REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL &ADMIRALTY DIVISION

CIVIL CASE NO. 288 OF 2016

FELIX MECHA NYAKUNDI…….…….....…...1ST PLAINTIFF

STELLA NYABOKE OTWORI……..……..2ND PLAINTIFF

FESTEMAGRA INVESTMENT LIMITED……...…….3RD PLAINTIFF

-VERSUS-

NATIONAL SOCIAL SECURITY FUND……...……..1ST DEFENDANT

MORARA NGISA & CO. ADVOCATES..……..……2ND DEFENDANT

RULING

[1] The Notice of Motion dated **18 July, 2016** was filed by the Plaintiffs on **19 July, 2016**. The same was brought pursuant to the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya,** as well as **Order 40 Rules 1, 3(1)** and **Order 52 Rule 4(1)(a), (b) and (c)** of the **Civil Procedure Rules, 2010 for the following orders:**

1) Spent

2) Spent

3) That a temporary injunction be issued restraining the Defendants/Respondents, their servants and/or agents or any party claiming interest through the 1st Defendant from interfering with the quiet enjoyment of the Plaintiffs' property in any manner whatsoever until the hearing and determination of this suit.

4) That the 2nd Defendant be ordered to produce cash account of the purchase of the 4 houses Title No. Nairobi/Blocks Units No. 031, 034, 070 and 076 involving the said Plaintiffs to enable the Court make a sound decision within the shortest time possible.

5) That the Defendants/Respondents be condemned to pay costs.

[2] The application is supported by the affidavit of the 1st Plaintiff sworn on **18 July 2016** together with

the annexures thereto. The background to the application is that on diverse dates, the 1st Plaintiff purchased 4 houses, namely **Title No. Nairobi/Block 140/571, Unit No.034, Nairobi/Block 140/567, Unit No. 031, Nairobi/Block 140/263, Unit No. 070** and **Nairobi/Block 140/516 Unit No**. **076** (herein the suit properties). The said properties belonged to the 1st Defendant and were previously under a tenant purchase scheme. The 1st Plaintiff had purchased the said suit properties from various tenants who had been unable to service the scheme facilities and were therefore in arrears. The purchase process was undertaken by the 2nd Defendant on the 1st Plaintiff's instructions. Consequently, the 2nd Defendant made certain professional undertakings in respect of the purchase of the suit properties, which undertakings the 1st Defendant acknowledged and acted upon. The undertakings are attached to the Plaintiffs' application and marked as **FMN 2** dated **26 May 2014, FMN 7** dated **10 September 2014, FMN 12** dated **5 November 2014** and **FMN 17** dated **29 October 2015**. Accordingly, the 2nd Defendant did undertake thereby to release the purchase price within 14 days of the registration and transfer of the suit property to the Plaintiffs.

[3] The 1st Plaintiff averred that the Plaintiffs were subsequently given titles for the houses they had purchased. Titles No. **Nairobi/Block 140/572 Unit No. 034, Nairobi/Block 140/567 Unit No. 031 and Nairobi/Block 140/516 Unit No. 076** were transferred in favour of the 3rd Plaintiff while Title No. **Nairobi/Block 140/263 Unit No. 070** was transferred to the 2nd Plaintiff. It was the Plaintiffs' case that on **4 July 2016,** the 1st Defendant without any lawful justification or notice locked tow of the said houses **(No. 031** and **034)** on account that they had not received the purchase price. The 1st Defendant also threatened to lock units **No. 070** and **076** if no payment was made. The 1st Plaintiff maintains that he had paid the purchase price for all houses.

[4] It is further the Plaintiffs' case that if indeed the 1st Defendant was not paid the full purchase price by the 2nd Defendant, then the 1st Defendant's remedy would only lie in a civil suit against the 2nd Defendant, since the Plaintiffs on their part discharged in full their obligation relative to the purchase of the said properties. The Plaintiffs blame the 1st and 2nd Defendants for not informing them that the professional undertakings had not been honoured, two years down the line.

