



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1089 OF 2016

APEX ADVANCEMENT LIMITED..... PLAINTIFF

VERSUS

SIMPLE HOMES DEVELOPMENT

CONSORTIUM LIMITED.....1ST DEFENDANT

LILIAN WANGUI RUKWARO.....2ND DEFENDANT

SIMPLE HOMES COOPERATIVE

SOCIETY LIMITED.....3RD DEFENDANT

NIC BANK LTD.....4TH DEFENDANT

RULING

Introduction:

The Plaintiff brought this suit against the Defendants seeking the following reliefs:

1. A permanent injunction restraining the Defendants from collecting money from the public for and on behalf of the Plaintiff.
2. A refund of Kshs.3,000,000/= paid to the 1st and 2nd Defendants.
3. An order compelling the Defendants to surrender all monies received by them on behalf of the Plaintiff.
4. General damages.
5. Costs of the suit.

Together with the plaint, the Plaintiff brought an application by way of Notice of Motion dated 6th September, 2016 seeking the following orders;

1. THAT the 1st and 2nd Defendants be restrained from collecting money from the public for and on behalf of the Plaintiff towards the purchase of housing units on Land Reference Numbers

Kajiado/Kaputiei-North/15459, 15460, 15461 and 15462(hereinafter referred to as “the suit properties”) pending the hearing of the suit.

2. THAT the 1st and 2nd Defendants be restrained from entering into and signing agreements with prospective purchasers using the Plaintiff’s property in particular, Apex Residence.

3. THAT the 3rd Defendant’s account number 1003357418 held at the 4th Defendant be frozen pending the hearing and determination of the application.

4. THAT a mandatory injunction be issued directing the 1st and 2nd Defendants to pay to the Plaintiff the money that was paid to the 1st and 2nd Defendants pursuant to the agreement and the addendum thereto which the 1st and 2nd Defendants had entered into with the Plaintiff.

5. The costs of the application.

The Plaintiff’s application was supported by the affidavit of Dr. Ken Mutuma Wyne sworn on 6th September, 2016. The application was opposed by the 1st, 2nd and 3rd defendants through a replying affidavit sworn by the 2nd Defendant, Lilian Wangui Rukwaro on 13th December, 2016. The 4th Defendant opposed the application through grounds of opposition dated 3rd October, 2016.

The Plaintiff’s case:

The Plaintiff has averred that on 1st February, 2016, it entered into an agreement with the 1st defendant which was supplemented by an addendum dated 22nd March, 2016. The Plaintiff has averred that under the said agreement and the addendum thereto (hereinafter together referred to only as “the agreement”), the 1st Defendant agreed in consideration of Kshs.3,000,000/= that was paid by the Plaintiff to the 1st Defendant to market and sell the houses that the Plaintiff was constructing on the suit properties. The Plaintiff has averred that under the said agreement, it was to be the main developer and the 1st defendant was under a duty to profile it as such during the marketing and sale of the said houses and house purchase plans. The Plaintiff has averred that under the said agreement, the 1st Defendant was supposed to release the proceeds of sale of the said houses to the Plaintiff’s appointed contractor within 48 hours. The Plaintiff has averred that pursuant to the said agreement, the 1st Defendant proceeded to launch a major social media campaign in which it used the Plaintiff’s housing project as the face of the said campaign particularly on face book in which it asked prospective purchasers of the said houses to make bookings by paying deposits to secure the housing units they wanted to purchase in the Plaintiffs housing project.

The Plaintiff has averred that on 20th April, 2016, the 1st Defendant submitted a report on its said campaign in which it contended that the Plaintiff’s housing project had received positive response and that the same had been overbooked. The Plaintiff has averred that the 1st Defendant stated in the said report that 274 people had purchased home plans which translated into Kshs.44,300,000/= in investment based on the construction unit model that was outlined in the agreement between the Plaintiff and the 1st Defendant. The Plaintiff has contended that using the purported success of the Plaintiff’s housing project, the 1st Defendant went out and misrepresented to various developers that it would be able to sell their housing projects in a similar fashion and succeeded in inducing them to enter into agreements similar to the one it entered into with the Plaintiff. The Plaintiff has contended that some of these developers have contacted the Plaintiff claiming that they have suffered loss and reputational damage as a result of the 1st Defendants use of the Plaintiff’s housing project to lure them into entering into agreements with the 1st Defendant. The Plaintiff has contended further that it had been contacted by several customers who claimed that they had made payments to the 1st Defendant towards the purchase of houses in the Plaintiff’s housing project and were not issued with receipts or acknowledgements. The Plaintiff has averred further that the prospective purchasers of houses in the Plaintiff’s housing project were being asked by the Defendants to be members of the 3rd Defendant and to make deposit payments into the 3rd

Defendant's account. The Plaintiff has contended that it has not received any payment from the 1st Defendant pursuant to the said agreement it entered into with the 1st Defendant.

