



**China Wu-Yi Company Limited v Suraya Property Group Limited & 2 others (Civil Case 76 of 2019) [2021] KEHC 16 (KLR) (Civ) (10 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 16 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
CIVIL  
CIVIL CASE 76 OF 2019  
DAS MAJANJA, J  
SEPTEMBER 10, 2021**

**BETWEEN**

**CHINA WU-YI COMPANY LIMITED ..... PLAINTIFF**

**AND**

**SURAYA PROPERTY GROUP LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MUGA DEVELOPERS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**EQUITY BANK LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 3<sup>rd</sup> Defendant (“the Bank”) has moved the court by the Notice of Motion dated 5<sup>th</sup> August 2021 seeking, in substance, a mandatory injunction compelling the Plaintiff to hand over possession of the following housing units; Hibiscus Villas – H036, H049, H060, H061, H105, H106, H107 and Tulip Apartments Court 6 Second Floor, Court 7 Ground Floor and Court 7 Third Floor (“the Houses”) erected on LR No. 28223/33 (“the suit property”) which is charged to the Bank by the 2<sup>nd</sup> Defendant and which are under control of the Plaintiff.
2. The application is supported by the affidavit and further affidavit of Moses Ndirangu, the Bank’s Director for Corporate Banking, sworn on 5<sup>th</sup> August 2021 and 20<sup>th</sup> August 2021 respectively. It is opposed by the Plaintiff through the replying affidavit of Chen Xiong Guan sworn on 17<sup>th</sup> August 2021. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants oppose the application through Grounds of Opposition dated 24<sup>th</sup> August 2021. The application was argued by counsel making oral submissions.

**Background**

3. The facts leading to this case are largely common cause. The 2<sup>nd</sup> Defendant is the registered owner of the suit property. It constructed a development thereon known as Fourways Junction Project comprising



of housing units and ancillary facilities. In order to develop the units, it charged the suit property in favour of the Bank to secure facilities by a Charge dated 28<sup>th</sup> March 2011, a Further Charge dated 4<sup>th</sup> April 2012 and a Second Further Charge dated 4<sup>th</sup> April 2012. It also appointed the 1<sup>st</sup> Defendant as its agent to sell units to prospective purchasers.

4. In March 2009, 2<sup>nd</sup> Defendant, through its Project Manager, advertised a tender for the construction of Phase I of the Fourways Junction Project. The Plaintiff, a contractor, successfully bid and was awarded the tender. Upon successful completion of the project at various stages, the project architect issued various certificates in favour of the Plaintiff amounting to Kshs 166,000,000.00. The final certificate of Kshs 116,261,185.94 was issued on 20<sup>th</sup> April 2015 out of which the Plaintiff is entitled to Kshs 73,668,495.04 with the balance being payable to subcontractors and other suppliers.
5. Since the 1<sup>st</sup> Defendant was unable to pay the Plaintiff the Kshs 166,000,000.00, it was agreed that the amount would be settled in kind by way of sale of the Houses implemented by sale agreements to the Plaintiff's nominee, Lixin Yang.
6. In due course, the Plaintiff took possession of some of the Houses but now complains that it did not receive the title documents from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff also claims that it is still owed Kshs 73,668,495.04 by the Defendants. In the Amended Plaint dated 17<sup>th</sup> February 2020, the Plaintiff seeks the specific performance of the sale agreements, delivery up of the titles to the Houses and mesne profits for the loss of income and rents from the Houses that were not handed over. In the alternative, it prays for judgment for Kshs 73,668,495.04 with interest thereon and general damages for breach of contract.
7. The Plaintiff filed an Amended application dated 17<sup>th</sup> February 2012 made, inter alia, under Order 40 rule 1, 2 and 3 of the Civil Procedure Rules seeking injunctions restraining the Defendants from dealing with the Houses pending the hearing and determination of the suit. I heard the application and dismissed it by the ruling dated 2<sup>nd</sup> November 2020.
8. Upon grant of leave to amend its defence, the Bank filed an Amended Statement of Defence and Counterclaim dated 5<sup>th</sup> August 2021. The thrust of the Statement of Defence is that the suit property is charged to it and that it did not consent to the lease, transfer or sale of the Houses to the Plaintiff by the 2<sup>nd</sup> Defendant. It therefore states that the Plaintiff is not entitled to possession of the Houses as claimed in the Plaint. In its Counterclaim, the Bank states that as a result of default by the 2<sup>nd</sup> Defendant to make payments advanced to, it appointed Muniu Thoiti and George Weru as joint receivers of the 2<sup>nd</sup> Defendant.
9. It pleads that following dismissal of the Plaintiff's application for injunction and holding that the Plaintiff had no claim over the Houses, the Bank demanded immediate possession of the Houses by its letter dated 26<sup>th</sup> March 2021. Despite demand, the Plaintiff has refused to grant the Bank immediate possession and that it has proceeded to rent out the Houses without the consent of the 2<sup>nd</sup> Defendant's receivers and the Bank. Since the Bank contends the Plaintiff has no claim over the Houses, it seeks a mandatory injunction compelling the Plaintiff to hand over possession of the Houses, a permanent injunction to restrain the Plaintiff from interfering with the Houses, an order directing the Commanding Officer, Kasarani Police Division to assist the Receivers of the 2<sup>nd</sup> Defendant to take possession of the Houses, an account of the rent received as a result of the renting out the Houses, damages for trespass and aggravated damages.