[5] The application was opposed by the Defendants. The 1st Defendant filed a Replying Affidavit sworn by **Caroline Esendi Rakama**, on **8 August 2016** while the 2nd Defendant filed Grounds of Opposition dated **15 September 2016**. The 1st Defendant averred that the suit properties belonged to them and they had entered into various Tenant Purchase Agreements with **Joseph Kimari M'Mwarania, Philemon Morara Apiemi, Wilkister Kemuma Nyangito** (subsequently transferred to **Winfida Yahudu Muhalia**), **Mercy Mildred Awuor** and **Fredrick George Ondari.** That the said purchasers defaulted and owed the 1st Defendant **Kshs. 3,156,908.75** in arrears as at **31 July 2016**. There were also outstanding loan balances in respect of the suit properties that continued to attract interest at the rate of 15% per annum. In view of the default and outstanding amounts, the 1st Defendant enforced their rights to repossess the properties under the agreements; adding that that they were not aware that the persons with whom they had entered into the Tenant Purchase Agreements had parted with possession. It was their position that they had never entered into any contract with the Plaintiffs in respect of the four suit properties and that they were not privy to any dealings between the Plaintiffs and the purchasers under the Tenant Purchase Agreements.

[6] With regard to the professional undertakings, the 1st Defendant confirmed having received the same from the 2nd Defendant. It was however their contention that the 2nd Defendant had never paid them any money pursuant to the undertakings; and that the 2nd Defendant had not brought it to their attention that they had completed registration of Transfer or Charge as purported in the undertakings. The 1st Defendant further averred upon closer scrutiny of the said undertakings, they came to the conclusion that their sanctity was doubtful for the reason that the said undertakings were not copied to the Financier, **Equity Bank Limited**, and for the reason that no Charge was ever registered to complete the sale transactions. In the circumstances, the 1st Defendant averred that it was then that it dawned on them that they had been

duped into executing transfers and releasing all documents to the 2nd Defendant on the strength of the doubtful undertakings. The 1st Defendant denied any collusion between it and the 2nd Defendant in respect of the subject transactions, contending that it had no reason to.

[7] As for the payments by the Plaintiffs/Applicants for the properties, the 1st Defendant averred that there was no evidence to back the same and therefore the Applicants were not entitled to the orders sought. The 1st Defendant concluded that the transfer of the suit properties to the Plaintiffs was fraudulent and ought to be cancelled.

[8] The 2nd Defendant on its part filed Grounds of Opposition contending that the present application is defective; and that the Plaintiffs/Applicants had not satisfied the requirements laid down in law for the grant of the orders sought. The 2nd Defendant further posited that there was no evidence of collusion between themselves and the 1st Defendant; and that they had fulfilled the terms of the undertakings and made payments to the 1st Defendant as was required of them. According to the 2nd Defendant, what is in issue herein is a dispute as to the amount allegedly due to the 1st Defendant which could only be resolved through a hearing. In conclusion, the 2nd Defendant urged for the dismissal of the present application dated **18 July 2016.**

[9] The application was disposed of by way of written submissions. The 1st Plaintiff filed its written submissions dated **22 December 2016** on **17 January 2017,** while the 2nd and 3rd Plaintiffs filed their submissions dated **11 January 2017** on **17 January 2017**. On the other hand, the 1st Defendant filed its submissions dated **16 February 2017** on even date, while the 2nd Defendant filed its submissions dated **14 March 2017** on **15th March 2017**.

[10] The main issue for determination is whether the conditions set out in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 360** have been met by the Plaintiffs herein. Here below is what the Court had to say in that case:

> **"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

[11] Has the Plaintiff made out a *prima facie* case with a probability of success? In the case of ***Mrao vs First American Bank of Kenya Limited & 2 others (2003) eKLR***, the Court of appeal defined a *prima facie case as follows:-*

> ***"a prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case 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."***

[12] In the present case, what is in dispute is the ownership of the four suit properties herein. The Plaintiff avers that they acquired the said properties and through the 2nd Defendant they had remitted the full purchase price to the 1st Defendant. The 2nd Defendant submitted that they had made payments to the 1st Defendant as is evidenced in the list of documents dated **23 September 2016**. The said documents do not offer a clear narrative in respect of the full purchase price of **Kshs. 20,100,000/=,** the sum which the Plaintiffs claim should have been paid to the 1st Defendant. Nevertheless, it is evident that the said payments were to be made through the professional undertakings, which have been acknowledged by all the parties herein.