The Plaintiff has contended further that the Defendants have lodged a smear campaign aimed at injuring the Plaintiff's reputation. The Plaintiff has contended that as a result of the said acts by the Defendants, the Plaintiff has been exposed to litigation by members of the public who have paid deposits to the Defendants towards the purchase of the houses in the Plaintiff's housing project. The Plaintiff has averred that together with other developers, they issued a notice to the public informing them that they had terminated the services of the 1st Defendant.

The Plaintiff has contended that the 1st Defendant has used the Plaintiff's housing project to collect money from the public in breach of the agreement the 1st Defendant entered into with the Plaintiff. The Plaintiff has contended that unless restrained by the court, the 1st Defendant would continue using the Plaintiff's housing project to solicit money from the public thereby exposing the Plaintiff to irreparable loss.

The 1st, 2nd and 3rd Defendants' case:

The 1st to 3rd Defendants have contended that pursuant to the agreement dated 1st February, 2016 between the 1st Defendant and the Plaintiff, the Plaintiff acquired 300 shares in the 1st Defendant valued at Kshs.3,000,000/=. The 1st to 3rd defendants have contended that the said sum of Kshs.3,000,000/= was to be used to promote the 1st Defendant business model. The 1st to 3rd Defendants have contended further that in consideration of the Plaintiff's acquisition of the said shares, the 1st Defendant was to prepare promotional material in respect of the Plaintiff's housing project. The 1st to 3rd defendants have admitted that through the addendum to the said agreement dated 22nd March, 2016, it was agreed that the Plaintiff would become a vanguard developer and would be profiled as such during the marketing and sale of the houses in its housing project and that the 1st Defendant would remit any money collected from the purchase of the Plaintiff's houses to the Plaintiff. The 1st to 3rd defendants have contended that pursuant to the said agreement and the addendum thereto (the agreement), the 1st Defendant went ahead and marketed the plaintiff's housing project which resulted in a number of people expressing interest and making promises to make payments towards the purchase of the Plaintiff's houses and home purchase plans. The 1st to 3rd Defendants have contended that the report which is annexed to the Plaintiff's supporting affidavit was not of actual sales made by the 1st Defendant but of the people who had expressed interest in the Plaintiff's housing project and the estimated amount of money they were to invest in the project. The 1st to 3rd Defendants have contended that there is nowhere in the said report where the 1st Defendant indicated that it had received any payment towards the purchase of the houses in the Plaintiff's housing project. The 1st to 3rd Defendants have contended that on 22nd July, 2016 the 1st Defendant suspended the sale of the Plaintiff's housing project due to fundamental breach of the agreement between it and the Plaintiff. The 1st to 3rd Defendants have averred that the 1st Defendant was no longer advertising the Plaintiff's housing project for sale. The 1st to 3rd Defendants have denied that they induced other developers to enter into agreements with them as alleged by the Plaintiff. The 1st to 3rd Defendant have contended that the people who joined the 3rd Defendant did so willingly. The 1st to 3rd Defendants have also denied that they had lodged a smear campaign against the plaintiff. The 1st to 3rd Defendants have denied any connection to the documents which the Plaintiff has exhibited as evidence of the said campaign. The 1st and 3rd Defendants have contended that the Plaintiff's case is based as assumptions and has not met the threshold for granting the orders sought. The 1st and 3rd Defendants have contended that the 2nd and 3rd Defendants were not parties to the agreement which the Plaintiff entered into with the 1st Defendant and as such the Plaintiff's claim against them has no basis. The 1st to 3rd Defendants have contended that they have not infringed the Plaintiff's rights. The 1st to 3rd Defendants have contended that it is the 1st Defendant's rights that will be infringed if the court freezes its

account as its daily activities will come to a halt. The 1st to 3rd defendants have denied that they are holding any money belonging to members of the public on account of the sale of the Plaintiff's houses.

The 4th Defendant's case:

The 4th defendant has contended that it was not privy to the contract which the Plaintiff entered into with the 1st to 3rd Defendants and as such the Plaintiff cannot sustain any cause of action against it. The 4th Defendant has contended that it was wrongly joined in the suit since the plaint does not disclose any cause of action against it. The 4th Defendant has contended that its role was limited to maintaining and/or managing the 1st Defendant's account and as such it was not a party to the dispute which the Plaintiff has with the 1st Defendant. The 4th Defendant has contended that the Plaintiff has not put forward a case that warrants the grant of the injunction sought against the 4th Defendant. The 4th Defendants has termed the Plaintiff's application as an abuse of the process of the court.

