



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI LAW COURTS
ELC DIVISION HCC NO 330 OF 2015

BATHAWAB INVESTMENT LIMITEDPLAINTIFF/APPLICANT

VERSUS

HASSAN AHMED ABDULHAFEDH aka

HASSAN AHMED ZUBEDI1ST DEFENDANT/RESPONDENT

DUBAI BANK KENYA LIMITED.....2ND DEFENDANT/RESPONDENT

AHMED HASSAN AHMED ABDULHAFEDH ..3RD DEFENDANT/RESPONDENT

UKAMBA AGRICULTURAL INSTITUTE.....4TH DEFENDANT/RESPONDENT

RULING

There are two notices of Motion for determination brought by the Plaintiff/Applicant. The 1st Notice of Motion is dated 23rd April 2015, brought under *Section 7 of the Arbitration Act of 2012, Order 5 Rule 17, Order 40 Rules 1,2,3 (3) and 4 of the Civil Procedure Rules ,2010 and Sections 1A,1B,3A,63 (c) and (e) of the Civil Procedure Act* and all other enabling provisions of the law seeking for orders that:-

1. Spent
2. Spent
3. *That pending the hearing and determination of this suit, an injunction do issue to restrain the 1st, 2nd ,3rd and 4th Defendants and or any other third parties by themselves and or their successors in title, servants and or agents and or employees and or howsoever from either entering upon, remaining in or upon, occupying,*

constructing on or developing or selling ,transferring ,charging, mortgaging or in any other manner whatsoever and howsoever interfering with the suit premises and title thereof and or dealing with or in any manner transacting with the Suit premises the subject matter of this suit and or in any other manner whatsoever from dealing with and or interfering with and or remaining on or continuing in occupation of all those pieces or parcels of land making up the Suit Premises known as land reference No.209/10350 situate in Nairobi in the Republic of Kenya together with all the buildings and developments thereon, if any.

4. *That an interlocutory order do issue directing the Commissioner of Lands and the Registrar of*

Titles to ensure that no other titles of transfers or sub-divisions in respect of the Suit Premises are registered that derogate from or subtract or diminish or in any other manner whatsoever take away from or neglect the title of the Plaintiff in the said property or alters the status quo hereinabove described in any manner shape or form whatsoever.

5. *That following the event of the issuance of the above and other ancillary or necessary orders, this suit be ordered, in as far as it relates to the dispute as between the Plaintiff and the 2nd Defendant to be referred to Arbitration in terms of the provisos of and by virtue of the terms of the Agreements described in the Plaint and Pleadings filed herein and entered into between the parties to this suit which contain and demand the implementation of mandatory dispute resolution mechanisms by way of Arbitration.*
6. *That the Defendants do pay the costs of this application.*

The application is premised on the grounds stated on the face of the application dated on 23rd April 2015, and on the annexed affidavit of **Swaleh Salim Mubarak Bathawab**. These grounds are:-

1. *The Plaintiff has shown by evidence and documents that there were written Agreements and Transfers duly executed in relation to the Suit Premises confirming the ownership rights purchased by the Plaintiff.*
2. *The plaintiff has provided evidence proving payment of the major part of its share of the consideration or price of the Suit Premises and that they paid to the Defendants the sum of US\$ 1.7 Million.*
3. *That the Defendants treacherously misrepresented the purchase price to be 440 Million when actually the same was being sold only for Kshs.254 Million with the result that the 1st Defendant therefore used the Plaintiff's funds to buy the entire Suit Premises.*
4. *That the defendants without contributing any share of the purchase price, at the same time claimed and applied for issuance of the title to the entire Suit Premises in the name of and to the favour of the 1st, 2nd, and 3rd Defendants who paid nothing for the same and leaving the Plaintiff who paid everything out in the cold.*
5. *That the 1st and 3rd Defendants in fact are deeply desirous of selling the suit premises in order that they may use the funds to bail out the 2nd Defendant, Dubai Bank Kenya Limited, which they own through proxies and which is in dire financial straits and is expected to go under at any time now.*
6. *That is in the public domain that the 2nd defendant, Dubai Bank Kenya Limited, is in serious financial and management problems and this fact has been the subject of various press reports that have neither been refuted by the 2nd Defendant nor have they sued the publications with any defamation suits giving rise to the reasonable propositions that the prejudicial matters published against the 2nd Defendant are true and that the Bank is in crises.*
7. *That if the suit premises are disposed of now, none of the defendant is in a position to refund the dues or pay any decretal amount ordered by this Court in the magnitude of kshs.1.5 Billion which is the current value of the Suit Premises.*
8. *That in the circumstances the Plaintiff will suffer an irreversible loss that will render the suit nugatory.*
9. *That the Defendants and especially the 2nd Defendant, Dubai Bank Kenya Limited (on whose financial back ride 1st and 3rd Defendants) is bankrupt and deeply involved in scandalous*

