



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 685 OF 2016**

**SHANGAI ENGINEERING CO. (K) LIMITED.....PLAINTIFF**

**=VERSUS=**

**HAU XIANG DEVELOPMENT LIMITED.....DEFENDANT**

**R U L I N G**

1. This Ruling relates to the Plaintiff's Notice of Motion Application dated 16<sup>th</sup> June 2016, through which the Plaintiff seeks the following orders:-

**“1. That this Honourable Court be pleased to certify this Application as urgent and service of the same be dispensed with in the first instance.**

**2. That the Defendant/Respondent be restrained jointly and severally either by themselves, their servants, employees and or agents or otherwise howsoever from transferring, charging, dealing, interfering, advertising for sale, disposing of, occupying and or otherwise Sale of Apartment Number A14 erected on property land reference number 330/794 (the suit property) pending the hearing and determination of this Application.**

**3. That the Defendant/Respondent be restrained jointly and severally either by themselves, their servants, employees and or agents or otherwise howsoever from transferring, charging, dealing, interfering, advertising for sale, disposing of, occupying and or otherwise sale of apartment number A14 erected on property land reference number 330/794 (the suit property) pending the hearing and determination of this suit.**

**4. That the Respondent does bear the costs of this application.”**

2. The Application is supported by an Affidavit sworn on 16<sup>th</sup> June 2016 by Tian Xiao Chun, a director of the Plaintiff company.

3. In the said Supporting Affidavit, the Deponent alleges that, “by virtue of a letter of offer dated 30<sup>th</sup> May 2015, read together with an amendment of agreement dated the same date,” the Plaintiff agreed to purchase the suit property from the Defendant at a sum of Ksh.17,000,000.

4. He depones that the Plaintiff paid a deposit of Kshs.1,000,000. He further alleges that a sum of Kshs.6,367,588 which the Defendant allegedly owed the Plaintiff under two other contracts unrelated to the suit property contract was to be offset against the purchase price. He contends that the balance of Kshs.9,632,412 was to be paid to the Defendant upon the handing of the Sub-Lease Title instrument in relation to the suit property.

5. The Deponent contends that the Defendant has failed to hand over the Sub Lease Title and has “taken to selling the suit premises to third parties.”

6. On 16<sup>th</sup> February 2017, the Applicant’s Advocate filed an Affidavit sworn by one Samuel Nderitu Kiariki on 14/2/17 in which he deponed that he had served the Application on the Defendant. Consequently, the Application was argued *ex parte* before me on 21/2/2017.

7. In his brief submissions, Mr. Wamae, Counsel for the Applicant, reiterated the averments made in the Supporting Affidavit and urged the court to grant the Application.

### **Issue**

8. The question to be determined in this Application is whether or not the Applicant has satisfied the legal criteria for grant of an interlocutory injunction.

### **Legal principles on Interlocutory Injunctions**

9. The legal criteria for grant of an interlocutory injunction was spelt out in the case of **Giella Vs Cassman Brown (1973) EA 358** as follows:-

**“The conditions for the grant of interlocutory injunction are now, I think, well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”**

10. A prima facie case in a civil application was defined in **Mrao vs First American Bank of Kenya Limited & 2 Others** as:-

**“a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

11. I will keep my determination brief for two reasons; first, the criteria for grant of interlocutory injunction is well settled and second, a court seized of an application for injunction ought to avoid digging deep into the merits of the parties’ cases as that could compromise the final determination.

### **Determination**

12. A court sitting to make a determination on an application for interlocutory injunction invariably asks itself the following questions:

**(i) has the applicant made out a prima facie case with a probability of success?**

**(ii) will damages be an adequate remedy in the circumstances?**

**(iii) does the balance of convenience favour the grant or refusal to grant the injunction sought?**

13. Before I make a determination, I should observe that, upon looking at all the exhibits annexed to the Affidavit in support of the Application, none of them bore the endorsement of the commissioner for oaths. The rubber stamp was imposed on them to signify the commissioner’s seal but the commissioner for oaths did not sign them. Rules 9 and 10 of the Oaths & Statutory Declarations Rules provides as follows:-

**“9. All exhibits to an affidavit shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.**

**10. the forms of jurat and of identification of exhibits shall be those set out in the Third Schedule”.**

In my view, the commissioner’s signature is a necessary authentication of exhibits annexed to an affidavit.

14. I am nonetheless alive to the Provisions of Article 159 of the Constitution and Sections 18 and 19 (1) of the Environment & Land Court Act which discourage this court against placing too much emphasis on technicalities of procedure.

15. Guided by this principle, I looked at the exhibits and I have considered their evidentiary value notwithstanding their legal defects.

16. The Applicant’s plea for an interlocutory injunction is based on a Letter of Offer dated 30th May 2015 from the Defendant. It is marked “Cash Buyer (subject to contract)”. However, it is not clear whether the anticipated formal contract was executed or not because none was attached to the Application. Secondly, under that Letter of Offer, the Applicant was required to pay a deposit of Kshs.1,000,000 into Account Number 1125219785 held at Salama Branch of Kenya Commercial Bank. No evidence has been exhibited to confirm that that payment was made. Third, in Paragraph 4 of the Supporting Affidavit of Chun, he alludes to a certified translation of a contract between the parties herein for the supply and installation of 3 Lifts. That certified translation was not annexed to the Affidavit. The omission denies the court the opportunity to interrogate that particular piece of evidence.

17. While cautious not to delve into the merits of the Plaintiff’s substantive claim against the Defendant, I am not satisfied that the Applicant has presented before court sufficient material to establish a prima facie case as defined above.

18. Secondly, the dispute before court involves an alleged contract with a monetary consideration of Kshs.17,000,000. Damages arising from breach of such a contract can be quantified and awarded as an adequate remedy.

19. The upshot of this Ruling therefore, is that, the Plaintiff’s Notice of Motion Application dated 16/6/2016 does not satisfy the threshold for grant of an interlocutory injunction. The Application is accordingly dismissed.

20. I direct that Summons to Enter Appearance together a with Mention Notice be served upon the company secretary or director or principal officer of the Defendant Company in accordance with the provisions of Order 5 Rule 3 (a) of the Civil Procedure Rules. This Matter shall be mentioned for pre-trial directions on a date to be given by the court at the time of reading this Ruling.

**Dated, signed and delivered at Nairobi on 14th day of March 2017.**

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**B M EBOSO**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court clerk