REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 719 OF 2010

MUGA DEVELOPERS LIMITED.....PLAINTIFF

-VERSUS-

HON. NJEHU GATABAKI.....1ST DEFENDANT

RACHEL MWIHAKI GATABAKI.....2ND DEFENDANT

(BY ORIGINAL ACTION)

MUGA DEVELOPERS LIMITED.....1ST DEFENDANT

SURAYA PROPERTY GROUP LIMITED.....2ND DEFENDANT

SURAYA SALES LIMITED.....3RD DEFENDANT

I&M BANK LIMITED.....4TH DEFENDANT

DR. SAMUEL M. GATABAKI.....5TH DEFENDANT

NANCY W. GATABAKI.....6TH DEFENDANT

EQUITY BANK LIMITED.....7TH DEFENDANT

(BY WAY OF COUNTERCLAIM)

RULING

[1] This ruling is in respect of the two applications dated **15 August 2016** filed by the 1st Defendant/Applicant, **Hon. NjehuGatabaki,** and the one **Notice of Motion** dated **25 August 2016** by the2ndDefendants/Respondent in the Counterclaim, namely: **Suraya Property Group Limited.**For the purposes of consistency, the parties will be referred to herein in both applications as the Applicant and the Respondents. The first application was filed under **Sections 3 and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, **Section 7 of the Arbitration Act**, 1995, as read with **Rule 2 of the Arbitration Rules**, **1997,** as well as **Order 40 Rule 1, Order 51 of the Civil Procedure Rules, 2010,** for the following orders:

[a] (spent)

[b] (spent)

[c] (spent)

[d] That a temporary injunction and/or interim measure of protection be granted against the 1st and 2nd Respondents, **Muga Developers Limited** and **Suraya Property Group Limited**, either through their agents, servants, employees or

in any way howsoever from either advertising, offering for sale, transferring, alienating and/or distributing of the property known as **Land Reference Number 28223/2** or any part thereof in Phase III of the development project christened "**Fourways Junction Estate** until the hearing and determination of the arbitration herein;

[e] that a temporary injunction and/or interim measure of protection be granted against the 1st and 2nd Respondents, **Muga Developers Limited** and **Suraya Property Group Limited**, either through their agents, servants, employees or in any way howsoever from either advertising, offering for sale, transferring, alienating and/or distributing of any houses or structures or development erected on **Land Reference Number 28223/2** or any part thereof in Phase III of the development project christened "**Fourways Junction Estate,** until the hearing and determination of the arbitration herein;

[f] that the Court be pleased to issue any order or directions that are just and convenient to protect the integrity of the arbitral process;

[g] That the costs of the application be provided for

[2] The Application was supported by the affidavit of the 1st Defendant, annexed thereto and the grounds set out on the face of the application. Briefly, the grounds upon which the application was premised are that the applicant entered into a sale agreement dated **2 April 1995** with the 5th and 6th Defendants in the Counterclaim, namely **Dr. Samuel M. Gatabaki** and **Nancy W. Gatabaki**, respectively, for the purchase of 20 acres of their piece of land, originally known as **Land Reference Number 5980/3**. Subsequently the Applicant, by an agreement **dated 19 March 2009** entered into a joint venture agreement with the 2nd Respondent for the development of various types of residential houses on the purchased piece of land, which came to be known as **Land Reference Number 28223/2**. It was further averred by the applicant that it was a term of the contract that the 2nd Respondent would give a 99 years lease with reversionary interest from the head title to **Muga Developers Ltd**, the 1st Respondent; and that a 5-acre portion of the land would be reverted back to the Applicant.

[3] It was further contended by the Applicant that it was a term of their agreement that his contribution was limited to availing the land, and that the 2nd Respondent would carry out the construction of the houses and secure funding for the project; and that as a way of sharing profits, the Applicant would be given Title to **16 Lillac Villas** among other benefits. He added that the 2nd Respondent was prohibited by the said agreement from charging or in any way encumbering the 20 acre parcel of land owned by the Applicant; but that the 2nd Respondent fraudulently and deceitfully charged the land through the 1st Respondent in breach of the agreement. Accordingly, as a result of the disputes between the parties, the 1st Respondent filed this suit on **28 October 2010** claiming the Applicant filed this suit seeking, inter alia, a declaration that the suit property rightfully belongs to it, for the reason that the Applicant was unable to pay the purchase price.