breach of the regulatory rules and framework governing the operation and conduct of banks, some of which have been reported prominently in the national press and is unlikely to survive much longer as a viable financial institution;-

10. *The 1st, 2nd and 3rd Defendants do not have the funds or monies or assets to cover and secure the payment of any judgement or order that may be granted in favour of the Plaintiff and certainly they cannot afford to pay for the value of the Suit Premises valued at between Kshs.1.5 Billion to 2 Billion at today's market rates and still rising;*
11. *That the suit premises is in danger of being wasted, damaged, or alienated by the 1st 2nd, 3rd and or 4th Defendants/Respondents acting in conjunction with unknown third parties ,or wrongfully sold as a means to secure the financial resuscitation and survival of the 2nd Defendant and once sold the said property and the value thereof will be placed out of the reach of the Plaintiff.*
12. *That the plaintiff herein was at all times material to this suit the legal and beneficial owners and entitled to possession of portions of land Number land reference 209/10350, Nairobi. Thereinafter referred to as the " Suit Premises") having purchased and the Plaintiff paying US\$ 1.700,000,00 through the 1st and 2nd Defendants to the 4th Defendant and the remaining US\$ 950,000,00 was to be paid on completion of the sale transaction or within 7 days after receipt of a demand by the 2nd Defendant.*
13. *That the 1st, 2nd and 3rd defendants /respondents threaten or intend to remove and render irredeemably lost, damaged, disposed and alienated of the plaintiffs property the subject matter of this suit in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the 1st, 2nd, 3rd and 4th Defendants in the suit .*
14. *That the plaintiff is the legitimate legal, beneficial and registered owner of the suit premises having acquired the aforesaid property for good and valuable consideration after the payment of the requisite consideration of US\$ 1.7 Million.*
15. *That the Plaintiff as an owner of the Suit Premises has never at any time past or present sold, leased, let or in any other manner whatever disposed of any of its interests in the suit premises to any other person or entity at all;*
16. *That the 1st, 2nd and 3rd Defendants/Respondents are committing an open and blatant crime and are without any color or right whatsoever attempting to dispossess the Plaintiff of its shares in the suit property as a proprietor contrary to law and justice and which action if allowed or allowed to continue will, inter-alia, cause irreversible and irreparable harm not capable of compensation in damages to the Plaintiff.*
17. *That the 1st, 2nd and 3rd Defendants /Respondents are perpetuating a fraud against the Plaintiff and are attempting to transfer, steal and dispose of the Plaintiff's land, the subject matter of this suit to unsuspecting third parties.*
18. *That the plaintiff purchased the aforesaid Suit premises for good and valuable consideration in the year 2011 as per the terms of the Agreements referred to in the Complaint and Pleadings filed herein. The signed transfer form was to be lodged at the Lands Registry for registration by the 2nd Defendant but they did not do so,;*
19. *That the actions set out above by the 1st, 2nd and 3rd Defendants to transfer and cause the title to suit property Land Reference No. 209/10350 situate in Nairobi to be registered solely in*

favour of the 2nd Defendant and thereafter to dispose of the same is illegal , unlawful and fraudulent as it is intended to deprive the Plaintiff of the US\$ 1,700,000.00 it is paid as consideration and also to disenfranchise the Plaintiff of its proprietary rights in the property land Reference No. 209/10350 situate in Nairobi are in the Republic of Kenya which is now valued at between Kshs.1.5. to 2.0 Billion and still rising;

20. That unless the Orders sought are granted and the suit premises herein are preserved, the suit herein will be rendered nugatory.

