REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 43 OF 2018

ALTANA CORPORATION LTD......................................APPLICANT

-VERSUS-

CLARENCE MATHENY LEADERSHIP

TRAINING INSTITUTE..DEFENDANT

NATIONAL LAND COMMISSION................................GARNISHEE

RULING

Altana Corporation Ltd in a motion filed in court on 2/11/2018 expressed pursuant to Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 23 Rules 1, 2, 3, 4, 8 to 10 and order 51 Rules of the Civil Procedure Rules of the Civil Procedure Rules claims against Clarance Matheny Leadership Training Institute and the National Land Commission the following declarations:

> **(a) That this honourable court do issue an injunction order restraining the Garnishee whether by itself, its directors, employees, agencies or assigns from making any payments to the defendant/respondent herein pending the hearing and determination of this application**
>
> **(b) That the impending compensation to the Respondent from the Garnishee in respect to property known as LR No. Ngong/Ngong/15559 be attached forthwith to cater for the amount owed by the Respondent to the applicant herein and the Garnishee be asked to pay the outstanding sum of Ksh. 139,895,571. The particulars of which are set out in the plaint, to the applicant herein through the Plaintiffs Advocate on record. The application is supported by an affidavit sworn to by Zeheer Jhanda a director of the applicant/plaintiff sworn on 2/11/2018. There is a further supplementary filed a court on 22/11/2018. In equal measure the application is opined by a replying affidavit sworn to by Mr. Joel Chola on 23/11/2018.**

The facts Outline

The facts leading up to this dispute are largely provided for and can be deduced from the pleadings, documentally evidence as attached to the respective affidavits. Clarance Matheny Leadership Institute is the registered proprietor of LR No. Ngong/Ngong/15559. The plaintiff Atlanta Corporation Ltd is a Limited Liability Company incorporated in Kenya and one of its Articles and Memorandum of Association is to offer consultancy services. The National Land Commission one of the independent commission is a creature of the constitution as provided for under Article 67. One of its key aims and objective is to manage public law on behalf of the National and County Governments.

The matter before court has its origins in an alleged consultancy agreement between the *"Institute and Altana Corporation Ltd"* entered into on 22/5/2018. By deed of assignment the Institute as the registered proprietor of title LR No. Ngong/Ngong/15559 hand its propriety earmarked for compulsory acquisition Under Article 40 of the Constitution for principles of the Government infrastructure development of what has been commonly referred to as the Standard Gauge Railway (SGR). The agreement itself rated what Altana Corporation Ltd was to offer consultancy services and expertise to the Institute in the area of producing advise and seeking adequate compensation in the events leading to compulsory acquisition of the property under the terms of agreement subject to strict conference with all the terms cited conditions Altana Corporation Ltd was entitled to consultancy fee amounting to 15.3% of the total award to the Institute in the manner set out in the manner set out in clause 36(1) (b) and (c) of the agreement.

The affidavit of Zaheera Jhanda stipulates that pursuant to the agreement Altana Corporation Ltd performed all its obligations diligently resulting in the 'Institute Property' being compulsorily acquired and an amount of Ksh. 139,895,511 has been set aside to compensate the Institute. That the Institute award is due to be paid by the National Land Commission without them having paid the agreed sum equivalent to 15.3% of the award that the consultancy services rewarded are now due and payable under clause 2(b) and 3 of the agreement. That the National Land Commission had confirmed that the 'Institute' award by virtue of the compulsory acquisition is made to be released in order for the Institute to relinquish any rights, title, interest and liens in respect to the property. That Altana Corporation Ltd is expressly relying and retaining the enforcement clauses in the agreement with the 'Institute' to the fullest and none of it should be varied or waived except by

writing and consent of both parties. That in the event the award is released the said agreement would splinter and Altana Corporation Ltd has no other known assets to enforce the debt in the event judgement is decided in their favour.

Further as a consequence of buttressing their case against the 'Institute', Altana Corporation Ltd annexed letter of authority from the company and the resolution to file suit for Zahera Director of the company to swear an affidavit in support of the application. The documentary evidence being relied upon by the applicant comprised of the consultancy agreement marked as ZJ1, copy of the final award to the 'Institute' from National Land Commission marked as ZJ3. Correspondence between Altana Corporation Ltd and the Institute marked as ZJ4 and ZJ5.

