



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 72 OF 2018

HOLLANDER NED SECURITY SERVICES LIMITED.....PLAINTIFF

VERSUS

JACQUELINE WANGUI HILL.....1ST DEFENDANT

MIBO CERAMICS LIMITED.....2ND DEFENDANT

AHMED HASSAN.....3RD DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated 29th March 2019. By the said application, Hollander Ned Security Services Ltd (the Plaintiff) prays for orders:-

1.

2.

3. That pending the hearing and determination of the suit herein, an interim injunction does issue directed against the 1st, 2nd and 3rd Defendants restraining them, either by their employees and/or agents or any person purporting to derive authority from them from selling, disposing off, transferring, alienating, pledging, trespassing upon, or in any manner whatsoever dealing with the properties the subject matter of the Joint Venture Agreement dated 16th January 2015 known as Plot No. 4805(Original No. 1935/548), Plot No. 4806(Original No. 1935/549), Plot No. 4807(Original No. 1935/550) and Plot No. 4808(Original No. 1935/551) altogether upon which are developed the apartments known as Ashok Apartments.

4. That pending the hearing and determination of the suit herein, an order of inhibition does issue against the Titles to properties the subject matter of the Joint Venture Agreement dated 16th January 2015 known as Plot No. 4805(Original No. 1935/548), Plot No. 4806(Original No. 1935/549), Plot No. 4807(Original No. 1935/550) and Plot No. 4808 (Original No. 1935/551) altogether upon which are developed the apartments known as Ashok Apartments.

5. That costs be provided for.

2. The application is supported by the annexed affidavit of David Murunga Robert, the Plaintiff's Managing Director and is anchored on the grounds that: -

a) There exists a Joint Venture Agreement dated 16th January 2015 between the Plaintiff and the Defendants the objective of which is the renovation, management and letting of Ashok Apartments;

b) The Joint Venture which runs for a term of four years is intended to enable the Plaintiff to recoup its investment made into the ventures in order to recover advances made to the 1st and 2nd Defendants which stood at Kshs 6,677,516 as at the time this suit was filed;

c) In breach of the Agreement, the 1st and 2nd Defendants have engaged in under-hand schemes of selling Apartments in the subject property with the intention of defeating the Plaintiff's interests and entitlements;

d) In particular, the 1st and 2nd Defendants recently negotiated the sale of the entire property with the 3rd Defendant which sale is meant to avoid the Plaintiff's claim. The 3rd Defendant has knowledge of the Joint Venture Agreement and the actions of the Defendants are in blatant breach of the said Agreement.

3. In response to the said application, the 3rd Defendant Ahmed Hassan has filed Grounds of Opposition herein dated 6th July 2018 in which he asserts that the Plaintiff has not established any cause of action against himself and further condemns the Joint Ventures Agreement as being inadmissible and lacking any basis.

4. In addition, the 3rd Defendant has also filed a Replying Affidavit herein on 27th July 2018 in which he asserts that the Plaintiff's suit is bad in law for being filed without valid resolutions of the Plaintiff's directors. He further avers that the Plaintiff has no justifiable cause of action against the 2nd Defendant and himself as there is no contractual obligations attaching to the 2nd Defendant and himself in relation to the alleged joint venture agreement.

5. The 3rd Defendant avers that the Plaintiff already has a caveat lodged against the 2nd Defendant's properties which in law is tantamount to an injunction and that there is hence no need for orders of injunction as sought herein. It is further his case that the Plaintiff has no proven debt against the 1st and 2nd Defendants and that there is hence no justiciable suit in law or equity against the said Defendants.

6. The 3rd Defendant asserts that he executed a Sale Agreement with the 2nd Defendant on 20th September 2017 to purchase six Apartments in Block B of the said Ashoka Apartments after he had bought Apartment No. 10 through a public auction on 30th June 2016.

7. The 3rd Defendant further avers that pursuant to the said sale, he did on 29th September 2017 meet the Plaintiff's Managing Director David Robert together with the 1st Defendant during which meeting the two handed to him keys to the Apartments without anyone mentioning the Joint Venture. He thereafter began renovating the Apartments in October 2017 with the knowledge of the two.

8. The 1st and 2nd Defendants herein neither entered appearance nor filed any response to the Plaintiff's application.

9. I have considered the application and the 3rd Defendant's response thereto. I have also considered the submissions filed herein by the Learned Advocates for the parties.