The 2nd Notice of Motion is dated **30th July, 2015** brought under section 7 of the **Arbitration Act of 2012, Order 5 Rule 17, Order 40 Rules 1,2,3)3) of the Civil Procedure Rules , 2010 and sub section 1A ,1B,3a, 63 (c) and (e) of the Civil procedure Act** and all other enabling provisions of the law.

The applicant has sought for these orders:-

1. **Spent**
2. **Spent**
3. **That pending the hearing and determination of the Plaintiff's Notice of Motion dated 23rd April 2015, an injunction do issue to restrain the 1st, 2nd, 3rd and 4th Defendants and or any other third parties by themselves and or their successors in title, servants and or agents and or employees and or howsoever from either entering upon ,remaining in or upon , occupying, constructing on or developing or selling ,transferring ,charging, mortgaging or in any other manner whatsoever and however interfering with the suit premises and title thereof and or dealing with or in any manner transacting with the Suit Premises the subject matter of this suit and or in any other manner whatsoever from dealing with and or remaining on or continuing in occupation of all those pieces or parcels of land making up the Suit Premises known as land reference No.209/10350 situate in Nairobi in the Republic of Kenya together with all the buildings and developments thereon, if any.**
4. **That the Defendants do pay the costs of this application.**

The application is based on the grounds stated on the face of the application and on the annexed Affidavit of **Swaleh Salim Mubarak Bathawab**. These grounds are:-

- a. **There exists new evidence from the Ministry of Lands confirming that, despite the fact that the Plaintiff has filed this suit and is seeking an injunction stopping the transfer or interference with suit Premises known as Land Reference No.209/10350 situate in Nairobi in the Republic of Kenya, the Defendants are in the process of illegally transferring the suit property to themselves and/or a third party.**
- b. **That the plaintiff filed suit on 23rd of April 2014 seeking inter-alia ,in its Notice of Motion dated 23rd April 2015 injunctive Orders on property land reference No.209/10350 situate in Nairobi in the Republic of Kenya.**
- c. **That the Plaintiff through its advocates have received confirmation from the Ministry of Lands Adhi House , that the file Reference No.209/10350, situate in Nairobi in the Republic of Kenya cannot be traced reason being that there is an ingoing activity concerning the suit property;**
- d. **That the Plaintiff is willing to issue an undertaking as to damages for any loss that any of the defendants may suffer if orders are issued as prayed.**
- e. **That unless the orders sought are granted and the Suit Premises herein are preserved, the suit herein will be rendered nugatory;**

f. ***The Defendants herein will suffer no prejudice if the said Orders sought are granted as prayed;***

The application is opposed. The 1st Defendant filed a Notice of Preliminary Objection and a Replying Affidavit.

In the Notice of Preliminary Objection, the 1st Defendant stated;-

1. ***Both the suit and the application are incompetent, misconceived, fatally defective, and bad in law.***
2. ***That there is no suit before this Honourable Court.***
3. ***That there being no suit, the present application does not and cannot in law or otherwise lie.***

In his Replying Affidavit the 1st Defendant ***Hassan Ahmed Abdulhafedh*** averred that the entire application and indeed the suit as far as it touches on him is totally misguided, unfounded and solely a product of fanciful inclination by the applicant to have his name dragged into unnecessary controversies. He denied ever entering into any agreement of whatsoever nature with the applicant for the sale of any property or any investment. He also denied ever discussing with the applicant any possibility of buying, selling or investing in any property with the applicant. It was his contention that he has never held any oral, written or any other form of communication with the applicant or anything relating to any property especially property mentioned in the suit

paper filed by the applicant. The deponent also denied ever holding any meetings with the applicant's Directors as alleged and he demanded to be

