



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL NO. 40 OF 2014

ARMSTRONG FRED KASUKU PLAINTIFF

VERSUS

JAMES CHARLES NAKHWANGA OSOGO 1ST DEFENDANT

MARIA ELIZABETH NAKHUBALI OSOGO 2ND DEFENDANT

RIVERA PROPERTIES LIMITED 3RD DEFENDANT

RULING

Before the court for determination are two applications. The plaintiff's Notice of Motion dated 20th January 2014 as subsequently amended on 14th February 2014 in which the plaintiff seeks an order of injunction against the 1st, 2nd and 3rd Defendants restraining them from executing any instruments of transfer or conveyance or issuing any licences, leases or other documents of title in respect of six (6) apartments erected and being upon **L.R. NO. 1/390 Nairobi**. The plaintiff additionally seeks an order that the costs of the application be borne by the 1st, 2nd and 3rd defendants.

The plaintiff basis his application on the grounds set out on the face of the amended Notice of Motion and the affidavit sworn in support of the application by the plaintiff/Applicant on 20th January 2014 and a supplementary affidavit sworn by the plaintiff on 24th February 2014.

The 1st and 2nd Defendants oppose the plaintiffs application for injunction on the grounds of opposition dated 3rd February 2014 and on the 2nd Defendant's **Maria Elizabeth Nakhubali Osogo** replying affidavit dated 8th February 2014 sworn in opposition thereto. Additionally the 1st and 2nd Defendants have filed a Notice of Motion application dated 7th February 2014 seeking an order that the suit as against the plaintiff and the 1st and 2nd Defendants is wholly compromised on the terms set out in the said Notice of Motion. The 1st and 2nd Defendants Notice of Motion is firstly based on the grounds that appear on the face of the application and secondly on the supporting affidavits sworn by **Maria Elizabeth Nakhubali Osogo and Steve Luseno Advocate**.

The 3rd Defendant opposes the plaintiffs application on the grounds of opposition dated 10th February 2014 and filed in court on 10th February 2014 and which are as follows:-

1. That 3rd Defendant is the registered owner of property **L.R.NO.1/390 (L.R.10347)** hereinafter “**the property**”.
2. There is no agreement for sale between the plaintiff and the 3rd Defendant in relation to the property in terms of section 3 of law of contract Act, Cap 23 Laws of Kenya.
3. The plaintiff has no legal or equitable interest in the property.
4. The plaintiff’s claim against the 1st and the 2nd Defendant’s is for a disclosed liquidated amount.
5. It would be unjust and inequitable to grant the orders sought for the reason that the plaintiff has no cause of action against the 3rd Defendant.
6. The plaintiff has not met any conditions for the grant of an injunction.

The brief background and facts of this matter is that the 1st and 2nd Defendant were the registered owners of **L.R. NO.1/390 “the suit property”** since 22/5/1972 which they variously charged to diverse financial institutions over time. The 1st and 2nd Defendants on 4/12/95 charged the said suit property to National Bank of Kenya Ltd to secure a sum of **Kshs.4,500,000/-**. The 1st and 2nd Defendants experienced difficulties in repaying the mortgage debt and the Bank wanted to realize the security through sale by public auction to recover its money. The 1st Defendant in particular approached the plaintiff for help and assistance to have the Bank postpone the public auction sale that scheduled for 28th October 2003 which the plaintiff states he was able to do. The 1st and 2nd Defendant enlisted the plaintiff’s assistance in negotiating with the Bank to have the mortgage loan repayment renegotiated and rescheduled with the result that the Bank agreed to suspend the recovery action and to restructure the loan on the terms that the loan owed by **Veritas Agencies Ltd** who the 1st and 2nd Defendants had guaranteed be fixed at **Kshs.4,521,676.75** at no interest over a period of 60 months provided that a sum of **Kshs.200,000/-** was paid on acceptance of the offer and the balance by monthly installments of **Kshs.75,000/-**. The Bank communicated its decision vide its letter dated 28/4/2004 annexed to the plaintiffs affidavit and marked “**AFK7**”. The plaintiff avers that the 1st and 2nd Defendants were not in a position to honour the terms for the rescheduling of the loan/debt imposed by the Bank and the Bank once again reinstated recovery action and threatened to sell the 1st and 2nd Defendants property by auction and/or private treaty.

