



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E250 OF 2021

SWANYA LIMITED.....1ST PLAINTIFF

STEVE KAMUYA.....2ND PLAINTIFF

FAITH HAKI.....3RD PLAINTIFF

VERSUS-

HOMEWAY PROPERTY LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Ruling herein is in respect of the Chamber Summons Applications dated the 5th July 2021, (*though the usage of Chamber Summons as a medium for approaching the Court is now extinct*) whereby the Plaintiffs have sought for the following Reliefs;

i.(Spent)

ii. *The Defendant/Respondent by itself, herself, agents, servants, assignees and/or Representatives be restrained from transferring, selling, charging, leasing and/or subleasing Apartment Number A21 (Block A, 10th Floor) erected on L.R No. 2/723 Kirichwa Road, Kilimani Nairobi pending the determination of this suit.*

iii. *The Defendant/Respondent by itself, herself agents, servants, assignees and/or Representatives be restrained from transferring, selling, charging, leasing and/or subleasing Apartment Number B29 (Block A, 13th Floor) erected on L.R No. 2/723 Kirichwa Road, Kilimani Nairobi pending the determination of this suit.*

iv. *The Directors of the Defendant/Respondent deposit their passports in court pending the hearing and determination of the suit as Security.*

v. *The Defendant/Respondent Deposits security in court in cash form or bank Guarantee equivalent to the Purchase Price of the Suit property or its current Market rate.*

vi. *Cost of this Application be provided for.*

2. The subject Application is premised and/or anchored on the numerous grounds contained at the foot thereof and same is further supported by an elaborate supporting Affidavit sworn by, Janet Nyanduko, who indicates that same is a Director of the First Plaintiff and has therefore been authorized to swear the subject Affidavit on behalf of the First Plaintiff.

3. On the other hand, the said Deponent has similarly stated that same has also been authorized to swear the subject Affidavit for and behalf of the rest of the Plaintiffs/ Applicants herein.

4. Upon being served with the subject Application, the Defendant filed and/or lodged a Preliminary Objection dated the 27th of September 2021, in respect of which the Defendant/ Respondent contended as hereunder:

i. The Honourable Court is devoid of jurisdiction to determine this suit on account of lack of a Sale agreement between the

Plaintiffs and the Defendants.

ii. That the subject suit contravenes the provisions of Section 3 (3) of the Law of Contract Act, Chapter 23, Laws Of Kenya.

DEPOSITIONS BY THE PARTIES

THE PLAINTIFFS' CASE:

5. Vide Supporting Affidavit sworn on the 5th of July 2021, one namely, Janet Nyanduko, has averred as hereunder:
6. The Plaintiffs/ Applicants herein entered into an Agreement for Sale of three separate and distinct Apartments with the Defendant, whereby the Defendant agreed to sell to and in favor of the Plaintiffs'/Applicants' Apartments erected on LR.NO.2/421, Kirichwa road, Kilimani, within the City of Nairobi.
7. It is further averred, that pursuant to the Agreements to sale, the First Plaintiff herein was purchasing studio Apartment No.B30, located on the 14th floor and in this regard, a Letter of Offer dated the 10th of July 2017, was duly executed by both parties on 14th of July 2017 and same was similarly, attested.
8. Besides the Deponent has also stated that the First Plaintiff herein was also buying and/or purchasing a 3 bedroomed Apartment, namely B26, Block B, located on the Eleventh and Twelfth floor (11th and 12th). For clarity, it is averred that a Letter of Offer dated the 11th of July 2017, was executed by the Parties on the 14th of July 2017 and was also attested.
9. On the other hand, the Deponent further averred that the First Plaintiff was also buying a 2 bedroomed Apartment, No. A19, Block A, situate on the Eighth and the Ninth Floor. In this regard, it was averred that a Letter of Offer was similarly generated, executed and attested.
10. Besides, the Deponent has further averred that the Second and Third Plaintiffs also executed Letters of Offers, pertaining to and/or concerning Apartments Numbers DS2, located on the Ground Floor and B17 (Block B), located on the Eighth and Ninth floor, respectively.
11. It was further averred, that other than the Descriptions, pertaining to and/or concerning the Apartments and the respective Purchase prices, the terms at the foot of the Letters of Offers, were similar in content, form and import.
12. It is further averred that upon the execution and the attestation of the Letters of Offers, the Plaintiffs herein paid to and in favor of the Defendant, various amounts of money towards part Performance of the Sale contract.
13. It was further averred that the Defendant herein agreed and/or covenanted to provide to and in favor of the Plaintiffs certain critical Documents, which were to accompany the Purchase Agreement, in line with Section 43 of the Sectional Properties Act.
14. Be that as it may, the Deponent has further averred that despite the explicit and express terms contained in the duly executed Letters of Offers, the Defendants herein, has failed and/or neglected to supply and/or avail the critical Documents, which same had promised.
15. On the other hand, the Deponent has further averred that on various dates, including the 9th of October 2017, the Defendants herein forwarded unto the Plaintiffs the Sale Agreements for consideration and execution.
16. However, the Deponent has averred that upon receipt of the said Sale Agreements, the terms thereof were found to be slanted and were merely favoring the Defendants. In this regard, it is averred that the Plaintiffs', were constrained to and indeed wrote back to the Defendants, intimating their positions and similarly, made proposed amendments to the Sale Agreements.
17. Nevertheless, the Deponent has averred that despite the proposed Amendments, the Defendant herein declined to accede to same but, instead dismissed the Amendments, without taking into account the Interests of the Plaintiffs.
18. Notwithstanding the foregoing, the Deponent has further averred that on or about the 10th of December 2019, the Defendants herein wrote to the Plaintiffs and same were seeking to terminate the Sale, based on the grounds that the Plaintiffs had refused and/or declined to execute the Sale Agreement.
19. It is the Deponent's further averment that upon receipt of the Defendant's letter, whereby the Defendant sought to terminate the sale, the Plaintiffs wrote back to the Defendant on the 11th of December 2019, whereby the Plaintiffs objected to the termination of the Sale and further, reiterated their commitment to complete the sale of the Designated Properties.
20. Following the exchange of correspondence between the Plaintiffs and the Defendant, it is further stated that on the 14th of April 2020, the Plaintiffs and the Defendants, entered into a new arrangement, whereby the Defendant offered to and in favor of the Plaintiffs New Properties.
21. According to the Deponent, the New Properties which were offered to the Plaintiffs were as follows:
 - i. One Bedroomed Apartment, namely A21, Block A, located on 10th Floor, erected on LR.NO.2/421 Kirichwa road, Kilimani, within the City of Nairobi.*

