Uwemeye & 2 others v Ahmed & another (Commercial Case E713 of 2024) [2025] KEHC 5010 (KLR) (Commercial and Tax) (22 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5010 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E713 OF 2024

MN MWANGI, J

APRIL 22, 2025

BETWEEN

JEAN BAPTISTE UWEMEYE ..... 1ST PLAINTIFF

KEVIN RAKUNDO ..... 2ND PLAINTIFF

KEN STELLA TETA ..... 3RD PLAINTIFF

AND

ELSAEI WASEEM AHMED AHMED ..... 1ST DEFENDANT

DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 2ND DEFENDANT

RULING

1. This ruling is in respect to two applications. The 1st application is the plaintiffs' Notice of Motion dated 25th November 2024 seeking orders that the 1st defendant be restrained from transferring or disposing of assets traceable to their investments, pending the hearing and determination of this suit and that the Directorate of Criminal Investigations be directed to investigate the defendant's alleged fraudulent acquisition of USD 1,040,000.00 and submit a report.

2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Jean Baptiste Uwemeye, the 1st plaintiff herein. He contended that the 1st defendant, an Egyptian national, fraudulently obtained USD 1,040,000.00 from the plaintiffs under the guise of securing investments in a luxury real estate development project called "The Grand Premier Apartment" in Lavington, Nairobi. He averred that the 1st defendant presented himself in early 2023 as a representative of a reputable real estate company and provided elaborate investment proposals, including luxury amenities and high returns. He further averred that the plaintiffs were promised

specific units comprising penthouses & commercial spaces, with Agreements and documentation provided, but some remained in draft or were not executed.

3. He deposed that despite full payment, discrepancies in pricing such as an under-declared amount of USD 500,000.00 for a penthouse actually purchased for USD 570,000.00 raised concerns of tax evasion, leading the plaintiffs to refuse to sign incomplete documents. Mr. Uwemeye stated that by late 2023, the plaintiffs had transferred the full investment amount with detailed allocations for each unit or space, but as at November 2024, the project remained largely incomplete, with minimal progress made and several promised units undelivered. He further stated that attempts to monitor the project were obstructed by the 1st defendant who became hostile when asked for refunds. He asserted that the 1st defendant blocked communication, made false claims, and threatened the plaintiffs while boasting of government connections to intimidate them. Mr. Uwemeye stated that they believe that the 1st defendant may dissipate or hide the funds in the event that the orders being sought are not granted, causing irreparable financial harm.

4. In opposition to the application, Mr. Elsaei Waseem Ahmed Ahmed, the 1st defendant herein filed a replying affidavit sworn on 10th February 2025. He stated that the disputed property, Grand Premier Apartments, is wholly owned and managed by Grand Premier Apartments Limited. He contended that the plaintiffs had entered into Agreements to purchase several units and make alterations, and they paid part of the purchase price, but left a significant balance unpaid. Further, that major customizations were undertaken at the plaintiffs' request, leading to further costs that the plaintiffs failed to cover.

   He averred that the plaintiffs demanded further changes including a spa and a bar, which were not acceptable and their request was declined. The 1st defendant deposed that the plaintiffs disengaged from the transaction without following proper cancellation procedures. Mr. Ahmed asserted that the project was completed, occupancy certified, leases were issued and since then, it is only the plaintiffs who have raised issues.

5. In a rejoinder, the plaintiffs filed a further affidavit sworn on 28th February 2025 by Mr. Jean Baptiste Uwemeye, the 1st plaintiff herein. He averred that they entered into off-plan property purchase Agreements with the 1st defendant, with the agreed prices covering all required alterations and modifications. He stated that the 1st defendant breached the contracts by rushing construction, resulting in substandard and uninhabitable properties. He asserted that the plaintiffs fulfilled all contractual obligations, including timely payments. Mr. Uwemeye alleged that the offer letters presented by the 1st defendant are fraudulent, mostly unsigned, and lack legal validity. He stated that in any event, authentic offer letters annexed to his supporting affidavit contradict the 1st defendant's claims. He averred that an independent assessment by an Interior Designer Sheba Gurel confirms the poor quality of construction and states that the properties are unfit for occupation.

