Eden Developers Limited v China Zhongxing Construction Company Limited (Civil Appeal E029 of 2020) [2024] KECA 1476 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1476 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E029 OF 2020

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

OCTOBER 25, 2024

BETWEEN

EDEN DEVELOPERS LIMITED ..... APPELLANT

AND

CHINA ZHONGXING CONSTRUCTION COMPANY LIMITED ..... RESPONDENT

(Being an appeal against the Ruling and Orders of the High Court of Kenya at Mombasa (P. J. O. Otieno, J.) dated 26th October 2020 in HCCC No. 30 of 2019)

JUDGMENT

1. By a Plaint dated 19th April 2019, the respondent, China Zhongxing Construction Co. Ltd, filed suit against the appellant, Eden Developers Limited, in Mombasa HCCC No. 30 of 2019 seeking an order of injunction restraining the appellant from transferring the suit property to wit LR No. MN/I/3595 situate in Shanzu in the Mombasa area pending reference to, hearing and final determination of arbitral proceedings relating to a dispute between the respondent and the appellant; costs of the suit; and any such further orders that the court may deem fit to grant.

2. The respondent's case was that it entered into a contract with the appellant on 8th June 2009 for the construction of Beach apartments at the suit property; that the respondent had duly performed its obligations under the contract on the terms of the agreement, and to the appellant's satisfaction; that, upon successful completion of their obligations under the contract, the respondent, on request, furnished the appellant with a financial statement with tabulations of the final accounts establishing a balance of the contract amounting to Kshs. 85,410,551/-, inclusive of interests and unpaid withholding tax; that the appellant duly acknowledged the amounts owing; that the appellant failed and/or refused and/or neglected to pay the respondent the amounts due despite numerous reminders, requests and demands therefor; that, subsequent to the demand letter, the appellant made false promises to settle the amounts due, but all in vain; that the respondent was apprehensive that the

appellant may dispose of the suit property before settling its fees and leaving them with no recourse on its liquidated demands; that the respondent therefore sought a prohibitory injunction to restrain the appellant from transferring the suit property pending referral of the dispute to arbitration and determination thereof; and that, unless the court intervened, the respondent stood to suffer loss and damage.

3. Along with the Plaint, the respondent filed a Chamber Summons dated 19th April 2019 seeking an order of injunction restraining the appellant from transferring the suit property pending referral of the dispute to arbitration and determination thereof; and that the costs of the application be awarded to the respondent. The Chamber Summons was brought under section 7 of the *Arbitration Act*, sections 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law.

4. The respondent's application was supported by the affidavit of Xu Jiansheng, the respondent's Managing Director, sworn on 19th April 2019. Apart from reiterating the averments in the Plaint, the application was also based on the grounds that Clause 45.1 of the contract binds the parties and requires that disputes arising from the contract be referred to arbitration; that the respondent was apprehensive that the appellant's directors are intent on transferring the suit property and, as such, the respondent sought to secure themselves against an attempt on the part of the appellant to defeat execution of any decree that may be passed in the intended arbitration with no genuine recourse to the respondent on its apprehension on account of the appellant's violations; that, unless the court intervened and granted the orders sought, the respondent stood to suffer loss and damage; and that the court had jurisdiction and unfettered jurisdiction to issue the orders sought to prevent the respondent from suffering injustice as equity will not condone the breach of a right to be without a remedy.

5. The appellant filed a Statement of Defence dated 23rd May 2019 denying the allegations contained in the Plaint. It averred that, even though the respondent completed the construction of the apartments on the suit property, it falsified and inflated the final accounts and moneys due to it; that it had paid the full and final amounts owed to the respondent; that it did not owe the respondent Kshs. 85,410,551/- or any monies in relation to the contract between it and the respondent; that the suit property and the apartments thereon had already been sold to third parties and that, therefore, the orders sought were overtaken by events and were in vain; that the contract between the respondent and the appellant was signed in Nairobi, and that both parties' principal location was Nairobi; that, therefore, the jurisdiction of the court was denied; that the suit was contra-statute to issue the orders sought, the appropriate court being the Environment and Land Court; and that the respondent would, at the appropriate time, raise a preliminary point of law on the jurisdiction of the court. The appellant prayed that the suit be dismissed.

