REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT NAIROBI (MILMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL SUIT NO. 862 OF 2010

FLORENCE WANJIKU GITAU ....PLAINTIFF/RESPONDENT

VERSUS

NATU INVESTIMENTS LIMITED ....1ST DEFENDANT/RESPONDENT
CHABRIN AGENCIES LIMITED ....2ND DEFENDANT/RESPONDENT

RULING

The Applicant on the Chamber Summons dated 14th December 2010 prays for the orders of this court, inter alia, as follows:-

1) **An injunction do issue against the 2nd Defendant, her servants, agents and representatives with immediate effect from releasing, remitting, paying to and/or in favour of the 1st Defendant any licence fees and other moneys received from Licencees occupying LR No.1/121, Ngong Road being the subject of an agreement dated the 31st August 2009 between the Plaintiff and the 1st Defendant pending the hearing and determination of this application and/or suit.**

2) **An injunction to issue against the 1st Defendant, her servants, agents and representatives from collecting, receiving and accepting any licence fees and any moneys directly from Licencees in occupation of LR NO. 1/121, Ngong Road pending the hearing of this application and/or suit.**

3) **An order that the Licence fees received by the 2nd Defendant from the date of this order and or received by the 1st Defendant at any time relating to the agreement dated the 31st August 2010 between the Plaintiff and the 1st Defendant with immediate effect be released to the Plaintiff to meet taxes and other outgoings and expenses accrued and/or likely to accrue pending the hearing and determination of this application and/or suit.**

4) **The Defendants do jointly and severally further avail and pay to the Plaintiff from the Defendant's own resources as a refund of moneys already improperly paid to the 1st Defendant sufficient to meet all outgoings and expenses envisaged in the said Agreement dated the 31st August 2009.**

5) **An order that the 2nd Defendant do give full and true monthly reports and supporting documents containing a detailed account of all Licence fees receivable and received, expenses and outgoings paid and forthwith from September 2009 to November 2010 and on or before subsequent months in respect to an agreement dated the 31st August 2009 between the Plaintiff and 1st**

Defendant.

6) **An order that the 1st Defendant do forthwith supply to the Plaintiff the original approved plans, approvals, correspondence thereof, occupation certificates of the buildings and improvements together with receipts for payments thereof as provided under Clause 8 (a) (ii) of the said agreement.**

The application is premised on 5 grounds set out therein and is supported by the affidavit sworn by Florence Wanjiku Gitau, the Applicant, on 14th December 2010.

The genesis of the application is that the 1st Respondent Company was a tenant of the Applicant in the suit premises for a period of 10 years during which she constructed permanent structures (referred to in the Supporting Affidavit as "Further Buildings and Improvements"). After the expiry of the lease, the Applicant and 1st Respondent entered into an agreement dated 31st August 2009 for the sale of the said Further Buildings and Improvements to the Applicant instead of demolishing them as having been illegally erected, in contravention of the terms of the lease.

The parties agreed that the consideration for the sale was the total net proceeds of licence fees to be collected from various licencees occupying the suit premises from 1st September 2009 to 31st March 2011 less KShs.100,000/- payable to the Applicant monthly and certain amounts in respect of fees, charges and premiums, including taxes and impositions of legislative or by any lawful authority, payable on the premises or incomes thereof; penalties as may be levied by any authority and licencees refundable deposits. It was a term of the contract that the collection of the licence fees would be carried out by an agent/manager appointed by the parties by mutual agreement and that the said manager/agent would in addition to collecting the liecence fees, remit all outgoings (as specified in the agreement) and to set aside necessary funds for the payment of the same, before the licence fees are paid to the 1st Respondent as consideration. The 2nd Defendant is sued as the manager/agent appointed by the Plaintiff and the 1st Respondent under a letter of appointment dated 3rd September 2009 (annexture **"FWG-2"** of the Supporting Affidavit), and is said to have been collecting and/or was expected to collect approximately KShs.1,469,067/- licensees' fees monthly.

