



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 376 OF 2013

DCF ENGINEERING LIMITED.....PLAINTIFF

VERSUS

JOHARI LIMITED.....1ST DEFENDANT

MARYANNE NJERI NJOROGE T/A

NJOROGE NYAGAH & COMPANY ADVOCATES.....2ND DEFENDANT

RULING

1. The Plaintiff filed this suit against the 1st and 2nd Defendant by a Plaint dated 29th August, 2013 and filed on 30th August, 2013, alleging that the 1st Defendant represented by the 2nd Defendant sold and transferred LR. No. Kajiado/Kaputiei-North/45337 (hereinafter referred to as “the property”) to the Plaintiff for a sum of Kshs.22,500,000/=. That the Plaintiff paid the said sum to the 2nd Defendant’s client account through the Plaintiff’s advocates, Ms Mutisya and Company Advocates, as agreed in the sale agreement dated 21st November, 2012. The Plaintiff also contended that it expended additional costs in relation to legal fees and incidental costs towards the sale transaction of the property.
2. The Plaintiff averred that subsequently the entire transaction turned out to be fraudulent and that the documents of ownership supplied to it were falsely obtained and that the actual owner of the property, a Ms. Florence Solia Ngossaor, was not even aware of the transaction between the Plaintiff and the 1st Defendant. As such, the Plaintiff contended that no good title in respect to the property was passed to it. The Plaintiff accused the Defendant of misrepresentation and breach of contract. The Plaintiff therefore claimed for the sum of Kshs.23,813,870/= , incidental costs incurred in the sale transaction, damages for breach of contract and costs of the suit.
3. Together with the Plaint, the Plaintiff filed a Notice of Motion dated 29th August 2013. The Plaintiff also filed a further application on 4th September, 2013 seeking certain documents from the 2nd Defendant. However that application is spent as the Defendants produced the relevant documentation concerning the client account as prayed by the Plaintiff. The 1st and 2nd Defendant also filed an application dated 18th September, 2013. On 27th September, 2013 this court made an order that all pending applications with regard to this matter be consolidated and be heard together on 1st October, 2013. This then is the composite ruling with regard to the two remaining applications. I propose to deal with the Plaintiff’s Chamber Summons dated 29th August, 2013.
4. I therefore agree with the Plaintiff’s submissions that if the interim orders had lapsed then the funds in question would have been disposed of at once thereby rendering all pending applications

- obsolete. Accordingly, I find that the Defendants' application dated 18th September, 2013 is without merit and dismiss the same with costs.
5. I propose to begin with the Plaintiff's Chamber summons dated 29th August, 2013. The Plaintiff sought several orders from the court . This includes an Order to restrain the Defendants from withdrawing, expending or in any other way disposing or dealing with the money that was paid to them by the Plaintiff for the purchase of the property including other incidental costs amounting to Kshs.23,813,870/= contained in the client account. That in the alternative, the court grants an order freezing the client account and any other bank accounts in any other bank or financial institutions held by the defendants to the extent of Kshs.23,813,870/= pending the hearing and determination of this suit. In addition, the Plaintiff sought an order directing the 1st and 2nd Defendant to furnish security for a sum of Kshs.23,813,870/= to the court or in a joint interest earning account in the names of the parties. That a warrant of arrest be issued against the 2nd Defendant to show cause why she should not furnish security for her appearance in this Court.
 6. The Plaintiff relied on the grounds on the body of the Summons and both the supporting and further affidavit of Dang Song sworn on 29th August, 2013 and 9th September, 2013, respectively. As noted earlier on, it was contended that the 1st Defendant represented by the 2nd Defendant as its director and advocate respectively, represented to the Plaintiff that it was the registered proprietor of the property. That in pursuance thereof, the Plaintiff and the 1st Defendant executed a sale agreement for the sale of the property for the purchase price of Kshs.22, 500,000/=. The said sum together with other incidental costs such as legal fees, stamp duty for the transfer of the property and change of user were paid to the 2nd Defendant who acted as the Advocate of the 1st Defendant. It was further averred that the Plaintiff consequently discovered that it did not acquire a good title to the property as the Defendants had passed on to it a fraudulent title over the property. It was deponed that the actual owner of the land was a Ms. Florence Soila Ngossor and not the 1st Defendant as had been represented to the Plaintiff.
 7. That the matter was then reported to the police, where the client accounts of the 2nd Defendant were frozen by an Order from the Chief Magistrates Court at Kibera. That order however was subsequently lifted through a Court Order issued by *Majanja J* in *Milimani High Court Miscellaneous Civil Application Number 292 of 2013 (Judicial Review) Republic –vs- D.P.P and 2 Others ex-parte Maryanne Njeri*. The Plaintiff further contended that the funds from the sale of the property were received by the 2nd Defendant and were still being held in the client account. That the 2nd Defendant transferred the purchase price received from the Plaintiff to her personal account through the law firm of Njoroge Nyagah & Company, Advocates. That the funds received in the client account were withdrawn in lump sum and not transferred to the 1st Defendant between 18th February, 2013 to 27th March, 2013 as alleged by 2nd Defendant.
 8. Learned Counsel for the Plaintiff, Mr. Wambugu submitted that the 2nd Defendant had not demonstrated or shown that the funds received from the Plaintiff were paid to the 1st Defendant. That no instructions by the 1st Defendant as to payment were produced to the satisfaction of the court. As such the Plaintiff argued that it had satisfied the requirements for the remedies sought in terms of the prohibitory and mandatory injunction. Reliance was placed on the case of *Giella –vs- Cassman Brown Limited (1973) E.A. 359* and *Mareva Compania Naviera SA –vs- International Bulkcarriers SA (1980) 1 All ER 213* in support of the Plaintiff's case. Mr. Wambugu further submitted that freezing of the 2nd Defendant's client account was on the basis of getting security for the money claimed and was therefore not an issue of tracing the funds made towards the purchase of the property. In conclusion, it was argued that it would only be just and fair for the court to freeze the said 2nd Defendant's client account to the extent of the sums claimed in the suit to protect the Plaintiff from disposal of the funds by the Defendants.
 9. The 1st and 2nd Defendants opposed the Application vide a Replying Affidavit and Further Affidavit of the 2nd Defendant sworn on 5th September, 2013 and 9th September, 2013, respectively. In addition, an Affidavit was also sworn by Salome Nyambura Nyagah on 5th September, 2013 and filed on behalf of the Firm of Njoroge Nyagah & Company, Advocates. It was admitted that the 2nd Defendant did represent the 1st Defendant in the transaction for the purchase of the property which measured six acres. That the land had been sub divided and the

search and enquiries from the land registry at the Kajiado land registry revealed that the same was in the name of George Ndungu Gathi and was free from any encumbrances. That the 1st Defendant consequently entered into a sale agreement for the sale of the property from the said George Ndungu Gathi, where he was represented by the law firm of Kimani Kahiro and Associates Advocates for a sum of Kshs.12,000,000/=. It was contended that after the payment of the full consideration, the 1st Defendant obtained a title for the property from the Kajiado Land Registry duly signed by the designated registry official. That in addition, the 1st Defendant also paid the stamp duty for the said transfer amounting to Kshs.240,040/= and the subsequent registration fee of Kshs.2,000/=.

10. The 1st and 2nd Defendant contended that the property was thereafter put up for sale, whereby the Plaintiff offered to purchase the same for Kshs.22,500,000 through the firm of Mutisya & Company, Advocates. It was maintained that the aforesaid firm carried out the requisite search for the property at the Kajiado lands registry which revealed that the 1st Defendant was the registered owner. The 2nd Defendant thereby asserted that she did not forge or fraudulently misrepresent that the 1st Defendant was the registered owner of the property as the transaction was carried out in an open and regular manner, given that even the registry officials at the Kajiado Registry had registered the transfer in favour of the Plaintiff from the 1st Defendant. That the money received for the sale of the property was transferred to the 1st Defendant and not transmitted personally to the 2nd Defendant's bank account as contended by the Plaintiff. That further, the 1st Defendant as a legal entity cannot operate its business jointly with the 2nd Defendant.
11. It was the Defendants opinion that the person criminally liable for the fraudulent sale was the Geoffrey Ndungu Gathi, who has since been charged with a criminal offence. Further, it was the Defendants' contention that the client account which was the subject of the interim freezing orders had monies belonging to innocent third parties including Kshs.14,528,500/= from a client by the name of Susan Sarah Kabali who was in the process of purchasing another property. Further, the 2nd Defendant averred that Kshs.15,000,000/= had also been transferred from the 2nd Defendant's Standard Chartered Bank Account Number 01021083601 to that account. Additionally, the 1st and 2nd Defendant asserted that the Firm of Njoroge Nyagah & Company Advocates was a partnership and should not be punished for the professional service rendered to the 1st Defendant, as the other partner in the firm had nothing to do with the failed transaction. That further there was no justifiable reason advanced by the Plaintiff to require that the 2nd Defendant to furnish security as prayed by the Plaintiff.
12. Mrs. Owino, learned Counsel for the Defendants submitted that the Defendants had sufficiently demonstrated through the various bank statements of the client account how the Kshs.22,596,645/= had been paid out to the 1st Defendant. That as at 27th March, 2013, the client account had only Kshs.150,176/= as all the money paid by the Plaintiff had been paid out as of that date. It was further submitted that the monies currently in the client account belonged to other clients who have been subjected to suffering due to the freezing of the account.
13. With regard to the forgeries of the title document, it was the submission of Mrs. Owino that the 1st and the 2nd Defendant were not to blame as they too had expended Kshs.12,000,000/= towards the acquisition of the property and had relied on documents supplied to them by the government land's registry at Kajiado. Mrs. Owino further pointed out that the Plaintiff had failed to meet the threshold for the grant of an injunction as it had not been shown that the Defendants sought to steal a march against the plaintiffs. On the prayer for the issuance of an arrest warrant against the 2nd Defendant, Mrs. Owino told the court that there was no evidence presented by the Plaintiff to show that the 2nd Defendant was threatening to abscond the jurisdiction of the court. That the law firm of Njoroge Nyagah & Company Advocates had been in existence for over 26 years and was not about to fold. She therefore submitted that that prayer was misplaced and should not be granted. In conclusion, the Defendants urged the Court to dismiss the Plaintiff's Application with costs as it had failed to establish the necessary conditions for the orders sought.
14. I have considered the affidavits on record and Counsels' submissions together with the authorities relied on. There are several issues for determination in this application. I shall consider prayer 2 and 3 as the same relate to orders of injunction against the 2nd Defendant on the client account and

any other accounts held in the banks or other financial institutions in the name of the 2nd Defendant.

15. First, it is important to determine whether the Plaintiff has met the thresholds required in the issuance of an injunction. Order 40 of the Civil Procedure Rules 2010, allows an applicant to go to court to request for preservation of property pending trial. In other words, the Applicant can ask the Court to issue preservative orders in respect to assets of a Defendant who may render a judgment against him nugatory by the disposal of his assets or otherwise dissipating them prior to the conclusion of the trial.
16. The principles underlying the jurisdiction of the court to grant an injunction are well enunciated in the case of **Giella –vs- Cassman Brown (supra)** where the 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. It is therefore essential to examine whether the Plaintiff has met the above thresholds in order for an order of injunction to issue. In this case however, I find that the orders sought are in the nature of a freezing order or what is commonly referred to as a mareva injunction. The threshold to be met with this particular kind of orders are slightly different from ordinary injunctions.
17. In **Goode on Commercial Law, 4th Edition at Page 1287** the learned authors state thus :-

“The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions....Before granting a freezing injunction the court will usually require to be satisfied that;-

- a. ***The claimant has ‘a good arguable case’ based on a pre-existing cause of action;***
- b. ***The claim is one over which the court has jurisdiction;***
- c. ***The defendant appears to have assets within the jurisdiction;***
- d. ***There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and***
- e. ***There is a balance of convenience in favour of granting the injunction;***
- f. ***The Court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant’s assets”***

18. These, in my view, are the parameters in which prayer Numbers 2 and 3 of the Plaintiff’s application should be considered. Has the Plaintiff in this case brought himself within the strictures set out above? In the case of **African Banking Corporation Limited –vs- Netsatar Limited & 6 Others Nairobi Milimani HCC no. 299 of 2009 (UR)** the court observed that:-

“A “good arguable case” was defined by Mustill J in The Niedersachsen [1983] 2 Lloyd’s Rep 600 at page 605 to be:-

“One which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success.” (Emphasis added)

This in my view, is a sound principle to rely on in establishing whether a Plaintiff has a good arguable case.”

19. As set out above, it is essential that the Plaintiff establishes that it has an arguable case. The facts are that the property in question was sold by the 1st Defendant to the Plaintiff for the sum of Kshs.22,500,000/=. The money was paid and received by the 2nd Defendant who was also a director of the 1st Defendant Company and at the same time a partner in the firm of Advocates that represented the 1st Defendant in the sale transaction. The money was allegedly paid in the law firm’s client account. However, there was no good title passed to the Plaintiff as it later turned out that the entire transaction was fraudulent, given that the real owner of the property was found to be a Ms. Florence Soila and not the 1st Defendant as had been represented to the Plaintiff.

- Meanwhile, the money paid as the purchase price for the property by the Plaintiff to the 1st defendant through the 2nd Defendant's client account was allegedly paid out to the 1st Defendant between 18th February, 2013 to 27th March, 2013. According to the Plaintiff, the 2nd Defendant was an active participant in the fraudulent scheme to swindle the Plaintiff into purchasing a non-existent property.
20. The Defendants however refuted these claims and contended that they were also innocent purchasers of the property as they acquired the same from a one Mr. Geoffrey Ndungu Gathi who misrepresented himself as the registered owner of the property. The Defendants further reiterated that they carried out all the due diligence with regard to the property from the lands office at Kajiado, including a search on the property. That the same clearly showed that the owner of the property to be Mr. Geoffrey Ndungu Gathi which gave them the confidence to buy the property from him for Kshs.12,000,000/=. In the said transaction, Mr. Gathi was represented by the firm of Kahiro and Associates, Advocates. I have seen the various communication between that law firm and the 2nd Defendant's firm from the annexures contained in the 2nd Defendant's replying affidavit. Though I cannot make any firm finding at this juncture, it would appear that on a prima facie basis, the Defendants have shown that they had also bought the property from another person whom they believed to be the registered owner.
21. Further, it is clear from the annexure marked as "MNN2", search results from the Kajiado land registry clearly showed that the owner of the property was Mr. Geoffrey Ndungu Gathi whereby the title deed to the property was issued on 10th August 2009. Moreover from the record, a search carried out by Ms Mutisya and Company Advocates the Plaintiff's Advocates in the transaction revealed that the 1st Defendant was registered as the owner of the property. I therefore agree with the Defendants' submissions that the officials at the Kajiado land's registry cannot escape blame as they issued ownership documents to several parties who placed reliance on their legitimacy. All the documents seem to have the signatures of a land official on the face of it. It is also patently clear to me that the history of the acquisition of the land by both the 1st Defendant and Plaintiff is convoluted and shrouded in mystery and merits a thorough investigation before any conclusive findings can be made. It is with a lot of concern that the real culprits and player in the fraudulent sale have not been joined in these proceedings. My view is that the concerned officers at the Kajiado Land Registry who executed the searches and the said Mr. Gathi would be the best people to unravel what exactly happened. Since however they are not parties nothing can be said or inferred about them.
22. Having said that, it is not denied that a sum of Kshs.22,500,000/= was paid to the Defendants for a non-existent piece of property. Indeed I empathize with the Plaintiff as the amount in question is quite substantial, not to mention the incidental costs that go with the purchase of such a property. The Plaintiff is also a foreign investor who requires the protection of this court in terms of recovering the funds in question.
23. The 2nd Defendant however sought to defend herself and her law firm and contended that the funds from the botched sale had already been transferred to the 1st Defendant on various dates from 18th February, 2013 to 27th March, 2013. The 2nd Defendant attached to her Replying Affidavit the Statements of Account with regard to the client account in question. The same shows that on 26th November, 2012 and 15th February, 2013 the total amount of Kshs.22,500,000/= was deposited in the account by Mutisya and Company, Advocates. The Defendant also highlighted various entries that show that the money was transferred, though it is not clear whether the same was to the 1st Defendant or another party.
24. On a prima facie basis however, I find that the fact that payments made to the 1st defendant was not seriously challenged by the Plaintiff. For example, the Plaintiff did not illustrate how it arrived at the conclusion that the money from the client account was transferred to the personal account of the 2nd Defendant as alleged. It is also noteworthy that the Plaintiff did not pray for the tracing of the 1st and 2nd Defendant's assets aside from the client account. Furthermore, the Plaintiff did not even request for the 1st Defendant to furnish it with bank account statements, in order to disprove that the 1st Defendant received the money from the 2nd Defendant as claimed. Moreover, I disagree with the Mr. Wambugu's submission that the basis of the freezing order is on the basis of getting security for the money claimed and is not an issue of tracing. In my view, asset freezing is

- not a means to pressure a Judgment Debtor or Defendant to give security. It is meant to safeguard the assets in question from dissipation that might have the effect of frustrating a judgment.
25. In any case it is clear from the evidence presented by the 2nd Defendant that the funds sought by the Plaintiff are no longer in the client account. I have seen the bank statement produced, the same holds funds that belong to other innocent third parties such as Susan Sarah Kabala, who may be inconvenienced if the orders prayed for by the Plaintiff are issued. The funds so held are far less than Kshs.1 Million.
26. Further, I find that the Plaintiff shall not be prejudiced if the orders in prayer number 2 and 3 are not granted. The Plaintiff has not demonstrated that the refusal of an injunction would involve a real risk that a judgment or award in its favour shall remain unsatisfied. Indeed the Plaintiff's claim for Kshs.23,813, 870/= is a liquidated sum and is therefore quantifiable. As such, it is clear that if the Plaintiff succeeds in its claim, it can be compensated by way of damages. In any event, it is trite law that a party cannot seek at an interlocutory stage a relief that is not pleaded in the Plaintiff. In this case, there is no prayer for injunction prayed for by the Plaintiff in its Plaintiff. In the foregoing, I find that the Plaintiff has not presented an arguable case to warrant the grant of freezing order. On that ground alone the prayers contained in paragraph 2 and 3 of the motion are without merit and are hereby refused.
27. I now turn to the prayer by the Plaintiff that the 2nd Defendant be ordered to furnish security for a sum of Kshs.23,813,870/= to the court or in a joint interest earning account in the names of the parties. I am unable to grant this prayer as there is no way an injunction can be sought and be granted and at the same time an order for security be made. This prayer should have been sought in the alternative to the prayer for an injunction. In my view, in pursuing the two remedies in a consecutive manner as it did, the Plaintiff was not acting in good faith. The same must be rejected.
28. As regards the prayer for the 2nd Defendant to give security for her appearance, I find the reasons advanced by the Plaintiff unconvincing. The first Defendant Company is duly registered in Kenya. Its directors the 2nd Defendant and Edith Akoth Awondo, are both Kenyans and are within the court's jurisdiction. The Plaintiff has not established on a prima facie basis that the 2nd Defendant is about to abscond from the jurisdiction. All that has been alleged is that the 2nd Defendant was the chief conspirator and architect of the fraudulent transaction. That may be so, but such a conclusion can only be arrived at when the matter has been fully canvassed at a trial but does not lay a basis for the grant of an order for security as sought by the Plaintiff. In this regard, I decline to grant the order as sought by the Plaintiff.
29. Accordingly, the Plaintiff's application dated 29th August, 2013 is without merit and is hereby dismissed with costs to the Defendants.
30. Being of the above view, the Defendants application dated 18th September, 2013 does not fall for consideration. The same is marked as spent with no order as to costs.

Orders accordingly.

DATED and DELIVERED at Nairobi this 8th day of November, 2013.

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A. MABEYA

JUDGE