



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.46 OF 2018

GENO SHAR SHAMO.....1ST PLAINTIFF/APPLICANT

LARS JONAS GEKJE.....2ND PLAINTIFF/APPLICANT

VERSUS

GANZA LIMITED.....1ST DEFENDANT/RESPONDENT

HOMEX HOUSING LIMITED.....2ND DEFENDANT/RESPONDENT

ECOBANK KENYA LIMITED.....3RD DEFENDANT/RESPONDENT

VALLEY AUCTIONEERS.....4TH DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Motion** Application dated **14th February 2018** by the Plaintiffs/ Applicants seeking for orders;

1. That at the interparties hearing of this Application., the Honourable Court be pleased to grant an injunction restraining the Defendants and specifically the 3rd Defendant either by themselves , servants, beneficiaries or any person claiming through the Defendants and/ or agents from disposing the suit premises known as Title No. Kabete/Kibichiko/906.
2. That the dispute over whether the 1st Respondent ought to refund the Plaintiffs the sums of Kshs.4,000,000/= with interest for breach of its obligation under the Offer Letter dated 24th April 2014 and Agreement for Sale for failing to complete the development on time be referred to Arbitration for determination in accordance with Section 6 and 7 of the Arbitration Act, 1995 and the Agreement for Sale between the Plaintiffs and the 1st and 2nd Defendants
3. That pending the hearing and determination of this suit, the Honourable Court be pleased to order inhibition to issue under Section 68 of the Land Registration Act, 2012 in respect of Title No.Kabete/ Kibichiko/906 until further orders of this Court.
4. That the Court grants Conservatory Orders to prevent any dealings in the property Title No.Kabete/Kibichiko/906 pending the determination of the suit.
5. That the Honourable Court be pleased to make such orders and/ or issue such other directions as may be necessary to bring into effect any orders granted and/ or as the justice of the case may dictate.
6. That the costs of this Application be costs in the cause.

The Application is premised on the grounds that the 1st Defendant/Respondent through the agency of the 2nd Defendant/ Respondent offered to sell to the Plaintiffs/Applicants **Maisonettes No.97 & 105** respectively in the development referred to as **Kitusuru Gardens** to be built on the 1st Defendant's/Respondent's property being the suit property. It was the term of the agreement that the 2nd Defendant/ Respondent was the developer while the 1st Defendant/Respondent was the vendor. The purchase price for the Maisonettes was **Kshs.10,000,000/=** each to be paid upon signing the **Offer Letter** for purchase, **10%** was to be paid on the **27th May 2014**, and the balance upon successful completion. The estimated completion date being **31st August 2015**. That further on the strength of the offer letter dated **24th April 2014**,

the Plaintiffs/ Applicants paid the deposit of **10%** on **23rd April 2014** and a further deposit of **10% in May 2014**. In **2015**, the Plaintiffs/Applicants sought a progress report on the development from the **2nd Defendant/Respondent** but there was no formal communication on when the development would be completed and when they visited the suit property, they realized that the development had stalled.

The Plaintiffs further stated that when they wrote to the Defendants through their Advocates seeking a refund of the deposit paid, the Defendants/Respondents wrote back indicating that they would not be offering any refunds and the Plaintiffs were bound by the terms of the sale and sent copies of agreements for sale to be executed three years after the deposits were paid. However the Plaintiffs were no longer willing to proceed with the purchases as the estimated completion date had lapsed and were only interested in refund of the deposits made. A dispute has therefore arisen between the parties and the Plaintiffs seek a refund of the deposit paid and the Plaintiffs require a Court order referring the dispute to Arbitration as provided for in the agreement. However when the Plaintiffs/Applicants were considering making a reference to arbitration, the **3rd Defendant/Respondent** through the **4th Defendant/Respondent** advertised the suit property for auction under the **3rd Defendant's** Statutory Power of Sale, the Plaintiffs having learnt that the **1st Defendant** charged the suit property to the **3rd Defendant** for **Kshs.422,000,000/=** almost a year after they bought the Maisonnettes.