furnished with the agenda, minutes, and resolutions of such meetings. It was his further contention that he was not in occupation of the suit property, neither did he have any right whether legal or equitable or intention of selling, alienating, disposing or dealing with the property in any other manner that the applicant wants the court to believe is apprehensive of. He further denied ever recalling any money from the applicant in connection to the subject matter of this suit and therefore any attempt to connect him to the suit is totally misguided. Further that since he has no interest in the suit property, then it is extremely strange for the applicant to have expected him to lodge any transfer for registration as alleged by him. He further alleged that he does not own the 2nd Defendant and neither does he have any control of the 2nd Defendant as alleged by the applicant and he has never participated in any process of transferring the suit property to anyone. The Deponent therefore denied all the allegations, contained in the applicant's affidavit and urged the Court to dismiss the applicant's Notice of Motion.

The 3rd Defendant filed Grounds of Opposition and Preliminary Objection and stated as follows:-

1. ***That the pleadings as drawn and filed are incapable of invoking the jurisdiction of this Honourable Court on account of non-compliance with the provisions of section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya.***
2. ***The Plaintiff has not met the threshold test set in the case of Giella Vs Cassman Brown.***
3. ***The Motion dated 23rd April, 2015 is incompetent to the extent that it seeks orders directed at parties who are not enjoined in the suit.***
4. ***The suit is incurably defective and ought to be struck out in limine for misjoinder of parties and causes of action.***
5. ***That the documents annexed in the Affidavit of Swaleh Salim Mubarak Bathawab sworn on 23rd April 2015 as proof of existence of a contract do not comply with the provisions of section 19(2) of the Stamp Duty Act, Cap 480 and cannot thus be relied upon in support of the Motion***

dated 23rd April, 2015.

6. *The Plaintiff has not demonstrated the existence of any privity of contract or novation between the parties enjoined in the suit and the suit is thus incurably defective .*

7. (iv) *The Plaintiff has not demonstrated that the property is occupied by any of the defendants to warrant the orders sought.*

(v) *That the Plaintiff has not demonstrated that the Defendants are in the process of selling, transferring charging, or mortgaging the property. Unfortunately fear is no basis for seeking court orders.*

The 2nd Defendants also filed its Replying Affidavit and one **Adam Ali**, swore an Affidavit and denied all the contents of the supporting Affidavit filed by the applicant. He denied that the 2nd Defendant is bankrupt and is deeply in breach of any law of banking as stated by the Plaintiff/Applicant. He further stated that the suit herein is filed in bad taste and ill intention against the 2nd Defendant and that no orders should be given against the 2nd Defendant in light of such flagrant lies and abuse of the process of the Court by the Plaintiff/Applicant. He averred that the 2nd Defendant is not in occupation or possession of the suit property and has not entered into any agreement over the property with the Plaintiff except the **investment agreement**, which is inchoate and has not been nullified for any reason whatsoever. He also confirmed that as per the affidavit in support of the application, the alleged payments were done to **Hassan Ahmed Zubedi** and not to the 2nd Defendant at all in respect of the intended transfer. It was his contention that the suit against the 2nd Defendant is maliciously brought;- it is in bad faith and is indeed in breach of Investment Agreement that subsists between the Plaintiff and the 2nd Defendant. The deponent urged the Court to dismiss the Plaintiff's application with costs.

The 4th Defendant also filed its Replying Affidavit through **Stephen Muli**, one of the Directors of the 4th Defendant. He averred that the 4th Defendant is the registered proprietor of all that piece of land registered in Nairobi and known as **LR .No 209/10350**. He further alleged that the 4th defendant is the sole indefeasible owner of the above mentioned property and any orders sought to interfere with its ownership, Occupation and Control are preposterous ,unlawful and misguided. Further that the 4th respondent is a stranger to any partnership agreement between the Plaintiff/Applicant and either /or any of the 1st, 2nd, 3rd Respondents. Further that the 4th Respondent did not enter into any sale agreement with the Plaintiff or authorize the sale of the suit property. It was his contention that the 4th Respondent cannot be liable for claims or remedies sought by the Plaintiff, since the remedies are sought as against the suit property which the 4th Defendant still owns and has never sold. He also contended that the 4th Respondent was not a party to the dealings of the Plaintiff and the other Defendants and as such there is no **privity of contract** between the Plaintiff and the 4th Defendant/Respondent.

