



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 79 OF 2014**

**HASSAN ZUBEIDI .....PLAINTIFF**

**Versus**

**PATRICK MWANGANGI KIBAIYA .....1<sup>ST</sup> DEFENDANT**

**EITE PAKA SERVICES LIMITED .....2<sup>ND</sup> DEFENDANT**

**RULING**

**Temporary injunction**

[1] The Motion before me is dated 4<sup>th</sup> March, 2014 and is seeking a temporary injunction. It is premised on Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 1 and Order 50 of the Civil procedure Rules. It is supported by two affidavits sworn by Mr. Hassan Zubeidi. The Respondent opposed the application and filed a replying affidavit.

[2] This application is hotly contested and that is visible in the kind of submissions and the tempo with which those submissions have been presented before Court. I will, for what they are worth, reproduce those submissions in extenso here below.

**The Applicant's submissions**

[3] The Applicant submitted that granting a temporary injunction is a matter of judicial discretion, which must be exercised in accordance with the defined legal principle in the case of **Giella Vs Cassman Brown (supra)**. He made the following submissions to demonstrate that he has established a prima facie case with a probability of success. The Respondent submitted that what constitutes prima facie case was discussed in the case of **MRAO LIMITED v FIRST AMERICAN BANK OF KENYA LTD; CIVIL APPEAL 39 OF 2002** which was cited with approval in the case of **BULK MEDICALS LTD v PARAMOUNT UNIVERSAL BANK LTD & 2 OTHERS (2006) eKLR**. It consists in a demonstration of infringement of a right and the probability of success of the Applicant's case at trial. And, they relied on the definition on the word "probability" in **The Concise Oxford Dictionary of Current English, 8<sup>th</sup> Ed.** As follows:

***"...The likelihood of something happening...the extent to which an event is likely to occur measured by the ratio of favourable cases to the whole number of cases possible...."***

[4] Applying the test in this case, the Applicant is convinced he has established as prima facie case with a probability of success and should be granted the injunction sought. He gave his reasons for that belief which draw from the circumstances of the case as follows. The understanding between the Applicant and the 1<sup>st</sup> Respondent was that they would in collaboration establish a Joint Venture for the design and development of apartments, a gym, a swimming pool and other conveniences on a portion of Land Known as LR No.209/1052/1, LR NO.134939 (hereinafter **“the property”**). The property was registered in the name of the 2<sup>nd</sup> Defendant and was charged to the Kenya Commercial Bank Limited (hereinafter **“The Bank”**). The Joint Venture Agreement is annexure HZ-3 at page 5-33 of the application. The Applicant and the 1<sup>st</sup> Respondent was to purchase the property from the 2<sup>nd</sup> Respondent (a company wholly owned by the 1<sup>st</sup> Respondent and his wife) at a cost of Kenya Shillings one hundred and eighteen Million (Kshs. 118,000,000.00). See annexure HZ-1. Further, the Applicant was to contribute a sum of Kenya shillings sixty five million (Kshs. 65,000,000.00) and the 1<sup>st</sup> Respondent a sum of Kenya shillings fifty three million (Kshs. 53,000,000.00) towards the purchase of the property. The contributions would, then, be paid to the 2<sup>nd</sup> Respondent’s Mortgage account with the Bank, with the intention of offsetting a loan taken by the 2<sup>nd</sup> Respondent. On the expectation that the 1<sup>st</sup> Respondent would honour his obligations, on diverse dates in 2012, the Applicant through Marina Resort Ltd, paid a sum of Kenya Shillings thirty three Million four hundred thousand (Kshs. 33,400,000.00) into the 2<sup>nd</sup> Defendant’s Mortgage account with the Bank. See annexure HZ 4 on pages 35-36 of the application. But, the 1<sup>st</sup> Respondent has failed, declined, and/or neglected to perform his obligations and instead has purported to un-procedurally and without any legal justification terminate the JVA. See Letter of 28<sup>th</sup> October, 2013 on pages 43-47 of the application.

[5] The Applicant submitted further. Prior to the termination of the Agreement by the Respondent, the Respondent through a letter dated 6<sup>th</sup> September, 2013 at pages 37-38 of the application, purported to issue a 30 days’ Notice intimating intention to terminate the JVA. However, despite these events, the Applicant in a letter dated 30<sup>th</sup> September, 2013, reaffirmed his commitment to the implementation of the JVA but also sought the Respondent to clarify certain issues that were of concern to the Applicant so that parties could then proceed to finalize their obligation. Instead of providing the clarification sought, the Respondents proceeded and terminated the JVA in the letter of 28<sup>th</sup> October, 2013 as pages 43-47 of the application. The in their Defence, the Respondents purport to allege that the Applicant was in breach of the Agreement thus justifying the termination of the JVA. The Respondents allege that the payment of Kshs. 33.4Million was towards the purchase of two apartments whose agreements are attached to the Respondents reply as annexure PMK-1. The introduction of these two agreements is an attempt by the Respondents to divert from the real issues; the agreements referred to are distinct and have nothing to do with the JVA. On perusal of the two agreements the following matters are notable:-

- a. The sale agreements relating to the two apartments are distinct and have nothing to do with the JVA; the said agreements are between Applicant and the 2<sup>nd</sup> Respondent;
- b. That the total cost of the two apartments alluded to is Kshs.24million. the Respondents have failed to offer a credible and/or logical explanation as to why the applicant would be paying Kshs.33.4 million for two apartments worth 24million
- c. As per the two agreements, Clause 2.1 thereof required a 10% down payment equivalent to Kshs.1.2 million for each apartment; this was to be paid on or before the execution of the agreements dated 26<sup>th</sup> June, 2012. The payments of 33.4 million was paid in October and not June, 2012; the applicant has clearly deposed in paragraph 9 (f) of the supplementary affidavit, payments for these two apartments were made separately.
- d. Again the balance of the purchase price on the two apartments which would have been 21.6 million was to be paid on completion i.e. 90 days from the date of execution, completion would have been 26<sup>th</sup> September, 2013 and NOT 26<sup>th</sup> October, 2013 when the sum of 33.4 million was paid.

- e. Nothing has been exhibited by the Respondents to show that completion of the two agreements had been achieved so as to even warrant payment of the balance of the purchase price. The fact of the matter is that the transactions on the two apartments have not been completed to date, and nothing has been exhibited to show the contrary.

[6] The Respondents argued that the 1<sup>st</sup> Respondent's contribution of Kshs.53 million was acknowledged as paid under the JVA. That is not true and as Clause 2.3.1.2 of the JVA is ambiguous in light of the discernible spirit of the JVA and it was a rider sneaked by the 1<sup>st</sup> Respondent in collusion with its advocates on record who drew up the JVA with a clear intention of defeating the rights of the Applicant. They gave the following reasons in support of that submission:

a) As confirmed by the 2<sup>nd</sup> Respondent's letter of 4<sup>th</sup> July, 2012 at page 34 of the application, which was written a few months to the JVA, the amount owed to KCB by the 2<sup>nd</sup> Respondent was estimated at Kshs.155million

b) The intention of the JVA was to enable the 2<sup>nd</sup> Respondent raise funds in order to clear its liability with the Bank;

c) At the point at which the JVA was executed, no party had made any contribution; in fact in the Applicant's letter of 30<sup>th</sup> September, 2013, the Applicant was concerned that his initial contribution of Kshs. 33.4 million would be lost if there was no clear intimation from the Respondent on how they intended to clear the deficit even after full payment of the Applicant's contribution; this was necessary since as at September, 2013 the loan account was in arrears in excess of Kshs. 100 million, which fact has not been refuted by the Respondent

d) In the letter dated 30<sup>th</sup> September, 2013, the Applicant requested the Respondents to avail bank statements of the 2<sup>nd</sup> Respondent if indeed it was their position that they had paid a sum of 53 million. The Respondents declined to avail the statements.

[6] The Applicant concluded that, when all these things are considered, they show that the Respondents are merely trying to turn tables against the Applicant where it is clear that the 1<sup>st</sup> Respondent did not perform his obligation in the JVA. And whereas it is not the duty of courts to rewrite contracts for parties, the Court has the power and jurisdiction to infer, interpret and enforce intentions of the parties. They relied on the case of **ALGHUSSEIN ESTABLISHMENT v ETON COLLEGE (1991) 1 All ER pp 267** which is on point with regard to the conduct of the Respondents, when the Court held as follows:

***“The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach.....”***

The legal position is that a party should never be allowed to take advantage of his wrongs/omissions at the expense of the other party. The 1<sup>st</sup> respondent is seeking to walk away from the JVA with the sole intention of defeating the Applicant's interest notwithstanding the fact that the Applicant's money has been used to significantly reduce the 2<sup>nd</sup> Respondent's indebtedness to the bank.

[7] The Applicant took the view that the Respondent's arguments that the JVA lapsed by effluxion of time as per the provisions of Clause 2.3.6 thereof have no or any legal basis and

contradicts the averments in the 1<sup>st</sup> Respondent's response. In annexure **PMK 7** the Respondents purport to say that the performance period was extended to 30<sup>th</sup> November, 2013. In addition, if it's is the Respondents position that the JVA had lapsed on 31<sup>st</sup> August, 2012, the question that arises is, what was the Respondents terminating through their letter of 28<sup>th</sup> October, 2013. Nowhere in the JVA was time stated to be of the essence. When the Applicant's tendered his payment of Kshs. 33.4 million, it was duly accepted and to date no refund has been made. If the Respondent decided to apply the said amount towards the settlement of the purchase price for the two apartments then that was a unilateral decision which we submit is illegal and cannot be enforced as against the Applicant. Even assuming that contention is true (which is not the case), the Respondents have not shown any attempts made to refund what would be the excess payment of **Kshs. 10million**, they continue to hold the same to date. See the case of **SAGOO v DOURADO (1983) KLR page 366** the court inter alia held as follows:-

*“...in contracts of all types, time will not be considered to be of essence unless*

- a. *The parties expressly stipulate that conditions as to time must be strictly complied.*
- b. *The nature of the subject matter or surrounding circumstances show that time should have been considered of the essence; and/or*
- c. *A party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence....”*

Similarly in the case of **BIR SINGH v PARMAR EA page 212**, the Court held as follows:

*“This appeal concerns an agreement for the sale of land, a condition of which was that a deposit was payable. The agreement did not specify that the time was of the essence in connection with the payment of the deposit, and the judge refused to imply a stipulation making time of the essence. He preferred to apply the general rule as stated in 8 Halsbury's laws, 3<sup>rd</sup> Edn. Pp.164-165, and held that in the absence of an express stipulation or clear implication that time in relation to the payment of the deposit was of the essence of the contract, failure to pay the deposit did not entitle the vendor unilaterally to avoid the contract. The position would of course have been different if the vendor had given notice making time for payment of the deposit of the essence of the contract and specifying a reasonable period for payment, but this he did not do. He preferred to treat the contract as not binding on him but I agree with the judge that in these circumstances the contract continued in force.*

See also the case of **Aida Nunes vs J.M.N Njonjo & C. Kigwe (1962) EA page 89**, where the court stated that:

*“when time has not been made the essence of a contract, it is clear that at least in contracts for the sale of land and the grant of leases, one of the parties cannot avoid the contract on the ground of unreasonable delay by the other until notice has been served making time the essence..... in the circumstances the respondents could have avoided the agreement only if they made time the essence of the contract by fixing a reasonable time within which the sublease must be granted coupled with a notice that, if not then granted the agreement would be avoided and this they failed to do.”*

[8] Clause 2.3.6 of the JVA stood varied through the conduct of the parties and the Respondents are legally estopped from claiming otherwise. The purported notice issued by the Respondent through the letter of 6<sup>th</sup> September, 2012 is of no consequence as the same was not issued in good faith and the Respondent was merely seeking a way of pacifying his intent to engage the Housing Finance Company Ltd; the 1<sup>st</sup> Respondent has not discharged his obligation under the JVA and even when requested to avail evidence to the contrary he neglected and/or declined to do so. If the Respondents were acting in good faith, they would have responded to the concerns raised by the Applicant in the letter of 30<sup>th</sup> September, 2013 and would not have rushed to terminate the JVA

without offering an appropriate response more so after the Applicant had given a clear indication that he was ready and willing to completing his part of the obligations. The real motive behind the Respondents unreasonable conduct was to clear way for their discussions with Housing Finance Ltd (See annexure PMK 9 of the Response) who would finance the implementation of a project similar to that envisaged under the JVA and as such they no longer had any use for the Applicant. The allegation by the Respondents that owing to the Applicant's failure to perform there was an escalation of interest on the loan account and a statutory notice was issued is not backed by any evidence. It is easy to exhibit any statutory notice sent the 2<sup>nd</sup> Respondent; nothing of that kind was ever brought to the attention of the Applicant prior to these proceedings. Further any escalation of interest can only be as a result of the Respondents own failure to perform their part of the obligations. No evidence by way of statement which show the escalation of interest (if at all) and even confirm whether or not the payment of 53 million had been made by the 1<sup>st</sup> defendant as alleged or not. The statements were sought by the Applicant before the purported termination and the Respondents declined to avail the same.

[9] On whether, the plaintiff stand to suffer irreparable injury if an order of injunction is not granted, the Applicant made the following submissions. The Applicant entered into the JVA on legitimate expectation to reap the benefits of his investment; returns in excess of Kshs.500 million. The court should take judicial notice of the fact that land in itself is a unique commodity and there is no land like any other. The Respondents seem to argue that the Applicant's claim is quantifiable and therefore he is not entitled to an injunction; it is our humble submission that the respondents position is hollow and without merit. Even where the court finds that damages are adequate, that in itself does not disentitle the Applicant to the interim relief sought in the nature of a temporary injunction. The court should seek guidance from the reasoning applied by Ringera ( as he then was) in the case of **WATHAKA v INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION (2001) KLR page 381**, where he stated as follows:-

*“As regard damages, I must say that in my understanding of the law, it is not inexorable rule that where damages may be an appropriate remedy an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespassers. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy.*

*By using the word “normally” the court was recognizing that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not enjoined. I think some of the considerations to be borne in mind is the strength or otherwise of the applicant's case for a violation or threatened violation of its legal rights and the conduct of the parties. If the adversary has been shown to be high handed or oppressive in its dealings with the applicant this may move a court of equity to say ‘money is not everything at all times and in all circumstances and don't think you can violate another citizen's right only at the pain of damages.’ In the instant case although I have found myself in doubt as to the existence of a prima facie I have said enough to show that the plaintiff has an arguable case and that the Defendant's conduct may be regarded as high handed and probably unfounded in law. All in all I think this is one case which should be outside the normal rule of no interlocutory injunction if damages will be adequate recompense. It now remains to weigh the balance of convenience.*

Similarly Hon. Justice Warsame in the case of **JOSEPH SIRO MOSIOMA v HFCK & 3 OTHERS, NAIROBI HCCC NO. 265 OF 2007 (UR)** quoted with approval in the case of **OLYMPIC SPORTS HOUSE LIMITED VS SCHOOL EQUIPMENT CENTER LTD (2012) eKLR page 5-6**) held as follows:-

***“On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substitute for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction.”***

[9] The Applicant urged the Court to find in favour of the Applicant on this issue; if the order of preservation is not granted as sought in prayer 3; the applicant stands to suffer immense prejudice and damage that cannot be compensated by mere payments of damages or costs.

[10] The Applicant sought the help of Balance of convenience in his favour should the Court be in doubt, which he doubted because he believed he had established the first and second requirements in *Giella*. He submitted he had clearly demonstrated that he deserves an injunction. The plaintiff seeks for specific performance; the defendants were paid and have been holding a sum of Kshs.33.4 million since October, 2012. Unless the orders sought are not granted, the entire of the plaintiff’s suit will be rendered nugatory and there will be nothing left for the court to deal with. The court has power to do that which ultimately serves substantive justice and fairness to the Applicant. See the case of **JAN BOLDEN NIELSEN v HERMAN PHILLIIPUS STEYA ALSO KNOWN AS HERMANNUS PHILLIPUS STEYN & 2 OTHERS (2012) eKLR** where Mabeya J remarked as follows:-

***‘I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the *Giella Vs Cassman Brown* case. The court may look at the circumstances of the case generally and the overriding objective of the law. In *Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J ( as he then was)* at page 607 delivered himself thus:-***

***‘.....counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago. In *Giella Vs Cassman Brown, in 1973* cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law as always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of *Films Rover International* made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- “ A fundamental principle of...that the court should take whichever course appears to carry the lower risk of injustice if it should turnout to have been “wrong”....”***

***Traditionally, on the basis of the well accepted principles set out by the court of Appeal in *Giella Vs Cassman Brown* the court has had to consider the following questions before granting injunctive relief.***

- i. Is there a prima facie case....***
- ii. Does the applicant stand to suffer irreparable harm...***
- iii. On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.....***

[11] The Applicant wound up his submissions by urging the Court to find that the balance of convenience tilts in favour of the Applicant and grant the orders sought in the interest of justice and fairness. He based his argument on the long known equitable adage that equity shall not suffer a wrong without a remedy, the applicant has not only suffered but continues to suffer in the hands of the Respondents. As costs follow the event; it is the Respondents unreasonable actions that precipitated these proceedings for court’s protection of the Applicant’s rights. The respondents should, therefore, bear the costs of the application.

## Respondents opposed the application

[12] The Respondents strenuously opposed the Applicant's Notice of Motion dated 4<sup>th</sup> March 2012. They filed Replying Affidavit sworn by Mr. Patrick Mwangi Kibaiya on 17<sup>th</sup> March 2014. They argued that the application was canvassed at a preliminary stage before Hon Lady Justice Kamau on 18<sup>th</sup> March 2014 where the applicant sought for temporary injunctive orders pending the hearing and determination of the application. On 19<sup>th</sup> March 2014 the court delivered its ruling and did not grant the any injunctive orders on the basis that the application will not be rendered nugatory in the absence of injunctive orders. The facts of the case have been elaborately pleaded in the Respondents replying affidavit. The Applicant does not object to the fact that there were two agreements; Sale Agreement and a Joint Venture Agreement (JVA). The agreements are contractual and the basis of the contractual relationship between the parties herein. The agreements were executed by the Applicant willingly. It therefore follows that the terms and conditions of the agreements are binding upon the executing parties. It was a salient term of the JVA that the Applicant was required to contribute Kshs. 65,000,000/-. The Applicant, and he has, did not contribute the entire amount but only part of it. This is a fundamental breach of the JVA and thus discharges it. Further the agreement was specific and unequivocal that upon such breach, the JVA would automatically lapse. The Respondents' position is that the JVA lapsed at the Applicant's conduct and breach. The application is simply seeking to justify the breach and mitigate its consequences. It also seeks to have the court vary and rewrite the terms of the JVA.

[13] According to the Respondents, the application is unmeritorious and mischievous. It does not meet the threshold in the case of *Giella Vs Cassman Brown*. See also the case of *JOSEPH WACHIRA WAMURU VS SAVINGS & LOAN (K) LTD [2010] eKLR* Kimaru J. at page 3 that:

***“The principles to be considered by this court in determining whether or not to grant the application sought are that the plaintiff must establish a prima facie case with likelihood of success. The plaintiff must also establish that he would suffer irreparable damage that will not likely be compensated by an award of damages. In the unlikely event that the court shall be in doubt, it shall determine the case on a balance of convenience.” (Emphasis added).***

[14] The Respondent sees the following issues to be for determination;

- i. Whether the Applicant is bound by the terms of the contract?
- ii. Whether the Applicant breached the Joint Venture Agreement?
- iii. Whether the contract lapsed by breach of contract?
- iv. Whether the Applicant is entitled to equitable relief?
- v. Whether the Applicant has satisfied the conditions for grant of the interlocutory orders sought?

[15] They submitted that the Applicant has not established a prima facie case with probability of success. They started on the prospects of issue 1 on whether the applicant is bound by the terms of the contract. They took the view that the Applicant is a man of full age and sophisticated. He has not pleaded or suggested that he was forced to execute the JVA or it was executed under fraud or misrepresentation. The contract was freely and voluntarily signed by the Applicant and the 1<sup>st</sup> Respondent. The Applicant and the 1<sup>st</sup> Respondent clearly understood the JVA and clearly expressed their intention by executing the JVA and creating a legal relationship. The Applicant and the 1<sup>st</sup> Respondent are therefore bound by the terms of that legal relationship and the Applicant cannot seek the court to overrule the clear intent expressed in the JVA. The court cannot deviate from the intention of the parties to a contract; the sacred duty of the court is to enforce and/or legitimize what parties have agreed between themselves. See the case of *GATOBU M'IBUUTU KARATHO v CHRISTOPHER MURIITHI KUBAI [2014] eKLR* where the court cited the decision of the court of appeal in *NATIONAL BANK OF KENYA LTD V PIPEPLASTIC SAMKOLIT (K) LTD AND ANOTHER (2002) EA 503* where it stated:-

***“This, in our view, is a serious misdirection on the part of the Learned Judge. A court***

*of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause.*

**[16] The Respondents submitted on issue 2: whether the applicant breached the joint venture agreement.** They took the view that the answer to this question lay on duties and obligation of the parties under the JVA as well as the genesis of the relationship between the parties. The genesis of the relationship between the Applicant and the Respondent stems from sale agreements between the 2<sup>nd</sup> Respondent and the Plaintiff dated 26<sup>th</sup> June 2012. According to the sale agreements; the Applicant was to purchase two apartments; that is apartment number 3 in Block A and Apartment 5 in Block A. The purchase price of each apartment is Kshs. 12,000,000/- and thus the total amount payable to the 2<sup>nd</sup> Respondent is Kshs. 24,000,000/- for both apartments; and make a Deposit for each apartment of Kshs. 1,200,000/- i.e. Kshs. 2.4 Million for both apartments. The Balance of the Purchase Price being Kshs. 21.6 Million was payable before the completion date. On 10<sup>th</sup> July 2012, the Applicant and the 1<sup>st</sup> Respondent entered into another contractual relationship, that is, a Joint Venture Agreement, herein the JVA, for purposes of constructing additional residential apartments on a portion of the suit property. The JVA recognized *inter alia*;

- i. The registered owner of the suit property is the 2<sup>nd</sup> Respondent, Elite Paka Services and is charged to Kenya Commercial Bank (KCB).
- ii. The Project shall be the development of among other things, apartments which project shall be implemented on a delineated portion of the suit property. (Clause 2.1.1.1)
- iii. The Value of the property, being the delineated portion, is Kshs. 118,000,000/-. (Clause 2.1.1.3)

[17] Further the CONDITIONS PRECEDENT of the Agreement were; (Clause 2.3)

- iv. The Parties were to purchase the property (*the delineated portion*) from the 2<sup>nd</sup> Defendant at a cost of Kshs. 118,000,000/-; (Clause 2.3.1)
- v. That the Applicant **will contribute** Kshs. 65,000,000/- of the purchase price; (Clause 2.3.1.1)
- vi. The 1<sup>st</sup> Respondent's contribution of Kshs. 53,000,000/- **has already been paid to the 2<sup>nd</sup> Defendant.** (Clause 2.3.1.2)
- vii. Upon payment of the Purchase price, the 2<sup>nd</sup> Defendant will grant parties the right to develop apartments on the property (Clause 2.3.4)
- viii. The payment by the Applicant will be paid into the mortgage account with Kenya Commercial Bank (KCB) to facilitate the discharge of the land. (Clause 2.3.4)
- ix. In the event that the above conditions, (*being the conditions precedent*) shall not be satisfied on or before 31<sup>st</sup> August 2012, this agreement shall lapse and neither party shall make any claim against any other. (Clause 2.3.6)
- x. Should either party become aware of anything which will or may be prevent any of the conditions precedent from being fulfilled it shall disclose the same to the other party

[18] According to the Respondents, the only party who was required to make any payment in both the Sale Agreements and the JVA is the Applicant. The 1<sup>st</sup> Respondent's contribution of Kshs. 53,000,000/- has already been paid. The Applicant was required to pay a total of Kshs. 24,000,000/- in total for the Sale Agreement and Kshs. 65,000,000 as his contribution towards the JVA making a total of Kshs. 89,000,000/-. The paid Kshs. **2,400,000/-** as deposit for the two apartments and on 25<sup>th</sup> October 2012 Kshs. **960,000/-** towards the Sale Agreement. On 26<sup>th</sup> October 2012 the Applicant made to different payments; The first payment was of Kshs, 1,400,000/- being "*Payment for purchase of apartments on L.R No. 209/1052/1*", and the second payment was of Kshs. 32,000,000/-, being "*Payment for purchase of apartments on L.R No. 209/1052/1*". These payments totaled Kshs. 36,760,000/-, leaving a deficit of Kshs. 52,240,000/-. As at 31<sup>st</sup> August 2012, the Applicant had not fulfilled his obligations which was a condition

precedent to the JVA and had an outstanding deficit of Kshs. 52,240,000.00

[19] The Respondents also gave an account of events after the Applicant's default. On 5<sup>th</sup> November 2012, the 1<sup>st</sup> Respondent's advocates, with intention to renew the JVA, forwarded to the Applicant's advocates a second Joint Venture Agreement whose purpose was to enable the parties to the JVA to fulfill their obligations. It was also meant to extend the time for compliance by the Applicant and give him ample time to complete the payment of the remainder of his contribution being Kshs. 52,240,000.00. But the Applicant failed to execute the second JVA's and further made no reference to it. Even after the frustration by the Applicant, after the one year lapse of the JVA and the failure of the Applicant to renew the JVA, the 1<sup>st</sup> Respondent still requested the Applicant vide a letter dated 6<sup>th</sup> September 2013 to remedy the situation and the plaintiff in his usual conduct failed to do so. It was on 30<sup>th</sup> September 2013 the Applicant finally responded to the 1<sup>st</sup> Respondent's letter however the tenor of the letter was indicative that the Applicant was not willing to remedy the situation and honor his part of the obligation. The conduct of the Applicant frustrated the JVA and its renewal and consequently the 1<sup>st</sup> Respondent terminated the Joint Venture Agreement by a notice dated 28<sup>th</sup> October 2013 on the basis of material breach of the conditions precedent and ultimate frustration of the Applicant in the execution of his obligation in the JVA.

[20] During these frustrations, the Respondent reminded that the mortgage account, which was to be partially settled through his contributions, continued to incur callous interest and penalty rates occasioning the 2<sup>nd</sup> Respondent losses in the tunes of millions. As a result of the loan account being in arrears, the bank, KCB, issued the 2<sup>nd</sup> Respondent with a statutory notice on 11<sup>th</sup> September 2013 which notice stipulated the Bank's intention to realize its security being the suit property. The 2<sup>nd</sup> Respondent, in an effort to remedy the situation, approached Housing Finance Corporation of Kenya, hereinafter HFCK, to take over the liability of the loan amount of Kshs. 95,000,000/- charged with the suit property from KCB. Obviously, according to the Respondent, the Applicant breached the JVA. See the case of **GATOBU M'IBUUTU KARATHO V CHRISTOPHER MURIITHI KUBAI [2014] ECLR** where it cited the High Court in Kampala case **Nakana Trading Co. Ltd V Coffee Marketing Board 1990 – 1994 EA 448**, which dealt with the issue of breach of contract as follows:-

***“In contract, a breach occurs when one or both parties fail to fulfill the obligations imposed by the terms since the contract between the parties was reduced into writing, the duty of the court is to look at the documents itself and determine whether it applies to existing facts.*”**

[21] The Court is not to be used to excuse the Applicant from performing its contractual duties and obligations or prevent the Respondent from enforcing its contractual rights. The Applicant committed a fundamental breach that entitled the Respondent to terminate the contract and bring it to an end. See the case of **EDWARD MUGAMBI v JASON MATHIU [2007] eCLR** where the court held that

***“Law of Contract in East Africa” by R.W. Hodgkin, Kenya Literature Bureau, and the learned author deals with “FUNDAMENTAL BREACH” in this way:-***

***“If the breach goes to the root of the contract and affects its commercial viability, it is said to discharge the contract.”***

See also **PURPLE ROSE TRADING COMPANY LIMITED V BHANOO SHASHIKANT JAI [2014] ECLR** where the court held that;

***“Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of***

*performance, but dismisses the claim...The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract.....the court of equity would refuse to grant specific performance and would leave the parties to their other rights...When the appellants came to court seeking the relief of specific performance of the agreement, they had not performed their one essential part of the agreement. Namely: payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In these circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice”.*

[21] The Applicant’s argument that the 1<sup>st</sup> Respondent ought to demonstrate the amount he paid towards the JVA is not helping his case in the face of Clause 2.3.1.2 of the JVA that the 1<sup>st</sup> Respondent has contributed towards the JVA. The Applicant should have refused to execute the JVA and would equally not have proceeded to contribute towards the JVA if he was opposed to the said clause. The Applicant is bound by the terms of the JVA and cannot seek for the court to relieve him from a term that he does not agree with after executing the JVA. See **GATOBU M’IBUUTU KARATHO V CHRISTOPHER MURIITHI KUBAI [2014] eKLR** where the court held that

*As was stated by Shah JA in the case of Fina Bank Ltd v Spares and Industries Ltd (2000) 1 EA 52: “It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity function to allow a party to escape from a bad bargain.”*

[22] As the above **CONDITIONS PRECEDENT** of the Agreement was not fulfilled, the JVA lapsed in accordance with Clause 2.3.6. At the time he made payments, JVA had lapsed. The JVA could not be extended but only renewed, which option the Applicant failed to exercise. The Applicant cannot ask this Honourable court to extend a contract which has lapsed. There was no provision for the extension of the JVA upon its lapse. See **OSTERIA ICE CREAM LIMITED v JUNCTION LIMITED (TJL) [2011] eKLR** the court held;

*It is to be noted that there was no provision in the agreement for extension of the duration of the license. It was to be for a period of only one year. If the parties had intended to have it renewable, they would have said so. Since the term agreed upon has expired by effluxion of time, there is nothing to extend and there is no basis for such extension. Any attempt by a court to extend the period would amount to rewriting the contract between the parties. Only the parties themselves can rewrite their contract. The duty of the court is to interpret and enforce contracts entered into by the parties but not to rewrite them. Ordinarily, it is not the function of a court of equity to allow a party to escape from a bad bargain as was observed by the Shah JA., in **FINA BANK LTD v SPARES AND INDUSTRIES [2000] I EA 52.***

And also **GATOBU M’IBUUTU KARATHO V CHRISTOPHER MURIITHI KUBAI [2014] ECLR** where the court stated that;

*No evidence can be adduced to vary the terms of the contract if the language is plain and unambiguous.*

[23] In sum, the Respondents submitted that the Applicant is not entitled to the equitable relief sought. He who comes to equity must do equity. The applicant has come to court with unclean hand for; he has tried to conceal the purpose of the payment made on 26<sup>th</sup> October 2012. The Applicant has failed to disclose that he has not fulfilled his obligations, defaulted in his payments

and that the Respondent made efforts towards renewing the JVA, which efforts he ignored and did not positively respond to. The applicant is not willing to honor his obligations under the JVA and has since not shown any intention to do so. On the conduct of the Applicant see **PURPLE ROSE TRADING COMPANY LIMITED V BHANOO SHASHIKANT JAI [2014] EKLR** where the court held that

***“However, the appellants’ conduct has been such as to render it inequitable for specific performance to be granted...There was no evidence that prior to the filing of the suit the applicants tendered the balance of the purchase price to the respondent. This only confirms that they were never ready, able and willing to carry out their part of the contract. Secondly, the appellants simply could not raise the balance of the purchase price on or before the specified time and were in fact in breach of the agreement. Thirdly, the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. The contract not having been completed within the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property, more than four years after the event when its current value has materially appreciated”.***

See also **APOLLO ONYANGO NJAGO & ANOTHER V SAVINGS & LOAN KENYA LIMITED[2012]eKLR** where it was held;

***I may also add that an injunction is both discretionary and equitable remedy. It therefore behooves a person seeking it to conduct himself in a manner that the court will not disapprove both before and after the filing of the application. He must be open and candid to court. He should not hide anything, must play above board and should not be found wanting in material non-disclosure.***

[24] When executing the JVA, the Applicant was aware that contributions by the parties to JVA would not have satisfied the debt the 2<sup>nd</sup> Respondent had with KCB, for, as at 26<sup>th</sup> July 2012 the debt was Kshs. 155,977,831. He cannot, therefore, rely on that fact to renege on his obligations. The Applicant has not shown the damage he will suffer. The suit property consists of 6 blocks of apartments (*Block, A, B, C, D, E, F*) owned and occupied by different owners. The portion of property subject of the proceedings is not divisible from the other properties as all are held in the one title. Therefore, the prayer sought in the application is too general and has far reaching consequences with possibility of rendering great prejudice to the tenants, owners of the apartments on the suit property. The 2<sup>nd</sup> Respondent intends to build high-rise blocks of apartments worth One Billion one Hundred and Seven thousand shillings and has already demolished Block D, E and F in implementation of the project. The construction of the said one billion developments has started. The Applicant cannot therefore claim that he would suffer irreparable loss at the expense of financiers and the Respondents particularly noting that he intentionally failed to fulfill his obligations; His loss is quantifiable and further he has not given any undertaking to compensate the Banks or the Respondent. See **CHARLES MUTHUNGU WAIRAGU v GEOFFREY WAMBUGU KAGUNDU & Another [2012] eKLR** where the court held that;

***In my view I do not think the anticipated damage can be regarded as irreparable. The same is quantifiable in monetary terms. In the case of Nicholas Mahihu =Vs= Ndima Tea Factory Ltd. & another Civil Application No. 101 of 2009 at page 3, (unreported) the Court of Appeal held inter alia:***

***“On the second consideration on whether the intended appeal is likely to be rendered nugatory, we find that even without speculating as when the appeal might be fully determined, or the hearing in the superior court finalized, we find that the intended appeal would not be rendered nugatory as the applicant can still be compensated in damages. Thus the loss if any, could still be quantified ...our finding on this is that the applicant has not satisfied the second principle,***

***as to trigger the exercise of our jurisdiction.”***

***It is obvious that the Plaintiff’s suit cannot be rendered useless. The loss the Plaintiff may suffer as a result of the denial of the order for injunction can be calculated in monetary terms. He has therefore failed to establish the second principle.***

[25] The Respondents placed the facts of the case on the scale of balance of convenience and concluded it tilts towards refusal of the relief sought. Over and above all the reasons given above, the suit property as explained earlier has 6 blocks and the 1<sup>st</sup> Respondent is in the process of selling apartments in Block A, B & C. Therefore, the orders sought by the Applicant seek to restrain such transactions which include innocent third parties. HFCK has given an undertaking to take-over the liability from KCB and the 2<sup>nd</sup> Respondent is expected to make payment towards the loan and any injunction against the construction of additional apartments, which is HFCK’s security, will cause callous loss to the Respondents and the Bank. See **PETER KINUTHIA WAITHAKA v TOM OCHIENG T/a M’OKETCHY AUCTIONEERS & 3 others [2005] eKLR** the court held that

***Given, as I have already noted, that the .... Defendants are....conducting major construction developments, it follows that the balance of convenience clearly lies in their favour; and it is the duty of this Court to ensure that they are not interrupted in their legitimate project of home development.***

The application should be dismissed with costs.

#### **DETERMINATION**

[26] I do not wish to re-invent the wheel. The primary legal dimensions for the grant of interlocutory injunctions were set ***Giella v Cassman Brown*** but they have subsequently been developed by case law; a fact that has been recognized by many courts such as in the case of **JAN BOLDEN NIELSEN v HERMAN PHILLIPUS STEYA ALSO KNOWN AS HERMANNUS PHILLIPUS STEYN & 2 OTHERS (2012) eKLR** where Mabeya J remarked as follows:-

***‘I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the *Giella Vs Cassman Brown* case. The court may look at the circumstances of the case generally and the overriding objective of the law. In *Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J ( as he then was) at page 607 delivered himself thus:-****

***‘.....counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago. In *Giella Vs Cassman Brown, in 1973* cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law as always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of *Films Rover International* made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- “ A fundamental principle of...that the court should take whichever course appears to carry the lower risk of injustice if it should turnout to have been “wrong”....”***

***Traditionally, on the basis of the well accepted principles set out by the court of Appeal in *Giella Vs Cassman Brown* the court has had to consider the following questions before granting injunctive relief.***

- iv. ***Is there a prima facie case....***
- v. ***Does the applicant stand to suffer irreparable harm...***
- vi. ***On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the***

***nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.....***

[27] I will apply the said test to the circumstances of this case. The basis of the application for injunction is the alleged breach by the Respondents of a Joint Venture Agreement entered into between the Applicant and the 1<sup>st</sup> Respondent on 10<sup>th</sup> July, 2012. According to the Applicant, the understanding between the Applicant and the 1<sup>st</sup> Respondent was that they would in collaboration establish a Joint Venture for the design and development of apartments, a gym, a swimming pool and other conveniences on a portion of Land Known as LR No.209/1052/1, L.R. NO.134939. The property was registered in the name of the 2<sup>nd</sup> Defendant and was charged to the Kenya Commercial Bank Limited (hereinafter “The Bank”). The Applicant and the 1<sup>st</sup> Respondent was to purchase the property from the 2<sup>nd</sup> Respondent at a cost of Kenya Shillings one hundred and eighteen Million (Kshs. 118,000,000.00). The Applicant was to contribute a sum of Kenya shillings sixty five million (Kshs. 65,000,000.00) and the 1<sup>st</sup> Respondent a sum of Kenya shillings fifty three million (Kshs. 53,000,000.00) towards the purchase of the property. The contributions would, then, be paid to the 2<sup>nd</sup> Respondent’s Mortgage account with the Bank, with the intention of offsetting a loan taken by the 2<sup>nd</sup> Respondent. Curiously, the Applicant seems to disown clause 2.3.1.2 which provided that **“Mwangi’s contribution of Kenya Shillings Fifty Three Million (Kshs. 53,000,000) has been paid to Elite Paka Services Limited”**. The quarrel the Applicant has on that clause is that it had been sneaked in the JVA by the Respondent and his legal counsel. Those allegations border on fraud and can only be determined in a trial where evidence is adduced by all parties. However, the clause was in the JVA when the parties signed the agreement and it is expected that a party is aware of the terms of the agreement; essentially will, after signing be bound by those terms. That fact is important in this application because it will affect the decision of the Court on whether the Applicant has established prima facie case with a probability of success. As long as the clause has not been adjudicated to be inconsistent with the intention of the parties, I may not, at this interlocutory stage, disregard it and its purport.

[28] Even assuming the clause was not there, and the 1<sup>st</sup> Respondent was in breach, it would simply be a case of *in pari delicto* whereat the court will not ordinarily involve itself in resolving one side's claim over the other; and will be guided by the practice of law to leave them where it finds them, in accordance with the maxim, *in pari delicto potior est conditio defendentis et possidentis*. Or, simply take the view that whoever possesses whatever is in dispute may continue to do so in the absence of a superior claim. Judicial decisions on this subject are legion and I do not wish to multiply them except I am content to adopt a work of this court in **NBI HCCC NO 516 2013 C-HEAR KENYA LIMITED v LIQUID TELECOMMUNICATION KENYA LIMITED [2014] eKLR**. Arguments that Clause 2.3.6 of the JVA stood varied through the conduct of the parties and the Respondents are legally estopped from claiming otherwise. Or that the purported notice issued by the Respondent through the letter of 6<sup>th</sup> September, 2012 is of no consequence as the same was not issued in good faith and the Respondent was merely seeking a way of pacifying his intent to engage the Housing Finance Company Ltd; do not change the position I have taken. That kind of argument, in the circumstances of this case, will not help the Applicant’s case because in any event, the breach of the Respondent will not justify a breach by the Applicant unless the obligations of the Respondent are *sine qua non* the performance of the Applicant’s obligations or they are inextricably bound to those of the Applicant. The Applicant had specific obligations under the JVA and most important, to pay Kshs. 65,000,000 as his contribution by the 31<sup>st</sup> August, 2012. I do not accede that time was not of the essence under the JVA as submitted by the Applicant. Clause 2.3.6 was worded in strict terms that should the conditions in the JVA not be achieved by 31<sup>st</sup> August, 2012, the entire agreement shall lapse. Undoubtedly, the Respondent did not pay up the entire sum as agreed in the contract. What he did was to engage the Respondent in requests for statements. The action may be expected from a prudent investor but it does not justify default on one’s contractual obligations.

[29] One startling thing; the registered owner of the suit property is the 2<sup>nd</sup> Defendant which is a limited liability company-a legal person. One, then, wonders how the JVA was entered into in the name of one of the directors and not the company's name yet the agreement was alienating the company's property. And, no resolution was passed in that respect. However, that issue was not canvassed and I will not base my decision on it. Nonetheless, whichever way I look at this case, the plaintiff may have a grievance against the 1<sup>st</sup> Respondent, but in the circumstances of this case, he has not established a prima facie case for purposes of an injunction. The counter-accusations made by the parties herein against one another on alleged breach of the contract should be tested in the trial if the Court is to find infringement of contractual rights of any party.

[30] On the threshold of irreparable damage, I should state that the Applicant's claim is quantifiable and compensable by an award of damages. I am saying this fully aware that an injunction will not be refused solely on the basis that damages are an adequate remedy to the Applicant's claim. This was explicated by Ringera (as he then was) in the case of **WAITHAKA v INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION (2001) KLR page 381**, where he stated as follows:-

*“As regard damages, I must say that in my understanding of the law, it is not inexorable rule that where damages may be an appropriate remedy an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespassers. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy.*

*By using the word “normally” the court was recognizing that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not enjoined. I think some of the considerations to be borne in mind is the strength or otherwise of the applicant's case for a violation or threatened violation of its legal rights and the conduct of the parties. If the adversary has been shown to be high handed or oppressive in its dealings with the applicant this may move a court of equity to say ‘money is not everything at all times and in all circumstances and don't think you can violate another citizen's right only at the pain of damages.’ In the instant case although I have found myself in doubt as to the existence of a prima facie I have said enough to show that the plaintiff has an arguable case and that the Defendant's conduct may be regarded as high handed and probably unfounded in law. All in all I think this is one case which should be outside the normal rule of no interlocutory injunction if damages will be adequate recompense. It now remains to weigh the balance of convenience.*

See also Warsame J (as he then was) in the case of **JOSEPH SIRO MOSIOMA v HFCK & 3 OTHERS, NAIROBI HCCC NO. 265 OF 2007 (UR)** quoted with approval in the case of **OLYMPIC SPORTS HOUSE LIMITED VS SCHOOL EQUIPMENT CENTER LTD (2012) eKLR page 5-6**) held as follows:-

*“On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substitute for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction.”*

[30] This case is not one of a kind with clear infringement of contractual rights as to warrant an injunction despite the fact that an award of damages would be adequate remedy. Each party has claimed the other is the one in breach of the agreement herein and each has presented powerful arguments in support of their respective stand-points. As such, on the balance of convenience in

light of the findings foregoing, preponderant weight tilts in favour of refusal of injunction. The suit property is owned by the 2<sup>nd</sup> Respondent and consists in several units owned and occupied by different persons. And it will be unfair to stop transactions which involve third parties who are not parties in the suit. The upshot is that the application dated 4<sup>th</sup> March, 2014 is dismissed. Costs shall abide the cause. The case should, however, be set down for hearing with expedition.

**Dated, signed and delivered in court at Nairobi this 8<sup>th</sup> October, 2014**

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**F. GIKONYO**

**JUDGE**