6. In reply to the respondent's Chamber Summons, the appellant also filed a replying affidavit sworn on 23rd May 2019 by Joseph Marie Ogeto, a Director of the appellant, deposing that, since both parties and their witnesses were based in Nairobi where the contract was executed, any orders (if any) against the appellant would have to be enforced in Nairobi; that the Commercial Division of the High Court in Nairobi was the proper forum for the adjudication of the dispute; that the only plausible conclusion was that the respondent had filed the matter in a wrong forum solely for the purpose of forum shopping at a great cost and inconvenience to the appellant; that the court should discharge the orders it had granted ex parte and refer the matter to Nairobi as the proper forum for adjudication thereof; that it was apparent from the attached extract of the title to the suit property's that the units thereon had been purchased and transferred to third parties while other transfers were in the process of being registered; that third parties who had acquired rights over the property and its title had not been joined as parties to the dispute; that, in any event, the contract dated 8th June 2009 between the parties did not provide that the executed project was to act as a guarantor against any of the contractor's claims and/or payments;

that the respondent had not demonstrated a reason or laid any basis for the grant of the orders sought; and that the appellant would raise an in limine objection that the suit was contra statute, and that there was no evidence presented for grant of the orders sought.

7. The record of proceedings and the impugned ruling also allude to a Notice of Preliminary Objection dated 22nd May 2019 said to have been filed by the respondent, but which is not part of the record before us.

8. In its ruling dated 20th October 2020, the court first dealt with the issue of its jurisdiction and held that section 12 of the *Civil Procedure Act* requires that, when the subject matter is immovable property, the suit be filed within the local limits of the jurisdiction in which the property is situated; that, in this case, the respondent had pleaded that the property was in Mombasa; that, therefore, the suit ought to have been filed at Mombasa; that the contestation as to jurisdiction was untenable since Article 165(3) (a) of *the Constitution* vests upon the court unlimited jurisdiction in both civil and criminal matters; and that the court had the jurisdiction to entertain the application for the interim measure of protection sought by the respondent pursuant to section 7 of the *Arbitration Act*.

9. With regard to the issue as to whether the respondent had made out a case for the granting of interim orders of protection pending arbitration, the court held that it was not disputed that the parties entered into a contract dated 8th June 2009, which contained an arbitration agreement in clause 45.1; that the appellant had not denied the debt as claimed, and that it confirmed that it had sold and transferred the units on the suit property to third parties, who acquired rights over the suit property while some units were in the process of being registered; that the appellant further argued that the impugned contract did not provide that the executed project was to act as a Guarantor against any contractor's claim; that the respondent had established that there was a likelihood/threat of wastage of the suit property, which was the subject matter of the intended arbitration; and that, if the interim orders were not issued, the subject matter of the arbitration would dissipate.

10. In view of the forgoing, the trial court allowed the respondent's application and ordered that the dispute be referred to arbitration in accordance with clause 45.1 of the contract; that, pending reference of the dispute to arbitration, the appellant by itself, its officers, employees, servants and/or agents or otherwise howsoever, be restrained from transferring the suit property or any unit of apartment comprised therein that remained alienated as at the date of the ruling; and that the costs of the application do abide the outcome of the arbitration.

11. Dissatisfied with the ruling of the trial court, the appellant lodged the instant appeal on 9 grounds set out on the face of its Memorandum of Appeal filed on 8th December 2020, namely that:

> " 1. Though the learned judge correctly noted that the units comprised in the suit property had been purchased and transferred and others in the process of being transferred, he erred in failing to place this fact in its proper context.
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> 2. The learned judge erred in both fact and in law in failing to recognize the interests of third party purchasers and failing to give due weight to the prejudice these third parties would suffer as a consequence of his order in favour of the Respondents.
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> 3. The learned judge erred in both law and fact in failing to appreciate that the Suit Property had not been constituted under the contract as guarantor of any of the Respondent's claims.

4. The learned judge erred in law in failing to consider the Appellant's Submissions in his ruling having confirmed that he was going to read parties' submissions since the parties had not highlighted their respective submissions thus denying the Appellant the most basic right to a fair hearing.

5. The learned judge erred in failing to recognize that the Respondent had not acquired any right or interest over the Suit Property which could possibly be under threat by the Appellant's dealings thereon.

6. The learned judge wholly misdirected himself on the application of this court's decision in Safaricom Limited v Ocean View Beach Hotel Limited & 2 others (2010) eKLR to the circumstances at hand.

