



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Civil Case 94 of 2010

TALA HOUSING CO-OPERATIVE SOCIETY
LTD.....PLAINTIFF

VERSUS

TOWN COUNCIL OF
KANGUNDO.....DEFENDANT

R U L I N G

Before me is an application dated 18th May 2010 filed by the plaintiff. It was filed under Order XXXIX Rule 1, 2, 3 & 9 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act (Cap 21). The substantive prayers are prayers (b), (c) and (d) as follows:-

- b. THAT, the court be pleased to grant temporary injunction restraining the Defendants from using and/or operating and/or dealing in any manner whatsoever with the toilets erected on LR 11800/93/1 in Tala, within the plaintiff's property.**
- c. Pending the hearing and determination of this suit the defendant/despondent by itself, its servants, agents and/or otherwise howsoever be restrained from interfering with the Plaintiffs/applicants quiet and peaceful enjoyment of their property located in Tala LR 11800/93/1.**
- d. THAT, the cost so this application be provided for.**

The application has grounds on the face of the Chamber Summons. It was filed with a supporting affidavit sworn on 18th May 2010 by Peter M Mutua described as the Chairman of the plaintiff Co-operative Society.

It was deponed in the said affidavit, *inter alia* that on 20th January 2009 members of the management committee of the Co-operative held a meeting with the officers of the Tala Town Council. In the meeting, it was agreed to demolish old toilets located at the plot of Tala Housing Co-operative Ltd and that the defendant would put up public toilets and provide water. It was also agreed that the defendant would hand over the toilets on completion to the plaintiff because of security reasons and also because the toilets were on the plaintiff's land. However, on completion of the toilets, the defendant had refused to hand over the public toilets. Instead, the defendant had operated the toilets and charged fees to users. It was also deponed that the toilets were emitting foul smell and as a result the tenants of the plaintiff were

complaining. That the plaintiff's tenants had been denied use of the toilets. It was further deponed that, if the orders prayed for were not granted, the plaintiff would suffer irreparable loss or damage.

The plaintiff through their counsel, Annie Thoronjo & Company, filed written submissions on 27th July 2011. In the submissions, the contention that there was a meeting and agreement reached on 20th January 2009 was emphasized. It was contended that the plaintiff was the owner of the land on which the toilets were put up. It was also contended that the plaintiff had made considerable investment as the registered owner of the suit land. It was further contended that they had satisfied the requirement for the grant of a temporary injunction as enunciated in **Giella –vs- Cassman Brown Ltd (1973) EA 358**. Reliance was also placed on the case of **Samuel Mwangi Kamau –vs- Strabag & Another – Nairobi HCCC 1971 of 1991**.

The application is opposed. A replying affidavit sworn on 25th May 2010 by Sospeter Musembi, the Town Clerk, was filed. It was deponed *inter alia*, that the suit and application were an abuse of the court process. It was contended that it was the plaintiff who requested, by letter, that they be considered to manage the toilets. It was averred that the defendant owned land nearby, where it could build the public toilets. However, the plaintiff urged them to build the toilets on their land. It was also averred that the toilets were for use by the general public and that the plaintiff had other private toilets in their premises. It was also deponed that no agreement was entered into between the plaintiff and the defendant.

The defendant through their counsel, Anthony Mulekyo, filed submissions on 23rd September 2011. It was contended that the plaintiff surrendered their portion of the land for the construction of public toilets. This was in consideration of the defendant not constructing public toilets on the defendant's premises which fronted the plaintiff's premises. It was contended that no security risk was posed by the public toilets, which were well managed. It was further contended that the plaintiff had not satisfied the requirements for grant of temporary injunctions as set out in the case of **Giella –vs- Cassman Brown Ltd**.

At the hearing, Mr Makau for the Plaintiff, addressed the court. Ms. Mwinzi for the defendant, also addressed the court.

I have considered the application, documents filed, as well as the submissions, both written and oral. This is an application for injunctive orders. The duration of prayer (b) is not stated. It is said to be temporary, but the limiting time or event is not stated. It is therefore not a prayer for temporary orders.

Prayer (c) is limited to the time up to the determination of the suit. It is therefore a prayer for temporary orders. It is however, not specific. It asks for restraining orders against interference with the plaintiff's quiet and peaceful enjoyment of their rights.

In my view, the two prayers cannot be granted for two reasons. Prayer (b) is not a prayer for temporary or interlocutory orders. In addition, if it is granted, the effect will be to issue permanent orders which are likely to determine the whole suit or a substantial part of it. In particular it will determine prayer (a) in the plaint.

Prayer (c) cannot be granted because it is not specific. This court cannot be used to grant amorphous prayers through discretionary equitable reliefs. It cannot be used to grant prayers which are either unenforceable, or which will need interpretation as to what is meant by the said prayer.

In my view, though the plaintiff might have a prima facie case in this matter, he has not demonstrated that he will suffer irreparable loss if the two above prayers or any of them is not granted. These two requirements of prima facie case and irreparable loss must be satisfied in an application for grant of interlocutory injunction – See **Giella –vs- Cassman Brown Ltd (1973) EA 358**. The failure to satisfy one or the other means the application will not succeed.

In my view also, the two prayers are meant to determine the substantive issues in the main suit, before

parties are heard through the tendering of evidence. At an interlocutory stage, the court is not entitled to grant orders that determine the entire suit.

For the above reasons, the application has no merits. I dismiss the same, with costs to the defendant.

Dated and delivered this **6th** day of **June** 2012.

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George Dulu

Judge

In the presence of:

Mr Makau for the Plaintiff

Mr Mulu holding brief for Mr Mulekyo for Defendants

Nyalo – Court clerk.