The Plaintiff/Applicant contends that although the 2nd Defendant/Respondent has, on the whole, adhered to the terms of her appointment she has breached the same by:-

1. Not remitting to the Kenya Revenue Authority (KRA) a sum of KShs.3,853,414/- comprising interest thereof for the period September 2009 to December 2010 leaving the Applicant to pay the same from her own resources.

2. Failing to remit to the KRA a sum of KShs.2,424,080/- being 16% V.A.T on the gross licence fee for the period September 2009 to December 2010 or to provide any evidence of such remittances if made.

3. Failing to set aside or to confirm that it has set aside monies to cover income tax and V.A.T for the period October 2010 to March 2011 (estimated at KShs.451,040 and KShs.1,215,780) refundable licence deposits totaling approximately KShs.3,210,728 and all expenses and outgoings accruing up to the 31st of March 2011.

4. Failing and/or neglecting to furnish the Applicant with the reports and documents as would confirm compliance with the requirements/responsibilities and/or liabilities of the Respondents under Clause 3 of the Agreement of 31st August 2009.

5. Allowing the 1st Defendant/Respondent to directly collect and/or receive licence fees.

6. Receiving and acting on unilateral directions from the 1st Respondent to the exclusion of the Applicant.

7. Exposing the Applicant to possible sanctions by the Kenya Revenue Authority once the Agreement comes to an end.

Submitting on behalf of the Applicant, learned counsel, Mr. Mugambi stated that the two Defendants appeared to be in cahoots in as far as the non-deduction of statutory dues and non-payment of the same from the licence fees collected was concerned and that it was apparent that the 2nd Respondent was abdicating its obligations to the Applicant so as to assist the 1st Respondent to continue receiving the fees without deductions. He submitted that the two ought to be restrained under **Order 40 Rule 2 of the Civil Procedure Rules** "as it is quite obvious that the 1st defendant has received more money than she should have received as consideration under the Agreement". For this reason, he submitted that the 2nd Defendant/Respondent should be restrained from making any further payments to the 1st Respondent and the latter be restrained from collecting monies directly from the tenants.

To back up his submissions, counsel relied on the provisions of the Civil Procedure Act and Rules and the holding in **Giella -vs- Cassman BrOWN Ltd [1973] EA 358** to show the Applicant had satisfied the legal requirements for the granting of the injunctive orders sought. He cited the decisions in **FRANCIS DADAIDDO -VS- BANK OF INDIA LTD [2006] eKLR and SHARRIFF ABDI HASSAN -VS- NADHIF JAMA [2006] eKLR** to the effect that where there is a clear breach, as the court should find herein, (according to counsel) then restraining orders ought to be granted to curtail further breach, whether or not the wrong doer (Respondent) is capable of compensating the aggrieved party.

Submitting in reply, learned counsel for the 1st Respondent, Mr. Ouma, relied on the Replying affidavit sworn by Dr. Daniel K. Kiaraho, a director of the 1st Defendant/Respondent on 20th December 2010 in which the agreement of 31st August 2009 is admitted, with the deponent stating that the same was in respect of the sale of specific assets, the Further Buildings and Improvements on L.R. NO. 1/121 with an agreed purchase price as stipulated in Clause 3 of the agreement and that the suit herein ought not to have been filed since the agreement provided that any disputes between the Plaintiff/Applicant and the 1st Defendant/Respondent in regard to the interpretation of any one or more provisions of the agreement was to be referred to arbitration commenced with written notification by either party and only after attempts to resolve the same amicably had failed.

Regarding the monies claimed by the Applicant, it is deponed that to order the remission of the amounts received by the 1st Respondent to the Applicant would defeat the consideration clause of the contract. In any event, the deponent states, the only tax liability as would attach to the 1st Respondent under the agreement is limited to statutory deductions due in regard to the income from the Further Buildings and Improvement and would be a mater between the 1st Respondent and the KRA wherein the Plaintiff/Applicant cannot purport to be the agent of the KRA.