The 1st and 2nd Defendants yet again sought the plaintiff’s assistance to help them save the property from being auctioned by the Bank as per the letter by the 1st Defendant dated 19/7/2004 to the plaintiff annexed and marked “**AFK8**”. The plaintiff states that following negotiations with the 1st and 2nd Defendants he agreed to pay the said sum of **Kshs.4,521,676.75** agreed with the Bank on the understanding that the 1st and 2nd Defendants would transfer to the plaintiff a portion of ¼ acre of the suit property upon discharge of the property by the Bank. The plaintiff avers that he paid the initial sum of **Kshs.200,000/-** to the Bank on behalf of the 1st and 2nd Defendants and established a bank standing order for **Kshs.75,000/-** from his standard Chartered Bank account in favour of **Veritas Agencies Ltd** Account of the 1st and 2nd Defendants at the National Bank of Kenya Ltd. An agreement representing the Agreement between the parties to the effect that upon the plaintiff redeeming the Defendants debt owing to National Bank of Kenya Ltd agreed at **Kshs.4,521,776/75** the 1st and 2nd defendants would cause the suit property to be subdivided and a portion of ¼ acre transferred to the plaintiff was entered into between the parties. The Agreement dated 7th November 2009 is annexed to the plaintiffs supporting affidavit and marked “**AFK 9B**”.

The plaintiff further claims the Bank debt was repaid as a result of his efforts and the title discharged but the 1st Defendant instead of giving effect to the Agreement dated 7th November 2009 transferred the suit property to the 3rd Defendant on 6th July 2011 after the 1st Defendant had vide his letter dated 14/12/2010 unilaterally purported to rescind the agreement dated 7th November 2009 and in turn invited the plaintiff to purchase at cost apartments to be erected upon the suit property instead of the ¼ acre portion being transferred to the plaintiff. The plaintiff states the 1st and 2nd Defendants as per an agreement between them and the 3rd Defendant was upon development of the apartments to be allocated a number of the apartments and the plaintiff is apprehensive that once the apartments are completed and certificates of occupation issued the apartments could be sold and the plaintiff would be prejudiced as he would be

without any ability to enforce any judgment he may obtain against the 1st and 2nd Defendants and it is for this reason he seeks an order of injunction restraining the Defendants from disposing at least 6 of the apartments that may be allocated to the 1st and 2nd Defendants being the number of apartments that would be commensurate with the contribution that the plaintiff claims to have made towards securing the suit property from auction by the Bank.

The 2nd Defendant who is the wife of the 1st Defendant in the replying affidavit sworn on 8th February 2014 admitted she and the 1st Defendant had been the registered owners of the suit property since 22nd May 1972. The 2nd Defendant further admits at the time of the institution of this suit they had transferred the suit property to the 3rd Defendant. The 2nd Defendant further admits she and her husband had guaranteed a loan to a company known as **Veritas Agencies Ltd** with the National Bank of Kenya Ltd but consequent to a stroke suffered by her husband they had difficulties meeting their financial obligations and they at some point requested the plaintiff to pay some monies to National Bank of Kenya to enable it to accommodate the said company, **Veritas Agencies Limited** and ourselves. The 2nd Defendant states the plaintiff came up with various proposals on how the Defendants could source funding to develop the suit property and/or a portion thereof but the proposals never materialized. In particular the 2nd Defendant avers that:-

- a. The plaintiff did not avail the funding for the contemplated project,
- b. That the exact amounts paid by the plaintiff to National Bank Limited were in dispute in view of the fact that the bank admitted receiving a sum of **Kshs.835,208/90** and not **Kshs.4,521,776/75** as alleged by the plaintiff.
- c. The plaintiff did not have the financial capacity to fund the project contemplated by the 1st and 2nd Defendants family.