6. The 2nd application is the 1st defendant's Notice of Motion dated 11th December 2024 brought pursuant to the provisions of Articles 40, 50(1) & 159 of *the Constitution* of Kenya, Sections 1A, 1B, 3A & 63(e) of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The 1st defendant seeks an order compelling Diamond Trust Bank to immediately unfreeze its Kenya Shillings bank account No. 0464246005 & USD bank account No. 0464246002 and allow their normal operation. The 1st defendant also seeks a gag order preventing the plaintiffs or their agents from publicly discussing or publishing any information about this case in any form of media pending the determination of the case. In addition, he prays for the setting aside of the orders issued on 3rd December 2024, particularly those freezing the 1st defendant's accounts and granting injunctive relief.

7. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Elsaei Waseem Ahmed Ahmed, the 1st defendant herein. He averred that he is the Director of Grand Premier Limited and that the plaintiffs willingly entered into an off-plan property purchase Agreement and paid USD 1,040,000.00, leaving an outstanding balance of USD 270,000.00 out of the total agreed price of USD 1,310,000.00, which included additional changes and specialized finishes. Mr. Ahmed stated that the apartment complex was completed as per the offer letters, certified for occupation, and it is now fully operational. He attributed the delay in handing over the units to the plaintiffs due to their extensive fit-out requests, which exceeded standard construction and conflicted with planning regulations.

8. He claimed that the Grand Premier Limited carried out structural and interior changes worth USD 1,069,389.38, plus USD 420,000.00 in unreimbursed expenses, all at the plaintiffs' request, but despite repeated follow-ups, the plaintiffs refused to sign formal sale Agreements outlining refund and dispute resolution terms, making their Court action for a refund inconsistent with the agreed framework. Mr. Ahmed alleged that the plaintiffs acted in bad faith by rejecting out-of-court settlement offers and by launching media campaigns to tarnish the 1st defendant's reputation. He denied allegations of tax evasion and claimed that they are false and malicious. He stated that the company is tax compliant. He averred that there is no risk of the main suit being rendered nugatory, as the disputed property is identifiable and remedies like specific performance are available.

9. In opposition to the 1st defendant's application, the plaintiffs filed a replying affidavit sworn on 7th February 2025 by Mr. Jean Baptiste Uwemeye, the 1st plaintiff herein. He contended that the 1st defendant breached the specific purpose for which the USD 1,040,000.00 was paid, acknowledged the breach, and offered an inadequate refund. Mr. Uwemeye maintained that the interim Court orders are necessary to preserve the subject matter unless the 1st defendant deposits the equivalent amount in Court. He claimed that they did not receive the agreed product, prompting him to hire an Interior Designer to monitor the works. He dismissed annexure EW-5 as irrelevant and emphasized that only the offer letters were used to authorize the fund transfers. He urged this Court to require a security deposit of USD 1,040,000.00 if the interim orders are lifted. He objected to the 1st defendant's video evidence for failing to meet admissibility standards.

10. In a rejoinder, Mr. Elsaei Waseem Ahmed Ahmed, the 1st defendant herein filed a further affidavit sworn on 5th March 2025. He contended that the plaintiffs hired an Interior Designer who introduced major structural changes beyond the original Agreement, causing at least an eight months' delay due to staggered draft submissions. He stated that despite the said changes, the developer met its obligations under both the original and revised scopes. He averred that the plaintiffs have only paid USD 1,040,000.00 out of the USD 1,310,000.00 initially due, and have not paid the additional USD 958,729.35 for redesigns. He claimed that this is a matter for specific performance, not refund or breach, and that possession and Title transfer are contingent on full payment.

11. Mr. Ahmed denied allegations of failing to deliver furniture, explaining that furnishing was part of a separate Agreement valued at USD 50,000.00, out of which only USD 10,000.00 has been paid. He claimed the plaintiffs made false accusations in the media, including allegations of fraud and tax evasion, harming his and his companies' reputation. He maintained that the freezing orders are unjust and should be lifted.