Analysis and determination of the issues raised:

The Plaintiff has sought both prohibitory and mandatory injunction. The principles that the court apply while exercising its discretion in applications of this nature are now well settled. As was stated in the case of Giella –vs- Cassman Brown & Company Ltd. [1973] E.A. 358, an applicant for a temporary injunction must demonstrate that he has a prima facie case against the respondent with a probability of success and that, unless the order sought is granted, he will suffer irreparable harm. If the court is in doubt as to the above, the application will be determined on a balance of convenience. For a temporary mandatory injunction, an applicant must establish more than a prima facie case. The granting of a temporary mandatory injunction effectively determines a case without the benefit of a trial.

An applicant for a temporary mandatory injunction must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success here must be higher than that which is required for a prohibitory injunction. In addition, a mandatory injunction will not normally be granted at interlocutory stage in the absence of special circumstances.

In the case of Locabail International Finance Limited v Agro-Export (1988) 1 All ER 901, it was held that:

A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.

In the case of Shepherd Homes Ltd. –vs.-Sandham [1971] 1 ch.304, Meggery J. had this to say on interlocutory mandatory injunctions:

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

Applying the foregoing principles to this case, the issue that I need to determine is whether the Plaintiff has met the thresh hold for granting the orders sought. I am not satisfied that the Plaintiff has satisfied the conditions for granting the orders sought. It is admitted that the Plaintiff and the 1st Defendant entered

into an agreement dated 1st February, 2016 and an addendum thereto dated 22nd March, 2016(the agreement). The said agreement set out the relationship of the parties and what was expected of each party thereunder. I am in agreement with the Defendants that the Plaintiff has made mere allegations without proof. The Plaintiff has not satisfied me that the 1st Defendant has breached the terms of the said agreement. There is no evidence placed before the court showing that the 1st Defendant has received payments on behalf of the Plaintiff and has refused to release the same to the Plaintiff's contractor in accordance with the terms of the said. The Plaintiff has not placed before the court the particulars of the persons who have made such payments to the 1st Defendant and the details of such payments. The Plaintiff has also not placed before the court the particulars of the developers who have been defrauded by the 1st Defendant using the Plaintiff's housing project. There is also no evidence regarding members of the public from whom the 1st Defendant is said to have been soliciting money using the Plaintiff's housing project.

It is not disputed that the 2nd to 4th Defendants were not parties to the agreement between the Plaintiff and the 1st Defendant. The Plaintiff has not pointed out any wrong doing on the part of the 2nd and 3rd Defendants. The Plaintiff has contended that the 1st defendant had misled potential purchasers of houses in the Plaintiff's housing project to pay deposits through the 3rd Defendant. There is no evidence of such potential purchasers or the payments they are said to have made to the 1st Defendant through the 3rd Defendant. There is also no evidence that any of the said purchasers joined the 3rd Defendant.

The Plaintiff has also not established any wrong doing on the part of the 4th Defendant. I don't think that the joinder of the 4th Defendant to the suit herein on account only of it having been a banker for the 1st and 3rd Defendants without more was justified. The Plaintiff did not need to join the 4th Defendant as a party to the suit herein for it to be bound by any order which the court may issue against the other defendants. I am in agreement with the 4th Defendant that no cause of action has been established against it.

The Plaintiff had also contended that the Defendants had waged a smear campaign against it with the intention of injuring its reputation. The documents which have been placed before the court as evidence of this smear campaign do not point to any of the defendants. The Plaintiff had also contended also that the Defendants had exposed him to litigation from the public who had made payments to the Defendants. The Plaintiff has not placed any evidence before the court in proof of this threat. As I have mentioned earlier in this ruling, there is no evidence of members of the public who have made payments to the Defendants on account of the Plaintiff's housing project. There is also no evidence that any member of the public has threatened the Plaintiff with legal action.

Due to the foregoing, I am not satisfied that the Plaintiff has established a prima facie case against the Defendants. I am also not satisfied that special circumstances exist in this case that would warrant the grant of a mandatory injunction at this stage. The Plaintiff having failed to establish a prima facie case with a probability of success against the Defendants, I am not persuaded that the Plaintiff would suffer irreparable harm unless the orders sought are granted.

The upshot of the foregoing is that the Notice of Motion dated 6th September, 2016 has no merit. The same is dismissed with costs to the Defendants.

Delivered and Dated at Nairobi this 2nd day of February 2018

S. OKONG'O

JUDGE

Ruling delivered in open court in the presence of:

N/A for the Plaintiff

Mr. Thangei h/b for Kageni for the 1st, 2nd and 3rd Defendants

Mr. Muchoki h/b for Onyinkwa for the 4th Defendant

Catherine Court Assistant