The 2nd Defendant further states after proposals by the plaintiff failed to materialize the 1st and 2nd Defendants family considered and evaluated other proposals with the knowledge of the plaintiff and ultimately a joint Venture Agreement with Kings Developers Limited was entered into and that before the execution of the Joint Ventrue Agreement an agreement had been struck with the plaintiff to the effect that:-

- i. The plaintiff would be allocated one 2 bedroomed flat from the share of the units allocated to the 1st and 2nd Defendants family in the joint venture with Kings Developers Ltd.
- ii. That the plaintiff would be reimbursed the sums he had paid to National Bank Limited which sum was to be agreed upon and verified by the parties respective Advocates.

The 1st and 2nd Defendant claim that indeed this agreement settled the matter as between the plaintiff and the 1st and 2nd Defendants and in a sense compromised the matter as in consequence thereof vacant possession of the suit property was handed over to Kings Developers Limited to execute the joint venture Agreement. Indeed this averred to agreement between the parties is the basis of the 1st and 2nd Defendants application seeking an order to the effect that there has been a compromise of the suit and that there is nothing left to proceed to trial.

Following the averred to agreement between the parties the parties respective Advocates engaged in extensive correspondence aimed at arriving at a settlement on all issues and more specifically having documentation to effectuate the transfer of one two bedroomed unit to the plaintiff and to reach agreement on the amount paid by the plaintiff to the National Bank of Kenya Ltd for the credit of the 1st and 2nd Defendant's account. The parties apparently could not agree on the sum paid by the plaintiff to the Nation Bank as the plaintiff maintained he had paid the full sum of **Kshs.4,521,776/75** but could not produce documentation to support the payment. The 1st and 2nd Defendants admitted the payment of **Kshs.835,208/90** in regard whereof there was documentation supporting the payment.

The 1st and 2nd Defendant Notice of Motion application dated 7th February 2014 in the main seeks the

following substantive orders namely:-

1. That this Honourable court do make an order wholly compromising the suit as against the plaintiff and the 1st and 2nd Defendants in the following terms,

- i. The 1st and 2nd Defendants and/or their authorised agents do execute and deliver to the plaintiff and/or his advocates a pledge Agreement or a transfer in respect of a two bed apartment in respect of their units erected on All that property known as **L.R.NO.1/390, Nyangumi road**
- ii. **Kilimani Nairobi** (hereinafter referred to as “**the suit property**”).

(ii) Judgment be entered in favour of the plaintiff as against the 1st and 2nd Defendants for a sum of Kshs.835,208/90 or such other sum as may be found due and outstanding from a report to be submitted to this Honourable court by an authorised officer of National Bank of Kenya Limited pursuant to a COMMISSION to be issued and directed to such an officer requiring him to investigate and furnish such a report to this court within a limited time.

(2) That the cost of this application and the suit be borne by the plaintiff.

This application is grounded firstly on the grounds that appear on the face of the application and secondly on the grounds and facts contained in the supporting affidavit of **Maria Elizabeth Nakhbali Osogo** and **Steve Luseno Advocate**. Basically the grounds, facts and material tendered in support of the application are largely similar as those contained in the replying affidavit in opposition to the plaintiff's application. The plaintiff filed a replying affidavit to the 1st and 2nd Defendants application and further filed a supplementary affidavit in response to the 2nd Defendant's replying affidavit sworn on 3rd February 2014 and to a large extent the same repeats the contents of his affidavit in support of his application. The plaintiff denies there was any agreement that can be taken as compromising the suit. The plaintiff in the supplementary affidavit paragraph 6 deposes that if he did not pay to National Bank of Kenya the sum of **Kshs.4,521,676/75** the Bank would have auctioned the suit property and the same would not have been available to be transferred to the 3rd Defendant and for the joint Venture Project between the 1st and 2nd Defendants and Kings Developers Limited. The plaintiff contends that the 1st and 2nd Defendant ought to be held to their bargain and should not be allowed to be unjustly enriched at the expense and prejudice of the plaintiff.