The Deponent averred that the 4th Defendant has always been in occupation and has always been the sole true owner of the property. Further that the 4th Defendant has tenants on the property and it would be a breach of its property rights if the orders prayed in the said application are granted. It was also contended that that the 4th Defendant/Respondent did not authorize any sale of land to the Plaintiff nor did it receive any purchase price from the Plaintiff herein. Further that the 4th Defendant is the only party capable of selling the suit property and denies that it ever received any monies for the sale of the suit property. It was deposed that the Plaintiff is not the beneficial owner of the suit property as alleged in the Notice of Motion dated **30th July 2015**, and there is no consideration that has been shown to have accrued to the 4th Respondent. It was further deposed that the transfer alluded to by the Plaintiff was not witnessed and it therefore lacks the most basic element of authenticity. The Deponent further contended that the orders sought by the applicant would prejudice the interest of the 4th Respondent in the property and the 3rd parties would also be prejudiced as the tenants would have the terms of their leases interfered with. It was the 4th defendant's contention that the order sought would prejudice the 4th Respondent's and

its tenants. The 4th Respondent therefore urged the court to decline the orders sought and dismiss the instant application with costs.

The parties canvassed the two applications by way of written submissions. The orders that were sought in the Notice of Motion were supposed to be issued pending the hearing of and determination of the Notice of Motion dated **23rd April, 2015**.

Since the parties filed their submissions in respect of the Notice of Motion dated **23rd April 2015**, then this Court finds that the prayers sought for in the Notice of Motion dated **30th July, 2015** have been overtaken by events. The court will therefore make only one determination for the Notice of Motion dated **23rd April, 2015**.

The court directed the parties herein to file their written submissions. The Law Firm of **Taib A. Taib & Co. Advocates** on behalf of the Plaintiff filed their written submission on **15th June, 2015** and list of authorities. The Plaintiff/Applicant submitted that they have met the threshold for grant of injunctive orders by establishing the principles laid down for grant of such orders in the case of **Giella Vs Cassman Brown & Co. Ltd**. They urged the court to allow the application in totality.

The 1st and 2nd Defendants/Respondents did not file their written submission despite the court granting them several opportunities to do so.

The Law Firm of **Mbugwa, Atudo & Macharia & Co. Advocates**, filed their submissions on behalf of the 3rd Defendant on **25th November, 2015** and submitted that the suit is bad in law and should be dismissed. Further that the plaintiff has not met the threshold test set in the case of **Giella Vs Cassman Brown** for grant of injunctive orders. They therefore urged the court to dismiss the Plaintiff's/Applicant's Notice of Motion dated **23rd April, 2015**. They further submitted that the plaintiff did not comply with **Section 3(3)** of the **Law of Contract Act** and the suit is therefore incompetent and should be dismissed.

The Law Firm of **Gikera & Vadgama & Co. Advocates** filed their written submissions on behalf of the 4th Defendant/Respondent on **11th November 2015**, and submitted that the plaintiff breached **Section 3(3)** of **the Law of Contract Act** and the suit should be dismissed. They further submitted that the plaintiff has not met the threshold test for grant of injunctive orders as there was no existence of **privity of contract** between the Plaintiff/Applicant and the 4th Defendant/Respondent. They submitted that the Plaintiffs' suit should be dismissed with costs.

The court has considered the pleadings herein, the written submissions, and the relevant Laws and makes the following findings:-

There are two Notices of Preliminary Objection raised by the 1st and 3rd Defendants/Respondents respectively. The Court will have to first deal with the said Preliminary Objection before delving into the substantive Notice of Motion.