ii. One Bedroomed Apartment, NO.B29, Block B, located on the 13TH Floor, erected on LR.NO.2/421, Kirichwa road, within the City of Nairobi.

22. It is further averred, that pursuant to the new arrangements, the Defendants generated Letters of Offers dated the 6th of April 2020 and the 14th of April 2020, which were both executed by the parties. Consequently, it is averred that the latter contracts, superseded the initial contracts, which were premised on the Letters of Offers dated the 10th and 11th of July 2017, respectively.

23. The Deponent has further stated that based and/or premised on the subsequent Letters of Offers, the monies which had previously been paid on the basis of the initial Letters of Offers were transferred to and were thus deemed to be payments at the foot of the new Letters of Offer.

24. The Deponent has further stated that based on the foregoing, the First Plaintiff herein had paid a total of Ksh.3,687,000 Only, towards the Purchase Price and same was to pay the sum of Kshs. 5,000,000 Only, at the execution of the Sale Agreement, leaving a balance of Ksh.1,813,000 only, which was to be paid by installments.

25. On the other hand, it was stated that the Second and Third Plaintiffs had themselves paid a total of Ksh.3,687,000 Only, towards the Purchase Price and same was to pay a further Ksh5,000,000 Only, immediately after the execution of the Sale Agreement, leaving a balance of Ksh.1,463,000 only and which was to be paid vide installments.

26. Be that as it may, the Deponent has averred that despite making Substantial payments towards the Sale and/or Purchase of the suit Apartments, the Defendants herein, has failed to complete the suit Apartments, to the desired Standards and have similarly failed to rectify various defects which were pointed out by the Plaintiffs.

27. Nevertheless, it is further averred by the Deponent that instead of remedying and/or rectifying the defects, the Defendants herein is now threatening to terminate the contracts relating to the sale of the suit apartments.

28. Owing to the foregoing, the Plaintiffs are therefore apprehensive that the Defendants herein are likely to terminate the contracts in respect of the sale of the suit apartments and to sell same to and/or in favor of Third Parties, which shall dispossess the Plaintiffs of their lawful and legitimate interests, over and in respect of the suit Apartments.

29. On the other hand, the Deponent has averred that the Defendant is a Kenyan company, but however controlled by foreign Nationals, namely Chinese. In this regard, the Deponent has therefore averred that in the event that the Defendant fails to transfer the suit Apartment to and/or in favor of the Plaintiffs and the Directors move out of the Jurisdiction of the Court, the Plaintiffs will have suffered Irreparable loss .

