Muconjo & 49 others (Suing as purchasers and unit owners of apartments at the development known as Digra Phase 1 Apartments) v Digro Holdings and Construction Limited & another (Environment & Land Case E092 of 2024) [2024] KEELC 7336 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7336 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT & LAND CASE E092 OF 2024

BM EBOSO, J

OCTOBER 23, 2024

BETWEEN

JULIUS MUCONJO & 49 OTHERS & 49 OTHERS & 49 OTHERS .... PLAINTIFF

SUING AS PURCHASERS AND UNIT OWNERS OF APARTMENTS AT THE DEVELOPMENT KNOWN AS DIGRA PHASE 1 APARTMENTS

AND

DIGRO HOLDINGS AND CONSTRUCTION LIMITED ..... 1ST DEFENDANT

SAMUEL NJAGU NYAMBURA T/A DIGRO SQUIRED INVESTMENT ..... 2ND DEFENDANT

RULING

1. The 50 plaintiffs initiated this suit through a plaint dated 5/6/2024. They sought the following reliefs against the defendants: (i) an order of specific performance decreeing the defendants to complete "construction of the suit properties," including all common areas; (ii) an order of specific performance decreeing the defendants to undertake the conversion of Ndumberi/ Riabai/7075 and Ndumberi/ Riabai/7757 to comply with the *Sectional Properties Act* by registering the plaintiffs as unit owners of their respective apartments; (iii) a declaration that the additional constructions/developments by the defendants made on the common areas, including the additional units at the roof-top and the letting of the "ground floor basement parking to retail shop" are unlawful and illegal; (iv) a mandatory injunction directing the defendants to remove the impugned additional developments; (v) a declaration that the defendants are in breach of various statutory frameworks; (vi) a permanent injunction restraining the defendants against interfering with, disconnecting or discontinuing utility supplies to the plaintiffs; (vi) a mandatory injunction decreeing the formation of a management company within the meaning of the *Sectional Properties Act* to manage all common areas of the suit property; (vii) an order decreeing

the Land Registrar to revoke the amalgamated title and restore the original titles relating to the suit land; (viii) general damages; and (ix) costs of the suit.

2. Together with the plaint, the plaintiffs brought an interlocutory application dated 5/6/2024, seeking the following interlocutory orders:

   i. Spent

   ii. Spent

   iii. That pending hearing and determination of this suit, this Honourable Court be pleased to issue an order of temporary injunction prohibiting the defendants/respondents, their servants, employees, proxies and/or any person claiming under them from selling, charging, mortgaging, transferring, sub-dividing, alienating, disposing and/or in any way interfering with the current ownership of the suit properties.

   iv. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction prohibiting the defendants, their servants, employees, proxies and/or any person claiming under them from undertaking any additional construction, development, leasing, letting and or in any manner interfering with the original development plans of the suit properties.

   v. Spent

   vi. That pending the hearing and determination of this suit, this Honourable Court be pleased to order that a management company/corporation be incorporated to oversee the management of the common areas, collection of service charge as well as an annual general meeting of the said corporation be convened within fourteen (14) days of the orders of this Court with the purpose of formation of a proper board of management in accordance with Section 26 of the *Sectional Properties Act* with all unit owners being notified of their right to vote.

   vii. That this Honourable Court be pleased to direct the Deputy Registrar of this Court to visit the suit properties and file a status report on the same.

   viii. That the costs of the instant application be borne by the defendants/respondents.

3. The above application, dated 5/6/2024, is the subject of this ruling. The application was premised on the grounds outlined in the motion; in the supporting affidavit; and in the further affidavit sworn by Julius Muconjo Muiru on 5/6/2024 and 16/7/2024 respectively. It was canvassed through written submissions dated 30/7/2024, filed by M/s Farrah Munoko & Company Advocates.