The 1st Defendant has alleged that:-

- ***Both the suit and the application are incompetent, misconceived, fatally defective and bad in law:***
- ***That there is no suit before this court***
- ***There being no suit, the present application does not and cannot lie in law.***

The 3rd Defendant alleged that:-

- ***The pleadings as drawn and filed are incapable of invoking the jurisdiction of the court on***

account of non-compliance with the provisions of Section 3(3) of the Law of Contract Cap 23, Laws of Kenya.

- ***That the suit is incurably defective and ought to be struck out in limine for misjoinder of parties and cause of action.***

The 1st and 3rd Respondents having raised Preliminary Objection, the Court will first deal with the said Notices of Preliminary Objection. The Court will first have to determine whether what the Respondents have raised amount to Preliminary Objection or whether it meets the criteria of what a Preliminary Objection is. In the case of **Oraro Vs Mbaya (2005) 1KLR 141**, the Court described Preliminary object as:-

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”

Further in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 701**, the court stated as follows:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by a clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”.

Are the points raised herein by both the 1st and 3rd Defendants points of law which are capable of disposing of the matter and which can adequately be described as preliminary objection?

The Respondents have alleged that the suit as drawn is incapable of invoking the jurisdiction of the court and has contravened the provisions of Section 3(3) of the Law of Contract Act. Further that the suit is incurably defective, is incompetent, misconceived, and bad in law.

The above points as raised by the Respondents raise pure points of law and are capable of disposing of the matter. In the case of **Avtar Singh Bhamra & Another VS. Oriental Commercial Bank, Kisumu High Court Civil Case NO. 53 of 2004**, the Court held that;

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained”.

The points raised herein stems from the pleadings filed by the plaintiff herein. Therefore the court finds that what the 1st and 3rd Defendants/ Respondents have raised amounts to Preliminary Objection as was described in the **Mukisa Biscuits case**.

Having found that what have been raised herein amounts to preliminary objections, the next question to answer is whether the said preliminary Objection is merited or not.

Though the 1st Defendant/Respondent filed a Notice of Preliminary Objection, the said Preliminary Objection was not pursued as the 1st Defendant did not file his written submissions. The said Preliminary Objection was not argued by the 1st Defendant and therefore the court finds that the said Notice was abandoned and this court would therefore have no option but to find that the said Notice of Motion is not merited and the same is dismissed.

On the Notice of Preliminary Objection raised by the 3rd Defendant, it was submitted that the plaintiff contravened the provision of Section 3(3)of the Law of Contract as there is no written contract. The said Section 3(3) of the Law of Contract provides as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

a. *the contract upon which the suit is founded—*

(i) is in writing;

(ii) is signed by all the parties thereto; and

b. *the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:*

It is very clear that an agreement for the sale of land must be in writing. However, the plaintiff's case is that it was supposed to buy the suit property together with the 1st defendant from the 4th Defendant and therefore it provided funds. That the suit land was indeed purchased but only in the name of the 2nd Defendant. That it was therefore possible that there existed a written sale agreement between the 1st Defendant and 4th Defendant over the purchase of the suit property **LR.209/10350** and not necessarily between the Plaintiff and the 4th Defendant.

The Court cannot hold and finds that though there is no evidence of existence of a written sale agreement over the suit property between the Plaintiff and 4th Defendant attached to the application, for this Court to conclusively hold whether there is a Sale Agreement or not, it has to ascertain facts from elsewhere and thus this Preliminary Objection is not stemming from the pleadings itself. See the case of **Avtar Singh Bhamra & Another VS. Oriental Commercial Bank, Kisumu High Court Civil Case NO. 53 of 2004**, Where the Court held that;

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained”.

The 3rd Defendant also submitted that the Plaintiff/Applicant is a non-existent entity and therefore incapable of commencing any proceedings. How would the court ascertain whether the applicant is an existing party or not? The Court would do that by ascertaining facts. The fact that the Court would have to ascertain facts means that the said objection does not stem from the pleadings and is not a pure point of law and thus the said objection is not merited. See the case of **Quick Enterprises Ltd vs. Kenya Railways Corporation, Kisumu High Court Civil Case NO. 22 of 1999** where the Court also held that.

