REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 12 OF 2014

NEPTUNE CREDIT MANAGEMENT LIMITED……....PLAINTIFF

VERSUS

INVESCO ASSURANCE COMPANY LTD..... DEFENDANT

RULING

The court on 16th January 2014 directed that the plaintiff's application dated 9th February 2010 and the Defendant's application dated 23rd December 2013 be heard together. On 3rd February 2012. **Hon Lady Justice Mwilu** (as she then was) had ordered and directed that this file be consolidated with **HCCCC NO. 52 of 2009** and **HCCCC NO. 232 of 2010 and W/UP Cause NO. 11 of 2010** and further that the four files be mentioned in the commercial Division on a date to be taken at the court registry. The instant file was ordered to be transferred to the Commercial Division. It appears as though the order for consolidation was not given effect to as on 6th January 2014 when the Defendant filed its application dated 23rd December 2013 only the instant file was placed before Hon. Justice Havelock (as he then was). On 7/1/2014 **Hon. Justice Havelock** certified the Defendant's application urgent and granted an interim order in terms prayer NO. 2 of the Defendant's Notice of Motion and without any reference to the order by **Hon. Lady Justice Mwilu** ordering consolidation of the suits ordered this file to be retransferred to the Environment and Land Court for hearing and determination of the plaintiff's and the Defendant's said applications. I will in the premises treat and regard the order of consolidation as having been vacated. I will therefore deal with the instant applications without any regard to the other suits the subject of the order for consolidation.

The plaintiff's application dated 9th February 2010 seeks the following substantive orders:-

> (I) That pending the hearing and determination of this suit a temporary injunction do issue restraining the Defendants by themselves, their servants, agents and/or assigns and in particular **Tradepoint Auctioneers**, its servants or employees from distressing, attaching or evicting the plaintiff's tenants at Flat number D1 and B4 erected on land reference number **209/4517** original number **6863/32**
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> (II) Pending the hearing and determination of this suit, the Defendants by themselves, their agents and/or servants or otherwise howsoever be restrained from alienating, charging, selling or otherwise disposing off or in any other manner encumbering the titles to the suit properties, to wit Flat number D1 and B4 erected on land reference number **209/4517** original number **6863/32**

hereinafter referred to as fine Diamond properties Ltd.

(III) An order do issue compelling the Defendants to deliver up to the plaintiff the Transfer of lease duly executed.

The plaintiff's application is supported on the grounds set out on the body of the application and the affidavit sworn on 9th February 2012 in support by one **Bryan Yongo** the Managing Director of the plaintiff.

The Defendant, filed a detailed replying affidavit through one **Geoffrey Njenga** sworn on 24th February 2010 in opposition to the plaintiff's application to which the plaintiff responded to through a further Affidavit sworn on 3rd March 2010. The plaintiff's application is primarily founded on an alleged agreement dated 5th December 2007 between the plaintiff and the Defendant whereby the Defendant is stated to have agreed to sell to the plaintiff Flat NOs. B4 and D1 erected on **L.R.NO.209/4517** for the consideration of Kshs.25,000,000/- which payment was made by way of issue of a credit notes for the sum of Kshs.25,000,000/- by the Defendant on account of monies owed by the Defendant to the plaintiff for services rendered. The Agreement for sale is annexed and marked "**BY-1**". The plaintiff states that they took possession of the apartments pursuant to the agreement for sale and proceeded to lease the same to tenants in terms of the copies of the leases annexed and marked **"BY-2".** The plaintiff further states that they continued to enjoy peaceful possession of the premises until 6th February 2010 when the tenants in the premises notified them that auctioneers had levied distress by proclaiming their goods as per the copies of the proclamation annexed and marked "**BY4**". The plaintiff avers that the purported levy of distress was illegal and unlawful since the Defendant had no tenants in the premises and further avers that the Defendant had granted the plaintiff possession of the premises and to the Defendants knowledge it is the plaintiff who had put the tenants in the premises. The plaintiff thus aver the Defendant had no basis to levy distress on the tenants goods who at any rate had no rent arrears as they had fully paid all their rent to the plaintiff.