12. The instant applications were canvassed by way of written submissions which were highlighted on 26th March 2025. The plaintiffs' submissions were filed on 25th March 2025 by the law firm of Danstan Omari & Associates Advocates, whereas the 1st defendant's submissions were filed by the law firm of Ombok & Owuor Advocates LLP on the same day.

13. Ms Martina, learned Counsel for the plaintiffs relied on the case of Sachin Shaha v Jagat Mahendra Kumar Shah & another [2020] eKLR, and submitted that the 1st defendant falsely stated the penthouse price as USD 500,000.00, though the plaintiffs paid USD 570,000.00 which discrepancy was allegedly a deliberate act of tax evasion, amounting to fraudulent misrepresentation. She further submitted that an independent designer found major deviations from the approved plans, including use of substandard materials, poor workmanship, and unapproved changes, which led to significant quality issues and project incompleteness by January 2025. She cited the case of Sunflag Textile & Knitwear Mills Ltd v Industrial & Commercial Development Corporation [2002] eKLR, and argued that under the principle of restitution, the plaintiffs are entitled to a full refund of USD 1,040,000.00 due to the 1st defendant's failure to fulfill his contractual obligations.

14. Counsel submitted that damages would restore the plaintiffs to the position they would have been in, had the contract been properly performed. Ms. Martina referred to the case of Coastal Bottlers Ltd v Kimathi Mithika [2018] eKLR, and contended that the 1st defendant's failure to deliver the properties to agreed standards, combined with fraudulent misrepresentation and refusal to issue refunds, caused the plaintiffs financial loss, mental distress, and reputational harm, thus they should be awarded general damages for breach of contract, fraud, and distress, special damages for financial losses due to the 1st defendant's fraudulent actions and exemplary damages to deter future misconduct.

15. Ms Mogire, learned Counsel for the 1st defendant submitted that the property transactions with the plaintiffs were conducted through the 1st defendant's company, with the said defendant acting solely in his capacity as a Director. She emphasized that any disputes should be between the plaintiffs and the company and relied on Section 37 of the *Companies Act* to bolster her argument. Counsel cited the case of Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & another [2014] eKLR, and stated that the plaintiffs' failure to include the company in the suit was a fatal flaw, as Directors are not personally liable for corporate obligations. She further argued that the plaintiffs have neither demonstrated fraud nor has any wrongdoing been established by the Directorate of Criminal Investigations.

16. She relied on the Court of Appeal case of Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR, and argued that the plaintiffs have failed to provide sufficient proof of fraud, despite outlining alleged indicators. Ms Mogire referred to the case of Joel Ndemo Ong'au & another v Loyce Mukunya [2015] eKLR, and submitted that the plaintiffs' claim is a commercial matter between them and the developer, and not the 1st defendant personally. She contended that there is no legal basis for lifting the developer's corporate veil to hold the 1st defendant liable. Counsel cited Order 51 Rule 15 of the Civil Procedure Rules, 2010 and stated that the plaintiffs obtained the December 2024 orders through misrepresentation and concealment of material facts. She cited case of Nova Holdings Ltd & another v County Government of Mombasa & 2 others [2023] KEELC 22026 (KLR), in asserting that the 1st defendant has made out a case for being granted the orders being sought in the application dated 11th December 2024.

17. In a rejoinder, Ms. Martina submitted that the certificate of completion is not related to the issues before this Court. She further submitted that there is no balance of purchase price that is to be paid by the plaintiffs. She insisted that accounts need to be kept frozen unless security is deposited.

Analysis and Determination.

18. I have considered the instant applications, the affidavits filed in support thereof, the replying affidavits by the plaintiffs and the 1st defendant and the further affidavit by the plaintiffs and the 1st defendant.

I have also considered the written submissions filed by Counsel for the parties. The issues that arise for determination are –

i. Whether the plaintiffs have made out a case for being granted an order of injunction;

ii. Whether an order should issue directing the Directorate of Criminal Investigations to investigate the 1st defendant's conduct;

iii. Whether the orders issued on 3rd December 2024 freezing the 1st defendant's bank account should be set aside.

iv. Whether Diamond Trust Bank should be compelled to unfreeze the defendant's accounts; and

v. Whether a gag order should issue against the plaintiffs.