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone”.

Having considered the Notice of Preliminary Objection raised by the 3rd Defendant/Respondent, the Court finds it not merited and the same is consequently dismissed.

The Court having now settled the issue of Preliminary Objection, the next issue for determination is the Notice of Motion dated 23rd April, 2015.

The issue for determination in this Notice of Motion is whether the applicant has met the threshold test in the case of **Giella Vs Cassman Brown**.

The Plaintiff/Applicant has sought for injunctive reliefs which are equitable remedies granted at the discretion of the court. See the case of **CMC Motors Group Ltd and Another vs. Evans Kangeche Boro, Civil Appeal NO. 295 of 2007**, where the court held that:

“In granting the injunctory reliefs, the superior court was exercising equitable jurisdiction which is discretionary and the court of Appeal can only interfere with the judicial discretion of the learned Judge, if it is satisfied that the learned Judge did not exercise the discretion Judicially.....”

For the applicant to succeed in this kind of an application, it has to meet the criteria set out for grant of

such orders. The principles for grant of injunctive orders were set out in the case **Giella Vs Cassman Brown & Co.Ltd 1973 EA 358.**

These conditions are:-

- a. ***The applicant must establish that he has a prima facie case with probability of success.***
- b. ***That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c. ***When the court is in doubt, to decide the case on a balance of convenience.***

The applicant therefore had to establish that it has a prima facie case with probability of success.

In the case of **Mrao Ltd Vs First American Bank of Kenya and 2 Others (2003) KLR 125.** the Court described prima facie case as;-

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

It is therefore evident from the above description that prima facie case means more than an arguable case. It means that the evidence must show an infringement of a right and the probability of success of the applicant's case.

The applicant herein alleged that he entered into a mutual agreement with the 1st and 3rd Defendants that they would jointly purchase the suit property **LR No.209/10350** situated in Nairobi. The suit property was and is still registered in the name of the 4th Defendant. It was the plaintiff's allegations that the 1st Defendant informed the Directors of the Plaintiff herein that the purchase price of the suit property was **Kshs. 420,000,000/=** and the Plaintiff was to contribute half of the purchase price. In pursuant of that oral agreement, the Plaintiff deposited **US Dollar 1,700,000** through the 1st and 2nd Defendants towards payment of purchase price to 4th Defendant. It was the Plaintiff's allegation that in pursuit of the said sale agreement, it signed transfer form which were to be lodged at the Land's Office for registration by the 1st, 2nd and 3rd Defendants but they did not do so. It is evident that an Investment Agreement dated **23rd November 2012**, was entered between the Plaintiff and 2nd Defendant which was in connection to the purchase of the suit property.

However, it is now evident from other ongoing litigations in other courts that the said transaction of the purchase of **LR No.209/10350** was only between the 2nd Defendant and the 4th Defendant and the purchase price was allegedly **Kshs.254,000,000/-** and not **420,000,000/=** as alleged by the Plaintiff. The Plaintiff/Applicant alleges that there was direct misrepresentation of the actual purchase price by the 1st, 2nd and 3rd Defendants and the facts that it has already paid **Kshs. US Dollars 1,700,000** to the 1st and 2nd Defendants, then in essence it is the plaintiff/applicant who has indeed paid the purchase price or funded the purchase of the suit property. What is not in doubt is that the agreement or arrangement between the Plaintiff and the 1st, 2nd and 3rd Defendants, was not in writing. The only existing document to support Plaintiff's claim is the **Investment Agreement**. There is also evidence of deposit of **US Dollars 1,700,000** in the 2nd Defendant –Dubai Bank. The existing sale agreement for the purchase of the suit property is between 2nd Defendant and 4th Defendant. The Plaintiff/Applicant, though having alleged that it paid **US\$ 1700,000/-** cannot be held to be a purchaser for value. However, from the Investment Agreement dated **23rd November, 2012**, it is evident that the Plaintiff/Applicant has beneficial interest in the suit property.