In the premises the plaintiff contend that they have demonstrated a prima facie case with a probability of success to entitle them to the orders sought in the application. The Defendant in response and answer to the plaintiff's application filed a replying affidavit in opposition sworn by **Joseph Gitau Mburu** a former director and shareholder of the Defendant company. **Mr. Geoffrey Njenja** who was appointed statutory manager of the Defendant by the Insurance Regulatory Authority on 29/2/2008 who was the Defendants Managing Director for additionally swore a replying affidavit in opposition to the plaintiffs application dated 24th February 2008. The said replying affidavit sets out in detail the sequence of events and facts leading to the plaintiffs claim of the two apartments. The Defendant denies that the plaintiff was indeed owed the amount he claims and states that the plaintiff had been fully paid for the services that he had rendered to the Defendant and that at any rate the amount that the plaintiff would have been entitled to if he performed the consultancy agreement would be a total of **Kshs.6,295,170/-** only. It is the Defendant's case that the plaintiff used unthordox means and forcefully took possession of the two apartments during the period when there was a tussle over the control of the assets of the Defendant between the **Insurance Regulatory Authority (IRA**) and the former directors of the Defendant's Company. The Defendant states that at any rate no valid sale of the assets of the Defendant could be effected when there were ongoing winding up proceedings by virtue of section 224 of the Companies Act. The Defendant states that as at 5th December 2007 when the plaintiff claims an agreement for sale of Apartment D1 and B4 erected on **L.R. NO. 209/4517** was entered into between the plaintiff and the Defendant, the Defendant could not do so as winding up proceedings vide petition **NO. 19 of 2007** (W/U) were ongoing unless with the sanction of the court. The said **Joseph Gitau Mburu** denies having executed the alleged agreement for sale and/or sale of shares transfer. The relevant paragraphs of the replying affidavit are reproduced hereunder:-

4. That the agreement is purported to have been made on 5th December 2007 when the Defendant was facing winding up proceedings instituted by the plaintiff herein for a purported debt of Kshs.14,760,000/-00

5. That during this time the company could not legally dispose of its property because of the pendency of winding up Cause NO. 19 of 2007, which had been filed by the plaintiff and it is therefore false and misleading to allege that Mr. Joseph Kariuki and I entered into a sale Agreement with the plaintiff.

7. That neither 1, nor my co-director Mr. Kariuki executed the sale Agreement as alleged nor did we appear before the above-named advocate to sign the Agreement.

8. That we also did not execute the sale of shares transfer document dated 5th December 2007, annexed on page 84 & 10 of Brian's affidavit and both documents are forgery.

9. That I have reported the matter to the police and investigations are under way to verify the authenticity of the signature appearing on the sale agreement.

A letter marked "**JGM-1**" is annexed to the affidavit addressed to the provincial Criminal Investigations Officer Nairobi Area and both alleged signatories to the purported Agreement for sale on the part of the part of the Defendant deny signing the Agreement and request for police investigations to verify the authenticity of the of the purported documents. Thus it is the Defendants contention that the plaintiff is using fraudulent and forged documents to stake claim to the Defendants said properties.

Following the filing of the replying affidavits on behalf of the Defendant, the plaintiff filed a further affidavit sworn by **Bryan Yongo** on 3rd March 2010 basically responding to the replying affidavit by **Geoffrey Njenga.** The further affidavit basically refutes everything in the replying affidavit of **Geoffrey Njenga** and reiterates the facts as set out in the supporting affidavit. The plaintiff denies all the allegations of coercion, duress and/or extortion and reiterates he had a valid contract and that he is entitled to have the same enforced.