Whether the plaintiffs have made out a case for being granted an order of injunction.

19. The law governing interlocutory injunctions is set out under Order 40 Rule (1)(a) and (b) of the Civil Procedure Rules, 2010 which provides as follows-

Where in any suit it is proved by affidavit or otherwise-

a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

20. The conditions to be borne into account in determining an application for an interlocutory injunction were settled in the case of Giella v Cassman Brown & Company Limited [1973] EA 358, where the Court held as hereunder -

> Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.

21. From the foregoing, it is evident that before granting an order for temporary injunction, the Court has to ensure that the property in dispute in the suit is either in danger of being wasted, damaged or alienated by a party to the suit, or wrongfully sold in execution of a decree, or that the defendant threatens or intends to remove or dispose of the property. In this case, the plaintiffs are seeking an order for temporary injunction restraining the 1st defendant from transferring or disposing of assets traceable to their investments.

22. It is not disputed that the 1st defendant is the Director of Grand Premier Apartments Limited and Adwaa Alkhalil Development Company Limited. The plaintiff's case against the 1st defendant is that the said defendant falsely stated the penthouse price as USD 500,000.00, although the plaintiffs paid USD 570,000.00. The plaintiff's case is also for breach of contract as a result of the 1st defendant's

alleged failure to deliver the properties and/or purchased units to agreed standards, combined with fraudulent misrepresentation and refusal to issue refunds.

23. This Court however notes that it is not in contestation that the Grand Premier Apartments Limited is the registered owner of the parcels of land upon which the "The Grand Premier Apartment" is erected. Further, from the offer letters and Agreements for sale annexed to the plaintiffs' and the 1st defendant's affidavits, it is evident that the plaintiffs got into agreements for sale with Grand Premier Apartments Limited and not the 1st defendant in his personal capacity; for the purchase of residential and commercial units within the "Grand Premier Apartment", which was being developed by Adwaa Alkhalil Development Company Limited. It is also manifest that the monies paid by the plaintiffs for the purchase of the said units were paid to accounts in the name of Adwaa Alkhalil Development Company Limited and not to the 1st defendant's personal accounts.

24. It is trite law that a company is a separate legal entity from its members and shareholders. This position was espoused by the Court in the English case of Salomon v Salomon [1897] AC 22. Bearing in mind the said decision, the proper parties that ought to have been sued by the plaintiffs are the Grand Premier Apartments Limited and the Adwaa Alkhalil Development Company Limited since the 1st defendant as the Director of the said companies cannot be held personally liable for actions or omissions performed in the course of his official duties on behalf of the two companies, unless and until the corporate veils of the said companies has been lifted or pierced.

25. It then follows that since the 1st defendant has not been properly sued, an order of injunction in the manner sought by the plaintiffs cannot issue against him pending the hearing and determination of the suit between the parties herein. The Court of Appeal in the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR, defined what constitutes a prima facie case as follows -

> ..."So what is a prima facie case" I would say that in civil cases it is a case in 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.

26. From the facts presented before me, and having considered the applicable law, I am not persuaded that the plaintiffs have established a prima facie case with a probability of success to warrant being granted the orders of injunction being sought in the instant application.

27. The Court of Appeal in the case of Nguruman Limited v Jane Bonde Nielsen and 2 others [2014] eKLR, held that the principles to be established in order for a Court to grant an order of interlocutory injunction are to be applied as separate, distinct and logical hurdles which the plaintiff is expected to surmount sequentially. The Court held thus-

> If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.

28. Since the plaintiffs have failed to establish a prima facie case, this Court need not go further to consider the other two grounds of whether the plaintiffs stand to suffer irreparable injury in the event that an order for injunction is not granted, as well as the principle of in whose favour the balance of convenience tilts.

Whether an order should issue directing the Directorate of Criminal Investigations to investigate the 1st defendant's conduct.

29. In view of the finding that a prima facie case has not been established against the 1st defendant, and more specifically based on the doctrine of corporate personality, I am not persuaded that an order directing the Directorate of Criminal Investigations to investigate the 1st defendant's conduct in respect to the allegations of fraudulent acquisition of USD 1,040,000.00 from the plaintiffs is warranted. In any event, the plaintiffs have not demonstrated that the 1st defendant fraudulently acquired USD 1,040,000.00 from them in his personal capacity, to persuade this Court to make a recommendation for investigation.