The 1st Respondent's position is that the amounts said to be due and/or to have been paid by the Applicant to the KRA are speculative and that since the receipts exhibited in the Supporting Affidavit as representing tax paid by the Applicant (for which she seeks a refund from the Respondents) show that the payments were not made in respect of the matters referred to in the agreement for sale, the receipts having been issued in the name of the Applicant without referring to the subject matter or the agreement at all.

It is further submitted on behalf of the 1st Respondent that the application, particularly as regards prayers (c), (e) and (f) seems to be an attempt to renegotiate the sale agreement and that to allow the same would disentitle the 1st Respondent from receiving its due consideration for the developments and improvements sold to the Applicant.

In closing, counsel submitted that the essentials for granting injunctive orders, as set down in the celebrated case of **GIELLA**

-VS- <u>CASSMAN BROWN & CO. LTD</u> [1973] E.A 358 had not been met in that a prima facie case had not been established and no irreparable loss has been demonstrated as being likely to accrue to the Applicant. Counsel submitted that the 1st Respondent would be able to compensate such loss, in any event. He submitted that the authorities cited by counsel for the Applicant in this regard were distinguishable and not applicable to this case where, in his opinion no breach has been proved.

For the 2nd Respondent, learned counsel, Mr. Wanjohi, adopted all the submissions made on behalf of the 1st Respondent. Relying on the Replying Affidavit of Stephen Kinuthia, the property Manager of the 2nd Respondent counsel submitted that the allegation that the agreement has been breached on the basis of non-payment of tax has no basis since no evidence has been placed before the court in the form of a demand or threat from the KRA and that it was never a responsibility of the 2nd Defendant to pay tax on behalf of the 1st Respondent.

Counsel submitted further that the 2nd Respondent's liability to render a full account of the monies collected as licence fees was to arise a month from the expiration of the agreement. Counsel did not go to the specifics of the Replying Affidavit filed on behalf of the 2nd Respondent. I find that some salient facts raised therein are worthy of mention. These are:

1. That the 2nd Defendant/Respondent is not privy to the agreement of 31st August 2009 between the Applicant and the 1st Plaintiff.

2. That the 2nd Respondent has performed its mandate but not pursuant to any joint appointment under the agreement for sale which only came to the deponent's knowledge when the application was served on the 2nd Respondent; but in accordance with his already existing contract with the 1st Respondent which did not require the 2nd Respondent to carry out any audit of income and/or pay taxes, but limited was to the collection of licence fees and payment of outgoings.

3. That the 2nd Respondent did not receive any fresh mandate under the agreement of 31st August 2009.

4. That any refundable deposits of licence fees were held by the 1st Respondent.

5. That the audit report of Kangethe & Associates, relied upon by the Applicant as evidence of unpaid tax and V.A.T cannot be a true reflection of the status since the said auditors never asked to inspect the books and records kept by the 2nd Respondent.

I have the considered the documentation filed herein, the submissions of counsel on both sides and the authorities cited. Save for the 2nd Respondent's statement that it is not a party to the Agreement of 31st August 2009, the agreement and the terms thereof are not disputed. Counsel for the Applicant intimated that the parties to the agreement could not pursue arbitral process to resolve the dispute herein because the 2nd Respondent is not a party to the said agreement. That being the case, the question arises as how 2nd Respondent's breach of the agreement arises.

The Applicant contend that the 2nd Respondent is bound by the terms of the agreement by virtue of the letter dated 3rd September 2009 which she claims to have been the letter under which the 2nd Respondent was appointed the joint agent of the Applicant and the 1st Respondent under Clause 5 (a) to carry out the functions of Manager/agent as set out in Clause 5 (b). The letter was written by the Applicant's advocates to the 1st Respondent's advocate and the 2nd Respondents. Although the same appears to be merely a covering letter forwarding photocopies of the sale agreement for the addressees' "information, pending any further processes on (our) part", the same does however state that:-

"**The agent – M/s Chabrin Agencies Ltd are requested to read the same carefully and keenly**

execute their mandate as per the said agreement with effect from 1st September 2009".