[13] The 1st Defendant has denied receiving any monies from the Plaintiffs and it is their case that they are entitled to repossess the suit properties as the persons with whom they entered the Tenant Purchase Agreements have defaulted. Though the 1st Defendant admitted that they had received professional undertakings from the 2nd Defendant with regard to the suit properties, it was their contention that the 2nd Defendant had not remitted any monies pursuant to the said undertakings. It was also their contention that on scrutinizing the said undertakings they came to the conclusion that their sanctity was in doubt and thus, it was their conclusion that they had been duped into signing transfers in favour of the Plaintiffs.

[14] In my careful consideration, the issues raised by the 1st Defendant in response to the application are issues that can only be explored and determined at a full trial. I therefore take the view that the Plaintiffs have *prima facie* established that they acquired the suit property for valuable consideration and that the properties were duly transferred into their respective names. The Plaintiffs exhibited the title documents to the suit properties to support their claim to ownership thereto. It is not denied that the properties are registered in the names of the 2nd and 3rd Plaintiffs. The 1st Defendant has admitted that they signed transfers in favour of the said Plaintiffs. In the circumstances, the allegation by the 1st Defendant that there was fraud in the said transfers and subsequent acquisition of the titles can only be established at trial as earlier stated. Accordingly, based on the material placed before this Court, there is a 'genuine and arguable' case between the parties herein.

[15] As to whether the Plaintiffs stand to suffer irreparable loss, there can be no doubt that the suit properties have a value and can be easily replaced, notwithstanding the contention by the Plaintiffs that they are of sentimental value. Accordingly, there can be no doubt that damages would be adequate. However, the Plaintiffs have alleged breaches of Professional Undertaking, and have demonstrated that they made payment for the properties and thereafter obtained duly signed Transfer in their favour. In effect, fraud has been alleged between the 1st and 2nd Defendant, through whom the funds were paid. In the premises, I would accordingly adopt the view point taken by **Mabeya, J.** in **Loldiaga Hills Ltd & 2 Others vs. James Wells & 3 Others** that:

> **"...It is not always mandatory that where damages are an adequate remedy an injunction should not issue...The Defendant has asserted that as a financial institution, it is capable of compensating the Plaintiff and therefore damages are an adequate remedy... I have never understood the law to be that a wronged party cannot obtain an injunction because the wrongdoer is capable of compensating such party with damages. More so, when the act complained of is an illegal act that blatantly flouts the law a court of equity cannot fold its hands and condone the flouting of the law on the basis that damages are an adequate remedy."**

[16] The same position was taken by **Warsame J** (as he then was) in the case of **Joseph Siro Musioma vs. HFCK and 3 Others Nairobi HCCC No. 265 of 2007** thus:

"On my part, let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so, a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."

[17] Accordingly, I would find and hold that the Plaintiffs have demonstrated that they are entitled to an injunction as sought; and that the balance of convenience is in their favour, given that they have been in occupation of the properties for over two years. In the premises, the path of least risk of injustice would be to maintain that status quo pending the hearing and determination of the dispute herein. In this respect, I would endorse the expressions of Ojwang Ag. J (as he then was) in the case of **Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589**, that:

"Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella v Cassman Brown, the Court has to consider the following questions before granting injunctive relief: (i) is there a prima facie case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied: (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice."

[18] With regard to Prayer No. (4) for an order directing the 2nd Defendant to produce a cash account in relation to the purchase of the suit properties, I note that the Plaintiffs invoked the provisions of **Order 52** of the Civil Procedure Rules, which is designed to augment the provisions of the **Advocates Act**, **Chapter 16 of the Laws of Kenya.** Accordingly, it is a prayer that is strictly speaking, between an Advocate and Client, for which reason **Order 52 Rule 4(2)** stipulates that the Court be approached by way of Originating Summons. In any event, it seems the Plaintiffs abandoned this prayer as they did not submit on it. I would thus be of the view that that prayer is misconceived and dismiss it accordingly.

[19] In the light of the foregoing, I would find merit in the Applicant's Notice of Motion dated **18 July 2016** and would grant orders in terms of prayer (3) thereof to the effect that:

[a] A temporary injunction be and is hereby issued restraining the Defendants/Respondents, their servants and/or agents or any party claiming interest through the 1st Defendant from interfering with the quiet enjoyment of the Plaintiffs' property that is the subject of this suit in any manner whatsoever until the hearing and determination of this suit.

[b] That the costs of the application be borne by the Defendants/Respondents.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE 2017

OLGA SEWE

JUDGE