



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 142 OF 2019**

**APEX COMMUNICATIONS LIMITED .....PLAINTIFF**

**=VERSUS=**

**APPLEWOOD INVESTMENTS LIMITED .....1ST DEFENDANT**

**CYJO LIMITED.....2ND DEFENDANT**

**RULING**

1. The plaintiff, Apex Communications Limited, initiated this suit through a plaint dated 30/4/2019. Their case was that they entered into a sale agreement with the 1st defendant on 19/8/2010, pursuant to which they purchased two office units on the third floor of Applepark Building, located on Land Reference Number 28209, Wood Avenue, Nairobi. The two Office Units were identified on the relevant plans as Numbers 405 and 406 respectively. In addition to the two units, they acquired office unit No 401 which had been purchased from the 1st defendant by M/s Soko Limited under the same terms.

2. The plaintiffs further contended that it was a term of the agreements and the subsequent leases that the 1st defendant would cause a management company to be incorporated and would convey the reversionary interest in the mother title into the name of the management company. Every office unit owner was to be allocated a proportionate shareholding in the management company. The affairs of Applepark Office Block would henceforth be handled by the management company. The plaintiff contended that the 1st defendant had breached both the agreements for sale and the leases by failing to operationalize the management and convey the reversionary interest to the management company as agreed. They added that the 1st defendant had failed to provide audited accounts relating to Applepark and was making unreasonable and unjustifiable demands for payments amounting to Kshs 1,308,000/= as service charge. Lastly, they contended that the 1st defendant had disconnected water, generator, and other services to the plaintiff's office units.

3. Consequently, they sought the following reliefs in the plaint dated 30/4/2019:

***a) That both the 1st and 2nd defendants be restrained by themselves and/or through their servants, agents and/or other third parties by way of permanent injunction from disconnecting water, generator and other services in the plaintiff's premises, the same being Office Units 401,405 and 406 and or charging, mortgaging or selling Land Reference Number 28209 Nairobi.***

***b) (i) That the 1st defendant be compelled to forthwith transfer the reversionary interest of Land Reference Number 28209 Nairobi to Applepark Management Limited; and***

***(ii) In the alternative, the Deputy Registrar of this Honourable Court do obtain a transfer of the reversionary interest to Applepark Management Limited from the 1st defendant and/or the plaintiff and sign the transfer and all such other matters necessary to effect the said transfer at the Lands Office at the cost of the 1st defendant.***

***c) That the 1st defendant do produce to the plaintiff audited accounts in respect of service charge for the years 2011 to 2018 as provided for in the Lease within the next sixty (60) days or such other date as the court may deem fit.***

***d) That the 1st defendant do produce to the plaintiff the annual returns for Applepark Management Limited since incorporation to-date within sixty (60) days or such other date as the court may deem fit.***

***e) Costs of the suit.***

***f) Any other relief this court deems fit.***

4. Together with the plaint, the plaintiff brought a notice of motion dated 30/4/2019, seeking the following interlocutory injunctive reliefs against the defendants:

(1) Spent

(2) Spent

(3) *That the Honourable court be and is hereby pleased to issue an order of permanent injunction restraining the 1st and 2nd defendants/ respondents, by themselves and or through their representatives, servants or agents from disconnecting services to the plaintiff/ applicant's Office Units 401, 405 and 406 situated at Applepark, Wood Avenue, on Land Reference Number 28209 Nairobi, within Nairobi City County, or in any way interfering with the plaintiff/ applicant's quiet possession of the aforementioned premises and / or charging, mortgaging or selling Land Reference Number 28209 Nairobi pending the hearing of this suit or until such time as the court may order.*

(4) *That the honourable court be and is hereby pleased to issue any other orders that it may deem just and fit to grant.*

(5) *The costs of this application be borne by the 1st and 2nd defendants.*

5. The said application dated 30/4/2019 is one of the two items falling for determination in this ruling. The other item falling for determination in this ruling is the defendants' notice of preliminary objection dated 18/10/2019 in which the defendants seek an order striking out the plaintiff's suit on the ground that under Clause 17 of the agreement for sale dated 19/8/2010 and Clause 5.2 of the Lease, the forum for dispute resolution between the parties therein is an arbitral tribunal, hence this court lacks jurisdiction to entertain this suit. On 9/12/2020, the court directed that both the application and the preliminary objection be canvassed through written submissions. The plaintiff filed written submissions dated 18/2/2021 which the court has duly considered. The defendant did not file any submissions.

6. Because the preliminary objection focuses on the jurisdiction of this court to adjudicate this dispute, the guiding principle requires that I dispose it first [see **Owners of the Motor Vessel "Lilian S" v Caltex (Kenya) Ltd [1189] eKLR**]. I will therefore dispose the preliminary objection and thereafter dispose the application for interlocutory injunctive relief.

7. First, from the court record, the defendants filed a notice of appointment of advocates on 12/6/2019. The notice of preliminary objection was subsequently filed on 22/10/2019, a period of more than four months later. **Section 6(1)** of the **Arbitration Act** requires that a party wishing to invoke an arbitration agreement does so not later than the time when that party enters appearance or otherwise acknowledges the claim. Without saying much, the present preliminary objection cannot succeed because it was brought more than four months after the defendants had acknowledged the plaintiff's claim through the notice of appointment of advocates.

8. Secondly, the objectors chose a preliminary objection as the platform on which to canvass their objection to this suit. Neither the plaintiff nor the two defendants have placed before court, as exhibits, copies of the relevant agreements for sale and the leases in which the arbitration agreements are contained. Consequently, the court has not been afforded the opportunity to examine the relevant arbitration agreements in order to render itself on them.

9. Thirdly, it is not clear at this point if the 2nd defendant was a party to the alleged arbitration agreements so as to have *locus standi* to invoke it. Only parties to an arbitration agreement can invoke it. In the circumstances, the court has no basis upon which to uphold the preliminary objection by the two defendants. The same is rejected on the above grounds. I now turn to the application dated 30/4/2019.

10. I have considered the application together with the plaintiff's written submissions. I have also perused the entire physical and electronic record before me. The key question falling for determination in this application is whether the applicant has satisfied the criteria upon which our trial courts exercise jurisdiction to grant interlocutory injunctive reliefs. The criteria was spelt out by the East African Court of Appeal [Spry VP] in **Giella v Cassman Brown (1973) EA 358**. First, the applicant is required to satisfy the court that he has a *prima facie* case with a probability success. Second, the applicant is required to demonstrate that if an injunctive relief is not granted, he would stand to suffer irreparable injury for which he may not be adequately indemnified through an award of damages. Third, should the court have doubt on both or either of the above two limbs, it is to determine the application based on the balance of convenience.

11. Further, at the stage of disposing an application for interlocutory injunctive relief, the court does not make definitive or conclusive pronouncements on the substantive questions or issues in the main suit.

12. The application under consideration was supported by an affidavit sworn on 30/4/2019 by Lawrence Gikaru. Paragraphs 3, 9, 11 and 15 of the said affidavit make reference to various exhibits, among them, the sale agreement(s) and the lease. Regrettably, none of the documents referred to in the said paragraphs of the supporting affidavit was annexed as an exhibit. A perusal of the page where court fees was assessed indicates that the documents assessed for purposes of court fees were: (i) Certificate of Urgency; (ii) Application; (iii) Order; and (iv) Affidavit. Annexures to the affidavit were not presented for assessment. Similarly, although the plaintiff filed a list of documents on 2/5/2019, the actual bundle of documents was not filed. The net result is that the relevant annexures to the supporting affidavit have not been placed before the court to support the plaintiff's case.

13. In the absence of the supporting documentary evidence, the court is not satisfied that the plaintiff has met the threshold spelt out in **Giella v Cassman Brown (1973) EA 358**. There being no doubt about the plaintiff's failure to satisfy the requisite threshold, the application dated 30/4/2019 fails.

#### **Disposal Orders**

14. In the end, the defendants' preliminary objection dated 18/10/2019 is dismissed for lack of merit. The defendants shall bear costs of the preliminary objection. Similarly, the plaintiff's application dated 30/4/2019 is dismissed for lack of merit. The plaintiff shall bear costs of the application

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JUNE 2021.**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Ongegu holding for Mr Muriithi for the Plaintiff

Court Assistant: June Nafula