It is not quite correct therefore, for the 2nd Respondent to say that they only saw the agreement when the application was served upon them. Moreover Clause 5 (a) of the agreement does provide that the Manager/Agent shall be the person stipulated in Schedule III of the Agreement. The 2nd Respondent is so named and cannot therefore deny his appointment under the agreement, alleging that he conducted his business under the previous mandate as the 1st Respondent's sole agent. If she did so, as is admitted in paragraphs 7, 8 and 9 of the Replying Affidavit of Stephen Kinuthia, which conflict with paragraph 6 of the same affidavit in which the 2nd Respondent now attempts to rely on Clause 5(b) of the "disowned" agreement, then clearly the 2nd Respondent acted in breach. The said Clause provides, inter alia, as follows:-

"The manager shall carry out his or her duties without undue interference from the parties and shall:-

(i) Remit all outgoings mentioned in paragraphs 3 timeously and in any case set aside necessary funds for their payment before remitting any moneys to the seller .....

(ii) Remit monies due and in respect to the current monthly licence fees to the seller on or before 10th day of the month together with a detailed account closely containing items mentioned in paragraph 3 herein above a copy of which shall be supplied to the purchaser."

By virtue of the implied admission contained in paragraph 6 of the 2nd Respondents Replying Affidavit, and the naming of the 2nd Respondent in Schedule III of the Agreement, which, as I have already noted was communicated to the 2nd Respondent vide the letter of 3rd September 2009, I find that the 2nd Respondent is bound to the terms of the sale agreement even if not a prime party thereto. Its dealings in the suit property as from 1st September 2009 were to be governed by the terms thereof until the expiry of the agreement on 31st March 2011. This is buttressed by the deposition in paragraph 11 of the said Replying Affidavit which clearly shows that the 2nd Respondent recognizes the agreement and its binding effect on her.

I find that Rates (payable or apportionable), taxes and impositions of legislative nature on the premises or incomes thereof, insurance premiums, penalties as may be levied by any authority in respect of default, and licencees' refundable deposits were all to be deducted from the monies remitted to the buyer as is clearly stipulated by Clause 3 of the agreement, which binds both the 1st Respondent and the 2nd Respondent and anything short of compliance is a clear breach on their part. From my reading of Clause 5 (b) as read with Clause 3 (d), (e), (h) and (j) claims made by the purchaser herein legally arise from the agreement itself and cannot be simply wished away at the whim of the two Respondents. The affidavits filed in respect to their positions in the matter do not adequately answer the application, which I find to be meritorious.

I find that the Respondents have together acted in breach of the sale agreement dated 31st August 2009 and that the Applicant has demonstrated a prima facie case against them. It is obvious to me that direct loss accrues to the Applicant and the Respondents must be held to account.

This court is much alive to the fact that the Agreement has come to an end by virtue of expiration on 31st March 2011. That however does not affect the jurisdiction of this court to make orders, as are just, in the circumstances. The parties are now in the 30 days accounting period and restraining orders issued herein in terms of prayers (b) and (c) are still in force. The same are hereby confirmed pending the hearing and determination of the suit. Prayer (g) which is directed at the 1st Respondent is also granted.

Having found that the 2nd Respondent is bound by the terms of the Agreement, I grant the prayer

sought under (f). To take care of prayers (d) and (e) of the Chamber Summons, I order that a true, proper, fair and honest audit of the accounts be undertaken within 30 days from the date of this Ruling. These shall include an account of all the licence fees collected by the 2nd Respondent and how disbursed, and all monies paid to the 1st Respondent by virtue of the said agreement.

I direct that the matter be mentioned after the expiry of the said 30 days to confirm compliance and to take further directions in the suit particularly as to whether the same should proceed to arbitration for the determination of the pending issues.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 8th Day of APRIL 2011.

M.G. MUGO
JUDGE

In the presence of:

Mr. Mugambi Mungama	For the Applicant
Mr. Ouma	For the 1st Respondent
Mr. Ouma holding brief for Mr. Wanjohi	For 2nd Respondent