REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Suit 459 of 2010

FLEMISH INVESTMENTS LIMITED……………………….…PLAINTIFF/APPLICANT

-VERSUS-

TOWN COUNCIL OF MARIAKANI…………….............…DEFENDANT/RESPONDENT

RULING

The suit lying in the background is dated ***15th December, 2010*** and relates to the exercise of ownership and possessory rights, in relation to L.R. No. 24366 situated in Mariakani Town; the plaintiff seeks *injunctions, declarations* and *damages.* Attending the suit is an interlocutory application of even-date, by way of Chamber Summons, brought under Order XXXIX, Rules 1, 2 and 9 of the earlier edition of the Civil Procedure Rules. The application carries one main prayer:

"THAT the defendant whether by itself and/or its agents and/or servants and/or employees and/or any person claiming under the defendant in any manner whatsoever and howsoever, be restrained from stopping, obstructing, hindering, entering upon and/or interfering with the plaintiff's construction of a perimeter wall around the plaintiff's parcel of land known as L.R. No. 24366 until the hearing and final determination of this suit."

The application rests on several grounds, as follows:

(i) the plaintiff is the registered proprietor of a leasehold interest in all that parcel of land known as L.R. No. 24366 [the suit property];

(ii) the defendant has without any lawful or reasonable cause barred and/or stopped the plaintiff from constructing a perimeter wall around the suit property;

(iii) the action of the defendant is wrong and unlawful;

(iv) the defendant intends to continue with the same unlawful acts unless restrained by the Court;

(v) the defendant has ignored notices issued by the plaintiff requiring it to allow the plaintiff to continue with the construction;

(vi) the plaintiff, by reason of the defendant's said actions, has been deprived of the use and enjoyment of the suit property;

(vii) the plaintiff has a prima facie case with a probability of success against the defendant;

(viii) the plaintiff stands to suffer irreparable harm unless the Orders sought are granted.

Suheil Sikandar Pasta, the Director of the plaintiff company, swore a 39-paragraph affidavit on ***16th December, 2010*** giving evidence in support of the application; and to this, he added a further 17-paragraph affidavit on ***31st January, 2011***. ***Isaac Kagia***, the Town Clerk of the Town Council of Mariakani swore a replying affidavit on ***11th January, 2011*** and a further affidavit on ***7th February, 2011***.

The affidavit evidence, on the whole, takes on key elements in the pleadings, proof of which must await full trial. ***Isaac Kagia*** depones that the plaintiff had not been an innocent purchaser for value, but "*took part in the perpetration of….fraud";* and he avers that the content of the supporting affidavits is untruthful in material respects.

Learned counsel, ***Mr. Koech*** for the plaintiff/applicant, submitted that a sound basis had been laid for granting the Orders sought: since the defendant "*has admitted that the plaintiff is the owner of the suit property but minus the 2.0 acres [that] were acquired illegally by the previous owner of the suit property";* and "*the defendant has not demonstrated at all that the plaintiff was privy or party to any alleged fraud in respect of the transfer of the suit property"*. Thus, counsel urged, "*the plaintiff's title and the suit property is therefore absolute and indefeasible"*. Counsel urged that "*the defendant has not demonstrated at all that it has any interest recognized in law in the suit property capable of being protected by this Court."*

Mr. Koech submitted that the plaintiff "*stands to suffer irreparable harm if the Orders sought are not granted";* for owing to the "*wrongful acts of the defendant, the construction work on the perimeter wall and around the suit property has stalled and the plaintiff is unable to make use of the suit property."*

Counsel submitted that the balance of convenience tilts in favour of the plaintiff: the plaintiff is in possession of the suit property and has enjoyed such possession since ***September, 2006.***

Learned counsel, ***Mr. Mrima*** for the defendant, submitted that "[*the defendant's] opposition to the application…remains only [as] to the…..two-acre parcel of land which was set-apart for…..the public cattle-dip"*, "*which was fraudulently made part of the suit property"* and in respect of which a *counter-claim* has been lodged. The objection, counsel urged, shows that the applicant has failed to satisfy any of the conditions for the Court's discretion in relation to grant of injunctive relief: a *prima facie* case has not been established.