The Institute on the other hand, points out that the contractual agreements referred to by Zahera Jhenda on behalf of the Altana Corporation is not valid as it runs contrary with the actual transactions carried out in pursuit of the compensation from National Land Commission. That on account of the compulsory acquisition of the property referenced as LR Ngong/Ngong/15559 the real players were the Kenya Railways, representatives from the Ministry of Lands, the National Land Commission, Axis Real Estate Valuers, Legal Advisers (Owaga) & Associates and Adroit Architects. The 'Institute' in support of the averments in the affidavit annexed documents marked as **JC1, JC2, JC3, JC4, JC5, JC6, JC7, JC8, JC9** and **JC10.** Accordingly, to the Institute placing reliance on these annexures there could be no debt due and owing in respect of Altana Corporation Ltd capable of being enforced by this court.

The Submissions

Ms Akello submitted on behalf of Altana Corporation, the applicants in this notice of motion. It was submitted that from the facts and historical background of the claim the interpretation of the agreement with the 'Institute', being the respondents as well as the award for compensation having been made by National Land Commission the payment of 15.3% as provided for in Clause 2 & 3 of the agreement became due and owing. Ms. Akello further submitted that the default and the refusal by the Institute to admit liability, existence of the agreement and the various undertakings proffered on Altana Corporations Ltd on its behalf is a breach of the contract which gives rise to a serious arguable case which cannot be determined at the interlocutory stage.

Further counsel contended that in consideration of the matter the Institute has benefitted from the services rendered by Altana Corporation Ltd and cannot repudiate or revoke the agreement without honouring its part of the bargain.

Counsel for the applicants referred this court to the well-known principles applicable for the grant of interlocutory injunctions pending the hearing and determination of the suit as espoused in the cases of **Giella v Cassman Brown & Co. Ltd 1978 EA, Parkasl Singh v State of Haryana and Others 2002, Mrao v First American Bank of Kenya Ltd & 2 Others 2003 KLR 125.**

On behalf of the respondent Mr. Echesa submitted and invited the court to have a glance of order 23 of the Civil Procedure Rules and Section 2 of the Civil Procedure Act; where he set out the test to be satisfied before any such orders like stay or injunction can be entertained by the court in so far as Garnishee proceedings are concerned. First counsel contends that the applicant is not a decree holder within the definition of section 2 of the Act.

Secondly, counsel contended that the test endorsed under order 23 of the Civil Procedure Rules on Garnishee being a third person called upon to settle the debt has also not been shown to apply to this case.

According to counsel it may be evident that the applicant has a good case to be tried at the trial but the focus of this court should be whether there is a decree to be served upon the Garnishee to settle on behalf of the judgement debtor.

Counsel took issue on point that there is no money judgement or order for sums to be paid by virtue of any order of the court to purpose this court's ability to exercise discretion in favour of the applicant. Counsel further argued and submitted that there is no merit in any of the grounds supporting the notice of motion which can bring it within the realm of equitable principles of injunction. Further, counsel contends that the agreement being referred to could not affect the 1st respondent endeavour to be paid on a priority for its land which has been compulsorily acquired by the state.

Analysis and the Decision

There are two key issues to be determined by this court.

The first one, is whether the applicant has adduced evidence which shows prima facie case that will persuade this court to grant a relief of interlocutory injunction.

Secondly, is whether the applicant has put forward strong grounds which in the circumstances of the case would warrant a stay order against the National Land commission from paying out the award to the 1st respondent.

Thirdly, whether in absence of a decree or judgement to be enforced against the Garnishee this court's discretion is disbarred from being exercised in order to grant this motion.

It is necessary in this case to start with examining in a little bit more detail the principles governing grant of the interlocutory injunctions. I accept the principles cited on behalf of the applicant in the cases of **Giella v Cassman Brown Mrao v First American Bank of Kenya and Nelson v Hedda Steyn & Another (2012) eKLR**. The gist of the dictum in these decisions is that an application for injunction invokes the equitable jurisdiction of the court for a case which satisfies the following tests:

(a) Has the applicant established a prima facie case with high chances of success? Under this test though the applicant might have an arguable claim if it is not particularly a strong one, then it weighs against grant of an interlocutory injunction. A prima facie case in this context does not necessarily mean a case with high probability of success but one which from the evidence the applicant is able to show sufficient likelihood of success to justify grant of an injunction pending trial. How strong the probability needs to be is to be assessed from the nature of the claim and the legal rights stated to be infringed by the applicant.