[4] According to the Applicant, after several years in court, and without the likelihood of having the matter finally determined, the parties chose to pursue alternative dispute resolution mechanisms. Thus, on the **19 January 2016,** the parties filed a consent whereby the dispute was first referred to mediation, and thereafter arbitration after the mediation efforts failed. Consequently, **Mr. Kyalo Mbobu**, was appointed as the Sole Arbitrator to help the parties find an expeditious resolution to their dispute.In support of this application, it was the contention of the Applicant that although the Respondents participated in the preliminary arbitral meetings, it was soon evident that they were no longer interested in the arbitral proceedings; and that the Plaintiff/1stRespondent thereafter became uncooperative and insinuated that it would not henceforth participate in the arbitral proceedings.

[5] It was further the case of the Applicant that while the matter was pending arbitration, the 2nd Respondent proceeded to commence the development of Phase III of the project; and had, on interviews and various fora, intimated that the houses would be completely sold within the first few months of the ground breaking, which took place on or about **28 July 2016**. That since the 2nd Respondent does not hold any tangible property that could be attached, the need arose to safeguard the arbitral proceedings to ensure that the Applicant does not end up with a paper decree with no prospects of recovery.

[6] In response to the first application, Grounds of Opposition were filed by the 1st, 2nd and 3rd Respondents to the effect that:

[a] The suit property is not in any danger of being damaged, alienated, wasted or destroyed so as to warrant the granting of the orders sought;

[b] That the Applicants interest in the development comprised in the suit property is limited to 16 residential units and as such the Applicant has no *locus standi* to interfere with the rest of the development project on the land;

[c] The suit property is registered in the name of the 1st Respondent and the Applicant has no legal interest over it capable of protection by the orders sought;

[d] That the 1st Respondent has been unable to complete the constructions of the 16 residential units due to the Applicant due to the existence of a court order obtained by the Applicant in **2011;**

[e] That the Applicant has Title to the 16 residential units due to him, as well as Title and possession of 5 acre portion of land from **LR No. 28223/2** that was due to him under the Development Agreement; and that therefore the application lacks merit, is an abuse of the Court process and ought to be dismissed with costs.

[7] The Respondents also relied on the Replying Affidavit sworn by **Peter Kiarie Muraya**, a Director of the 1st, 2nd and 3rd Respondents in which it was deponed that whereas the 1st Respondent was the registered proprietor of **LR No. 5980**, even the Applicant's interest in the 20 acres comprising the suit property herein, **LR No. 28223/3,** passed on to the 1st Respondent upon execution of the Development Agreement; and therefore the Applicant no longer had any interest in the portion of the land capable of protection by the orders sought. It was further averred by the Respondents that the Applicant's interest in the suit property is limited to the construction, delivery and ownership of 16 residential units which are part of the development, and which were duly identified and the leases therefor granted to the Applicant.

[8] The Respondents further contended that the reason the 1st Respondent has been unable to complete the construction of the 16 residential units was the injunction issued by the Court stopping the construction of the units. As for the 5 acres of land, the Respondents contention is that the Lease in respect thereof was sent to the Applicant for execution and subsequent registration, but that the Applicant had failed to execute the same. For the foregoing reasons, the Respondents contend that the Applicant's interests which are the subject of this litigation are well protected and is therefore not necessary to grant the orders sought.

[9] Having carefully considered **the first application** dated **15 August 2016** in the light of the pleadings, the averments in the Supporting and Replying Affidavit, the Grounds of Objection filed, as well as the written and oral submissions made by Learned Counsel, the key issue to resolve, in my considered view, is whether justification has been shown for the issuance of an **interim measure of protection**as sought by the Applicant pending arbitration. It is common ground that by a consent dated **19 January 2016**, the parties agreed to have this dispute referred to mediation, failing which the parties were to apply to the Chairman of the Chartered Institute of Arbitrators for the appointment of a single Arbitrator for the final resolution of the dispute. The record shows that an attempt was made at mediation, without success, whereupon the matter was referred to the arbitration of **Mr. Kyalo Mbobu**, pursuant to **Order 46 of the Civil Procedure Rules, 2010.**

[10] Section 7(1) of the Arbitration Act, under which the instant application has been brought provides that:

> **"It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure."**

And in the case of **Safaricom Ltd vs Ocean View Beach Hotel Limited & 2 Others [2010] eKLR,** the Court of Appeal had occasion to interpret the aforestated provision, and **Nyamu JA**, had the following to say in that regard:

> **"Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunction for example) and what is suitable must turn or depend on the facts of each case before the court or the tribunal - such interim measures include, measure relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-**
>
> **1. The existence of an arbitration agreement;**
>
> **2. Whether the subject matter of arbitration is under threat;**
>
> **3. In the special circumstances, what is the appropriate measure of protection after an assessment of the merits of the application?**
>
> **4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties?**

[11] The record is explicit that whereas the 1st Respondent sued the Applicant and the 2nd Defendant herein for, inter alia, a Declaration and Permanent Injunction; the Applicant counter-claimed for specific performance of the agreement dated **19 March 2009**, among other reliefs. Although Counsel for the Respondents went into details in respect of each of the prayers in the Counter Claim to demonstrate the Respondent's posturing that the Applicant has no legal or equitable right to the suit property, the jurisdiction of the Court under Section 7 of the Arbitration Act is circumscribed, and therefore does not include a consideration of the merits or otherwise of the Applicant's case. This point was made by **Nyamu JA** in **the Safaricom Limited Case** (supra) thus:

> **"In my view, the High Court should have confined itself to the issue of either granting the interim measure or refusing to grant it without delving into the merits. The usurpation of the arbitrator's jurisdiction by the superior court also contravened Section 17 of the Arbitration Act."**

[12] Thus I would confine myself to the pertinent issue as to whether there a dispute and whether the parties by an agreement in that respect, opted for their dispute to resolved by an arbitrator. There is no doubt that, after the Development Agreement of **19 March 2009** a dispute subsequently arose between the parties, for which resort was had to the Court by the institution of this suit in **2010**. The parties thereafter, by a consent recorded herein on the **19 January 2016,** agreed in writing that their dispute be referred to arbitration and have already submitted to the jurisdiction of the Arbitral Tribunal pursuant to Section 4 of the Arbitration Act.

[13] As to whether the subject matter of the arbitration is under threat, the Applicant relied on the annexures at pages **288-**

309of his application to support his averment that as at **8 August 2016**, the Respondents had commenced the construction of Phase III of the **Fourways Junction Estate Project**; and that what was left was only 6 acres out of approximately 100 acres of land which comprised the original land that was donated for the purposes of the project. The Applicant was thus of the conviction that, the Respondents having evinced a clear intention of dissipating their only known asset, their sense of urgency had been heightened, and all the more so because the Respondents had bared their intent not to respect the outcome of the arbitral process by the e-mail exhibited at page 68 of the Applicant's annexures.

[14] Dissipation of assets was discussed in the persuasive authority of **Mobil Cerro Negro Limited vs Petroleos De Venezuela SA [2008] APP.L.R. 03/18** thus:

> **"The expression "dissipation of assets" focuses on the conduct of the defendant as regards the defendant's assets, and the question is whether a particular course of conduct in relation to assets by the defendant, actual or feared, is conduct which should or may lead the court to conclude that the grant of a freezing order is just and convenient..."**

[15] The posturing of the Respondents is evident in the Grounds of Opposition and the Supporting Affidavit sworn by **Peter Kiarie Muraya**, seems to me to be an ambivalence between an acknowledgement of the Development Agreement dated **19 March 2009** and a denial that the Applicant has any rights at all in the suit property. For instance, in Grounds 1, 2, 4, 5 and 6 ofthe Grounds of Opposition as read with paragraphs 3, 6, 7, 8 and 9 of the Replying Affidavit, it has been acknowledged that by virtue of the Development Agreement, the Applicant has an interest in 16 residential units on the suit land together with 5 acres thereof; yet in Grounds 3 of the Grounds of Opposition and paragraphs 5 of the Replying Affidavit, it is the Respondents' case that the Applicant's interests in the suit land were passed on to the 1st Respondent and that the Applicant no longer has any interest in the suit property capable of protection by the orders sought.

[16] In the premises, I am of the conviction that the Applicant has demonstrated sufficient cause for the issuance of the interim measure of protection sought. More importantly, it was acknowledged by the Respondents that interim injunctive orders had been issued herein in 2011, which are still subsisting todate, and which have been responsible for the hold up in the finalization of the construction of the 16 residential units that are the subject of this application. In this regard, I have noted the proceedings of **30 March 2011**, involving a consent touching on the 16 units as well as the 5 acres in issue herein. Accordingly, I would agree with the expressions of **Gikonyo, J** in **BABS Security Limited vs Geothermal Development Limited [2014] eKLR** that:

> **"A consensus seems to have emerged from the string of judicial authorities cited ... that, if an injunction is sought as the interim relief under section 7 of the Arbitration Act, existence of an enforceable arbitration agreement constitutes prima facie case in the context of GIELLA V CASSMAN BROWN CASE...The protection envisaged under the section is to ensure that the subject matter of the arbitral proceedings is not in any danger of being wasted or dissipated before the final decision by the arbitral tribunal is made on the matter."**

[17] I would accordingly be inclined to allow the Applicant's Notice of Motion dated **15 August 2016** and grant orders as prayed. It is noted however that the Respondents did file an application, the second application herein, seeking the setting aside of the Consent Order by which the dispute herein was referred to arbitration. The effect of a setting aside of the Consent Order would be to have the arbitration proceedings terminated to pave for the hearing and determination of this suit by the Court. The outcome of **the first application** will therefore abide the result of **the second application**, which is considered here below.

[18] The **second application** is the Notice of Motion dated **25 August 2016**, filed by the2nd Respondent, **Suraya Property Limited**, for orders that the Court be pleased to set aside the Consent Order entered into on **19 January 2016** and terminate the arbitration proceedings, to the end that the suit herein be proceeded with for hearing and determination by the Court. The application is expressed to have been brought pursuant to **Sections 1, 1A, and 3A of the Civil Procedure Act, and Order 51 of the Civil Procedure Rules**. The motion was supported by the affidavit of the Chief Executive Officer of the 2nd Respondent, **Mr.Peter Kiarie Muraya,** and the grounds set out on the face thereof, namely:

> [a] That the person that gave the 2nd Respondent's Advocates instructions to have the dispute referred to arbitration had no authority to do so.
>
> [b] That the instructions to have the dispute referred to arbitration were null and void *ab initio*;
>
> [c] That the subsequent conduct by one of the parties to the intended arbitration has made the 2ndRespondent believe that the arbitration proceedings will not be fair;
>
> [d] That all other attempts to alternative dispute resolution have failed and it is prudent that the matter be determined by the Court once and for all.

[19] It was deponed on behalf of the 2ndRespondent by **Mr. Muraya** that on the **10 June 2016**, he received a letter from the Respondents' Advocates, **Miller & Company Advocates**, informing him that they had attended a Preliminary Arbitration meeting in which directions had been issued regarding the management of the arbitration proceedings; and that the communication took him by surprise, as he was not aware then that the dispute had been referred to mediation/arbitration. That upon further inquiry, their Legal Officer, one **Peter Mutuku**, informed him that during the month of **December 2015**, their Advocates had written seeking instructions and/or consent for the dispute to be referred to mediation or arbitration; and that he, (**Mr. Mutuku)** provided the requisite instructions as he **(Mr. Muraya**) was away from the office on holiday.

[20] According to **Mr. Muraya**, their Legal Officer did not have the authority to instruct the Respondents' Advocates on the conduct of any of their legal matters. He therefore averred that, in those circumstance, the consent entered into on **19 January 2016** referring the dispute to mediation/arbitration was entered into as a result of a mistake and ought to be set aside. It was further averred by **Mr. Muraya** on behalf of the Respondents that upon learning of the consent order, the Respondents' Advocates were immediately informed to disengage from the same and to have the dispute resolved by the Court. He added that this was because several attempts had been made towards employing Alternative Dispute Resolution mechanisms, including mediation attempts **by Havelock J** (now retired), but that none of the initiatives bore any fruit, largely due to the conduct of the Applicant, **Njehu Gatabaki.**

[21] It was also the contention of the Respondents that their Advocates had severally communicated their changed position to the Arbitrator and the other parties, and requested that the arbitration process be stopped and the matter referred back to the Court for determination, but that the Arbitrator had expressed his unwillingness to stop the proceedings despite their refusal to participate in the same. They are now apprehensive that the arbitration process would not be fair, and that the same was being used as a tool to cause fear and push the Respondents into a settlement. The Respondents therefore prayed for the setting aside of the Consent Order dated **19 January 2016**, the termination of the arbitration proceedings and an order that the matter be referred back to the High Court for hearing and final determination.

[22] In his Replying Affidavit sworn and on filed on **5 September 2016** in response to the second application, the Applicant reiterated that the course of action chosen by the parties to refer the matters in dispute to arbitration was consensual, contractual and sanctioned through the court process by virtue of the Consent Order dated **19 January 2016**; and that he arbitral proceedings had since been ongoing and were at an advanced state, in that 5 witnesses had already presented their evidence before the Arbitrator. It was thus the contention of the Applicant that the inordinate delay of about 8 months before the filing of the instant application had not been satisfactorily explained; and that the Consent Order had been perfected and the matter was beyond the intervention of the Court.

[23] It was further deponed by the Applicant that the firm of **Miller & Company Advocates** having been on record for the Respondents herein from the inception of the suit, had the ostensible authority to bind the Respondents, just as he did on **30 March 2011** and that the issue of from whom or how the supposed instructions were issued to the Advocates was an internal matter that did not concern the Applicant. Relying on the provisions of **Article 159(2)(d) of the Constitution of Kenya**, the Applicant urged the Court to support the arbitral process that is already underway to its logical conclusion.

[24] The second application was also opposed by the 2nd Defendant in the main suit, **Rachel Mwihaki Gatabaki**, in terms of her Grounds of Opposition filed herein on **9 September 2016**. Her argument was that the 2nd Respondent had not advanced any grounds that could satisfy the threshold for setting aside the terms of the consent order by which the dispute was referred to arbitration; and that the application is therefore an afterthought and only meant to delay the resolution of this suit and deviate from the real issues at hand. She prayed for its dismissal positing that it is misconceived, mischievous and an abuse of the due process of the Court.

[25] Having perused and considered the second application, dated **25 August 2016**, the affidavits and Grounds of Opposition filed in respect thereof as well as the written submission filed to articulate the various viewpoints taken by the parties herein, it seems clear that the only issue to resolve is whether, in the circumstance, justification has been shown for the setting aside of the Consent Order of **19 January 2016**; and in this connection, the law is now settled that a consent order can only be set aside on grounds which would warrant the setting aside of a contract, such as fraud, misrepresentation or illegality. In the case of **Flora Wasike vs Destimo Wamboko [1988] eKLR** the Court held that:

> **"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out..."**

[26] An in the case of **Board of Trustees National Social Security Fund vs Michael Mwalo [2015] eKLR**, the Court of Appeal restated the above principle and added thus:

> **"The position is clearly set out in Setton on Judgments and Orders (7thEdn), Vol. 1 pg 124 as follows:**
>
> **Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."**

[27] Quite a bit of energy was expended by Counsel for the Applicant to demonstrate, in his submissions that Counsel on record for the Respondents had **ostensible authority** to consent to the signing of the Consent Order dated **19 January 2016**, I did not understand the Plaintiff to be contesting that legal posturing. What is in contest is whether Counsel was **"duly instructed"** granted that the instructions came from a Legal Officer of the 2nd Respondent and not the directors. The 2nd Respondent also posed the question whether the consent should bind the 4th, 5th 6th and 7th Defendants who had not been served as at **19 January 2016** and were therefore not parties thereto.