7. The learned judge's finding that the Respondent had established the likelihood or threat of wastage of the Suit Property as the subject matter of the intended arbitration is a serious misapprehension of the facts and the dispute. The Suit Property is not in dispute in any way and cannot possibly dissipate in the context of the intended arbitration.'

8. The learned judge misconceived the decision in Seven Twenty Investments Limited v Sandhoe Investment Kenya Limited (2013) eKLR by wrongly characterising the Suit Property and interests thereon including those of third parties as the subject matter of the impending arbitration which it is not.

9. The learned judge's order to the effect that the whole property Land Reference No. MN/1/3595 Shanzu Mombasa or any unit of apartment comprised therein remains alienated is restrained from being transferred is contradictory to the circumstances of this case."

12. The 1st interested party, Company for Habitat & Housing in Africa (Shelter Afrique), and the 2nd to 17th interested parties (Lawrence Munene Wahome & 15 others) filed two separate Notices of Motion both dated 20th June 2023 seeking leave to be joined in the appeal as interested parties. Their applications were allowed vide orders of this court (Laibuta, JA) dated 4th December 2023.

13. Learned Counsel for the appellant, M/s. Nyamweya Mamboleo, filed written submissions dated 25th October 2021 and a list and bundle of authorities dated 8th June 2023. Counsel cited 7 judicial authorities, namely: Seven Twenty Investments Limited v Sandhoe Investment Kenya Limited [2013] eKLR, highlighting the principle that all that a court would be interested in when considering whether or not to grant an order of interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings is whether or not there was a valid arbitration agreement and if, indeed, the subject matter of the arbitral proceedings was in danger of being wasted or dissipated; and Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd (1993) A.C. 334 for the proposition that, when the court is asked to order by way of interim relief in support of arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators, there is a tension between the need to tentatively assess the merits in order to decide whether the Plaintiff's claim is strong enough to warrant protection and, on the other hand, the duty not to take out of the hands of arbitrators (or other decision-makers) the power of decision making which the parties have entrusted to them alone.

14. In addition, counsel cited the cases of Carzan Flowers (Kenya) Ltd & 2 others v Tarsal Koos Minck B. V & 4 others [2009] eKLR for the proposition that, for a party to succeed in an application under section 7 of the *Arbitration Act*, the applicant must firstly establish that there exists an arbitration clause in

the agreement between the parties that is capable of being invoked; and that it would suffer irreparable damage or loss that, by the time the arbitration is heard, such party may not be able to obtain an appropriate remedy; and Lawrence P. Mukiri v Attorney General & 4 Others [2013] eKLR, submitting that a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

15. On the right to be heard, counsel cited the cases of Kiai Mbaki and Others v Gichuhi Macharia and Another [2005] 2 EA 206, submitting that the right to be heard is a valued right; Rattiram v State of M.P. (2012) 4 SCC 516 for the proposition that a fair trial is required to be conducted "in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism...decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused..."; and Kenneth Stanley Njindo Matiba v The Honourable Attorney General [1998] eKLR for the proposition that the normal procedure is that if counsel made submissions before the court, the record would show it and courts should not make orders without submissions because no man shall be condemned unheard.

16. On their part, learned Counsel for the respondent, M/s. Conrad Law Advocates LLP, filed written submissions and a list and bundle of authorities dated 30th November 2021. Counsel cited 4 cases, including Safaricom Limited v Ocean View Beach Hotel Ltd & 2 others [2010] eKLR which set out the factors that should be considered in determining whether or not to grant interim measures of protection under section 7 of the *Arbitration Act* as: whether there exists an arbitration agreement between the parties; whether the subject matter of the arbitration is under threat; the appropriate measure of protection applicable after assessment of the merits of the application; and the period which the measure should be given before commencement of the arbitration.

17. In addition, counsel cited the cases of Kanduyi Holdings Limited v Balm Kenya Foundation & another [2013] eKLR for the proposition that a mareva injunction or freezing order made under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment- debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him; and Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another [2015] eKLR and Aineah Likuyani Niirah v Aga Khan Health Services [2013] eKLR, highlighting the principle that a contract cannot confer rights or impose obligations on any person other than the parties to the contract and, accordingly, that a contract cannot be enforced either by or against a third party. They urged us to dismiss the appeal.

18. Learned Counsel for the 1st interested party, M/s. Waruhiu K'Owade & Ng'ang'a, filed written submissions dated 9th June 2023 also citing the case of Safaricom Limited v Ocean View Beach Hotel Ltd (supra) for the same proposition.