The parties filed written submissions on the plaintiff's application dated 9th February 2010 and the application was scheduled to be heard on 10th May, 2010 when the matter was ordered to be mentioned on 20th May 2010. It appears the matter was not mentioned on the said date and for some unexplained reason the matter went to sleep and was only awaken by a court initiated notice for dismissal of the suit for want of prosecution on 3rd February 2012. As indicated earlier the directions given by the court on the said date were not complied with and the matter resurrected before **Hon. Justice Havelock** on 6/1/2014 when the Defendant filed its application dated 23rd December 2013.

The Defendant's application seeks a temporary injunction restraining the plaintiff from offering for sale, selling, transferring or handing over possession of the property known as apartment number B4 erected on Land Reference Number **209/4517** (**original number 6863/32**) Nairobi to one **Francis Nganga Mundia** or any other person or group of persons. The plaintiff also seeks an order to revoke or cancel any purported sale to the said **Francis Nganga Mundia**. Further the Defendant seeks an order from the court granting possession of the said property apartment B4 to the Defendant. The Defendant premises its application on the grounds set out on the body of the application and on the supporting affidavit by **Paul Gichuhi**, the Legal Manager of the Defendant sworn on 23rd December 2013.

Principally the Defendant states that it is the owner of the apartment known as Flat Number B4 erected on **L.R.NO. 209/4517** (original **6863/32**) and the one share attaching to it in the company known as Fine Diamond Properties Limited. The Defendant avers that the plaintiff has now purported to sell the said apartment to one **Francis Nganga Mundia** and is in the process of transferring and handing over possession of the apartment to him for undisclosed consideration. The Defendant asserts that there exists a dispute of ownership of the said apartment between the plaintiff and the defendant and the dispute is the subject of these proceedings instituted by the plaintiff against the Defendant. The Defendant avers that on 16th December 2013 it received a letter dated 10th December 2013 drawn by **M/S Stephen K. Kibunja Advocates of Kibunja & Associates Advocates** from **M/S Fine Diamond properties Limited** to whom the letter was addressed intimating that the said advocates were in the process of transferring the apartment B4 aforesaid to one Francis **Nganga Mundia**. The copy of the letter is annexed and marked

"PG1". M/S Fine Diamond Properties Limited referred the letter to the Defendant as it was not aware of any sale of the apartment by the Defendant to the plaintiff. The Defendant as per the records of **M/S Fine Diamond Properties Limited** is the owner of two (2) fully paid up shares in respect to the apartments B4 and D1. The Defendant states that the plaintiff instituted the present suit and by the application dated 9th February 2010 sought among other orders that the Defendant be restrained from disposing the said apartments pending the hearing and determination of the application and the suit. As intimated earlier in this ruling the plaintiff's application was not prosecuted and is equally subject of this ruling.

The defendant avers that the purported sale of the apartments to the plaintiff is null and void for the reasons set out under paragraph 20 of the supporting affidavit and inter alia asserts that:-

(i) That the same was purportedly entered into while there were ongoing winding up proceedings initiated by the plaintiff against the Defendant.

(ii) That the parties to the impugned transaction lacked the requisite power, authority and capacity to enter into the agreement.

(iii) That the transfers are void for want of consent from the holding company, fine Diamond Properties Limited.

(iv) That the sale did not have any board resolution as required under the defendant's memorandum and Articles of Association.

The Defendant further states that during the pendency of the winding up proceedings the Commissioner of Insurance on 18th December 2007 appointed a caretaker board who took over the functions of the previous board of the Defendant and thus the caretaker board would have been the proper authority to deal with any sale transaction if there was any as alleged by the plaintiff. After the lapse of the mandate of the caretaker board the statutory manager appointed by the Insurance Regulatory Authority was charged with the responsibility of Managing the Defendant and the plaintiff did not bring the issue of the alleged sale transactions to his attention to deal with which puts to question the authenticity of the said transactions. The Defendant further avers the settlement of the winding Up proceedings by consent of the parties did not entail and/or include the sale/purchase of the apartments and that the apartments remained the property of the Defendant as even as late as 5th July 2011 the Defendant reported the loss of its titles (leases) to the apartments at the **Muthangari Police Station** and was issued with a police abstract marked "PG6" and is pursuing the Ministry of Lands to be issued with provisional leases.