Counsel submitted that the applicant has not shown that it will suffer irreparable harm not compensable in damages if the Orders sought are not granted: for "*the two-acre land remains a public utility set aside for public purposes…..[and] was….illegally allocated [so] a party which offered itself [in such a dealing] cannot be heard to claim any irreparable loss…."*

Learned counsel submitted that the evidence shows the applicant to have the intent of fencing off the disputed two-acre portion of land, for use as a parking yard; and since losses in that regard, on account of not being allowed to fence, are readily calculable, any possible harm suffered by the applicant during the pendency of the suit, is not unsuitable for recompense by an *award of damages.*

There is no dispute as regards the main part of the plaintiff's land; but as regards some *two acres* registered in the plaintiff's name, there is a brisk *dispute*, which is now destined to be resolved by trial –

the pleadings therefor being the plaint of ***15th December, 2010*** and the defence-and-counterclaim of ***21st January, 2011***. While the plaintiff's pleadings proceed on the basis that it is the legal proprietor of a certain parcel of land, the defendant contests such ownership in respect of *two acres*, and claims that portion to be *public land* wrongfully acquired. So the defendant asserts in the counterclaim:

"….the ownership of the suit property by the plaintiff herein remains fraudulent having been illegally acquired since it includes a portion of 2 acres which had earlier-on been earmarked for a community cattle-dip…"

In the relevant paragraphs of the counterclaim, the following prayers are made:

"(b) A mandatory injunction be issued directing the first and/or second defendant and/or the defendants to forthwith ensure that the Deed Plan No. 226946 is duly rectified so as to hive out the 2-acre plot whereon the community cattle dip stands.

"(c) A permanent injunction restraining the first defendant and/or the second defendant and/or both the defendants whether by themselves, their agents, servants and/or employees or otherwise howsoever from taking possession, obstructing, stopping, hindering or in any other way whatsoever interfering with the plaintiff's use of the two-acre public utility plot known as plot No. 34 Kawala "B" Adjudication Scheme."

This Court must be guided by *two considerations*, as it applies the standard tests set out in ***Giella v. Cassman Brown & Co. Ltd*** [1973] E.A. 358 for the grant of equitable injunctions: (i) whether there is a *prima facie* case with probabilities of success; (ii) whether the applicant is likely to suffer irreparable harm not compensable in damages, if temporary injunction is not granted; and (iii) where the balance of convenience stands.

The two considerations are: (a) the main cause entails a sharp and lively *contest*, with *prima facie*, well-matched stamina; (b) the presence of any special factor which may call for *judicial notice* – and in this regard, the special factor is the nature and standing of the *public* or *community interest*.

It is quite clear, from the pleadings in the main causes herein, that the matter is *vigorously contested*, and therefore, ought not to be pre-determined as regards its substance, at an interlocutory stage. This is not a condition favouring the grant of interlocutory injunctions.

Secondly, the defendant/counter-claimant invokes the *community interest* in the maintenance of a cattle dip, on part of the land claimed by the plaintiff. The existence of a *meritorious community interest* is a factor to take into account, in determining whether an interlocutory injunction should be granted in favour of a "private" party. Where *prima facie* such a public or community interest is a weighty one, it is undesirable for the Court to predetermine the question by granting an interlocutory injunction that re-arranges the position on the ground.

There is still another factor which militates against the grant of an injunction at this stage. *Fraud* has been pleaded as a blot on the transactions that conveyed title to the plaintiff, in respect of the said two acres of land. At this stage it is not possible to establish the truth, as regards fraud; this must be proved at the trial. Therefore, it would be injudicious for the Court to grant an interlocutory Order which has the effect of changing the state of affairs at the *locus in quo.*

These considerations lead me to make Orders as follows:

(1)The plaintiff's application by Chamber Summons dated 15th December, 2010 is disallowed.

(2)The parties to the suit of 15th December, 2010 and the counterclaim of 27th January, 2011 shall make the pre-trial arrangements on the basis of priority, and the causes shall be listed for mention, for trial directions, within 21 days of the date hereof.

(3)The costs of the application of 15th December, 2010 shall be costs in the cause.

SIGNED at **NAIROBI** ……………………………….

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 19th day of March, 2012.

……….…………………….
M.A. ODERO
JUDGE