[28] It was the submission of the 2nd Respondent that the discovery of improper instructions is a material fact that would warrant the setting aside of the Consent Order. Relying on the case of **Lennard's Carrying Company Limited vs Asiatic Petroleum Company Limited [1915] AC 705,** the 2nd Respondent posited that the Advocates for the Respondents were could not be said to have been "duly instructed" in respect of the Consent Order of **19 January 2016**.In the case aforementioned it

was held thus:

> **"A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company."**

[29] It was therefore submitted on behalf of the 2nd Respondent that it cannot be argued that any person in the employment of a company has the authority to bind the company by his/her action or decisions, as only acts or decisions by duly authorized persons can. However, it is also trite that parties who have dealings a company need not inquire into the indoor management processes, but are in order if they assume that the company's requirements had been complied with. This principle was set out in the case of **Royal British Bank vs Turquand [1856] 6 E&B 327** thus:

> **"while persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings - what Lord Hatherley called "the indoor management" and may assume that all is being done regularly. This rule, which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed."**

[30] And in **Gower's Principles of Modern Company Law**, the rationale for **Turquand Principle** was explained thus:

> **"This rule was manifestly based on business convenience, for business could not be carried out if everybody who had dealings with a company had meticulously to examine its internal machinery in order to ensure that the officers with whom he dealt with had actual authority. Not only is it convenient, it is also just."**

[31] Accordingly, I would have no hesitation in holding that both the Advocates on record herein had no reason to doubt that the 2nd Respondent's Legal Officer had the authority to give instructions pertinent to the Consent Order of **19 January 2016** and that the Respondent's Advocates were thus duly instructed for that purpose. In any event, other that the general averment on behalf of the 2nd Respondent by **Peter Kiarie Muraya** that their Legal Officer, **Peter Mutuku,** had no authority to give such instructions, no attempt was made to prove this by way of a Job Description or documented internal instructions issued from time to time by the 2nd Respondent to its employees. Also pertinent is why it took 8 months for the instant application to befiled in respect of a decision that was taken by the Legal Officer in **December 2015.** I would thus take the view that the argument that the Advocates were not duly instructed by the 2nd Respondent is indeed an afterthought and that the Consent Order dated **19 January 2016** was validly made.

[32] Having thus had their dispute referred to arbitration by consent, the next issue to consider is whether the Court has the jurisdiction to countermand the Consent Order, terminate the arbitration and "recall the dispute" as it were for hearing and determination. In this connection, the 2nd Respondent cited its right to a fair hearing under **Articles 25** and **50**of the **Constitution of Kenya**. However, having found that the parties opted for the arbitral process by consent, the argument about fair hearing is untenable. In any event, **Sections 10 and 33**of the Arbitration Act would preclude the Court from any interventions in the manner sought for the reason that the same would be inconsistent with the Arbitration Act. In particular **Section 33** of the **Arbitration Act** provides that:

> **"(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under subsection (2);**
>
> **(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where** --
>
> > **(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a finalsettlement of the dispute;**
> >
> > **(b) the parties agree on the termination of the arbitral proceedings; or**
> >
> > **(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible;**
>
> **(3) Subject to sections 34 and 35, the mandate of the arbitral tribunal shall terminate upon the termination of the arbitral proceedings."**

[33] In the light of the foregoing, I find no merit in **the second application** filed by the 2nd Respondent and would dismiss the same with costs. In the result, **the first application** dated **15 August 2016** is hereby allowed and orders granted prayed for in paragraphs [d], [e] and [g] thereof**,**namely:

[i] That a temporary injunction and/or interim measure of protection be granted against the 1st and 2nd Respondents, **Muga Developers Limited** and **Suraya Property Group Limited**, either through their agents, servants, employees or in any way howsoever from either advertising, offering for sale, transferring, alienating and/or distributing of the property known as **Land Reference Number 28223/2** or any part thereof in Phase III of the development project christened "**Fourways Junction Estate** until the hearing and determination of the arbitration herein;

[ii] That a temporary injunction and/or interim measure of protection be and is hereby granted against the 1st and 2nd Respondents, **Muga Developers Limited** and **Suraya Property Group Limited**, either through their agents, servants, employees or in any way howsoever from either advertising, offering for sale, transferring, alienating and/or distributing of any houses or structures or development erected on **Land Reference Number 28223/2** or any part thereof in Phase III of the development project christened "**Fourways Junction Estate,** until the hearing and determination of the arbitration herein;

[iii] That the costs of the application be in the cause.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY, 2017

OLGA SEWE

JUDGE