Issues for determination

The court directed the parties to file written submissions and the plaintiff filed his submissions dated the 25th February 2014 on the same date while the 1st and 2nd Defendants filed their submissions dated 24th March 2014 on 25th March 2014. Counsel for the parties made oral submissions on 1st April 2014 highlighting their filed submissions. In the filed submissions and the oral submissions the parties recount the facts set out in their various affidavits in support of their respective positions.

I have carefully considered the pleadings, the affidavits and the annexures and the parties submissions and the issues that stand to be determined at this interlocutory stage is whether:-

- a. Whether the plaintiff has satisfied the conditions for grant of interlocutory injunction against the Defendants.
- b. Whether the plaintiffs suit as against the 1st and 2nd Defendant has been compromised as pleaded by the 1st and 2nd Defendants.

The plaintiff on the issue as to whether a prima facie case had been established and/or demonstrated submitted that there was the agreement dated 7th November 2009 whereby the 1st and 2nd Defendants were to subdivide **L.R.NO.1/390 Nairobi** into 2 portions one of one (1) acre and the other a quarter (1/4) acre portion. The ¼ acre portion was to be transferred to the plaintiff in consideration of his payment to the National Bank of **Kshs.4,521,676/75**. The plaintiff submits that the 1st and 2nd Defendants admit this

agreement notably through the letter of 14th December 2010 by the 1st Defendant and contends that this establishes a prima facie case with a probability of success. It is to be noted that while the 1st Defendant's letter of 14th December 2010 though acknowledging the existence of some agreement with the plaintiff it further states that the plaintiff had failed to honour the terms of that agreement and that the Defendants had opted to amicably rescind the aforesaid agreement on the terms expressed in the said letter. In the said letter the 1st Defendant stated he had found some serious developers who had ready cash and who were willing to partner with the Defendants to redevelop the suit property into two, three and four bedroomed apartments. While acknowledging the plaintiff's contribution and assistance the 1st Defendant in the said letter wrote:-

“In consideration, recognition and appreciation of all the assistance that you have provided me over the last twenty years or so, and my honest, long standing and sincere relationship with you, I wish to give you first priority to purchase the developed apartments, at cost, equivalent to your anticipated investment in the quarter acre piece of land that I had earlier offered you, so that we can keep as many units as possible within the family”

This letter from the 1st Defendant opened up a flurry of activity and consultations notably amongst the parties Advocates with a view to having the matter resolved amicably. As is apparent from the consequent correspondences between the parties Advocates notably:

- i. Letter of 16/22/2011 from Amolo & Kibanya Advocates to Majanja Luseno & Company Advocates.
- ii. Letter of 21/11/2011 from Majanja Luseno & Company Advocates to Amolo & Kibanya Advocates.
- iii. Letter of 13/3/2012 from Amolo & Kibanya Advocates to Majanja Luseno & Company Advocates.
- iv. Letter of 2/4/2012 from Amolo & Kibanya Advocates to Majanja Luseno & company Advocates.
- v. Letter of 12/4/2012 from Amolo & Kibanya Advocates to Majanja Luseno & Company Advocates.
- vi. Undated final draft of the pledge Agreement forwarded to **Amolo & Kibanya Advocates** vide **M/S Majanja Luseno & co, Advocates** letter of 27/4/2012.
- vii. Letter of 10/5/2012 from **Amolo & Kibanya Advocates** to **Majanja Luseno & company advocates** making comments on the final draft pledge before the document was finalised.