30. The above notwithstanding, it is not disputed that the plaintiffs vide a letter dated 18th November 2024 wrote to the Directorate of Criminal Investigations requesting it to investigate the 1st defendant on allegations of obtaining by false pretence. It is evident that the said investigations begun and the Police took statements from the 1st defendant and several employees of the Grand Premier Apartments Limited.

31. In the absence of an allegation and/or evidence that the Directorate of Criminal Investigations abandoned the said investigations, the prayer for this Court to direct the Directorate of Criminal Investigations to investigate the 1st defendant's conduct in respect to the allegations of fraudulent acquisition of USD 1,040,000.00 from the plaintiffs is premature and unwarranted. I am not therefore persuaded that such an order should issue.

Whether the orders issued on 3rd December 2024 freezing the 1st defendant's bank account should be set aside.

32. The orders of 3rd December 2024 which include an order freezing Diamond Trust Bank Kenya Shillings bank account No. 0464246005 & USD bank account No. 0464246002 were issued pending the hearing and determination of the plaintiffs' application dated 25th November 2024. This therefore means that the said orders will elapse upon delivery of this ruling leaving nothing to be set aside. That being the case, the application for setting aside the said orders is not merited as I have already declined to uphold the orders that I granted at exparte stage.

Whether Diamond Trust Bank should be compelled to unfreeze the 1st defendant's accounts.

33. Noting that the order freezing the Kenya Shillings bank account No. 0464246005 & USD bank account No. 0464246002 at Diamond Trust Bank was issued pending the hearing and determination of the plaintiffs' application dated 25th November 2024, the said order will elapse on the delivery of this ruling, and that will automatically unfreeze the said accounts.

34. In the premise, this Court does not have to determine whether or not Diamond Trust Bank should be compelled to unfreeze the 1st defendant's bank accounts.

Whether a gag order should issue against the plaintiffs.

35. The 1st defendant claims that the plaintiffs launched media campaigns to tarnish his reputation, thus it is imperative that a gag order preventing the plaintiffs or their agents from publicly discussing or publishing any information about this case in any form of media pending the determination of this case should be issued.

36. It is however worth noting that the 1st defendant has not demonstrated the alleged media campaign launched by the plaintiffs. Further, in the persuasive case of Advtech Resourcing (Pty) Ltd v Kuhn 2007 (4) ALL SA 1386 (C), paragraph [51], the Court set out the requirements that qualify information to be considered as confidential as follows -

    a. The information must be capable of application in trade and industry;

    b. The information must not be public knowledge or public property;

    c. The information must be of economic value to the person seeking its protection;

    d. Confidential agreements cannot be invoked to bar disclosure of illegal or immoral activity.

37. The 1st defendant failed to specify the exact nature of the information he seeks to protect. Instead, he broadly categorized the entire subject matter of the case as confidential, without identifying particular details. In the oft cited case of Okiya Omtatah Okoiti v Attorney General & 2 others [2013] eKLR, the Court held that any limitation to the freedom of expression guaranteed under Article 33 of *the Constitution* must be justified within the confines of Article 24 on limitation of rights.

38. In this case, the 1st defendant not only failed to identify the specific information to be protected but also neglected to assess whether his proposed gag order complies with the limitations on rights as required by Article 24 of *the Constitution* of Kenya.

39. For the foregoing reasons, I am not persuaded that the 1st defendant has made out a case to warrant being granted a gag order against the plaintiffs.

40. In the end, it is my finding that the application filed by the plaintiffs defective. It is hereby struck out. The application by the 1st defendant is not merited. It is hereby dismissed. Each party shall bear is own costs.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF APRIL 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Nyoroku h/b for Mr. Wafula for the plaintiffs/applicants

Mr. Glenn Innocent h/b for Ms Mogire for the 1st defendant/1st respondent

No appearance for the 2nd defendant/2nd respondent

Ms B. Wokabi – Court Assistant.