The Plaintiff in response to the Defendant's application dated 23rd December 2013 has filed a detailed replying affidavit sworn by **Bryan Yongo** on 13th January 2014 and filed in court on 15th January 2014 together with a Notice of preliminary objection to the Defendant's application. The replying affidavit materially reiterates and repeats the averments by the plaintiff contained in the plaintiff's supporting affidavit and further affidavit sworn in support of its application dated 9th February, 2010. The Plaintiff in the replying affidavit literally contraverts and denies the truth or otherwise of all the averments contained in the affidavit sworn by **Paul Gichuhi** in support of the application and as the issues stand the same are strenuously contested. The plaintiff has meekly alluded to the application by the Defendant being both **res judicata** and statute barred. The plaintiff contends the application is **res judicata** by virtue of a ruling delivered on 12th June 2011 as regards to the monies owed to the plaintiffs by the Defendants while the plaintiff further contends the Defendant ought to have sought recovery of possession within a period of 6 years and as they did not do so their claim for recovery of possession is statute barred.

The Plaintiff in the Notice of preliminary objection contended that the Defendant's claim contravened section 4 of the Limitation of Actions Act, Cap 22 Laws of Kenya which provides that certain actions may not be raised after six years from date of the cause of action. The plaintiff argues the sale agreement on which the suit is founded is dated 5th December 2007 and thus the Defendant cannot sustain any action

arising out of it as it was made 7 years back and the Defendant's action if any has been extinguished. The plaintiff aver the Defendant's application is founded on perjured evidence and is thus unmaintainable. The plaintiff further argues the Defendant's application contravenes section 181 of the companies Act and the doctrine of estoppel and latches would operate to defeat it. Specifically the plaintiff states that being a third party dealing with the company he is entitled to assume that the internal processes and management procedures of the company have been complied with in terms of the company's articles of association in the absence of facts that ought to place him on inquiry.

The parties filed written submissions articulating their respective positions in regard to the Defendant's application. The Defendant/Applicant filed its submissions on 22nd May 2014 while the plaintiff had filed their submissions on 10th March 2014.

I have considered the pleadings and the filed submissions by the parties and I now turn to dispose off the issues that arise. In regard to the plaintiff's application dated 9th February 2010 the issue that arises is whether the plaintiff has established a prima facie case to warrant the court to grant the order of injunction sought in the application. It is not in dispute that the plaintiff and the Defendant had prior to September 2007 entered into some arrangement where the plaintiff was to render some consultancy services to the Defendant for which the Defendant was to pay fees to the plaintiff. While in this suit the issue is not how much fees was owed to the plaintiff by the Defendant on account of the consultancy agreement but rather whether the Defendant entered into the sale agreement dated 5th December 2007 which the Defendant should complete by delivery of duly executed instruments of lease to the plaintiff, the Defendant has denied the existence and validity of the agreement. The Defendant additionally denies the plaintiff is owed any, monies arguing that the plaintiff was paid and that the settlement of the petition for Winding Up was not on terms that the Defendant transfers the two apartments to the plaintiff.

It is a fact that the plaintiff obtained possession of the two apartments. The plaintiff contends that possession was lawfully granted to them with the authority and consent of the directors of the Defendant and points to the letter of 25th September 2007 said to be signed by both directors of the Defendant as the letter that offered the two apartments to the plaintiff in settlement or partial settlement of the fees owing to the plaintiff and also authorized the plaintiff to take possession of the apartments. The Defendant have for their part disowned both the agreement of 5th December 2007 and this letter terming them forgeries.

It is not lost to the court that the plaintiff had in November 2007 filed a petition seeking to wind up the Defendant vide **HC Winding Up Cause NO. 19 of 2007**. Under paragraph 5 of the petition the plaintiff claimed the Defendant was indebted to them in the sum of **Kshs.14,760,000/-** being the balance of the sum due and payable to the petitioner in respect of services rendered to the Defendant pursuant to an Agreement dated 25th May 2007 made between the petitioner and the Defendant. If the amount that was due and owing to the plaintiff as at 22nd November 2007 when the Winding Up Cause was filed, it is unclear why the plaintiff was to be given 2 apartments whose value was said to be Kshs.25 million as at 25th September 2007 when the plaintiff was allegedly offered the two apartments and possession yielded.

Quite clearly the threat of being wound up was bearing heavily on the directors of the Defendant company and the situation was made even worse by the intervention of the Commissioner of Insurance and the Insurance Regulatory Authority. The Management of the Defendant between December 2007 when the Commissioner of Insurance appointed an over-sight board and the time the statutory Manager was appointed was undoubtedly in a state of lapse and definitely questions linger as to who was incharge. Could the previous board undertake any transactions and what was the fate of any transactions that they may have initiated but had not been completed by the time the oversight board and the statutory manager was appointed? This indeed is an issue that would need to be canvassed at the full trial as I cannot make a final determination of the issue at this stage of the proceedings.

The court having evaluated the facts and circumstances of this matter is of the view that it cannot in the face of the contested facts make any definite findings and/or holdings at this stage and that the parties will require to give evidence and be cross examined at the trial to enable the court to determine the validity of the contested agreement for sale. However the plaintiff has an arguable case which on the face of it

cannot be said to be frivolous. The plaintiff had a relationship with the Defendant and he is in possession of the disputed apartments and has been since December 2007. The balance of convenience would militate against disturbing that state of affairs until the suit is heard and determined. In the premises therefore I grant prayers 5 and 6 of the plaintiff's Notice of Motion but I decline to grant prayer 7 to compel the Defendant to deliver up to the plaintiff the Transfer of lease duly executed and direct that the determination of that prayer await the hearing and determination of the suit.

The Defendant's Application

The plaintiff took a preliminary objection to the Defendant's application in terms of the Notice of preliminary objection filed on 15th January 2014 and I consider hereunder the issues raised in the preliminary objection.

(a) Whether or not the application is statute barred.

The plaintiff contends that the Defendant's application is statute barred on the ground it is being raised after six years from the date on which the cause of action arose.

Section 4(1) (a) of the Limitation of Actions Act (Cap 22 Laws of Kenya) which the plaintiff relies on provides as follows:

> **4. (i) The following actions may not be brought after the end of six years from the date or which the cause of action accrued-**
>
> **(a) actions founded on contract,**
>
> **(b)----------**
>
> **(c)----------**

With respect I do not think that the Defendant is basing its action on the contract. The Defendant's position is that it is the registered owner of the apartment in dispute and contends that the plaintiff's entry and possession were effectuated forcefully. The Defendant infact denies the validity of the agreement dated 7th November 2007. Indeed the Defendants claim could be a kin to one for recovery of land where the limitation period would be 12 years from the date of the accrual of the cause of action.

The Defendant at any rate is a defendant and although it does appear as though the Defendant has not yet filed a defence, the Defendant would be perfectly entitled to file a defence and counter-claim. From the file record it appears that even though the summons to enter appearance were prepared the same were never signed and issued for service upon the Defendant with the result that the Defendant has never been served with the summons to enter appearance and has consequently not filed any defence. There is no affidavit of service showing that summons to enter appearance were at anytime served on the Defendant so that he would have required to enter an appearance and file a defence.

I therefore hold that the matter is not statute barred.

(b) Whether or not the Defendants application is res judicata.

I have perused the ruling by **Hon. M.G. Mugo** (as she then was) in **HCC Misc. App case NO. 52 of 2009** delivered on 12th day of September 2011 and I am unable to find in what manner it can render the present application by the Defendant **Res judicata**. As far as I am able to decipher the only relevant portion of that ruling is to be found at pages 11, 12 and 13 where the Honourable judge declined to strike out the suit on the basis that the plaintiff in that suit who also happens to be the plaintiff in the present could well have been owed more sums than the sum of **Kshs.14,760,000/-** claimed in the winding up petition and that the settlement of the petition did not necessarily mean all the plaintiff's claims, past, present and future had been discharged.

The issue for determination in the present suit is whether or not the Agreement dated 5th December 2007 as between the parties is valid and whether the same ought to be effectuated. The issue of whether the plaintiff was owed any money and if so how much does not arise. **Mugo J** did not also determine the quantum of debt if any was owed by the defendant to the plaintiff. The dispute in the present suit is indeed whether the plaintiff is entitled to ownership of the two apartments. The provisions of sections 7 of the Civil Procedure Act have not been satisfied to enable the court to rule the application as being **res judicata.**

Section 7 of the Civil Procedure Act provides

> **No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been heard and finally decided by that court.**

In my view the issues before this court were not directly and substantially in issue before **Mugo J** and therefore it cannot be said that the issues were finally determined. There has to be a determination of the issue in the previous suit for the matter to be ruled to be **res judicata.** I therefore hold the Defendant's application is not **res judicata.**

I have in determining the plaintiff's application dated 9th February 2010 held that the court cannot make a determination of the contested issues of fact without taking evidence. The plaintiff has an arguable case which undoubtedly satisfies the test of what constitutes a prima facie case as defined in the case of **MRAO –VS- First American Bank of Kenya Ltd & 2 others (2003) KLR 125** where the court stated:-

> **"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".**

I would further say that the Defendant equally has a prima facie and/or an arguable case against the plaintiff having consideration of the facts before the court.

Incase the Agreement of 5th December 2007 is upheld as valid then the plaintiff would be entitled to specific performance. However in the event that the court holds the same to be invalid then the Defendant would be entitled to possession and possibly damages. As I have held and stated earlier the balance of convenience would tilt in favour of maintaining the present status quo until the suit is heard and determined. That would mean no disposal by way of transfer of the disputed apartment B4 should be effected by the plaintiff until the suit is heard and determined so that the question of ownership is finally determined.

I would therefore having regard to all the facts and circumstances of this matter grant an order of injunction in terms of prayer 3 of the Defendant's Notice of Motion dated 23rd December 2013. In regard to prayer 4 of the Notice of Motion I restrain the registration and/or effectuating of any transfer of the apartment B4 erected on **L.R.NO.209/4517** (**original number 6863/32**) Nairobi by the plaintiff to **Francis Nganga Mundia** or any other person pending the hearing and determination of the suit.

As regards prayer NO (5) I decline to grant the same and direct that the same await the hearing and determination of the suit. In summing up this matter I would observe that it is indeed a matter of regret that in nearly 5 years the pleadings in this matter are yet to close. As observed the summons to enter appearance in this matter are yet to be issued and served and hopefully the parties will take cue and do whatever is necessary to complete the pre trial preparations including ensuring the pleadings are closed and pre trial directions in terms of Order 11 Civil Procedure Rules are taken to enable the suit to progress to trial for the determination of the issues.

The upshot is that I allow the plaintiff's application dated 9th February 2010 in terms of prayers 5 and 6 but decline to grant prayer number 7 of the same. As relates to the Defendant's application dated 23rd December 2013 I allow the application in terms of prayer 3 and prayer 4 as modified above but I decline to grant prayer number (5) of the application. As both the plaintiff and the Defendant have partially succeeded in the respective applications I direct that each party will bear their own costs of the applications.

Ruling dated, signed and delivered at Nairobi this…**6th**……..day of…....**February**…..2015.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A.…… For the Plaintiff

Mr. Njenga…… For the Defendant