(b) One of the critical test here is whether the applicant will suffer irreparable harm not capable of being compensated by an award of damages if the injunction is not granted.

(c) Notwithstanding the above two tests the third test is whether there is any feature in the case which allows the court to exercise discretion on a balance of convenience, what one can generally refer as the balance of justice.

Flowing from the principles in the cases referred to by counsel for the applicant she urged this court to find that the applicant has established a serious question to be tried at the hearing of the main suit to warrant temporary injunctive orders.

So it must be made clear that where the applicant has established a serious issue to be tried at the hearing of the already filed suit in absence of any special circumstances the discretion conferred upon the court should be exercised in favour of the applicant.

If the prima facie case does not favour the applicant its incumbent upon the court to determine the rationale on irreparable injury or harm which cannot be remedied by way of adequacy of damages between the parties.

There is however the carrier of the above two commonly known as the balance of convenience. In this test the court must among other considerations decide whether the maintenance of the status quo between the parties outweighs any injury or inconvenience the respondent may suffer if the injunction is granted. Fourth, in keeping with the courts obligation the court has to examine the distinct features of the application in order to ensure justice between the parties can be done during the period pending the final determination of the dispute.

I think it is well settled that the court would not invoke the equitable remedy of injunction unless certain key elements of the case are sufficiently determined. One of the formidable decision on this legal proposition is the judgement by **Lord Diplock in the American Cyanamid Co. v Ethicon Ltd 1975 AC 396** where he held as follows:

"It is often said that the payment of an interlocutory injunction is to present the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account the purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to provide a just result. That means if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in American Cynamid [1975] 1 All ER 504 AT 511: It would be unwise to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases. There is, however, no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that they could should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey of Tullichettle in R v Secretary of State for Transport, ex p Factortame Ltd (No. 2) [1991] 1 All ER 70 at 127. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see Films Rover International Ltd v Cannon film Sales Ltd [1986] 3 All ER 772 at 780-781. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out have been wrongly granted are low; that is to say, that the court will feel, as Meggery J said in Shepherd Homes Ltd v Sandham [1970] 3 All ER 402 at 412, 'a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted."

Based on the main characteristics of the notice of motion as presented by the respective parties in their affidavits and the submissions by both counsels being guided by the above principles.

I draw the following conclusions: On the matter it was quite evident from the submissions advanced by counsel for the applicant that the relief sought is anchored on the consultancy contract on payment of fees arising out of the award in respect to the property L.R No.

Ngong/Ngong/15559 with the 1st respondent.

According to counsel the applicant is entitled to payment of 15.3% of the total award. In response the 1st respondent arguments as stated in the affidavits and submissions denies of any existence of a contract with the applicant capable of being enforced by this court. The operation of the law would be to determine whether there was a valid contract between the applicant and the respondent.

In this case the following points can be deduced from the pleadings and material deponed in the respective affidavits. The first one is that of an alleged consultancy agreement between the 1st respondent (Institute) and Altana Corporation Ltd dated and signed on 22/5/2018. In view of the objection raised by the 1st respondent its validity as an enforceable contract entered into in exchange of consideration as an element in the law of contract to me is a triable issue at the main suit.

The second ground is that the agreement makes reference to LR No. Ngong/Ngong/15559 title to the subject property registered in the name of the 1st respondent in which the applicant was to benefit by virtue of the consultancy services as defined in the terms and conditions provided for in the agreement. In a situation where a court is faced with rival submissions a conclusive determination of the issues remains a mirage unless the evidence so relied upon can be tested at the hearing of the suit. I pose the question; was there a valid contract between the applicant and the 1st respondent? With the contestation seen from the affidavit evidence the 1st respondent has completely denied of being a party to any contract purportedly signed in respect of compulsory acquisition of its property by the 2nd respondent.

The third cluster of grounds is whether if there existed a valid contract. What are the terms in favour of the applicant set out in the agreement. Has the 1st respondent been paid an award with regard to the suit property? If so, has the percentage of commission become payable to the applicant. With regard to the 1st respondent conduct did he as an afterthought repudiate the contract without notice to the applicant? Is the 1st respondent in possession of the award done under the authority of the consultancy agreement to render adherence to the obligations under the agreement valid. This being an interlocutory application it is no longer appropriate to rule on the emerging issues as between the parties based on rival submissions and affidavits.

On the face of the evidence before court I have found that from the construction of the aforesaid agreement the applicant has demonstrated a prima facie case of serious triable issues for grant of an interlocutory injunction against the respondents.

Secondly, it's whether the applicant has established that if the injunction is refused it would suffer irreparable harm not remedied by way of damages.

In the instant case the specific depositions in the affidavit and authorities makes reference to a legitimate expectation of being paid by the 1st respondent upon the award on compensation adequately reached and concluded by the state. The courts attention has been drawn to the relief prayed for in the substantive suit on payment of consultancy fees arising out of the agreement. The 1st respondent has controverted and denied in its counter affidavit existence of any privity of contract with the applicant in respect to services rendered on compulsory acquisition of Ngong/Ngong/15559.

The consideration provided for in the consultancy agreement may vary depending on the circumstances on the process leading to the termination of the contract. It may include, payment of a lamp sum amount as stipulated in the agreement and in addition to reimbursement of expenses and costs incurred during the subsistence of the relation between the parties. In a contract the general principle to be applied in assessing damages for breach is that the claimant is entitled to be restored to the position it could have been in had the contract been performed. If the injunction is not granted would the applicant have alternative remedies against the 1st respondent. There is evidence to show real loss or injury to the applicant if the status quo of the award is not preserved pending the outcome of the suit. The effect of granting such an injunction is to put the applicant in a strong bargaining position were the respondent prepared to fully repudiate the contract.

The declaratory relief as to the legal rights in the contract has everything to do with the already detailed award legally payable to the 1st respondent by the 2nd respondent. As stated in the case of **Erick Makokha & 4 Others v Lawrence Zagnui & 2 Others CA NBI 20 of 1994 UR,**

> ***"An injunction is an equitable remedy. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. That is to say, Equity, like nature would do nothing in vain."***

The upshot of this is whether the type of loss or hardship likely to be experienced by the applicant on the question of the consultancy fees to be earned from the award would be lost if at this stage it is not preserved by way of an injunction. I hold the view that given the nature of the amount pleaded in the affidavit the applicant will suffer injury which cannot be adequately compensated in damages at the very end of the trial. To buttress the legal position the court in **Bhasin v Hrynew 2014 SCC 71** stated that,***"In commerce, a party may sometimes cause loss to another – even intentionally – in the legitimate pursuit of self- interest"***

I have in mind where the applicant succeeds on the merits at the main hearing and he has in possession a valid judgement to be enforced against the 1st respondent. What are the chances that the sum of money paid out would still be available to satisfy the decree?

In the circumstances the applicant's chances of making good the payment from the 1st respondent is dependent on the monies due and payable by the 2nd respondent. There is no credible evidence that the 1st respondent has in its disposal financial resources besides the quantum from the 2nd respondent which can satisfy any decree or judgement obtained by the applicant before a court of law. In the circumstances the applicant is likely to suffer greater harm and prejudice in the event an order is not made to prevent the disputed amount from being protected pending the final determination of the suit on the merits.

Also, in reference to this general principle of law is that the applicant who is entitled to an injunction ought to give an undertaking as to damages. However, it is also correct to state as held in the case of ***Mbogo & another v Shah 1968 EA*** that the jurisdiction and powers of the court in exercising discretion at different circumstances of the case such discretion remains unfettered.

In dealing with this application it is obvious to me that no similar cases comprise of identical characteristics of facts. Each dispute must be construed with its own peculiarity. For the present application I would apply the principles elucidated in Halsbury's Laws of the Land 4th Edition Volume 24 paragraph 1074 where the Learned Authors put it this:

> ***"The court may dispense with the undertaking, but will only do so in the very special circumstances such as when the order is in that area of final order and is not intended to be open to review at any time afterwards"***

In applying this principle to the instant case the parties are litigating as of necessity on a transaction which one can describe as unique and rightly inferred by the particular facts in the dispute. The consideration of the consultancy fees subject matter of the application was based on the compulsory acquisition award. The validity of the claim was to mature upon the successful procedures on compulsory acquisition being fulfilled by both parties and the award declared payable to the 1st respondent.

From the record there is no evidence that has been presented by either party that if the court was to rule in favour of the applicant any decree obtained would be settled by the 1st respondent from other sources besides the award. There is no challenge as to the validity of the award given under the authority of the 2nd respondent. The usage of the suit property and transfer of absolute title to the state would not be stayed for reason of this temporary injunction.

That being so with broader spectrum of just or unjust the damage likely to be suffered by the 1st respondent is if at the end of the day it turns out that the injunction ought not to have been granted in the 1st place is the delay in accessing the entire award of compensation. The circumstances of this case as a whole are that if the grant of injunction is denied it would result in higher risk of injustice on the part of the applicant in the event the court decide the dispute in its favour. Perhaps to the 1st respondent being denied part of the fruits of the award forthwith as it remains a subject of litigation can be compensated by way of costs.

On the issue of a balance of convenience, I have reviewed the applicant's affidavit and the rejoinder by the 1st respondent it is not lost that there are competing rights and interest arising from the purported consultancy agreement. The contention by the 1st respondent repudiating the agreement in their depositions are crystal clear that no such agreement existed. There is prima facie evidence from the summary of the case that the applicant is entitled to assert its rights under the consultancy agreement. Moreover, the 1st respondent possession of the award was subject to honouring the obligations under the agreement. In all the scales on the balance of convenience lies with the applicant if the injunction sought is granted. Again I reiterate that if the substance of the award is lost or expended there might be nothing to satisfy the enjoyment of the intended judgment of the court if the applicant succeeds at the trial.

In reaction to the respondent's counsels that there is no decree as defined under Section 2 of the Civil Procedure Act, it is my view that the court is sufficiently clothed with inherent jurisdiction under Section 3A of the Civil Procedure Act to do whatever is necessary to meet the ends of justice. It is my considered opinion that in a litigation parties must approach the court on equal arms. There is nobody who should be allowed to steal a match from the other by simply contending that he has no knowledge of the claim.

It is true the 1st respondent has submitted forcibly that the order on *stains quo ante helium* cannot issue in absence of the decree. That cannot be the case particularly if one is not able to resolve the issues on the status of the consultancy agreement at this interlocutory stage.

That being the case and for the above reasons I hereby exercise discretion by granting temporary injunction against the 1st respondent from being paid the entire decretal amount of the award declared by the 2nd respondent in respect to L.R. No. Ngong/Ngong/15559 pending the hearing and determination of the suit. That in accordance with Order 23 of the Civil Procedure Rules the Garnishee having been served with summons of these proceedings is hereby restrained from declaring the entire amount of the award as payable without subsequent orders being made on the disputed amount of Ksh. 139,895,511 as between the applicant and 1st respondent. Based on the affidavit evidence on record before the on-set of the proceedings the Garnishee herein identified as the 2nd respondent is hereby notwithstanding the award to the 1st respondent notified that the amount in dispute be preserved and remain in their custody until the claim by the applicant is determined. In addition, the effect of this ruling is to have the undisputed balance of the award be released to the 1st respondent by the 2nd respondent save for the computed sum now subject matter of attachment before judgement as provided for under Order 39(5) of the Civil Procedure Rules. The court considers that under Article 159(d) of the Constitution on alternative dispute resolution mechanism the parties be at liberty in the interim to negotiate any such final rights and obligations under the contract. In the alternative, the court orders that in the event the 2nd respondent is desirous of releasing the entire award to the 1st respondent the portion of the claim under the impugned contract be deposited in the joint earning interest of both counsels in a preferred reputable financial institution to await the outcome of the suit. The costs of this application to abide the final order of this court. It is so ordered.

Dated, Signed and Delivered in open court at Kajiado this 28th day of November 2018.

…………………………………………..…………

R. NYAKUNDI

JUDGE

Representation

Ms. Nyamulo and Mr. Mukuha appearing together for the 1st Respondent

Mr. Makori holding brief for Ms. Akello for the Plaintiff.