submitted that the threshold established in that case for the grant of an injunction have not been met. In addition the 2nd and 3rd Defendants emphasized that no privity of contract between the Plaintiffs and the 2nd and 3rd Defendants was established.

From the foregoing, since the Plaintiffs' claim is predicated upon the agreement dated **9th February 2010**, the Defendants cannot be bound by the terms of the said agreement as they were not privy thereto.

The doctrine of *privity of contract* is that, as a general rule, a contract cannot confer rights or impose obligations on strangers to it. Under this doctrine, therefore, it is submitted that the 2nd and 3rd Defendants cannot be bound by the agreement dated **9th April, 2010** and there is therefore no basis at all to have adverse orders directed to the 2nd and 3rd Defendants as sought herein.

The applicability of the *doctrine of privity* of contract is now settled and was a subject of litigation in **MWANGI – VS – BRAEBURN LIMITED [2004] 2 E.A. 196** in the words of O'kubasu, Onyango-Otieno & Ringera, JJA at page 2020 thus:-

"With regard to the appeal against the order of mandatory injunction, it is clear that the learned judge found there was no contract for the provision of education services as between Dickson and the school: the contract was between the parents and the school and, accordingly, only the parents could sue for any alleged breach thereof. That being so, the order for (mandatory) injunction made in favour of Dickson could not stand. . ."

The court went on to emphasize the doctrine at page 203 in the following words:-

". . . If any authority were required for the above elementary propositions of law, we would refer to the following in Halsbury's Laws of England (3rd Edition) volume 8, paragraph 110 where the learned editors posit the law as follows:-

"As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party to it even if the contract is made for his behalf and purposes to give him the right to sue or to make him liable upon it."

In similar fashion, the 2nd and 3rd Defendants submitted that as regards the Joint Development Agreement (annexture 3) dated **11th July, 2006** which was signed between the 1st, 2nd and 3rd Defendants and whose terms and conditions the Plaintiffs seek to obtain a benefit, it is quite clear that the Plaintiffs were never parties thereto. The above principle of *privity* of contract apply to this situation.

It has further been submitted that the Applicants have no proprietary interest in the suit properties. Since neither the Plaintiffs nor the 1st Defendant are proprietors of the suit properties, to wit LR. No.20914211, LR. No. 209/14122 and LR. No. 209/14213, an injunction cannot issue in their favour as regards these properties. It was submitted that this position is well settled in our jurisprudence as was held in **CENTRAL KENYA LIMITED - VS - TRUST BANK LIMITED AND OTHERS [1995-98] 2EA 57**, **NAIROBI MAMBA VILLAGE - VS - NATIONAL BANK OF KENYA [2002] 1EA 197** and **FELIX** & **2 OTHERS - VS - VOI DEVELOPMENT COMPANY LIMITED & 4 OTHERS [2000] KLR 285** where it was held that in view of the conclusiveness of proof of proprietorship of property by virtue of the possession of a valid certificate of title, a party who is not the registered proprietor of such property has no right to an injunction against the registered owner. This submission, in my view, is only applicable in law but not in equity. We all know how equity developed. It relaxed the rigid application of the law and allowed, *inter-a-alia*, occupants without titles to sue the landlords. Indeed, this is the hall mark of injunction as an equitable remedy, it is not therefore right that before the court can issue an injunction, it must be satisfied that the Applicants have a legal interest in the subject matter.

12. For the 5th Defendant, M/s Oduor submitted that the 1st, 2nd and 3rd Defendants entered into a Joint Development Agreement dated 11th July 2006 by which they agreed to develop all that property known as L.R. No. 209/4211 and LR. No. 209/4212 located in Nairobi.

The terms of the Agreement include:-

(a) The parties would co-operate together on an exclusive basis in developing the project.

(b) The 2nd Defendant's contribution to the project would be **Kshs.35 million** in the form of land as he was the registered owner of the properties known as LR. No. 209/4211 and LR. No. 209/4212 (hereafter "*the suit property*").

(c) The suit property to be transferred to the company on the signing of the agreement and incorporation of the company.

(d) The 1st Defendant's contribution to the project would be **Kshs.36 million**.

(e) The parties would jointly seek additional financing with such financing to be explored and developed jointly by the parties.

(f) No shares in the project company would be transferred unless and until the rights of preemption conferred on the parties to the agreement shall have been exhausted.

A copy of the Agreement is annexed to the 4th Plaintiff's supporting affidavit sworn on **10th January 2012** as annexture **AMJ – 3**. The 5th Defendant submits that it is not a party to the Joint Development Agreement and the Plaintiffs cannot sustain a cause of action against it on the basis of the Agreement or representations made by the 1st Defendant to the Plaintiffs pursuant to the said Agreement.

The Plaintiffs in seeking the injunctive orders further rely on the Agreement dated **9th April 2010** between them and the 1st Defendant, a copy of which is annexed to the 4th Plaintiff's supporting affidavit

sworn on **10th January 2012** as annexture **AMJ-1**. The 5th Defendant states that it is not a party to the Agreement and is not bound by the provisions of the said Agreement.

In the result the 5th Defendant submits that the suit against it in so far as the same is based on the two agreements discloses no cause of action against it.

The 5th Defendant in support of this relies on the holding of the court in the case of **MUCHENDU – VS – WAITA [2003] KLR 419** in which the court held that:

"a contract cannot confer rights or impose obligations arising out of it on any person other than the parties to it."

The court in the said case in dismissing the Plaintiff's application for injunction held that:-

"The third issue which the Defendant raises is that even if there was a valid contract, there is no privity of contract between him and the Plaintiff. It is clear from the pleadings that the Defendant is sued in her personal capacity and not as the legal representative of the estate of Francis Waite Mbaki, deceased. There was no contract between the Defendant and the Plaintiff over the suit premises. Hence she is a stranger to the Plaintiff's claim arising out of a contract which she was not a party. I am convinced also that the Plaintiff on this issue has no claim against the Defendant. To me the Plaintiff has not established a *prima facie* case with a hope of success at this preliminary stage. A contract cannot confer right to or impose obligations arising out of it on any person except the parties to it."

The 5th Defendant further relied on the holding of the court on the case of **PROVINCIAL CONSTRUCTION COMPANY LTD. & ANOTHER – VS – ATTORNEY GENERAL [1991] KLR 497** in which the court held as follows:-

"It is a cardinal principal of the applicable common law that a third party cannot benefit from a contract unless such a contract is for his benefit or was made on his behalf by his agent."

The 5th Defendant urges this court to uphold the above decisions of the court and hold that the Plaintiffs cannot seek an injunction against the 5th Defendant on the basis of either the Joint Development Agreement between the Plaintiffs and the 1st Defendant as the 5th Defendant is not a party to any of these agreements.

The 5th Defendant also enquired as to whether the orders herein extend to L.R. No. 209/4213.

The 5th Defendant submits that the construction it is undertaking not only involves all that property known as LR. No. 209/14213. In support of this the 5th Defendant has annexed to its replying affidavit as annexture **SSC-3** at page 20 filed on **24th January 2012** a copy of the amendment to approve subdivision plan of the said properties. The plan clearly indicates that the construction and plan relates to "*L.R. No. 209/142111-14213*."

In addition to above the 5th Defendant submitted it owed no money to the Plaintiff and no evidence has been led to show or prove the contrary. Further the 5th Defendant submitted that it was not an agent of the 1st Defendant nor is the 1st Defendant a shareholder in the 5th Defendant. Other grounds of submission by the 5th Defendant are the same with those of the rest of the Defendants.

14. The parties submitted several issues for determination. However, having carefully considered the entire suit and applications and the submissions of parties I am persuaded that for the purposes of the application before me the following issues are relevant to dispose off the matter at this stage:-

(a) Whether the 2nd, 3rd and 5th Defendants are strangers to the suit.

(b) Whether the Applicants have proprietary interest in the suit property.

(c) Whether the Plaintiff are entitled to an injunction taking into account all the facts of the case.

(d) Whether an escrow account should be opened.

(e) Whether the *ex-parte* orders made on **12th January 2012** and extended on **24th January 2012** can be varied and/or set aside

15. To address the first issue herein, are the 2nd, 3rd and 5th Defendants strangers to this suit? I have no doubt that, given the legal texts cited and legal authorities submitted by the counsel for these Defendants, the easier and obvious answer to this question would be in the affirmative. In my view, however, the Plaintiffs have established that they have a reasonable cause of action against the 1st Defendant based on the alleged breach of trust, misrepresentation, and legitimate expectation. It is also clear that the money was advanced to the 1st Defendant based on her misrepresentation. However, it is also clear that the money was used in building the said houses, which are apparently being sold, or may soon be sold, by the 5th Defendant, on a land owned by the 2nd Defendant. The 5th Defendant has not denied this allegation. If that is so, and I think it is, then in my view, there is a threat connecting all the Defendants together in this transaction. Contractually it may appear that the 2nd, 3rd and 5th Defendants are strangers to this suit, yet, equity establishes an equitable thread which connects the Defendants to an equitable adventure in which all the Defendants expected to benefit. The bed rock of this equitable adventure is the original misrepresentation which the 1st Defendant made. While I uphold the submissions that the 2nd, 3rd and 5th Defendants are not privy to the Agreement dated **9th April 2010**, and that the Plaintiffs are also not privy to the Joint Development Agreement dated **11th July 2006**, I nevertheless rule that the case establishes clear equitable principles which I cannot ignore. When parties operate on legal principles which appear on the face of it to also include equitable elements of trust and honesty, submissions based purely on the law may not very convincingly be advanced to defeat an intended equitable achievement. Therefore, for the purpose of the intended equitable achievement in this matter, I find and rule that the 2nd, 3rd and 5th Defendants are not strangers to this suit.

16. The second issue is whether the Plaintiffs have a proprietary interest in the suit. It was submitted for the Defendants, and that submission supported by case law which I have already stated, that the Applicants have no proprietary interest in the suit properties by virtue of the fact that a party who is not the registered proprietor of a property has no right to an injunction against the registered owner. This submission is correct. However in my view it is only applicable in law but not in equity. We all know how the law of equity evolved and developed. It was as a result of the rigidity of the common law. Equity came in to relax the rigid common law and to provide remedies which were not available in law. It allowed *inter-a-alia* occupants without titles to sue their landlords. Indeed, the remedy of injunction is founded on the principle that a person without right to a title can still have certain rights appurtenant to that title. As I have already stated, this claim is largely founded in equity, and that being so, I rule that the Applicants have demonstrated a *prima-facie* interest in the suit property to enable the grant of interim orders pending further investigation of that interest at the hearing of the suit.

17. The third issue is whether or not the Plaintiffs are entitled to an injunction taking into account all the facts of the case. In its application the Plaintiffs had prayed for up to 10 orders all of them either injunctive or quasi injuncive. At the time of hearing of this application the Plaintiffs abandoned **prayers 4**, **5**, **6** and **7**. This left the court with substantive **prayers 3**, **8** and **9**. **Prayer 3** seeks an injunction against all the Defendants and their agents from selling, disposing of, charging, sub-dividing, leasing, pledging, dealing, interfering with and/or intermeddling in any manner whatsoever with the suit property. **Prayer 8** sought an injunction restraining the Defendants from paying any sum of money to the 1st Defendant. **Prayer 9** seeks that all proceeds from the sale of the houses be deposited in an escrow account in the names of the Applicant's advocates and the Respondent Advocates.

Due to the nature of this transaction, I am not persuaded that I should issue an injunction in the nature prayed for in **prayer 2** and **3** of the application. To do that would disable the operations of the 5th Defendant Company and also jeopardize the fruit of the equitable venture which is the subject matter of this suit. The business of the parties must proceed as envisaged without any interference pending the determination of this suit.

However, it is also my duty to protect the proceeds from that business from waste, pilferage plunder or mismanagement which may destroy the intended goal. I allow **prayers 8** and **9** of the application and order and direct that pending the hearing and determination of this suit the 2nd, 3rd, 4th and 5th Defendants and their agents are restrained from paying any sum of money to the 1st Defendant. I further order and direct that all money from the proceeds of the sale of the houses be deposited in an escrow account in the names of the Applicants Advocates and the Respondents Advocates pending the hearing and determination of this suit.

18. The above orders now provide an answer to the last issue I raised, i.e. whether the *ex-parte* orders made on **12th January 2012** and extended on **24th January 2012** can be varied and/or set aside. When the matter was heard *ex-parte* on **12th January 2012**, the court allowed the entire **prayers 1** to **10**. Arising from the foregoing paragraphs of this Ruling those orders have now been varied and/or set aside to the extent that now the only orders subsisting are **3**, **8** and **9** of the application.

I cannot fail, at this stage to agree with the observation of Mr. Ochieng Oduol for the 1st Defendant that court orders are not given in vain. Mr. Muriithi for the Plaintiffs at the hearing of this application with the approval and leave of the court withdrew **prayers 4**, **5**, **6** and **7** of the 1st application. He did not provide a reason but I can take it that those orders were no longer relevant to his clients. However, his clients had been enjoying these orders since **January 2012**. The cumulative effect of those withdrawn orders on the Defendants have not been addressed by the Defendants but it does not require expenditure of energy to imagine the result. That kind of action, without reasons being provided, may amount to an abuse of the process of the court.

19. In the upshot I grant orders as under:-

(a) For the Notice of Motion application dated **10th January 2012**, I grant **prayers 8** and **9** of the application. The escrow account shall be opened within **14 days** from date of this Ruling.

(b) For the Notice of Motion dated **24th January 2012** the same is allowed to the extent of the prayers not allowed in the Notice of Motion dated **10th January 2012**. Those prayers not allowed are prayers **2**, **3**, **4**, **5**, **6** and **7** of that application.

20. As for costs it appears to me that the party most negatively affected by the interim orders in this application is the 5th Defendant. While I order that parties to this application shall bear their own costs, I also direct that the Plaintiffs shall pay the 5th Defendant's costs of the application.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 28TH DAY OF SEPTEMBER 2012

E. K. O. OGOLA

JUDGE
PRESENT:

Muriithi for the Plaintiffs

Mrs. Oduor H/B for Oduol for the 1st Defendant

Ms. Oduor H/B for Masika for 2nd and 3rd Defendant

Mrs. Oduor for the 5th Defendant

Teresia – Court Clerk