Further that the **3rd Defendant** is estopped from exercising their Statutory Power of Sale over the suit property without taking the Plaintiffs interest over the suit property into account as to the Plaintiff's knowledge, the **3rd Defendant** was aware of the existence of the Plaintiffs and other purchasers of the development and unless restrained by an order of Court, the Defendants' actions exposes the Plaintiffs to substantial loss and damage.

In his **Supporting Affidavit**, the **1st Plaintiff/Applicant** reiterated the contents on the face of the affidavit and further averred that if the **3rd Defendant** is allowed to dispose of the suit property, the Plaintiffs will have no way of recovering the deposits they had paid to the **1st & 2nd Defendants**. He further averred that the instant case is fit for the Court to offer protection envisaged by **Section 50, 51 & 52 of the Land Registration Act**. He sought for the Court's protection under **Section 106 of the Land Act** to re-open the Charge as between the **1st Defendant** and include their interest to compensation. He further urged the Court to grant an injunction restraining the Defendants/Respondents from disposing off the suit property and for an order that the **1st Defendant/ Respondent** ought to refund them the sum of **Kshs.4,000,000/=** with interest for breach of Contract and for the matter to be referred for Arbitration. He further urged the Court to make a declaration that the **3rd Defendant's** Statutory Power of Sale over the suit premises can only be exercised if and when their interests in the suit premises is registered as the charge was registered with the **3rd Defendant**. He therefore urged the Court to grant conservatory orders to prevent any dealings in the suit property.

The Application is opposed and the **3rd Defendant/Respondent** through its **Legal Officer** filed a **Replying affidavit** and averred that it granted a financial facility to the **2nd Defendant** which was secured by a **Charge** dated **24th February 2015**, over the **1st Defendant's** property being the suit property and a further debenture over the assets of **1st Defendant/Respondent** as evidenced by **annexture JK-1 & JK-2**. It was his contention that on **10th March 2016**, the **3rd Defendant/Respondent** disbursed part of the charged amount and the **2nd Defendant/Respondent** was required to repay the disbursed amount in 12 equal monthly instalments inclusive of interest and principal after 12 months moratorium on the amount after the disbursements. The **2nd Defendant** was equally required to service the Interest monthly on the disbursed amount during the 12 months moratorium. He averred that when the settlement account fell into arrears and due to the failure by the **2nd Defendant/Respondent** to regularize the account, the entire amount under the charge fell due and payable with interest at default rates. It was then that the **3rd Defendant/ Respondent** reissued a **Statutory Notice**, for exercise of its **Statutory**

Power of Sale of the charged property over the entire outstanding amount being **Kshs.227,105,146.66/=**.

When the **2nd Defendant** did not regularize its account, it issued its Director with a Notice and upon expiry of the **Forty days**, the **3rd Defendant** instructed the **4th Defendant/Respondent, Valley Auctioneers** who in turn issued the **1st & 2nd Defendants/Respondents** with the **45 days of Redemption** and a **Notification of Sale**. The **2nd Defendant** then made some payments after service with the Statutory Notice but did not clear their indebtedness and some amounts remained due and outstanding. He averred that he has been advised by his Advocates that the Plaintiffs/Applicants claim of **Kshs.4,000,000/=** should be against the **1st & 2nd Defendants** who sold **Maisonnettes No. 97 & 105 Off Plan** to them and the **3rd Defendants/Respondents** not being privy to the said sale, nor did it have notice of the said sale before executing the Charge instruments and therefore its rights cannot be defeated by the Off Plan sale.

He alleged that the **3rd Defendant** has fully complied with the law and its right to exercise Statutory Power of Sale has crystallized. It was his contention that the Application is brought in bad faith and merely intended to prevent the **3rd Defendant/Respondent** from recovering the outstanding sums to its immense prejudice. He therefore urged the Court to dismiss the Application.

Despite being duly served, the **1st, 2nd & 4th Defendants/ Respondents** did not put in their **Replying Affidavits**. The parties were then directed to file written submissions to which the Court has now carefully read and considered.