### **Submissions and determination**



10. The basis of the Bank's case is that the court, in dismissing the Plaintiff's application, has already held that the Plaintiff does not have any claim over the Houses thus the continued possession of the Houses by the Plaintiff is unlawful and a blatant disregard of the court's orders. Counsel for the Bank submits that the facts of this case constitute special circumstances upon which the court may grant a mandatory injunction.
11. The thrust of the Plaintiff's opposition to the Application for mandatory injunction is that, "it would be impossible for the Plaintiff to hand over possession of the houses which they are also saying that they were not put in possession and are seeking a court order to take possession." In essence the Plaintiff depones that Bank and 2<sup>nd</sup> Defendant knew that the Plaintiff's nominee, Lixin Yang, was given possession of Hibiscus Villas – H049, H060, H061 and 106 while H036, H105, H107 and Tulip Apartments Court 6 Second Floor, Court 7 Ground Floor and Court 7 Third Floor and were not handed over and that is why it sought an order of specific performance for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant to hand them over to the Plaintiff.
12. The Plaintiff further states that the Bank has been dealing with the said Lixin Yang whom it avers that it is not aware of his whereabouts. It further avers that Lixin Yang even sold Hibiscus 106 in 2013 to one Jun Zhang. The Plaintiff further avers that Tulip Apartment 6 Second Floor and Tulip Apartment 7 Third Floor were in fact sold to other persons by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. From the totality of circumstances, the Plaintiff states that Bank has not demonstrated that it is entitled to the orders sought.
13. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants oppose the application and support the Plaintiff. The thrust of its opposition is that the court cannot issue the orders sought as it would, in effect, be determining the entire suit at an interlocutory stage. They submit that the court cannot grant orders which are sought in the plaint as final reliefs.
14. I do not think there is any dispute that the general principle is that while the court may grant a mandatory injunction at an interlocutory stage, it will not normally be granted unless there are special or exceptional circumstances. These special circumstances include a case that is clear and one which the court thinks it ought to be decided at once by a simple and summary act that can be easily remedied, or if the defendant attempted to steal a march on the plaintiff (see *CF Financial services v Juja Road Fancy Store Limited* NRB CA Civil Appeal No 12 of 2010 [2017]eKLR *Belle Maison Limited v Yaya Towers Limited* NRB HCCC No. 2225 of 1992 (UR) and *M'Mukanya v M'Mbijiwe* [1984] KLR 761)
15. In *{> Kenya Breweries Limited and Another v Washington Okeyo* //NRB CA Civil Appeal No. 332 of 2000}, the Court of Appeal summarized the principles applicable for the grant of a mandatory injunction as follows:

The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 *Halsbury's Laws of England* 4th Edn. para 948 which reads:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ..... a mandatory injunction will be granted on an interlocutory application".

Also in *Locabail International Finance Ltd v Agroexport and others* [1986] 1 ALL ER 901 at pg. 901 it was stated:



“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

16. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ objection that the court cannot grant a mandatory injunction as this stage is answered by the decisions I have cited above. They demonstrate that an interlocutory mandatory injunction may be granted if the applicant meets the high threshold warranting the grant of such orders. Moreover, that is not the end of the suit as the Plaintiff seeks damages which will be subject of trial.
17. The question for resolution by the court is whether the Bank has established special circumstances that would warrant the grant of a mandatory injunction. As I have set out in the background above, the material facts are not in dispute. When the Plaintiff filed suit to restrain the Bank from dealing with the Houses pending the hearing and determination of the suit, I held, in the ruling dated 2<sup>nd</sup> November 2020 that the Plaintiff has not established a *prima facie* case with a probability of success based on its claim for the Houses. I stated as follows:

(18) Since the Bank is a chargee and therefore a proprietor whose interests are registered, in order to succeed in its claim, the Plaintiff must show that its interest falls within any provisions of the LRA that would defeat the Bank’s interest. In this instance, as I have stated above, the purchaser’s lien is against the vendor and not the Bank while the builder’s lien is against the developer. In both cases, the claims are against the 1<sup>st</sup> Defendant. The Plaintiff does not have any registered or other interest that would defeat the Bank’s charges. I therefore agree with what Ochieng J., stated in *Dr Samuel Mundati Gatabaki v Muga Developers Limited & 3 Others (Supra)* that:

It is common ground that the financial facility which the bank granted the developers has not been repaid in full. In the circumstances, even though the directors of the 1<sup>st</sup> defendant and the plaintiff may have reached an agreement between themselves, about how the plaintiff is to be compensated. I find on a prima facie basis, such an agreement cannot override the chargee’s rights ....

It is my considered opinion, any person who lays claim to the ownership of any housing units which are on the property charged to the bank, should strive to ensure that the bank loan was paid of ... it is only after the balance has been cleared that the persons laying claim to various housing units could possibly have a chance of persuading the court to order specific performance.

(19) The Plaintiff’s agreements with the 1<sup>st</sup> Defendant cannot override the charge. In *Innecity Properties Limited v Housing Finance and Another HC COMM No. E030 of 2020*, the interested parties purchased some units in a development without consent of the bank which had a charge over the



development. In rejecting the application for injunction, the court expressed the view that:

- (41) ..... Since the Bank is the Chargee, it must give its consent to the plaintiff to sell the property. The interested parties have not shown that they received the Bank's consent to purchase the apartments or that they paid the Bank any money. Since they have not established a legal claim against the Bank, the court cannot issue an injunction in their favour.

[20] Having found that the Plaintiff has not established any proprietary interest in the suit property that would defeat the Bank's securities, I hold that the Plaintiff has not established a prima facie case with a probability of success against the Bank. Since I have found that the Bank has a superior interest on the suit properties by reason of the charges, I have not found it necessary to consider the case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as they cannot deal with the suit properties without the consent of the Bank.

18. In light of the clear finding that the Plaintiff lacks a proprietary interest in the Houses, can the Plaintiff resist the Bank's application for a mandatory injunction on the basis that first, it does not have possession of the some or all of the Houses and second, that the Houses are in possession of a third party?
19. I hold that the Plaintiff cannot at this stage argue that it is shielded from liability by the act of the third party who was at all material times its nominee. The Plaintiff has filed its Plaint and Amended Plaint on the basis that it is the legal owner of the Houses and it seeks to enforce its right under the agreements. The fact that it states that it does not have possession of the Houses only strengthens the Bank's case to take possession of the Houses charged to it and which I have held that the Plaintiff does not have a proprietary interest. To hold otherwise would be to accept that the Plaintiff now has proprietary interest in the Houses.
20. I would also point out that the 2<sup>nd</sup> Defendant, as the party which purported to sell the House to the Plaintiff, has not put before the court any facts, by way of a replying affidavit, that would negate the Bank's application. It does not deny the fact that it is now under receivership by the Bank. In the circumstances, I do not find any reason to deny the Bank orders to take possession of the Houses. I find and hold that the Bank has established special circumstances that would entitle it a mandatory injunction as it has a duly registered charge over the Houses and the Plaintiff does not have any proprietary interest that would defeat the Bank's rights.

### Disposition

21. I therefore allow the Notice of Motion dated 5<sup>th</sup> August 2021 and make the following orders:
- (a) A mandatory injunction be and is hereby issued compelling the Plaintiff whether by itself, its officers, employees and/or agents to hand over the following housing units erected on Land Reference No. 28223/33 charged to the 3<sup>rd</sup> Defendant and in control of the Plaintiff known as: Hibiscus Villas – H036, H049, H060, H061, H105, H106, H107 and Tulip Apartments Court 6 Second Floor, Court 7 Ground Floor and Court 7 Third Floor.**
- (b) If the Plaintiff does not hand over possession of the said housing units Hibiscus Villas – H036, H049, H060, H061, H105, H106, H107 and Tulip Apartments Court 6 Second Floor, Court 7 Ground Floor and Court 7 Third Floor with seven (7) days from the date hereof, the Nairobi County Officer Commanding Police Division Kasarani,**



**be and is hereby directed to assist the Receivers of the 2<sup>nd</sup> Defendant appointed by the 3<sup>rd</sup> Respondent to take over the said housing units.**

**(c) Costs of the application are awarded to the 3<sup>rd</sup> Defendant.**

**DATED and DELIVERED at NAIROBI this 10<sup>th</sup> day of SEPTEMBER 2021.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

Mr Githumbi instructed by Githumbi Gachaga and Achoki Advocates for the Plaintiff.

Mr Kimondo instructed by L. Kimondo and Company Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Mr Kimani, SC with him Mr Ondieki instructed by Hamilton, Harrison and Mathews Advocates for the 3<sup>rd</sup> Defendant.