19. Finally, learned Counsel for the 2nd to 17th interested parties, M/s. Ombachi Moriasi, filed written submissions dated 8th June 2023 and a list and bundle of authorities dated 12th June 2023, citing the case of Tarabana Company Lilmted v Sehmi & 7 others [2021] KECA 76 (KLR), submitting that it is clear from the provisions of section 26(1) (a) and (b) of the *Land Registration Act* that a certificate of title issued by the Registrar to a purchaser of land upon a transfer is prima facie evidence that the person named as a proprietor of the land is the absolute and indefeasible owner, except where it was obtained through fraud or corrupt means.

20. In their written submissions, learned Counsel for the appellant condensed the grounds of appeal into 4 main issues on which we are called upon to pronounce ourselves, namely: (i) whether the suit property is the subject matter of the dispute or, put differently, what was the nature of the dispute between the parties; (ii) whether the suit property constituted a security for such sums as may become due

and payable by the appellant to the respondent under the contract; (iii) whether the learned Judge erred by failing to consider the interests of third parties who were bona fide purchasers for value of the apartments erected on the suit property; and (iv) whether the learned Judge failed to consider the appellant's submissions, thereby denying it the right to fair trial.

21. With regard to the 1st issue as to whether the suit property constituted "a guarantee" or security for payment of any sums that may become due and payable to the respondent, the learned Judge had this to say:

> " 18. .... With regard to whether the subject matter is under threat, I have considered the various arguments advanced by the opposing parties. The plaintiff avers that the defendant has not performed part of its obligations under the said contract and as a result the plaintiff is claiming a sum of Kshs. 85,410,551/ =. On the part of the defendant, the debt has not been denied. In fact, the defendant has confirmed that indeed it has sold and transferred units on the suit property to third parties who have acquired rights over the suit property while some units are in the process of being registered. Further, the Defendant argues that the impugned contract did not provide that the executed project was to act as a Guarantor against any contractor's claim.
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> 19. From the foregoing, it is my view, the plaintiff has established that there is a likelihood/threat of wastage of the suit property which is the subject matter of the intended arbitration."

22. Faulting the learned Judge for his decision in that regard, learned Counsel for the appellant submitted that the subject matter of the dispute is a claim for monies; that the respondent does not claim the Suit Property or any part thereof; that the main issue in the dispute between the parties to this suit in the Arbitral Proceedings is whether the respondent is owed money by the appellant under the contract, and whether specific performance may be ordered; and that the court erred in concluding that the Suit Property was the subject matter of the impending Arbitral Proceedings merely in view of the fact that the respondent constructed it.

23. According to counsel, the court issued the injunction to protect the respondent in the event the Arbitration Tribunal ruled in its favour and it sought to attach the Suit Property to realize the arbitral award, but not to protect the subject matter of the arbitration. Counsel contended that this was akin to attachment before judgment or award, which is not within the contemplation of interim measures of preservation. They argued that a subject matter in a dispute is the cause, the object, the thing that is in dispute, and that, in this case, the subject matter in the Arbitration tribunal is the respondent's right to be paid, but not the suit property as presumed by the learned Judge; that the suit property has already been alienated or appropriated as the appellant has already transferred some units, and was in the process of transferring others; and that any unit purchased by a third party is irretrievably committed to the third party regardless of what amount the third party has paid towards the purchase price thereof.

24. Counsel submitted further that the learned Judge failed to appreciate that the purpose of interim measure of protection is to assist the arbitral tribunal discharge its mandate by preserving the subject matter of the dispute; and that instances where the court may be justified to grant interim measures of protection are where the subject matter constitutes perishable commodities, where it may deteriorate in value or undergo changes, such as a construction site which may be covered up, where the proceeds or affairs of a going-concern require to be safeguarded through the appointment of a receiver manager, or where a notice terminating a contract needed to be stayed.

25. Opposing the appeal, learned Counsel for the respondent submitted that the purpose of an order of protection is to preserve assets or, in some way, maintain the status quo as the parties await the outcome of the arbitral proceedings; and that the property is the subject matter described in the contract in the enforcement of which, under and by virtue of clause 45.1, the dispute arising therefrom was referred to arbitration. Counsel submitted that the respondent claim is for a liquidated sum of Kshs. 85,410,551.00/-; that the respondent was apprehensive that the appellant may dispose of the suit property before settling its fees and leaving them with no genuine recourse on their liquidated demands.