The Court has now carefully read and considered the instant Application, the pleadings in general and the annexures thereto. The Court too has considered the written submissions together with cited authorities and makes the following findings:-

There is no doubt that the Plaintiffs herein were offered **Maisonnettes No.97 & 105** by **Homex Housing Ltd** vide the **Letters of Offer** dated **24th April 2014**. The said development was known as **Kitsuru Gardens** which were being developed on **LR.No.Kabete/Kibichiko/906**. It is evident from the **Letters of Offer** that the purchase price was **Kshs.10,000,000/=** for each Maisonnette. The Plaintiffs alleged that they bought the **two Maisonnettes Off Plan** and the estimated **Date of Completion** was **31st August 2015**. The Plaintiffs/Applicants have also alleged that they have so far paid **Kshs.4,000,000/=** to the **2nd Defendant**. Further that the said parcel of land

was owned by the 1st Defendant and the developments were being undertaken by the 2nd Defendant. There is also no doubt that the 1st Defendant, **Ganza Ltd** was advanced a **loan of Kshs.422,000,000/=** by the 3rd Defendant on **24th February 2015** and the suit property **Kabete/Kibichiko/906**, was used as security for the said loan facility. A legal **Charge** was signed between 1st Defendant & 3rd Defendant on **24th February 2015**.

From the Charge document, both the Chargor and the Chargee had their duties and obligations spelt out. The Chargor was to pay the loan as per the terms of the charge document. In default, the Chargee had the power to exercise its **Statutory Power of sale**. It is alleged by the 3rd Defendant that the 1st Defendant defaulted in the loan repayment and several **Demand Letters** were sent to the 1st Defendant. Eventually, the 3rd Defendant instructed the 4th Defendant to sell the suit property through **Public Auction** in exercise of the 3rd Defendant's Statutory Power of Sale. The Plaintiffs/Applicants moved to court seeking for various orders against the Defendants.

The Plaintiffs/Applicants have attached two receipts of payment of **Kshs.1,000,000/=** by each of them as part Deposit of their respective units at **Kitsuru Gardens**. The said payments were made to **Homex Housing Ltd**, the 2nd Defendant herein. Though the said payments were in respect of payment of 10% of the purchase price, the Letters of Offers have not been signed by the Plaintiffs/Applicants. Further the Plaintiffs/Applicants did not sign any **Sale Agreement**. What is not in doubt is that the 1st

Defendant is indebted to the 3rd Defendant and the 1st Defendant has charged the suit property **LR.No.Kabete/Kibichiko/906** in favour of the 3rd Defendant.

The Plaintiffs/Applicants have alleged that the development of the alleged Maisonnettes have stalled. However, what the Plaintiffs/Applicants had paid to the 1st & 2nd Defendants according to them is **Kshs.4,000,000/=**. The 3rd Defendant is owed a colossal sum by the 1st Defendant. The 3rd Defendant is attempting to exercise its Statutory Power of Sale as per the Charge document.

The issues now for determination is whether the Applicants are deserving of the orders sought. First the Applicants have sought for injunctive orders which are equitable remedies granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **Mrao.....Vs...First American Bank of Kenya Ltd & 2 Others (2003) eKLR**, where the Court held that:-

“The power of the court in an application for an interlocutory injunction is discretionary. Such discretion is Judicial and as always the judicial discretion has to be exercised on the basis of law and evidence.”

The principles that will guide the court in deciding whether to grant or not to grant an order of injunction are set out in the case of **Giella... Vs...Cassman Brown Co. Ltd 1973 EA 358** and later repeated in other judicial pronouncements. See the case of **Kibutiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, where the Court held that:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, 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 might 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. See also E.A Industries ..Vs..Trufoods (1972) EA 420.”

Have the Applicants herein established that they have a *prima-facie* case with probability of success at the trial or have they established that their rights have been infringed?