30. Finally, the Deponent has averred that the Plaintiffs/Applicants herein, undertake to file the Pleadings, over and in respect of the subject matter, within 7 (seven) days, from the Date of filing of this Application and shall serve them upon the Defendant.

RESPONSE BY THE DEFENDANT:

31. As pointed out earlier, upon being served with the Application, the Defendant herein entered appearance and thereafter filed a Notice of Preliminary Objection, whose details, have been reproduced herein before.

SUBMISSIONS

32. The Subject matter came up for hearing of the Application dated the 5th of July 2021, on the 30th of September 2021, on which date it transpired that the Defendant herein had filed a Notice of Preliminary Objection, challenging the validity and/ or propriety of the Subject suit.

33. Owing to the foregoing, it became necessary that directions be issued, towards the hearing and disposal of the Application dated the 5th of July 2021, as well as the Preliminary Objection, which had been filed by the Defendant herein.

34. Pursuant to the foregoing, this Court issued directions towards and concerning mode of disposal of the two (2) Items. For clarity, the Court directed that the Application dated the 5th of July 2021, and the Preliminary Objection dated the 27th of September 2021, be disposed of together.

35. Besides, the Honourable Court also directed that the Applications and the Preliminary objection be canvassed and/ or disposed of, by way of written submissions. For completeness, the timelines for the filing of the Written Submissions were also prescribed and/ or circumscribed.

36. When the matter came up for mention on the 9th of November 2021, the Parties herein indicated to the Court that same had not complied with the directions to file and/or exchange the written submissions. Consequently, the Parties herein, sought for and/or obtained indulgence by the Court, to enable same file and exchange the written submissions within a set timeline and in any event, before the next return date.

37. Owing to the foregoing, the Court directed that the subject matter shall be mentioned on the 22nd of November 2021, for purposes of confirming that the Parties had complied, by filing their respective written submissions and thereafter by setting a date for Ruling. However, come the 22nd of November 2021, none of the Parties had complied and therefore the Court was constrained to and indeed fixed the subject matter for Ruling on the 16th of December 2021.

38. On the other hand, the Court further Granted to and in favor of the Parties further latitude to file and serve written submissions, if same, were still keen to do so.

39. Be that as it may, by the time the Court retired to craft the Ruling, only the Plaintiffs/Applicants herein had filed their submission pertaining to and/or concerning the Preliminary objections raised by the Defendant.

40. For the avoidance of doubt, the Plaintiff herein did not file any written submissions on their own Application dated the 5th of July 2021, for reasons only known to same .

41. Notwithstanding the foregoing, the written submissions pertaining to and in respect of the Preliminary Objection, form part and parcel of the Court records and same have been considered and/or appreciated.

ISSUES FOR DETERMINATION

42. Having reviewed the Application dated the 5th of July 2021, the Supporting Affidavit thereto, as well as the written submissions filed by and/or on behalf of the Plaintiffs and having similarly considered the Notice of Preliminary Objection, *I am of the view that the following issues are Germane for determination:*

i. Whether the Preliminary Objection raised by the Defendant, raises a pure point of law.

ii. Whether the suit herein is contrary to and in contravention of Section 3 [3] of the Law Of Contract Act, Chapter 23 Laws Of Kenya.

iii. Whether the Application herein is competent and legalluy tenable, to the extent that same was filed in the absence of the requisite suit.

ANALYSIS AND DETERMINATION

ISSUE NUMBER ONE:

Whether the Preliminary objection raised by the Defendant raises a pure point of law.

43. The Defendants herein has filed a Notice of Preliminary Objection dated the 27th of September 2021 and which preliminary objection is based on the import or tenor of the provisions of Section 3(3) of the Law of Contract Act, Chapter 23 Laws Of Kenya.

44. According to the Defendant, the Plaintiffs and the Defendant herein had not executed binding Sale Agreements and/or Contracts and that what had been executed were Letters of Offers, which contained Preliminary terms upon which the Sale of the suit Apartments were to be premised.

45. In view of the fact, that no Formal Agreements had been signed, executed and/or attested, the Defendant therefore contended that the Plaintiffs' suit, based on the Letters of Offer, was therefore incompetent and void.

46. On the other hand, the Defendant has further averred that the Court also has no Jurisdiction to entertain the suit.

47. Consequently, and according to the Defendant, the issue before the Court, can be dealt with and/or disposed of, on the basis of a Preliminary objection.

48. Be that as it may, the circumstances where Preliminary Objection can be raised, and/or disposed of by the Court, have been deliberated upon and same has been the subject of numerous Court Decisions.