26. According to counsel, the court's attention should be drawn to the fact that the respondents erected the apartments on the premises with their own financial resources, and that the appellant failed to compensate them in terms of the contract. Counsel submitted that the appellant does not deny owing the respondent the amount claimed; that the appellant, by its conduct, indicates that it is not keen to settle the amounts; that the respondents are principally seeking an interim measure of protection by way of a mareva injunction under section 7 of the *Arbitration Act*, and that, in similar circumstances, Order 39 Rule 5 of the Civil Procedure Rules grants the High Court jurisdiction to grant orders of attachment before judgment in ordinary civil proceedings.

27. Counsel submitted further that the appellant confirmed that they had sold "several parts of the suit property to third parties," and that they were in the process of disposing of the few remaining parts of the property to third parties thereby extinguishing their interests in the property without "offering any concrete avenue to settle the respondent's owed amounts"; and that, in the circumstances, the purpose of the Application was to seek orders to prevent the appellant from doing any act that would obstruct or delay execution of the arbitral award/decree that may be issued against them.

28. On their part, learned Counsel for the 1st interested party submitted that, from the arbitral agreement, it was clear that notification of a dispute was a prerequisite, but that such notice was not given or exhibited by the plaintiff/respondent to set out the subject matter of the intended arbitration; that, from the supporting affidavit, the subject matter of the arbitration is the respondent's claim for a liquidated sum of Kshs. 85,410,551/-, which is subject to final determination by an arbitrator as to whether it was due and payable by the appellant to the respondent; that the suit property was not the subject matter of the dispute; and that, at any rate, no colour of right over the suit property was demonstrated by the respondent.

29. Finally, we take note of the fact that learned Counsel for the 2nd to 17th interested parties did not make any submissions on the issue as to what constituted the subject matter of the dispute.

30. We take to mind the provisions of section 7(1) of the *Arbitration Act* (Cap. 49), which the respondent sought to invoke to obtain injunctive relief pending hearing and determination of its claim for a liquidated sum of money. The section reads:

> 7. Interim measures by court
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> (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

31. Addressing itself to the form and purpose of interim measures with regard to the preservation of the subject matter of an arbitration pending hearing and determination of a dispute, this Court had this to say in Safaricom Limited v Ocean View Beach Hotel Limited & 2 others (supra):

> " Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-
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> 1. The existence of an arbitration agreement.
> 2. Whether the subject matter of arbitration is under threat.
> 3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?
> 4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties?" [Emphasis added]

32. The pertinent question in this case is what constituted the subject matter of the dispute between the appellant and the respondent. In his article titled Subject-Matter published in the Columbia Law Review, Vol. 9, No. 5 (May 1909) at 416 – 426, Hugh Evander Willis shed light on the use of the term "subject matter" in the following words:

> " In positive law "subject-matter" is the term used to denote the content — that is, the subjects or matters presented for consideration — of either the whole of the law or by some particular part of it, and these are always legal rights ....
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> Sometimes, unfortunately, the term "subject- matter" is used in another sense, to designate the res or tangible object, such as a chattel, or land, with which the law may have some connection or relation .... When an expression is capable of use in two senses, one of which is always true and the other may be true or false, if both are not necessary, the true ought to be adopted as the sole expression. If one sense is capable of definition and application and the other is not, the first should be followed and the other abandoned. This is the only way to avoid inconsistencies and difficulties, if not positive danger of perpetrating wrongs through misconceptions ....
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> The subject-matter of contracts is private legal rights in personam created by agreement; of quasi-contracts, private legal rights in personam created by implication of law .... A promises to make for B a machine of a certain pattern for two hundred dollars in return for B's promise to pay two hundred dollars for the machine. This is a contract to make a machine. The subject-matter of this contract is the right of B to have the machine made according to the pattern and delivered to him, and the right of A to have the payment of two hundred dollars when the work is done. If instead of promising to make the machine A in writing sells for two hundred dollars a particular machine already made and B promises in writing to pay

two hundred dollars therefor, this is a sale. The subject-matter is the actual transfer of the title, and the right of B to delivery and the right of A to the payment of two hundred dollars ....” [Emphasis ours]

33. In this case, the subject matter of the dispute is the respondent's right of claim for payment of the sums that might be found due in consideration for the contracted works undertaken on the appellant's premises (the suit property) in performance on its part of the contract entered into between the appellant and the respondent on 8th June 2009. It was not a term of the contract that the sale and transfer of the completed apartments to third parties was conditional upon payment of the contract sum. Neither did the respondent have a stake in the suit property or in any part thereof. Simply put, the suit property on which the apartments were constructed was not the subject matter of the dispute. Accordingly, the respondent's submission that the orders sought under section 7 of the *Arbitration Act* were similar to a mareva/freezing injunction contemplated in Order 39 of the *Civil Procedure Act* for the purpose of protecting the assets held by the appellant pending arbitration does not stand in view of the fact that the suit property was not the subject matter of the contract or dispute.

