REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY

CIVIL SUIT NO. 627 OF 2012

ANTHONY RAYMOND CORDEIRO ……….……..………… 1ST PLAINTIFF

ELAINE DE SA CORDEIRO …….………………….………….. 2ND PLAINTIFF

TECHNOLOGY TODAY LTD. ….…...………………………… 3RD PLAINTIFF

VERSUS

ADRIAN NOEL CARVALHO ….…...……………….….…… 1ST DEFENDANT

ARLET DOMINICA CARVALHO ….……....…….…….…. 2ND DEFENDANT

I & M BANK LTD. ….………...………………….....………… 3RD DEFENDANT

JAYANTLAL JIVAJ MEPAL SHAH …....………..……… 4TH DEFENDANT

MANSUKHLAL JIVAJ MEPAL SHAH ……..………..…. 5TH DEFENDANT

DILIPKUMAR JIVAJ MEPAL SHAH ……..…..…….……. 6TH DEFENDANT

R U L I N G

1. Before the Court is an application by the Plaintiffs dated 7th February, 2014 brought pursuant to the provisions of **Order 40 Rules 1(a), 10(1)(a)**, **Order 42 Rule 6** and **Order 51 Rules 1-3** of the *Civil Procedure Rules* and **Sections 1A, 1B and 1C and 3A** of the *Civil Procedure Act*. the applicants seek the following orders *inter alia:*

"1. THAT this application be certified urgent;

2. THAT the service of this application be dispensed with at the first instance owing to the urgency of the matter;

3. THAT the 4th to 6th Defendants/Respondents be restrained by themselves, servants or agents from alienating, transferring, charging or otherwise dealing with the suit property known as L.R No. 1870/VI/145 Westlands, Nairobi until further orders of this honourable Court;

4. THAT the 4th to 6th Defendants/Respondents be restrained by themselves, servants or agents from alienating, transferring, charging or otherwise dealing with the suit property known as L.R No. 1870/VI/145 Westlands, Nairobi until the Plaintiff/Applicant's intended appeal is heard and determined;

