



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 652 of 2007**

**MAESTRO ARCHITECTS LTD.....1<sup>ST</sup> PLAINTIFF**  
**GESTO CONSULTANTS LTD.....2<sup>ND</sup> PLAINTIFF**  
**APEX SYSTEMS CONSULTING GROUP LTD.....3<sup>RD</sup> PLAINTIFF**  
**GILBERT MWAKAZI MWALIMO.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**SARABJIT SINGH SEHMI .....DEFENDANT**

**RULING**

It is alleged that the defendant is the registered proprietor of all that piece of land known as LR. NO.209//8999 on which housing project involving the construction of 32 town houses is situated. The plaintiffs were allegedly employed to provide professional services to the defendant's project. It is the case of the plaintiffs that the defendant procured the use of their professional expertise in the conception, design approvals and development of the project but declined to pay the agreed professional fees. And is going ahead with the construction oblivious of the input of the plaintiffs' professional expertise in the project. It is contended that the defendant agreed to employ the professional services of the plaintiffs for a sum of Kshs.4,133,432/50 out of which a sum of Kshs.300,000/= was paid to the plaintiffs. It is as a result that the plaintiffs contend that their claim against the defendant is for a sum of Kshs.4,133,432/50 and that is the sum the plaintiffs seek judgement against the defendant plus costs and interest. The plaintiffs also seek an order of prohibitory injunction forbidding the defendant from continuing with the construction of Greenford Park estate on LR. NO.209/8999 or utilizing the plaintiffs' approved drawings and all bill of quantities with impunity pending the payment of the plaintiffs' fees or the hearing of this suit.

The plaintiffs have therefore filed an application dated 13<sup>th</sup> December, 2007 seeking;

**ii) An order of prohibitory injunction stopping the defendant from forbidding the defendant from continuing with the construction of Greenford Park on L.R. No.209/8999 and/or selling transferring any of the 32 units in the housing project pending the hearing and determination of this suit.**

The application is based on the following grounds;

- (i) The defendant engaged the plaintiffs as consultants and utilized their concept, approved drawings and designs and professional expertise for the project but has declined to pay professional fees amounting to Kshs.4,133,432.50.**
- (ii) The housing development project is nearing completion.**
- (iii) There is danger that the defendant will alienate and transfer to third parties the 32 town houses that comprise the housing project before paying of the plaintiffs professional fees to the detriment of the plaintiffs.**
- (iv) Unless the defendant is prohibited from further development and/or alienating the town houses, the subject matter of the housing project, the plaintiffs will suffer irreparable loss, as the defendant could relocate from Kenya.**
- (v) The justice of the case dictates that the defendant be restrained now from finishing the housing development and/or from selling the town houses units, pending the full hearing and determination of the dispute relating to professional fees of Kshs.4,133,432.50.**

The application is supported by the affidavit of **Peter Otaya Nalyana** who is one of the directors of the 3<sup>rd</sup> Plaintiff. He states that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs were appointed by the defendant as consultant for the project in question with effect from 6<sup>th</sup> September, 2005 while the 1<sup>st</sup> plaintiff started working with the defendant as early as 2004 when the initial design for the housing project was conceived and approvals of architectural drawings were presented to the Nairobi City Council and approved on 22<sup>nd</sup> November 2004. That as at 14<sup>th</sup> September, 2004 the defendant had started utilizing the plaintiffs' professional services. The 2<sup>nd</sup> plaintiff was given approved drawings and tasked with obligation of providing preliminary estimates for the project whereas the 3<sup>rd</sup> plaintiff was tasked with the obligation of providing structural and civil engineering designs and drawings of the project. The 4<sup>th</sup> plaintiff was also issued with drawings for earlier familiarization with the project concept and for purposes of professional advice to the defendant relating to necessary electrical and mechanical installations required in the building. It is also contended that despite all the professional inputs into the defendant's project, the plaintiffs were paid a sum of Kshs.300,000/= only. And that as at the time, all the plaintiffs stopped working for the defendants in March, 2006, the defendant had all the documents and designs that it used to fully carry out the housing project. It is also contended that all the plaintiffs issued, fee notes to the defendant which the defendant has ignored and/or refused to honour despite demand and notice of intention to sue by the plaintiffs' advocates.

The application is opposed and the defendant filed a replying affidavit dated 20<sup>th</sup> February 2008. In the said affidavit, the issue of the joinder of the plaintiffs in this suit is attacked and secondly that there is no material before this court to show that the plaintiffs are owed any sums as claimed in the plaint. It is contended that the plaintiffs have not exhibited any material before this court to show that in deed such amount is payable or that it was payable by any particular date or that their services were certified as having been rendered at an agreed costs.

It is also the case of the defendant that the law cannot restrain perceived breach of contract which are compensable by way of an award of damages and since the plaintiffs are professionals who if at all their services were unpaid for are entitled to sue for the value of such services and prove the value of the services rendered.

The applicants thereafter filed a further affidavit annexing the relevant documents showing that they had provided relevant professional services. The advocates for the parties thereafter filed written skeleton submissions urging this court to uphold the position of their respective client.

I have considered the application in the light of the material that was placed before me by the parties. The

plaintiffs have applied for a prohibitory injunction aimed at stopping the defendant from continuing with the construction of **Greenford Park** on LR. No.209/8999 in **Kyuna** Nairobi. The plaintiffs are professionals in the construction industry. And it is alleged that they assisted the defendant in the conceptualization, design, approval and initial implementation of the housing development project as architects, civil and structural engineers, quantity surveyors and electrical engineers. As was rightly pointed out by the plaintiffs' advocate the basis of the plaintiffs' application is aimed at stopping a breach of contract and alienation of the units, the subject matter of the project through sale and transfer. Their case is that they provided professional services to the defendant and that the defendant had declined to pay for their services in the sum of Kshs.4,133,432.50.

The case of the defendant is that the plaintiffs have not shown that they have a prima facie case with a probability of success and that if an injunction will not be granted they will suffer irreparable harm or damages incapable of compensation by an award of damages.

The point for determination is whether the plaintiffs are entitled to an order of injunction as sought in the application under my determination. Clearly the applicants claim is for a liquidated amount of Kshs.4,133,432.50 arising from an alleged breach of contract between the parties herein. It is clear that the services of the plaintiffs were discontinued in March 2006 and the project has since been going on. The present suit was filed in December 2007 almost one year and three months after the termination of the plaintiffs' services. There is no evidence and/or material to show why the plaintiffs failed to file the present suit soon after the termination of their services or after they found that the defendant was unable to pay for their services.

In my humble view the plaintiffs are not entitled to the orders sought because they are seeking a liquidated claim against the defendant. There is no evidence to show that the defendant would be unable to satisfy any decree that may be obtained against him. I therefore, think that this is not a case where the principles of **Giella vs Cassman Brown** do apply. There is no prima facie case demonstrated by the plaintiffs and there is no material to show that damages should not be adequate. And since the plaintiffs' claim is for a liquidated sum, then there is no basis to grant the orders sought in the application. It is my decision that the orders sought are unmeritorious and misconceived.

In conclusion the application dated 13th December, 2007 is dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of June, 2008.

**M. A. WARSAME**

**JUDGE**