49. Despite the legion of Case Law on the issue of Preliminary objection, one cannot lose sight of the Decision in the case of **MUKISA BISCUITS MANUFACTURING CO. LTD –V- WEST END DISTRIBUTORS LIMITED (1969) E.A. 696** , see page 701, where the Court Of Appeal for Eastern Africa observed as hereunder

“ The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

50. Based on the foregoing Decision, which has attained sufficient publicity and notoriety, a Preliminary objection can only be ventilated when same raises a Pure Point of law and based on the assumption that the issues of facts, pleaded by the adverse Party are correct.

51. On the other hand, it is also crystal clear that the Preliminary objection cannot be raised where the impleader of the Preliminary objection disputes and/or contests the veracity of the factual averments contained in the Pleadings.

52. Thirdly, it is also settled that a preliminary objection cannot be raised where the issue in dispute requires exercise of Discretion by the Court, one way or the other. Simply put, exercise of Discretion cannot found a Preliminary Objection.

53. Fourthly, a Preliminary objection cannot be raised where the impleader seeks to invite the Court to carry out and/or undertake minute examination of the factual issues and thereby to arrive at a conclusion of facts, before the plenary hearing.

54. For coherence, the determination of a Preliminary objection, must not invite the Court to conduct a mini-trial on the facts and thereby deprive a Party of a rightful opportunity to have his/her case, heard in the usual manner.

55. Based on the foregoing, it is now imperative to consider whether what the Defendant has pleaded, strictly raises a pure point of law, as opposed to an invitation to delve and/ or venture into factual analysis, albeit, prematurely.

56. Having looked at the Preliminary objection, I must point out that same does not raise a pure point of law, which can be determined and/or resolved on the basis of the pleadings raised by the adverse Party and the preliminary objection only.

57. Contrarily, the Defendant herein seek to invite the Court to engage with the Letters of Offers and the terms therein and to find and hold that same do not meet the statutory threshold envisaged under Section 3[3] of the Law of Contract Act, Chapter 23, Laws of Kenya.

58. On the other hand, whereas the Plaintiffs have pleaded that the letters of offers, which were duly executed by the Parties, contained all the terms, which regulated the relationship between the Parties, the Defendant is of the contrary opinion. Clearly, the Defendant is not admitting the factual averments by and/or on behalf of the adverse Party.

59. In the premises, it is my finding and holding, that what the Defendant deems to be a Preliminary Objection, is however a disguised attempt to invite the Court to undertake a mini-trial, on the facts and/or issues in dispute and thereby draw conclusions on the facts, with a view to determining the purported Preliminary Objection.

60. In my humble view, such kind of an invite is unorthodox and contrary to the established procedure. Consequently, same must be and is hereby declined.

61. Before departing from the issue pertaining to circumstances where Preliminary Objection can be raised, it is also important to mention the Decision in the case of **Oraro Versus Mbaja [2004]eKLR** where the Court stated as hereunder:

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are diverse weighty authorities carrying the message.”

62. In my humble view, what has been touted as a Preliminary objection by the Defendant herein, does not meet the threshold and/or fall within the legal strictures of what constitutes a Preliminary objection.

ISSUE NUMBER TWO:

Whether the suit herein is contrary to and in contravention of Section 3 [3] of the Law Of Contract Act, Chapter 23 Laws Of Kenya.

63. Having dealt with the preliminary issue, pertaining to and/or concerning the circumstances where preliminary objection can be raised, it is now appropriate to venture into and consider the gravamen of the Defendant’s preliminary objection.

64. In this regard, it is important to observe that the gist of the Defendants’ objection is based on the sufficiency or otherwise, of the Letters of offers, which were executed by the Parties, pertaining to the sale of the suit Apartments.

65. According to the Defendant, the Letters of offers, which were executed and attested between the parties, were the precursors to the Sale Agreement, the latter, which was supposed to be prepared later and thereafter signed by the Parties.

66. It is further contended by the Defendant that up to and including the time of filing of the subject suit, no Sale Agreement had been executed and/or attested by the Parties. Consequently, the suit herein violates the provisions of Section 3[3] of the Law Of Contract Act, Chapter 23, Laws Of Kenya.

67. Be that as it may, there is no dispute that the Letters of offers, which were signed and executed by the Parties, and which were similarly attested, contained various terms upon which the Parties engaged.

68. The Question is whether the terms contained in the Letters of offer, as well as the execution and attestation thereof, meet the statutory threshold envisaged and/ or stipulated under the law.