34. In TNT Express Worldwide (Kenya) Limited v Timothy Graeme Steel [2022] KECA 881 (KLR), this Court had this to say about the threshold to be met for grant of freezing orders under Order 39 of the *Civil Procedure Act*:

> 35. In the case of Kuria Kanyoro T/A Amigos Bar & Restaurant vs Francis Kinuthia Nderu & Others [1985] 2 K.L.R. 126, this Court, citing the case of John Kipkemboi Sum vs Lavington Security Guards Limited (supra), cautioned that the power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by orders 39 rule 5 of the Civil Procedure Rules, namely, that the Defendant is 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 ....
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> 37. The provisions and ensuing decisions are clear that what an applicant must prove are that:
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> i. the Defendant with the intent to delay the Plaintiff or
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> ii. to avoid the process of the Court or
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> iii. to obstruct or delay the execution of any decree that may be passed against him or
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> iv. has either disposed off or
>
> v. removed from the local limits of the jurisdiction of the Court his property or
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> vi. is about to abscond or leave the local jurisdiction of the Court.”

35. Taking to mind the nature of the subject matter of the dispute to wit a debt allegedly owed by the appellant to the respondent, the respondent cannot be said to have met the threshold for the grant of the freezing orders in respect of which the learned Judge was at fault in granting. Put simply, the suit property was not the subject matter of the dispute liable to preservation pending determination of the respondent's debt claim. Furthermore, the exact extent of proprietorship of the suit property attributable to the appellant was not ascertained, it having been demonstrated by the extract of the title to the suit property that Leases/Sub-Leases over the apartments erected on the suit property had been issued to third parties and titles registered in their favour before the completion Certificate was issued by the project Architect in favour of the respondent on September 19, 2018.

36. Turning to the 2nd issue as to whether the suit property had been given as security for payment of any sums found due and payable to the respondent, learned counsel for the appellant faults the learned

Judge for failing to appreciate the fact that, even though the respondent had undertaken construction on the Suit Property, it did not acquire any interest or claim therein. Counsel submitted that the contract on which the respondent's claim is founded did not constitute the suit property a guarantee or security; that the parties did not provide for any guarantee or security clause; that clause 16 of the contract provided for a performance bond, but that the clause was subsequently vitiated by the parties; and that this did not in any manner or sense imply that the suit property would act as security in lieu of the performance bond, and that, therefore, the respondent's assertion that they stand to suffer loss if the property is transferred lacks merit.

37. On their part, learned Counsel for the respondent and for the interested parties did not make any submissions on this issue. The same having been neither contested nor considered or determined in the impugned ruling, we need not say more than to conclude that we find nothing on record to suggest that the suit property or any part thereof was offered as security for payment of any sums due to the respondent to justify injunctive relief or preservation as granted by the learned Judge.

38. With regard to the 3rd issue as to whether the learned Judge was at fault in failing to consider the interests of third parties, learned counsel for the appellant faulted the trial court for disregarding the fact that the appellant had transferred, and was in the process of transferring, interests in the Suit Property to bona fide purchasers, and that some of the bona fide purchasers had received sub-leases over their respective apartments; that the orders of injunction issued by the learned judge were unjust and infringed upon the rights of the purchasers; that the property in question has been legally transferred to 3rd parties, and that the interest held by the appellant in the property was extinguished to the extent that the third parties had legally purchased the apartments by the time the respondent filed the suit and application; that the units comprising of the Suit Property had been sold to the 3rd Party purchasers; and that the respondent had not acquired any interest in the property and that, therefore, the interests transferred and those that were in the process of being transferred cannot be called into question.