4. The case of the applicants is that the defendants [respondents] are the developers of 100 apartment units erected on land parcel number Ndumberi/ Riabai/7075 and 7757 [the suit properties]. The applicants contend that they bought and fully paid for specific apartment units vide diverse agreements of sale, hence they acquired proprietory rights over their respective units and the common areas of the suit properties. The applicants further contend that according to the agreements for sale, the common areas were to include an open common kitchen; a basement and ground floor parking; a common social hall at the top of the apartments; shared lifts; and emergency generators. The applicants fault the respondents for failing to undertake and complete development and installation of the above amenities.

5. The applicants further fault the respondents for failing to deliver to the applicants copies of mandatory documents which include the by-laws to govern the use of the apartments; management agreement; the leases or titles to the suit properties; certificate of title or lease for each apartment unit; and the

sectional plan. They contend that the respondents' conduct contravenes Section 43 of the *Sectional Properties Act*.

6. The applicants also fault the respondents for undertaking additional developments on the common areas of the suit properties which were not in the approved development plans. The impugned additional developments include the construction of rental units on the roof-top and a supermarket. The applicants contend that they did not contemplate such additional developments at the time of purchasing their respective units and that they were not consulted before the additional developments were undertaken. The applicants further contend that in undertaking the additional developments, the respondents contravened Section 42 (2) of the *Physical and Land Use Planning Act*, No. 13 of 2019, and Section 58 of the *Environmental Management and Co-ordination Act*.

7. The applicants add that the respondents have frustrated the formation of a management company and as a result, they have illegally retained sole authority and management of the common areas of the suit properties to the detriment of the applicants. The applicants fault the respondents for levying additional charges on them, including levies for processing title deeds, management of common areas, with the threat of discontinuing provision of water and electricity if the applicants don't comply. The applicants urge this Court to issue a mandatory injunction to stop the respondents from proceeding with the additional developments on the suit properties not contemplated in the original plans.

8. The respondents oppose the application through a replying affidavit sworn on 28/6/2024 by Samuel Njagu Nyambura, who is the 2nd respondent and a director of the 1st respondent. They filed written submissions dated 26/8/2024 through M/s Wanjiru Ng'ang'a & Company Advocates. The case of the respondents is that the 100 apartment units were to be erected on land parcel number Ndumberi/ Riabai/7075 and Ndumberi/ Riabai/7074. They contend that the developer and the investors held a meeting on 5/5/2024 in which it was agreed that the two parcels of land would be merged to create land parcel number Ndumberi/Riabai/7757 where Digro Phase 1 and Digro Phase 2 were to be erected. They further contend that the project was to be undertaken jointly with the applicants despite them having separate sale agreements with varying terms. The respondents add that some of the applicants have not fully paid the purchase prices of their respective units. They admit that titling formalities, completion of the basement parking and formation of the management company are still pending. However, they state that the pending matters were discussed between the parties in a meeting held on 4/7/2021. The respondents add that the construction of the basement parking stalled owing to the balances accruing from the applicants. They contend that they are in the process of forming a management committee that will in turn come up with the by-laws. They further contend that the agreement by the parties provided for the creation of usual conveniences and services.

9. The respondents state that the registration of the management corporation has been frustrated by the fact that the Land Registry, as currently constituted, lacks the required legal framework under the *Sectional Properties Act* (2020) for the registration of management corporations. They deny imposing unilateral charges on the applicants, adding that all the outgoings charged were mutually agreed too by all the parties. Their case is that parties agreed that the applicants would pay a water connection fee of Kshs 12,000 and that services were discontinued for only persons whose bills were due but remained unpaid. They argue that the applicants have approached the Court with unclean hands and are therefore not deserving of the interlocutory injunctive reliefs sought. They further argue that if the reliefs sought are granted, the respondents and more than 50 other investors who are not privy to this suit will be prejudiced. They add that the applicants will be prejudiced because the completion and further transition of the project will be delayed.

10. The court has considered the application, the response to the application and the parties' rival submissions. The two questions to be answered in this ruling are: (i) Whether the application satisfies

the criteria for grant of an ordinary injunction. (ii) Whether the application satisfies the criteria for grant of a mandatory injunction. I will analyze and dispose the two questions sequentially in the above order.

11. Does the application satisfy the criteria for grant of an ordinary injunction by a trial court? The relevant criteria was outlined by the Court of Appeal of East Africa in Giella v Cassman Brown [1973] EA 358. First, the applicant is required to demonstrate a prima facie case with a probability of success. Second, the applicant is required to demonstrate that if the injunction is not granted, he would stand to suffer injury that may not be adequately indemnifiable through an award of damages. Third, should the court have doubts on either of the above two requirements, the application is to be decided based on the balance of convenience.

12. At the stage of disposing a plea for interlocutory injunction, the court does not make conclusive or definitive findings or pronouncements on the key issues in the suit. Definitive and conclusive findings and pronouncements are reserved for judgment after trial.

13. At this interlocutory stage, there is common ground that there are binding contracts between the parties to this suit. The contracts relate to purchase of apartment units erected on the suit land. There is also common ground that the plaintiffs are in possession of their respective units which they purchased from the defendants through off-plan arrangements. The respondents contend that not all the plaintiffs have completed payment of the agreed purchase price. The respondents have, however, neither specified the defaulting plaintiffs nor disclosed the amounts still owed.

14. Further, the respondents admit that titling, incorporation of the management company/corporation and completion of development and installation of some common amenities are pending. It is clear from the foregoing that, the plaintiffs have, prima facie, demonstrated that they have interest in their respective units and in the suit land, which deserve to be protected. The plaintiffs have alleged and demonstrated through interlocutory evidence, that there are additional developments on the suit land which were not part of the original approved plans and which were not contemplated at the time they purchased their units. They contend that the additional developments are being undertaken on the blocks of apartment without their consent. They have also demonstrated that the defendants have amalgamated their title with other titles without their consent. To the above extent, the court is satisfied that the plaintiffs have demonstrated a prima facie case in terms of the first limb of Giella v Cassman Brown [supra].

15. On the inadequacy of damages as a relief, allegations have been made about unilateral alteration of the original designs and addition of structures that were not in the original approved development plans. The allegations have not been effectively controverted at this interlocutory stage. The court is therefore satisfied that the second limb of Giella v Cassman Brown has been satisfied. Lastly, the balance of convenience favours preservation of the land and maintenance of the original development plans pending disposal of this suit.

16. Have the plaintiffs satisfied the criteria for grant of a mandatory injunction? I do not think so. The law on mandatory injunction is well settled. The relevant principle on mandatory injunction was outlined in the English Case of Locabail International Finance Ltd. V. Agroexport and others [1986] 1 ALL ER 901 at pg. 901 as follows:

> "A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted

to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

17. In the present application, some of the orders that are sought by the applicants are in the nature of final and mandatory injunctive reliefs. The applicants have made various allegations against the respondents. The respondents have denied a number of the allegations. The allegations require proof through a proper trial. The circumstances of the application cannot, in the above premise, be said to be clear to warrant grant of mandatory injunction orders at this interlocutory stage.

18. For the above reasons, the court declines the plea for mandatory injunctive orders but grants the plea for ordinary injunctive orders geared towards preserving the subject matter of the suit. The plaintiff will be expected to prosecute their suit and procure a determination within 12 months. Consequently, the application is disposed in the following terms:

    a. Pending the hearing and determination of this suit, the defendants are hereby restrained against charging title numbers Ndumberi/ Riabai/7075 and Ndumberi/ Riabai/7757.

    b. Pending the hearing and determination of this suit, the defendants are restrained against undertaking on the said lands any new developments that were not in the original approved development plans.

    c. The above orders will be in place for only 12 months, during which period the plaintiffs are expected to prosecute their suit.

    d. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF OCTOBER 2024

B M EBOSO

JUDGE

In the presence of:

Mr Dawood Farah for the Plaintiffs

Ms Ng'ang'a for the Defendants

Court Assistant: Melita