5. THAT the costs of this application be borne by the Defendants/Respondents".

2. The application is predicated upon the grounds that the Plaintiffs, being aggrieved by the decision of this Court, intend to file an appeal in the Court of Appeal, which appeal would be rendered nugatory if the prayers sought before this Court are not granted. It is further contended that it would be in the interests of justice that the said orders are issued as the Plaintiffs stands to suffer substantial loss, and further that the Court has the jurisdiction to issue the orders to preserve the subject matter.
3. The application is further supported by the Affidavit of **Bosco Manuel Dourado** sworn on even date. It is deponed that the Plaintiffs are aggrieved by this Court's determination and Ruling on the application dated 27th September, 2012 delivered on 28th January, 2014 and intend to lodge an appeal against the same. It is further deponed that the 4th-6th Defendants are in possession and in control of the movable assets of the Plaintiffs, to their deprivation and that the Orders sought would prevent the Defendants from further dealing with the property pending the intended appeal. The cases of **Ernie Campbell & Co. Ltd v Githunguri Dairy Plant Co. Ltd & Another [2009] eKLR**, **Bankruptcy Causes No. 25 & 26 of 2009 Purity Gathoni Githae v Ocean Freight Transport Company**, **Mombasa H.C.C.C No. 274 of 2009 Emma Muthoni Wambaa & Another v Joseph Kibaara**, **Madhupaper International Ltd v Kerr [1985] KLR 840** and **Civil Application No. Nai 53 of 2010 African Safari Club v Safe Rentals Ltd** were relied upon in support of the application.
4. The application is opposed. The 1st and 2nd Defendants filed their Grounds of Opposition dated 5th March, 2014. They contended that the application is bad in law, mala fides and defective as it does not comply with the provisions of **Order 4 Rule 1(4)** and **Order 51 Rule 13(2)** of the *Civil Procedure Rules*. It is further contended that the application is *res judicata* as the Orders sought were dealt with in a previous Application dated 29th September, 2012.
5. The 4th – 6th Defendants filed their Replying Affidavit sworn on 4th March, 2014, by **Jayantilal Jivaj Nepal Shah,** on behalf of the 5th and 6th Respondents, deponed to the fact that the Orders sought in the application were already dealt with by the previous Application dated 27th September, 2013. It was further averred that the Plaintiffs will not be prejudiced by the provision of security in pursuit of their application and intended appeal against the Court's Ruling of 28th January, 2014.
6. In submitting on the application, the Plaintiffs reiterated that there was the fear that the suit property would not be protected pending the hearing and determination of the intended appeal. It was further submitted that this Honourable Court has the jurisdiction to allow the application even though the same had been dismissed at an interlocutory stage. They relied upon the authorities of **Madhupaper International Ltd v Kerr** (supra) which referred to Megarry's , J ruling in **Erinford Properties Ltd v Cheshire County Council [1974] 2 All E.R 443** and **Emma Muthoni Wambaa v Joseph Kibaara** (supra). The Plaintiffs submitted that there was no inconsistency in the Court granting the Orders that it had previously dismissed as it would allow for the appeal to be heard without the risk of the same being rendered nugatory. Reliance was placed on the case of **Civil Application No. 64 of 2010 Lake Tanners Ltd & 2 Others v Oriental Commercial Bank Ltd** and **African Safari Club v Safe Rentals Ltd** (supra) on the issue of the Court's objective and mandate in achieving the overriding objective as enunciated under **Section 1A(2)** of the *Civil Procedure Act* and the power and discretion of the Court in allowing the reliefs sought as was set out in **Erinford Properties Ltd v Cheshire County Council** (supra) and **Butt v Rent Restriction Tribunal [1982] KLR 417**.
7. The 1st and 2nd Defendants submitted that the Application is frivolous and vexatious and had failed to comply with the provisions of **Order 51 Rule 13(2)**. They further submitted that *Article 159(2)(d)* of the Constitution is not a panacea for irregularities and failure to comply with formal and procedural imperatives. They relied upon the case of **Joshua Werunga v Joyce Namunyak**

& 2 Others **[2013] eKLR**. It was submitted that the application did not give rise to the unique circumstances reiterated in the cases of **African Safari Club v Safe Rentals Ltd** (supra) and **Madhupaper International Ltd v Kerr** (supra) which they distinguished from the instant application. The Defendants' contention was that the requirements for an injunction had not been established as was the case in the aforementioned rulings and that, as such, the application was unmeritorious and should thereby be dismissed. On the issue of *res judicata*, the Defendants relied upon the case **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others** **[1996] eKLR** and **Section 7** of the *Civil Procedure Act*, on the applicability of the principles as enunciated therein.

8. In their submissions, the 4th – 6th Defendants relied upon the case of **Giella v Cassman Brown** **(1973) E.A 358** to contend that the Plaintiffs had not established the grounds for the grant of injunctive orders as reiterated therein. They submitted that the Orders sought in the instant Application had already been determined and dismissed in the previous Application dated 29th September, 2012 and were thus *res judicata*. Further, it was submitted that the prayers for stay have not been established as per **Order 42 Rule 6(2)(a)** and further the determinations in **Jackson Mwangi Githuma & Another v Scheme Manager Mwea Settlement Scheme** **[2013] eKLR, Civil Appeal No. 169 of 2013** **Esther Wanjiru v Jackline Arege** and **Transport Workers Union Kenya v African Safari Diani Adventure** **(2013) eKLR**. It was submitted that an application for stay was discretionary, and should only be exercised and orders granted by the Court in instances where the applicant has demonstrated that it stood to suffer substantial loss and that the Application had been made without unreasonable delay.
9. Having considered the application, the affidavits in support and in objection thereto, as well as the submissions and oral arguments by counsel for the parties, it appears from the pleadings that three issues arise for the determination of the Court: (1) whether the application is incompetent and defective for lack of compliance with **Order 51 Rule 13(2)** and **Order 4 Rule 1(4),** (2) whether the issues as raised are *res judicata* in light of the determination of this Court delivered on 28th January, 2014 and (3) whether the Plaintiffs are deserving of the injunctive orders sought and have made out a prima facie case with a probability of success.
10. In considering the first issue, the Court stands guided by the law as enunciated under *Article 159(2)(d)* of the *Constitution of Kenya* and **Sections 1A and 1B** of the *Civil Procedure Act* as read together with **Section 3A** of the same Act. Pursuant to *Article 159(2)(d)*, the Court is empowered, in the exercise of its mandate under the Constitution, to dispense justice without undue regard to technicalities. It has been reiterated in several instances, as per **Joshua Werunga v Joyce Namuyak** (supra) (see also **Hunker Trading v Elf Oil (K) Ltd** **Nai. Civil Appl. No. 6 of 2010**) that the provisions of *Article 159(2)(d)* should not be used by litigants as a panacea to all irregularities and procedural technicalities. The Courts have cautioned that the same should not be used to trash procedural provisions as the Rules are the handmaidens of justice. On the other hand, it has been reiterated, as per **Raila Odinga v I.E.B.C & Others** **(2013) eKLR**, that the Court should not pay undue attention to procedural technicalities and requirements at the expense of substantive justice. It was clearly detailed in **Joshua Werunga v Joyce Namunyak** (supra) i*nter alia:*

"In the case of Raila Odinga v I.E.B.C & Others (2013) eKLR, the Supreme Court said that Article 159(2)(d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

The 1st and 2nd Defendants contend that the application contravened the provisions of **Order 51 Rule 13(2)** which provides:

> **"Every application shall bear at the foot the words- 'If any party served does not appear at the time and place above mentioned such order will be made and proceedings taken as the Court may think just and expedient'."**

11. In the Court's view, it would seem that the application of that provision as an objection to the

instant application would have been overtaken by events. All parties concerned did attend before the Court for the hearing of the Application. In consideration that all parties attended Court, it would be foolhardy for the Court to dismiss the application on technicalities of procedure at the expense of the substantive issues therein. As reiterated in **Raila Odinga v I.E.B.C & Others** (supra) as well as **Hunker Trading Ltd v Elf Oil (K) Ltd** (supra) the Court will not, in the exercise of its mandate under the Constitution and the *Civil Procedure Act*, be encumbered with technicalities of procedure in the dispensation of justice but shall endevour to determine the substantive issues, notwithstanding the technicalities of procedure therein. This Court is persuaded to proceed with the substance of the Application before it and determine the matter on its merits, (or lack thereof as the case maybe), without undue regard to the technicalities of want of form of the application by the Plaintiffs.

12. The second issue is whether the application is *res judicata* in light of the application dated 29th September, 2013. The Defendants in their Grounds of Opposition and Replying Affidavit contend that the instant application is *res judicata*, and that the issues raised were determined in the Ruling delivered on 28th January, 2014. They contend that under the purview of **Section 89** of the *Civil Procedure Act* as enunciated in **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others** (supra), an Application for stay having already been heard and determined, a similar application cannot be brought unless there are new facts not put before the Court. It is contended that the Plaintiffs want to re-open the matter and persuade the Court afresh that they satisfy the criteria of irreparable loss. The Defendants relied on the provisions of **Section 7** of the *Civil Procedure Act*, which provides that a matter would be deemed to be *res judicata* if it was directly and substantially in issue in a former suit between the same parties litigating in a Court of competent jurisdiction which issue was subsequently raised and has been heard and determined by such Court. The Defendants referred the Court to paragraphs 4 and 5 in the former application dated 29th September, 2013 and the instant application. Both paragraphs, they maintain, are similar and seek the same orders. In **Arnold v National Westminster Bank (1991) 2 A.C 93** it was held:

"Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter . . . . [The] bar is absolute in relation to all points decided unless fraud or collusion is alleged."

A similar determination was made in **North West Water Ltd v Binnie & Partners [1990]3 ALL E.R.547**, where Lord Drake, J held **at 556:**

"Where an issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in a separate proceeding between the different parties arising out of identical facts and dependant on the same evidence since, not only was the party seeking to re-litigate the issue prevented from doing so, by virtue of issue estoppel but it would also be an abuse of process to all, for the issue to be re-litigated."

13. The Plaintiffs contend that the Court has the jurisdiction under **Order 40 Rule 10** of the *Civil Procedure Rules* to issue injunction orders even after it has previously dismissed a similar application. They submitted that there was no inconsistency in the Court issuing such orders as prayed for in a subsequent application, even after a similar application had been dismissed by the same Court. The Plaintiffs referred the Court to the case of **Erinford Properties Ltd v Cheshire County Homes** (supra) where it was held *inter alia:*

"I can see no real inconsistency in any of these cases. The questions that have to be decided on the two occasions are quite different. Putting it shortly, on a motion the question is whether the applicant has made a sufficient case to have the respondent restrained pending the trial. On the trial, the question is whether the Plaintiff has sufficiently proved his case. On the other hand where the application is an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of

course, is whether the possibility of that judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be every clear in his conclusions and yet on appeal be held to be wrong."

The Court of Appeal in **Madhupaper International Ltd v Kerr** (supra) and the High Court in **Emma Muthoni Wambaa v Joseph Kibaara** (supra) applied the principles as propounded in the **Erinford Properties Ltd v Cheshire County Homes** (supra). In the former, it was held as follows:

> **"Where a Judge dismisses an application for an interlocutory injunction, he has jurisdiction to grant the unsuccessful litigant an injunction pending an appeal against the dismissal and there is no inconsistency in doing so as the purpose of granting the injunction would be to prevent the decision of the appellate court from being nugatory should the appeal succeed."**

In **Emma Muthoni Wambaa v Joseph Kibaara** (supra) referred to above, Okwengu, J held *inter alia:*

> **"Therefore it is clear that this Court has jurisdiction to hear the present application and if persuaded grant orders sought. …It is evident that the purpose of the Plaintiff's intended appeal is to preserve the subject matter of the suit which is the suit properties now in possession of the 3rd – 7th Defendants. The 3rd – 7th Defendants claim that they are bona fide purchasers for value without notice. That is a defence that the Defendants would have the opportunity to fully ventilate when the suit is heard. The main consideration herein is whether the plaintiff's intended appeal would be rendered nugatory if the orders sought are not granted. In my considered view, the Defendants would not in any way be prejudiced by the issue of an order of injunction restraining them alienating, or transferring, or charging the suit property. On the other hand, if that order of injunction is not given the defendants who are in possession of the title to the suit properties may dispose of the suit property or deal with it in a manner that may render the plaintiffs appeal nugatory if successful. I think in the circumstances of this case, it is fair and just that indeed, in the interest of justice that the subject of the suit be preserved".**

14. The English Courts in the case of **ACG Acquisition XX LLC v Olympic Airlines SA [2044] EWCA Civ 821** followed the principles as laid down in **Arnold v National Westminster Bank** (supra) in disallowing an application for injunction after a previous application of the same had been dismissed. That case affirmed that there were exceptions to the rule of issue estoppel or res judicata, and for an applicant to be granted such orders, he had to show and establish that there were special circumstances to warrant the decision of the Court in their favour. In **Arnold v National Westminster Bank** (supra) Lord Keith in that regard held as follows:

"In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings."

Lord Lowry in his concurring judgment reiterated *inter alia:*

> **"It appears from this review [of the authorities] that there are arguments in favour of the proposition that issue estoppel constitutes a complete bar to relitigating a point once it has been decided but I am now of the opinion that the court can, and in exceptional circumstances should, relax that rule."**

The "special" and/or "exceptional" circumstances referred to by Lord Keith in his determination were that there was further material made available to the party that could not have by any reasonable diligence been presented before the Court. In my view, it is the onus of the Plaintiffs to

present before the Court, and indeed establish that there was material that was not presented before the Court, that would now alter the decision of the Court. Further in ***Fidelitas Shipping Co Ltd v V/O Exportchleb*** **[1965] 2 All ER 4** Lord Denning held *inter alia:*

> **"The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances"**

15. The question now before this Court is have the Plaintiffs in consideration of the dicta in **Fidelitas Shipping Co. Ltd v V/O Exportchled** (supra) and **Arnold v National Westminster Bank** (supra) established special circumstances that would persuade this Court to issue the Orders as prayed for in the application and do the circumstances in the instant suit warrant the Court to issue orders pending appeal as was reiterated in **Erinford Properties Ltd v Cheshire County Homes** (supra) as applied in **Madhupaper International ltd v Kerr** (supra) and adopted in **Emma Muthoni Wambaa v Joseph Kibaara** (supra)? The submissions made by the Plaintiffs are that they will be prejudiced and suffer irreparable loss should the said Orders not be granted, and that the appeal would be rendered nugatory, if it indeed was successful.
16. This Court has considered the application and the authorities cited by the parties. It has also considered the circumstances in which the Plaintiffs now find themselves *vis-a- vis* those of the Defendants. The Court is of the considered opinion that there would be no inconsistency in issuing the Orders as prayed for by the Plaintiffs. As has been reiterated and cited in **Erinford Properties Ltd v Cheshire County Council** (supra) and approved in the decision of **Madhupaper International Ltd v Kerr** (supra), the Court while dismissing a previous application for injunction has the jurisdiction to issue the unsuccessful applicant an injunction pending appeal. Although it would seem that the appropriate approach by the Plaintiffs may have been to apply to the Appellate Court for such Orders, this Court, nevertheless, has the requisite jurisdiction, as per the aforementioned cases, to issue such Orders pending an intended appeal by the Plaintiffs. As reiterated in **Re Umoja Services Ltd [2008] eKLR** by Kimaru, J, the Court is neither *functus officio* nor is the matter *res judicata*, as no previous application to grant an injunction pending appeal has been made before the Court. There is no need for the Plaintiffs to establish any exceptional or special circumstances before the Court as was reiterated in **Arnold v National Westminster Bank** (supra).
17. As observed above, the 4th, 5th and 6th Defendants are already in possession and enjoyment of the suit property. In paragraph 11 of the 4th Defendant's Replying Affidavit dated 4th March 2014, he details that the 4th, 5th and 6th Defendants have been unable to develop the suit property as a result of the plaintiff's Application for injunction dated 27th September 2013. The 4th Defendant maintains that the development project has already been delayed and is costing the 4th, 5th and 6th Defendants "all projected rental income". I see no reason why the said developments project should not go ahead pending the intended appeal as its completion will bring in rental income. However, if the suit property was sold to an independent 3rd party, the Plaintiff's appeal would no doubt be rendered nugatory.
18. As a result, I allow the Plaintiffs' Notice of Motion dated 7th February 2014 but on the following conditions:

a. The 4th, 5th and 6th Defendants will be restrained by themselves, servants or agents from transferring or charging the suit property to any 3rd party or parties but will be at liberty to lease the same or portions thereof.
b. The Plaintiffs will provide security for costs in the amount of Shs. 5 million to be held in an interest bearing account in the joint names of the Advocates for the parties, the same to be paid within 60 days from the date hereof.

There will be no order as to costs of the Application.

DATED and delivered at Nairobi this 16th day of July, 2014.

J. B. HAVELOCK

JUDGE