39. In rebuttal, learned Counsel for the respondent submitted that the third parties are neither privy to the contract between the parties nor the suit and the appeal herein; that the third parties cannot enforce any of its terms nor have any burden from that contract enforced against them; and that the alleged interests of the third parties have not been established or substantiated. According to counsel, the appellant acknowledges having sold and/or transferred parts of the suit property after making improvements without providing any proof, such as certificates of titles and/ or sub -division deeds distinguishable from the suit property. Counsel argued that the appellant ought to have disclosed to the third parties of the existing court case to enable them make an informed decision; and that the third parties were free to file an application for leave to be joined in the suit, but no such application has been filed to date.

40. On their part, learned Counsel for the 1st interested party submitted that, as is evident from the copy of the title to the suit property, the 1st Interested Party obtained 11 Leases/Sub-Leases on apartments on the suit property, and was issued with titles by the Registrar of Titles for 11 apartments; that other parties obtained proprietary rights over portions of the suit property; and that all third parties were condemned unheard in clear breach of rules of natural justice despite the trial court having been made aware that there were other third parties in the picture, and which rendered the application unmeritorious, and militated against the grant of the protective measure aforesaid.

41. In addition, learned Counsel for the 2nd to 17th interested parties submitted that the 2nd to 17th interested parties own their respective apartments erected on the suit property for value having respectively paid the full purchase price to the appellant and subsequently issued with Sub-Leases and others with Title Numbers by the Registrar of Titles; that the impugned decision offended their rights to ownership and enjoyment to the unalienated and alienated apartments respectively, and yet the apartments were not encumbered to the appellant or the respondent, and nor were they parties to the proceedings in

the High Court suit; that the interested parties' right to ownership have been prejudiced by the said judgment, and yet they were not privy and parties to the High Court suit; and that the respondent had a duty to first carry out due diligence before filing the High Court Suit and seeking omnibus Injunctive Orders over title LR. No. MN/1/3595, Shanzu Mombasa which comprised interests of the interested parties.

42. Counsel contended that the sanctity of title to their clients' apartments was protected under the provisions of sections 26 (1) of the *Land Registration Act*; that the 2nd to 17th interested parties were innocent bona fide purchasers/owners for value of their respective apartments and that, therefore, the absolute and indefeasible owners of the said apartments; and that the respondent has never held any superior or overriding interests over the apartments.

43. Having concluded that the suit property was not the subject matter of the suit in the trial court, and having further found that most of the apartments erected on the suit property had either been transferred or were in the process of transfer to third parties, we find that the learned Judge had disregarded those facts and failed to consider the legitimate rights of third parties, who were bona fide purchasers for value of their respective apartments which, in any event, did not constitute security for payment of the alleged debt sought to be recovered by the respondent against the appellant.

44. Turning to the 4th and final issue as to whether the learned Judge failed to accord the appellant a fair trial as guaranteed under Article 50 of *the Constitution* by allegedly failing to consider its submissions, learned counsel for the appellant faulted the learned Judge for indicating that the appellant's submissions were not on record while the same had been filed as confirmed at the mention on 16th March 2020 when the learned Judge set the date for ruling on 26th October 2020. According to counsel, the interests of justice and fairness required that, during the intervening 7 months, the court had sufficient time to direct that the missing submissions be availed.

45. According to counsel, the right to fair trial is non-derogable by dint of Article 25 of *the Constitution*, and that omission to consider the appellant's submissions was an infringement of this right; that failure to consider the appellant's submissions caused and continues to cause great prejudice to the appellant; and that the ripple effect of such omission was also suffered by the third- party purchasers.

46. Learned counsel for the respondent contends that there was nothing on record to show that the appellant filed and served its submissions. According to counsel, the appellant's allegation was an afterthought and a desperate attempt to delay justice in contravention of Article 159(2) of *the Constitution*.

47. Be that as it may, we find nothing on record to suggest that the appellant has adduced evidence, such as a receipt from the Registry or a duly received and stamped copy of the submissions, to controvert the finding of the learned Judge that the appellant's submissions were not on record by the time of preparing the decision that is, by 16th March 2020. Accordingly, we find nothing to fault the learned Judge on this account.

48. Having carefully considered the record, the impugned ruling and orders, the rival submissions of learned counsel, the cited authorities and the law, we find that the appeal succeeds and is hereby allowed with costs to the appellant. Consequently, the ruling and orders of the High Court of Kenya at Mombasa (P. J. O. Otieno, J.) dated October 26, 2020 are hereby set aside. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF OCTOBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR