IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 76 OF 2019

BETWEEN

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

AND

SURAYA PROPERTY GROUP LIMITED .....1ST DEFENDANT

MUGA DEVELOPERS LIMITED.....2ND DEFENDANT

EQUITY BANK LIMITED ..... 3RD DEFENDANT

RULING

Background

1. The facts leading to this case are largely common cause. The 2nd Defendant is the registered owner of LR No. 28223/33 situated on Kiambu ("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 suit property, it charged the suit property in favour of the 3rd Defendant ("the Bank") to secure facilities by a Charge dated 28th March 2011, a Further Charge dated 4th April 2012 and a Second Further Charge dated 4th April 2012 in order to secure advances. It also appointed the 1st Defendant as its agent to sell units to prospective purchasers.

2. In March 2009, Muga Developers, 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 20th April 2015 out of which China Wu-Yi is entitled to Kshs 73,668,495.04 and the balance is payable to subcontractors and other suppliers.

3. Since the 1st Defendant was unable to pay the Kshs 166,000,000.00, it was agreed that the amount to be paid would be settled in kind by way of sale of the following houses in the project: 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"). The sale agreements were implemented by the sale of those houses to the Plaintiff's nominee, Lixin Yang.

4. 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 1st and 2nd Defendants. The Plaintiff also claims that it is still owed **Kshs 73,668,495.04** by the Defendants. In the Amended Plaint dated 17th February 2020, the Plaintiff seeks the specific performance of the sale agreements, delivery up of the titles to the Houses, 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.

The Application

5. The application before the court is the Amended application dated 17th 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.

6. The application is supported by the affidavit of Chen Xiong Guan, the Plaintiff's project manager, sworn on 17th February 2020 and a further affidavit. The 1st Defendant filed a replying affidavit to the original application sworn on 14th May 2019 by its director, Peter Muraya. The 2nd Defendant did not oppose the application while the Bank opposed the application through the replying affidavit of Moses Ndirangu, its Associate Director of Corporate Banking, sworn on 13th May 2020. Counsel for the Plaintiff and the Bank filed written submissions in support of their respective positions.

7. The parties agree that the application for consideration is to be determined in accordance with the principles established in ***Giella v Cassman Brown*** **[1973] EA 348**. In order to succeed an applicant has to satisfy three requirements; establish that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt, show that the balance of convenience is in its favour. In ***Nguruman Limited v Jane Bonde Nielsen and 2 Others*** **NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR**, the Court of Appeal restated the three-part test and observed that:

> *These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See* ***Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86****). If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.*

8. In ***Mrao Ltd v First American Bank of Kenya Limited and 2 Others*** **[2003] eKLR**, the Court of Appeal explained that a prima facie case 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 to call for an explanation or rebuttal from the latter."* In resolving this issue, the court must ask what proprietary interest the Plaintiff has in the suit property.

Whether the Plaintiff has a Prima facie Case

9. The thrust of the Plaintiff's case is that as contractor, it expended labour and incurred costs in improving the suit property and is thus entitled to be paid. It asserts that it holds an enforceable builder's lien over the Houses in its possession having purchased them based on the undisputed money owed to it by the 2nd and 3rd Defendants which was converted to purchase price. It contends that the Defendants had knowledge of its interest in the Houses hence they are estopped from denying that it is entitled to the Houses and the amount of money owed to it.

10. Counsel for the Plaintiff submitted that based on the uncontested facts that the Plaintiff's debt as a contractor was paid when it purchased the Houses, it now holds a purchaser's lien over the Houses which is an enforceable right. Counsel referred to ***Pan Canadian Mortgage Group Inc. v. 679972 B.C. Ltd*** **2013 BCSC 1078**, where the Supreme Court of British Columbia in Canadian held that, *"A purchaser's lien is a well-established equitable charge over property that arises at the time a purchaser of property provides a deposit or funds to the vendor or their agent in part or whole payment of the purchase price."*

11. Counsel further submitted that with the purchaser's lien amounts to a charge over the property and therefore the Plaintiff is a secured creditor. Counsel relied on ***George Eason & Another (Liquidators of Alpha (Students) Nottingham Ltd v Anthony You-Wing Wong*** **[2017] EWHC 209 (Ch)** and ***Lehmann v BRM Enterprise Ltd*** **[1978] 88 DLR (3rd) 87** to support this position. He added that even where it is arguable that a purchaser could not have received a good title for the reason of failure to comply with some statutory requirements, the lien cannot be defeated. Counsel relied on the case of ***Whitehead & Co Adv v Watt*** **[1902] 1 Ch 835** to submit that a purchaser's lien was a right that was invented for purposes of doing justice to a purchaser and it would be unjust to hold that the Plaintiff has no enforceable interest.

12. The Plaintiff's alternative argument was that since it was the contractor and had improved the suit property by investing its resources, it had an unassailable builder's lien and should therefore continue being in occupation of the Houses until it is fully paid. Counsel relied on the case of ***Fynbosland 435 CC and Torro Ya Africa (PYT) Ltd & 2 Others*** **[2011] ZANWHC 68** where the court explained that a builder's lien is, *'a right of retention over the building or structure which the builder has constructed or repaired to secure payment of the contract price….. The lien entitles an applicant to his full contract price.'* The Plaintiff argued that since the unpaid amounts were not disputed and the Plaintiff was in occupation of the Houses, it has made out a prima facie case for a builder's lien thus entitling it to an injunction pending the hearing and determination of the suit.

13. In regards to the submission by the Bank that the 1st Defendant did not have its consent to sell the Houses, Counsel for the Plaintiff pointed out that the Bank was always aware of the sale transactions. It contended that the Bank appointed a project manager who informed it about the progress of the project and that the project manager ought to have known which Houses had been sold. It submitted that the initial facility letters did not have enforcement mechanisms and the Bank did not insist that all transactions over the Houses be done by an advocate in their panel. It maintained that the Bank had a duty to ensure that its clients do not defraud third parties such as allowing the 1st Defendant deal with the suit property in any manner. Counsel urged the court to take judicial notice of what is happening in construction industries particularly in off-plan developments where purchasers and contractors are losing their money at the behest of banks and developers and which the court could only ameliorate by enforcing the purchaser's and builder's liens.

14. The Bank's case was grounded on the fact that the Plaintiff was aware and admitted that the 1st Defendant had charged the suit property

to it at the time the sale agreements between the Plaintiff and 1st Defendant were executed. It contended that under **section *Land Registration Act, 2012*** (“***LRA***”), it was the registered proprietor of charges and its rights could not be defeated under **section 25(1)** of the ***LRA***. Counsel for the Bank submitted that by reason of the registration, the public including the Plaintiff had constructive notice of its interest hence the Plaintiff was deemed to be aware that any transfer of the Houses would require the Bank’s written consent before effecting any transfer. The Bank maintained that there was no evidence and that the 1st Defendant obtained the Bank’s consent to sell the Houses to the Plaintiff.

15. Counsel for the Bank further submitted that the Bank’s rights, as a chargee, could not be taken away either by knowledge of the transaction as suggested by the Plaintiff. Further that the Bank did not have any duty or responsibility to police the activities of the borrower. Counsel cited the case of ***Dr Samuel Mundati Gatabaki v Muga Developers Limited & 3 Others*** **HC COMM No. 151 of 2017 (UR)** and ***Lucy Wangari Kamau and 13 Others v Muga Developers Limited*** **(in Receivership) HC COMM No. E052 of 2020 [2020] eKLR** to support the primacy of the chargees’ rights over the unregistered rights of third parties. Counsel for the Bank further distinguished the cases cited by the Plaintiff’s counsel on the ground that the cases did not deal with registered interests. The Bank submitted that based on its registered interest, as chargee, the Plaintiff has failed to establish that it has a prima facie case with a probability of success.

16. Whether the Plaintiff has a prima facie with a probability of success case turns on the nature of its interest in the suit property. It has based its interest on a purchaser’s and a builder’s lien. The purchaser’s lien is based on the sale agreement between its nominee and the 1st Defendant. The builder’s lien is based on the construction services it rendered to the 1st Defendant. From the undisputed facts, it is clear that the liens are exercisable only in respect of 1st Defendant and not the Bank.

17. The Bank holds a registered interest which is protected by **section 25(1)** of the ***LRA*** as follows:

> *25(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.*

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 1st 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 1st 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 1st Defendant cannot override the charge. In ***Innercity Properties Limited v Housing Finance and Another*** **HC COMM No. E030 of 2020 [2020] eKLR**, 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 1st and 2nd Defendants as they cannot deal with the suit properties without the consent of the Bank.

Whether damages are an adequate remedy

21. Even though the Plaintiff has failed to establish a prima facie case with a probability of success, for purposes of completeness, I shall deal with the issue whether the Plaintiff will suffer irreparable harm which is not compensable by an award of damages.

22. In reality the injunction is against the Bank and whether or not the 1st Defendant will not be in a position to pay any damages as it has been put under receivership by the Bank is immaterial. The Plaintiff also contended that its interest in the suit property is protected under **Article 40** of the Constitution and as such violation thereof is not a manner that can be remedied by an award of damages.

23. The Bank submitted that the Plaintiff’s claim as set out in the Amended Plaint is a tacit admission that damages are an adequate remedy. As its claim is for the current market value of the Houses as well as the outstanding amount under the final certificate is quantifiable in monetary terms, the Bank submitted that an injunction should not be issued. It adds that the reference to the Constitution is an afterthought and the principles for grant of injunction are well settled under common law.

24. I agree with the Bank that damages are quantifiable and an adequate remedy in light of the remedies sought by the Plaintiff. It is the burden of the Plaintiff to show that the Bank may not be in a position to pay damages if they become due. It has not done so.

25. **Article 40** of the Constitution protects the right to property. But that right is not absolute as property may be taken away by due process. Due process is protected by statute, common law and principles of equity which determine how proprietary rights may be lost. This case is testament that the Plaintiff is exercising its due process rights to protect its property. I therefore find and hold that the Plaintiff has not established that it shall suffer irreparable harm which may not be compensated by an award of damages.

Balance of Convenience

26. In considering the balance of convenience, the court balances the relative harm to be suffered by either party if an injunction is either granted or refused. It is however the burden of the Plaintiff to demonstrate that it will suffer greater injustice or harm, if the injunction is not granted pending the hearing and determination of the suit.

27. As I have held elsewhere, the issue at hand is whether the Bank should be restrained from exercising its statutory rights under the securities on the basis of a claim by a third party, in this case the Plaintiff, who has no proprietary interest in the suit property. The Bank is owed money by the 1st Defendant which continues to accrue interest and will at some point outstrip the value of the security if not paid. In that event, the Bank, which has no contractual relationship with the Plaintiff, will not have any recourse against the Plaintiff for that loss. On the other hand, if the Plaintiff's claim against the Bank succeeds, it will be compensated. The balance of convenience is not in favour of the Plaintiff.

Disposition

28. I dismiss the Amended Notice of Motion dated 17th February 2012 with costs to the 3rd Defendant.

DATED and **DELIVERED** at **NAIROBI** this **2nd day of NOVEMBER 2020.**

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

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

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