69. Suffice it to say, that the provision of Section 3[3] of the Law Of Contract Act, Chapter 23, Laws of Kenya, provides that an Agreement

for disposition of an interest in land shall be in writing, contain all the terms and shall be signed by the persons chargeable therewith.

70. On the other hand, it is also provided that the signatures of the persons chargeable with the contract, shall be attested by an attesting Witness, who was present at the time of the execution of the contract and witnessed the signing thereof.

71. It has been stated by the Plaintiffs that the Letter of offers, which were generated by the Defendant, were indeed in writing, contained all the requisite terms of engagement, were signed by both the Defendant and the Plaintiffs and that the signatures thereto were duly attested.

72. In the premises, it must be noted that though the law requires that the Agreement must be in writing, contains all the terms of engagement agreed upon by the Parties chargeable therewith and the signatures be attested, the law has however, not prescribed the format and/ or Form, as to how the written Documents has to look like or otherwise.

73. In my humble view, the Letter of offer containing all the terms of engagement, duly signed by the Parties thereto and whose signatures are thereafter attested, may very well suffice for purposes of Section 3[3] of the Law of Contract Act, Chapter 23, Laws of Kenya.

74. Nevertheless, I must hasten to state that the sufficiency or otherwise of the Letter of offer, is a factual issue that must await the plenary hearing, so as to determine its adequacy or lack of it. For clarity, such determination, belongs to the trial Court and not otherwise.

75. In support of the foregoing pronouncement, I am obligated to invoke and adopt the Decision in the case of **Tiara Properties Limited versus Shadrack Musyoka [2019]eKLR** where the Court Of Appeal held as hereunder:

“In our view the issue whether the letter of offer could be the basis of a contract between the appellant and the respondent was raised prematurely at the interlocutory stage. It is an issue that could not be addressed by looking at the letter of offer in isolation, without the benefit of full evidence. On the face of it, the letter of offer though indicating subject to contract included terms such as, a booking fee payable in July 2012, and balance payable on completion, and other costs including stamp duty of 4% of the purchase price or government valuation, and an important clause: that “the vendors lawyer will prepare the sale agreement and sub leases and the purchaser agrees to execute the same within 7 days. Therefore, whether the letter of offer was capable of creating a binding contract separate from the contract for sale of land is a conclusion that could not be arrived at without evidence from the parties regarding these issues.”

76. In my humble view, the foregoing quote answers the Defendant’s complaints herein. Consequently, I beg to say no more.

ISSUE NUMBER THREE:

Whether the Application herein is competent and legalluy tenable, to the extent that same was filed in the absence of the requisite suit.

77. Before endeavoring to answer the third issue herein, It is important to reproduce the contents of paragraph 62 of the Supporting Affidavit sworn by one (1),namely, Janet Nyanduko, which states as hereunder:

“62. That the Plaintiffs/Applicants undertake to file the pleadings of the main suit within seven (7) days and serve them upon the Defendants”

78. From the foregoing, it is apparent that the subject Application was filed earlier than the substantive suit and same was based on an alleged undertaking that the main suit would be filed within seven(7) days thereafter.

79. Suffice it to say, the pleadings in respect of the main suit, were never filed and/or lodged with the Court until the 26th of November 2021, some four Months after the filing of the subject Application.

80. Based on the foregoing, the question that arises is whether an Application for Temporary Injunction, which must be anchored on a Substantive suit, can precede the suit or better still, whether the substantive suit can come after the Application.

81. In my humble view, an Application for Temporary Injunction cannot precede the Substantive suit and in any event, it is the substantive suit, which must be considered, to determine whether same Discloses a Prima Facie case, to warrant the Grant of an order for Temporary Injunction.

82. To vindicate the foregoing observation, I restate the position of the law as enunciated in the Decision in the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] eKLR** where the Court Of Appeal observed as hereunder:

“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.”

83. In my humble view, in the absence of a Substantive suit, the subject Application, was mounted in vacuum. Same was therefore legally untenable and incapable of attracting Orders of Temporary Injunction.

FINAL DISPOSITION

84. Based on the forgoing observations, I now make the following Dispositive Orders:

i. The Preliminary Objection dated the 27th of September 2021, is devoid of merits. Consequently, same be and is hereby Dismissed.

ii. The Notice of Motion Application dated the 5th of July 2021, is incompetent and legally untenable. Consequently, same be and is hereby struck out.

85. The Scales have evenly balanced between the Parties. Consequently, each Party shall bear own Costs, of the preliminary Objection and Application, respectively.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH _ DAY OF DECEMBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant

Mr. Kuria h/b for Mr. Ogeto for Plaintiffs/Applicants.

Mr. Ochieng' for the Defendant/Respondent.