The parties engaged in protracted negotiations and the question quite clearly was not whether the agreement of 7th November 2009 could be effectuated but on what terms the same could be rescinded and/or terminated. It is clear that the terms for settlement had boiled down to:-

- (a) The 1st and 2nd Defendants delivering one unit of the apartments from their share of apartment units to be erected on **L.R. NO. 1/390 Kilimani**.
- (b) The 1st and 2nd Defendants making a refund to the plaintiff of all sums paid by the plaintiff to the National Bank of Kenya Ltd.

It is apparent that the 1st and 2nd Defendants disputed the sum paid by the plaintiff to the National Bank of Kenya Ltd and the plaintiff likewise was not in a position to demonstrate the payments he made to the National Bank of Kenya save for the sum of **Kshs.835,208/90** which the 1st and 2nd Defendants acknowledge as having been paid. Failure to agree on what was paid by the plaintiff to the Bank appears to have rendered the pledge agreement whose terms were all but agreed ineffectual for want of execution.

The 1st and 2nd Defendant insist it is the plaintiff who effected the payments to the National Bank of Kenya Ltd and he should therefore have the record of how he paid. The plaintiff for his part states it was the 1st and 2nd Defendants account to which he effected payments and they therefore should have access to the Bank statements to verify the payments. Besides the plaintiff argues the Bank discharged the suit

property after they were paid and they are not making any demand for payment which must mean they were paid.

The 1st and 2nd Defendants submit that the plaintiff has not demonstrated and/or established he has a prima facie against them to be entitled to the order of injunction that he seeks. The 1st and 2nd Defendants submit further that the plaintiff has by his plaint paragraph 14 pleaded that he has been occasioned financial loss and he is entitled by way of restitution to the transfer of 5 apartments and 0.4 share of another apartment. This in essence, the 1st and 2nd Defendant argue renders the plaintiff's application not one for an injunction but rather an application for attachment before judgement in the guise of an application for injunction. Under ground 1A of the amended Notice of Motion the plaintiff states thus:-

“.....On the basis of an agreement dated 7th November 2009 the plaintiff claims and seeks judgement for 5 apartments and a 0.4 common share in one other apartment and the interim relief sought merits to be granted so as to preserve six (6) of the 1st and 2nd defendants apartments so as not to render this suit nugatory and there is in place assets that may be attached in execution of the decree that may be entered in the plaintiff's favour”.

That indeed discloses the plaintiff's real motivation in bringing the instant application which would appear to be to secure readily available assets which could be reached for attachment in the event of execution of a decree. The 1st and 2nd Defendant assert that the plaintiff's application is mischievous as the plaintiff has not satisfied any condition for grant of an order for attachment before judgment and cite the case of **Kuria Kanyoko t/a Amigos Bar and Restaurant –vs- Francis Kinuthia Nderu & others (1988) 2 KAR 126** to illustrate the conditions for grant of an order for attachment before judgment where the court stated thus:-

“the power to attach before judgment must not be exercised lightly and only upon clear proof of mischief aimed at by order 38 rule 5, namely that the defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him”.

Quite evidently even if the plaintiffs application was a formal one for attachment before judgment there is little likelihood that the same would succeed since the extent of the restitution the plaintiff would be entitled to would have to be determined and further there is no evidence the 1st and 2nd Defendants intend to dispose any apartments that they would be allocated in the suit premises or that they intend to relocate from the jurisdiction such that they may not be traced.

It is admitted by both parties that the Agreement dated 7th November 2009 failed to materialise and it is on the basis of that realisation that the parties entered into settlement negotiations that spread over the years 2010 to 2012. As the negotiations were ongoing the suit property was transferred to the 3rd Defendant who are in the process of completing the construction of apartments thereon. The terms of the Agreement of the 7th November 2009 on which the plaintiff founds his suit cannot in the premises be specifically enforced. The Agreement did not relate to the six (6) apartments that the plaintiff now claims from the 1st and 2nd defendants. The 1st and 2nd defendants are not the owners of any identified specific apartments. Until the apartments are legally transferred to the 1st and 2nd Defendants they belong to and are owned by the 3rd Defendant who is the registered owner of the suit property.

The plaintiff has no privity of contract with the 3rd Defendant to entitle him to make any claim against the 3rd Defendant. The 3rd Defendant is not a party to the Agreement dated 7th November 2009 on which the plaintiff basis his claim. The law of contract Act Cap 23 Laws of Kenya section 3 requires that a contract for the disposition of an interest in land be in writing and signed by the parties intended to be bound by it and their signatures attested. Section 3(3) of Law of Contract Act provides:-

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 signing has been attested by a witness who is present when the contract was signed by such party.**

It is unclear on what basis the plaintiff has sued the 3rd Defendant but it is clear the plaintiff has no agreement with the 3rd Defendant and thus there can be no basis upon which an injunction can issue against the 3rd Defendant in the absence of an agreement that is in writing as required under section 3(3) of the Law of Contract Act. The transaction relating to the 6 apartments that the plaintiff claims would be a disposition of an interest in land to which the provisions of section 3(3) of the Law of Contract Act would apply. This court in the cases of **Silverbird Kenya Ltd –vs- Junction Limited and 3 others (2013) eKLR**, **Kangatta Properties Co. Ltd –vs- Charity Njeri T/A Winacom Crossline Supplies & 4 others (ELC HCCC.NO.1222 of 2013)** and **Kenya Anticorruption Commission –vs- Kimumu Service Station & 2 others (ELC HCCC NO.1204 of 2006)** considered the application of section 3(3) of the Law of Contract Act and was emphatic that an agreement for a disposition of an interest in land that was not in compliance thereof cannot be the basis of a suit.

In both the **Silverbird Kenya Ltd** case (Supra) and **Kangatta Properties Co. Ltd** case (Supra) the court struck out the plaintiffs suits as the agreements sought to be relied upon did not comply with the provisions of section 3(3) of the Law of Contract Act. In the case of **Kangatta Properties Co. Ltd –vs- Charity Njeri & 4 others** (Supra) the court while commenting on a lease that was not reduced into writing and which the plaintiff sought to enforce stated as follows:-

“The suit before this court is founded on an agreement between the parties that the law requires to be in writing and signed by both parties to the agreement and the signatures witnessed and/or attested. This was not done and section 3(3) of the Law of Contract Act expressly states no suit shall be founded on such a contract. To the extent that the plaintiff sought to base/found its case on such a contract this court cannot entertain it as the law expressly bars it to do so. The court simply has no jurisdiction to deal with the matter where it holds that the contract on which the suit is founded is in breach of the law”.

Whereas the plaintiff has alleged fraud on the part of the 1st and 2nd Defendant in causing the transfer of the suit property to the 3rd Defendant there is no evidence of any such fraud and neither has it been substantiated. To the contrary the plaintiff appears to have been in the picture all along as to what the 1st and 2nd Defendants were doing and he in fact participated in several of their family meetings at which various proposals were floated and considered. The plaintiff indeed engaged with the 1st and 2nd Defendants through the parties respective counsel in lengthy settlement negotiations and the desire by the parties to reach an amicable settlement is demonstrated through the various correspondences and meetings of the parties. My view is that the plaintiff has not as at this stage of the proceedings established fraud on the part of the 1st and 2nd Defendants.

Having regard to all the facts and circumstances and considering the parties pleadings and submissions thereto I am not persuaded and/or satisfied that the plaintiff has established a prima facie case with a probability of success against the Defendants. On the question whether damages would not be an adequate remedy, the plaintiff by its pleading particularly under prayer (b) of the plaint claims to be entitled to restitution by way of ownership of five (5) unidentified apartments and a 40% share of one other apartment to be held in common with the 1st and 2nd Defendants. The 3rd Defendant is developing these apartments for sale. The plaintiff has not stated that these apartments are so special and unique that he could not obtain similar ones in the market.