10. The basis of the Plaintiff's application for injunction herein is a Joint Venture Agreement executed in respect of certain premises developed and erected on four portions of land situated within Malindi and known more particularly as Ashoka Apartments. The Agreement dated 16th January 2015 was executed between the Plaintiff company (therein described as the 2nd party) on the one hand and the 1st and 2nd Defendants (referred to as the 1st Party) on the other hand.

11. Article III of the Agreement provides the Obligations of the parties as follows: -

"3.01. The 1st Party is the owner and/or otherwise beneficially entitled to the all that property known and described as Ashok Apartments situate of Parcels of land known and described as Portion Nos. 4805, 4806, 4807 and 4808 Malindi (hereafter "the Subject Property"). The 1st Party's capital contribution to this Venture is to provide the said property for the purpose of this Agreement.

3.02. The Subject Property constitutes property of the Joint Venture for the duration of this Agreement and shall not be conveyed, transferred, charged, pawned or in any way dispossessed by the 1st Party to any third Party.

3.02. The 2nd Party shall contribute the entire cash capital investments for the renovation, management and letting of the Subject Property as specified under the First Schedule hereto attached."

12. The Plaintiff avers that in keeping with its obligations under the Agreement, it has since spent the sum of Kshs 6,677,516/- in renovating the said premises but contrary to the Joint Venture Agreement, the 1st and 2nd Defendants have by a Sale Agreement dated 28th August 2017 sold the entire apartments in the subject property to the 3rd Defendant as a result whereof the Plaintiff is now apprehensive that it shall not recover the costs incurred in renovating the apartments.

13. The 1st and 2nd Defendants have neither entered appearance nor responded to the Plaintiff's application. On its part, the 3rd Defendant avers that both the 2nd Defendant and himself are not bound by the terms and conditions of the Joint Venture Agreement and further that there is no privity of contract between the Plaintiff and himself to warrant his being enjoined in these proceedings.

14. A perusal of the Joint Venture Agreement referred to by the Plaintiff reveals that it was executed by Ms Jacqueline Wangui Hill and Ms Grace Wanjiku Kirina. From annexure "DMB5" of the Plaintiff's Supporting Affidavit, the two were the listed directors of the Mibo Ceramics Ltd (the 2nd Defendant) as at January 2013, with 450 and 50 shares respectively. The two therefore had the authority to transact on behalf of the 2nd Defendant.

15. From the material placed before me, it is evident that contrary to Clause 3.2 of the Joint Venture Agreement executed between the Plaintiff on the one hand and the 1st and 2nd Defendants on the other, the 1st and 2nd Defendant entered into another Sale Agreement on 28th August 2017 in which they purported to dispose off the properties described in the Joint Venture as owned by the parties therein to the 3rd Defendant.

16. And while the 3rd Defendant may as well be an innocent purchaser for value without notice as he asserts, I note that the Agreement between himself and the 1st and 2nd Defendants provides at Clause 16 that the Agreement will be deemed complete once the Apartment are transferred from the 2nd Defendant to himself. That transfer has not happened as the Plaintiff herein placed a caveat on the suit properties.

17. Having acted diligently and come to Court before the conclusion of the Agreement between the 2nd and 3rd Defendants, I think it would be wrong for this Court to turn a blind eye to the inequities of the 2nd Defendant in the circumstances herein.

18. This being an application for interlocutory injunction, the Plaintiff was only required at this stage to demonstrate that he has a prima facie case with a probability of success and that he stands to suffer irreparable damage. While the Plaintiff at this stage claim a specific sum of money as damages, I note that under Clause 4.02 of the Joint Venture Agreement, it was entitled to 100% of all profits, losses and other allocations of the venture.

19. As the Court of Appeal stated in *Nguruman Ltdf –vs- Jan Bonde Nielsen & 2 Others(2014) eKLR: -*

“...The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sough to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

20. In the matter before me, I am satisfied that the Plaintiff's rights are directly threatened by the acts of the Defendants herein as to warrant this Court's protection.

21. Accordingly, the application dated 29th March 2018 is allowed in terms of Prayer Nos. 3 and 4 thereof.

22. The Plaintiff shall also have the costs of this application.

Dated, signed and delivered at Malindi this 8th day of October, 2019.

J.O. OLOLA

JUDGE