As the Court stated earlier, the Applicants bought two Maisonnettes from the 2nd Defendant who were developing the same on suit property **Kabete/Kibichiko/906**, which was owned by the 1st Defendant. Though the Plaintiffs/Applicants paid the initial deposit of **Kshs.1,000,000/=**, they did not sign the **Letters of Offer** dated **24th April 2014**. Again no Sale Agreements were signed. However, the 1st Defendant charged the suit property in favour of 3rd Defendant for a loan of **Kshs.422,000,000/=**. It is alleged that the 1st Defendant is in default and the 3rd Defendant is now proceeding to exercise its Statutory Power of Sale as provided by the Charge document. Since the Plaintiffs/Applicants did not sign the Letter of Offer nor the Sale Agreements, the Court cannot find and hold that they have any beneficial interest on the suit property as yet. The money that they paid to the 2nd Defendant can be recovered as a Civil debt. Whatever dispute the Plaintiffs/Applicants have with 1st & 2nd Defendants cannot prevent the 3rd Defendant from exercising its Statutory Power of Sale as per the legal Charge. The Court finds that the Plaintiffs/Applicants have not established that they have a *prima-facie* case with probability of success at the trial. Further, while attempting to exercise its Statutory Power of Sale, the 3rd Defendant cannot be said to have infringed on the Plaintiffs/

Applicants rights since they have not yet acquired the said Maisonnettes.

Having found that the Applicants have not established a *prima-facie* case with probability of success, the Court finds no reason to deal with the other limbs of **Giella...Vs...Cassman Brown** since they are sequential. See the case of **Kenya Commercial Finance & Co. Ltd... Vs...Afraha Education Society (2001) 1EA 86**, where the Court held that:-

“The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima-facie case with probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt

it will decide the application on a balance of convenience. See Giella..vs..Cassman Brown & Co. Ltd 1973 EA pg.360 Letter E. The conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

On prayer no.4, the Applicants are seeking to have the matter referred to arbitration as provided by Clause No.19 of the Sale Agreement. However the Sale Agreements attached to the instant application are not dated nor signed by any of the parties. The Court cannot hold and find that parties are bound by the terms of their contract and therefore this Court finds that the said prayer is not tenable.

The Applicants have also sought for an Order of Inhibition under **Section 68** of the **Land Registration Act** in respect of the suit property **Kabete/Kibichiko/906**. **Section 68(1)** of the **Land Registration Act** provides:-

“The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge”.

Further in the case of **Dorcas Muthoni & 2 Others...Vs...Michael Ireri Ngari (2016)eKLR**, the Court held that:-

‘An order of inhibition issued under Section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off. The Court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial’.

It is evident that an Order of Inhibition is similar to prohibitory injunction. The Court has found that the Applicants herein have no good reasons to seek for injunctive orders against the Defendants since whatever they paid to the 1st & 2nd Defendant is recoverable as a Civil debt without affecting the 3rd Defendant’s right to exercise its Statutory Power of Sale. The Court finds the said prayer for inhibition not merited and will not grant it.

The Applicants have also sought for Conservatory Orders. The order sought herein is for maintenance of status quo. Maintaining the status quo herein would mean preventing the 3rd Defendant from exercising its Statutory Power of Sale. However, as submitted by the 3rd Defendant, there is no privity of Contract between the Plaintiffs/Applicants and the 3rd Defendant that would warrant the conservation of the *status quo* herein. Further, there is no evidence that the 3rd Defendant have infringed on any rights of the Plaintiffs/Applicants herein. See the case of **Muslims for Human Rights (MUHURI) & 2 Others...Vs...Attorney General & 2 Others, HC Petition No.7 of 2011**, where the Court held that:-

“A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would still be possible that the right and freedoms of the claimant would be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse of exercise”.

The Applicants herein have not met the above criteria and this Court finds no reasons to grant any Conservatory Orders.

Further, this Court finds no reasons to issue any such other orders or directions apart from finding that the instant application is not merited.

Having now carefully considered the instant **Notice of Motion** application dated **14th February 2018**, the Court finds it not merited and the same is dismissed entirely with costs to the 3rd Defendant/Respondent herein.

It is so ordered.

Dated, Signed and *Delivered* at Thika this *4th day of October, 2019*.

L. GACHERU

JUDGE

4/10/2019

In the presence of

Mr. Gachuhi for the Plaintiffs/Applicants

Mr. Murgor for 1st & 2nd Defendants/Respondents, and holding brief for M/S Mwanzile for 3rd Defendant/Respondent

No appearance for 4th Defendant/Respondent

Lucy - Court Assistant

Court – Ruling read in open court.

L. GACHERU

JUDGE

4/10/2019