The plaintiff having attached evidence of payment of **US\$ 1700,000** in the 2nd Defendant and

there being evidence that **Kshs.254,000,000/=** was used to pay for the suit property and the fact that an Investment Agreement was signed between the Plaintiff and 2nd Defendant , then that shows that the Plaintiff has established a prima facie case with probability of success.

Having found that the applicant has a prima facie case with probability of success has the applicant established that it will suffer irreparable loss which cannot be compensated by an award of damages?.

From the pleadings and annexures attached to the application here, it is evident that the Plaintiff paid **US Dollars 1700,000** to the 2nd Defendant Dubai Bank. It is also evident that **Kshs.254, 000,000/=** was paid towards settlement of the purchase price. It is also evident that eventually what was reflected in the existing sale agreement was that the suit premises were only purchased by the 2nd Defendant. There are two existing suits which shows that the purchaser of the suit property was 2nd Defendant and the purchase price was **Kshs.254,000,000/=** These two suits are:-**HCCCNo.172 of 2012** and **JR Misc No.406 of 2012**, already decided.

It is also evident that **Dubai ,Bank Kenya Ltd** , the 2nd Defendant has filed suits or other litigations seeking to be registered as the sole proprietor of the suit property. If that is done , the Plaintiff/Applicant would be left out of the equation even after having paid **US Dollars 1,700,000**. There is no evidence that the Defendants would be in a position to refund the amount of money already deposited by the Plaintiff /Applicant. Indeed the applicant is likely to suffer irreparable loss which cannot be compensated by an award of damages.

On the balance of convenience, the court finds that indeed the 4th Defendant did enter into a sale agreement with the 2nd Defendant. Out of the said sale agreement, two other litigations did crop up and in those matters the courts have already expressed their decisions in the said suits. The said decisions of the two other Courts have not been overturned in an appeal or reviewed or set aside. The two decisions are therefore still in force. It is also evident that the Plaintiff are not in possession or occupation of the suit property. There is also no evidence that the 1st, 2nd 3rd Defendants are in occupation or possession.

However, there is a pending issue herein on whether the Plaintiff herein is the legal and beneficial owner of the suit property. The Court herein would not issue any order that would seem to overturn, set aside, or review the decisions from the other two counts.

The Court therefore finds that the balance of convenience herein tilts in favour of issuing orders that would maintain the **Status Quo** . Much as the 2nd Defendant pursues the orders that were granted by the other two courts, the court finds that the Plaintiff's apprehension should be addressed. This Court finds that even after the Land Registrar has acted as per the decision in **JR Misc Application No.406 of 2012** and as the 2nd Defendant goes on with the implementation of the decision of the Court in **HCC No. 172 of 2012**, the applicant's claim has to be addressed. However whichever order this Court would issue would only be in respect of 1st, 2nd and 3rd Defendants /Respondents and not 4th Defendant as there is no privity of contract between the Plaintiff and 4th Defendant.

Having now considered the instant Notice of Motion and the submissions therein, the Court finds that the balance of convenience tilts in favour of maintaining the **Status Quo** herein and the **Status Quo** means that even after implementation of the Court orders issued in **HCCCNo. 172 of 2012, and JR Misc No.406 of 2012**, the 1st, 2nd and 3rd Defendants are restrained from **transferring, sub-dividing, charging, mortgaging**, and/or in **any manner whatsoever or howsoever interfere** with the suit premises and title thereof or in any **manner transact** with the suit premises, the subject matter of this suit being **LR No. 209/10350** situate in Nairobi together with all the buildings and development thereon .

The Court also allows the applicants prayer No.5 of the Instant Notice of Motion .Costs shall be in the cause.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **12th day** of February, **2016**

L. GACHERU

JUDGE

In the presence of :-

L .Gacheru : Judge

Ben: Court Clerk

None attendance for the Plaintiff/Applicant

None attendance for 1st Defendant/Respondent

Mr Onindo for the 2nd Defendant/Respondent

M/s Nyamweya holding brief Mr Macharia for the 3rd Defendant/Respondent

M/s Nyamweya for the 4th Defendant/Respondent

L. GACHERU

JUDGE

12/2/2016