My view is that the value of the apartments once ready can be quantified and it would be possible for the plaintiff to be paid the equivalent value of the apartments that he might be found to be entitled to at the conclusion of the trial. I therefore hold that damages would be an adequate remedy in the event the plaintiff is successful at the trial. It is not necessary that I consider the other limb of the conditions for the

grant of an interlocutory injunction having held the plaintiff has not established or demonstrated he has prima facie case with a probability of success and that damages would be an adequate remedy. The plaintiff has therefore not satisfied the conditions for the grant of an interlocutory injunction as enunciated in the case of **GIELLA –vs- CASSMAN BROWN CO. LTD (1973) EA 358** to an injunction.

It must have become clear by now that the plaintiff's amended Notice of Motion dated 14th February 2014 seeking injunctive reliefs is for dismissal. I accordingly order the same to be dismissed for lack of merit.

1st and 2nd Defendants Application

In the course of considering the plaintiffs application for injunction I have dealt with the facts and submissions made in support of the 1st and 2nd Defendants application. The issue for determination is whether the court should issue a Commission to an Authorised Officer of the National Bank Ltd to investigate and make a report in regard to payments made by the plaintiff on behalf of the 1st and 2nd Defendants loan account operated by **Veritas Agencies Limited at National Bank of Kenya Ltd** whom the 1st and 2nd Defendants had guaranteed. Under Order 28 Rule 7 the court can issue a Commission to any person to make investigations.

Order 28 Rule 7 provides:-

On the application of any party or of its own motion in any suit the court may issue a commission to any person to make an investigation and report to the court for the purpose of ascertaining:-

- a. **Any matter in dispute in the suit whether or not the matter is substantially the whole matter in dispute between the parties, or**
- b. **The value of any property or the extent of any damage thereto, or the amount of returns, profits, damages or mesne profits.**

The plaintiff has stated that he considers his just entitlement from the 1st and 2nd Defendants to be 5 apartments and 40% of one other share based on what he claims to have been his contribution in redeeming the title of the suit property from the National Bank of Kenya. The 1st and 2nd Defendants urge the court to hold that the matter was compromised on the terms that were set out on the pledge that the parties never executed. The pledge dealt with the disposition of one apartment to the plaintiff by the 1st and 2nd Defendant and the reimbursement of the funds that the plaintiff paid to the National Bank of Kenya Ltd on behalf of the 1st and 2nd Defendant to the plaintiff. The 1st and 2nd Defendants wish to rely on the unexecuted pledge Agreement and the various correspondences to hold the plaintiff to the proposal set out in the pledge agreement. To the extent that the pledge Agreement was not executed I am not prepared to hold and find that the plaintiff was bound by the terms of the unsigned pledge agreement and the issue would best be left for determination at the trial.

As regards the issue of a commission as requested by the 1st and 2nd Defendant to the National Bank of Kenya Ltd my view is that parties have an obligation to present their cases by way of evidence. If the plaintiff alleges he paid the sums that he claims he paid to the National Bank of Kenya Ltd he has a duty to tender evidence of payment and if for any reason there is need to call an officer from the Bank to give evidence in relation to the particular account it should be possible for such a person to be called as witness by either the plaintiff and/or the Defendants. Indeed evidence at the trial by such a Bank officer would be most appropriate as the witness would be available to be cross-examined by the parties and questioned by the court if necessary.

Ordinarily Bank's run statements for their customers and a duly certified statement of account by an authorised Bank officer would be receivable in evidence but then there may be entries and/or transactions in the statement of account which may require explanation and/or clarification and/or could be challenged.

It is therefore my view that issue of a commission as sought by the 1st and 2nd Defendants would be inappropriate at this stage of the proceedings and I decline to grant the request. I therefore disallow the 1st and 2nd Defendants Notice of Motion dated 7th February 2014.

As both the plaintiff and the Defendants have been unsuccessful in their respective applications and noting that the 3rd Defendant was more or less supporting cast I direct that each party will meet their own costs of the applications.

Orders accordingly.

Ruling dated, signed and delivered this....8th.....day of....August.....2014.

J. M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendants