REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 534 OF 2009

CHAMBEKE INVESTMENTS LTD. ..... PLAINTIFF/ORIGINAL PLAINTIFF

VERSUS

JOAN ABILA OBALA. & 4 OTHERS. ..... DEFENDANTS/ORIGINAL DEFENDANTS

R U L I N G

Before me are two applications, which parties counsels agreed should be dealt with by this court together.

The first is a Notice of Motion dated 3rd of March 2010 filed by Mutuli and Apopo Advocates for the plaintiffs (original Plaintiff) **CHAMBEKE INVESTMENTS LTD**. The second is a Chamber Summons dated 4th of March 2010 filed by Langat & Co. Advocates for the defendants (original defendants) in the main suit, who are **JOAN ABILA OBALA, JOSEPH KIMANI, PERIS ANNE WAMBUI MBACHIA, SVEN JOAN PETER SVENSSON and DERKTI BERHANE HAGOS SVENSSON.** (***These are also called original defendants because there is a counter claim filed by the same persons and described themselves as plaintiffs in the conterclaim***.)

The Notice of Motion dated 3rd March 2010 was brought under section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act (**Cap 21 Laws of Kenya),** as well as Order 39 rules 1, 2 and 9 of the Civil Procedure Rules. It has four prayers, one of which has been spent as follows: -

1. (spent)

2. That the court do immediately issue an order of mandatory injunction against the 1, 2nd, 3rd, 4th and 5th defendants herein whether by themselves, their agents, servants, employees or whosoever directing them to return the electric circuit board and to restore the water supply on the suit premises known as Plot No. L.R. 13867/4 situate within an Estate known as Karen Country Homes, Karen Plains, Nairobi and allow the plaintiff/applicant to re-enter the said premises and continue with his peaceful business of managing and supplying borehole water pending the hearing and determination of this application and subsequent hearing and determination of this suit. And the officer commanding Karen Police Station do assist in the execution of this order.

3. That an order for temporary injunction be issued against the 1st, 2nd, 3rd, 4th and 5th defendants herein by themselves, or through their agents, servants, employees or whomsoever restraining them from preventing and/or interfering with the plaintiff's management of the borehole water within the suit premises known as Plot No. L.R No. 13867/4 until the hearing and determination of this

application and the subsequent hearing and determination of the suit.

4. That costs of this application be provided for by the defendants in any event.

The application has grounds on the face of Notice of Motion. It was filed with an affidavit sworn by **NICODEMUS MUNYWOKI,** described as Operations Manager on 3rd March 2010. In the said affidavit it is deponed, inter alia, that the plaintiff had leased a small portion of land out of LR No. 13867/4 Plot No." D" NAIROBI KAREN PLAINS owned by one Walter Kiilu. That the said portion of land contains a borehole, which the plaintiff maintains and uses to supply water to various houses in Karen, commonly known as Karen Country Homes and other users outside the said Karen Country Homes. That the plaintiff applied and was issued with relevant licences and authority to sink a borehole on the suit premises and invested heavily in the construction of the borehole. That the plaintiff procured the services of Real Management Services (2002) Limited to manage the use of the borehole including maintenance and billing for its various users. That Karen Country Homes is an estate comprising of eleven town houses with a common boundary wall and common roads connecting them. That the majority of home owners in the estate have signed contracts for the supply of borehole water. That the 1st defendant, after paying for several months had now stopped payments of monthly bills. The 2nd and 3rd defendants had failed or refused to pay for borehole water despite using the same. That the 4th and 5th defendants had refused, failed or neglected to pay the monthly charges for use of the said water. That the management company had informed the plaintiff that the said defendant had refused to allow the management company access to the meters which are located within their maisonettes. That despite notice having been made, the defendants had refused to pay for the borehole water and now instigated the other owners of the maisonettes in the estate to refuse or delay payments of the borehole water. That the defendants on or about 1st March 2010 through their servants, agents or employees disconnected the electric circuit board on the borehole thereby interrupting the supply of the water to other consumers. That on the night of the 1st March 2010 the defendants through their agents, servants or employees caused considerable distress to the occupants of the suit premises where the borehole is located by unlawfully entering the said premises by force using threats. That the actions by the defendant are not only malicious but unlawful and totally unjustified as the plaintiff stands to suffer irreparable loss and damage.

This application was opposed through a replying affidavit sworn by **JOSEPH KIMANI** and filed on 4th May 2010.

The second application is the Chamber Summons dated 4th of March 2010. It was filed by the defendants (***original defendants***) under section 63 (c) and (e) of the Civil Procedure Act (***Cap 21 Laws of Kenya***), and Order 39 rules 1, 2 and 3 of the Civil Procedure Rules. This application by the original defendants, lists the plaintiff together with three other persons as defendants. The purported additional defendants are **CHARLES STEPHEN MBINDYO** (2nd defendant), **WALTER KIILU MBINDYO** (2nd defendant), and **REAL MANAGEMENT SERVICES (2002) Ltd** (4th defendant). This application have four prayers, two of which have been spent has follows: -

1. (Spent)

2. (Spent)

3. Pending the hearing and determination of this suit, the defendants in the counter-claim whether by themselves, agents, servants, or otherwise howsoever be restrained from in any way interfering with the plaintiffs in the counter claim, their servants/or agents free and unlimited access use and management of the borehole situated on property L.R. No. 13867/4.

4. The costs of the application be provided for.

The application has grounds on the face of the Chamber Summons. It was filed with an affidavit sworn by

JOSEPH KIMANI the 2nd defendant on 4th March 2010. It is deponed in the said affidavit, inter alia, that the 2nd defendant in the counter claim was the registered proprietor of property land reference 13867/4 situated at Karen Nairobi. That the 2nd defendant in the Counter Claim subdivided and developed the property into approximately 11 sub-plots. The second defendant appointed the 4th defendant as his sole agent to market and sell the estate. The second defendant also incorporated Karen Country Plains Limited to manage common areas of the estate to the extent that purchasers of the individual property would become shareholders in the management company. The 4th defendant printed brochures for the sale of the estate which described the facilities including a drawing of the site plan of the estate where a borehole and a tower tank appeared to be dug and erected in the common area. That based on the brochures, the notices placed by the 4th defendant and the presentations from the said defendant, the plaintiffs in the counter-claim and the deponent of the affidavit became interested in purchasing of houses erected on the property for residential purposes and subsequently held individual negotiations with the 4th defendant. That the plaintiff's in the counter-claim and the 4th defendant in the counter-claim individually upon negotiations agreed to purchase respective properties in the estate and entered agreements for sale. That the 1st, 2nd, 4th and 5th plaintiffs in the counter claim entered into agreements for sale dated 7th August 2007, 27th April 2006, 27 May, 2006 respectively; that the 1st, 4th,5 and 2nd plaintiffs in the counterclaim also separately executed a deed of covenant with the management company which governed the management of the common area, and that the said agreements and deeds were silent on the issue of ownership and management of the borehole and the water tank; that based on representation from the 4th defendant in the counter claim ostensibly acting on the authority of the 2nd defendant in the counter claim, the plaintiffs in the counter-claim were made to believe that since the borehole and tower tank were erected in the common area, the same would be owned and managed by the management company; that during separate negotiations with the 4th defendant in the counter-claim, no representation was made to any of the plaintiffs in the counter claim to the effect that the borehole and tower tank would be owned by the 4th defendant in the counter claim and managed by the 1st defendant in the counter claim; that it was from the representation made by the 4th defendant in the counter claim that the plaintiffs in the counter claim entered into their agreements for sale with the 2nd defendant in the counter claim; that the plaintiffs in the counter claim would not have purchased their respective houses in the estate had they been informed or notified by the 2nd or the 4th defendants in the counter claim that the borehole and tower tank would be or had been dug and erected on the 3rd defendant's property who would retain its ownership; that having taken possession of the respective property the plaintiffs in the counter claim were wittingly approached by the 4th defendant in the counter claim through letters that they were required to indicate acceptance to the supply of water to their houses failure to which water would be disconnected; that despite other owners of the houses signing the letter with others refusing to sign the 4th defendant in the counter claim sent extortionate water bills separately to the plaintiffs in the counter claim as well as the deponent; the 1st, 3rd, 4th and 5th plaintiffs in the counter claim and the deponent were ready able and willing to pay for the supply of water only if the same was owned and managed by the management company; that at the time of purchasing respective properties, the 1st, 3rd, 4th and 5th plaintiffs in the counter claim and the deponent were made to believe that the borehole would be owned by the management company and this was an implied warranty to them having knowledge that Karen is notoriously known for lack of water; that on 27th of August, 2009 the 4th defendant in the counter claim failed to pay accrued electricity bills for the supply of electricity to the borehole amounting to ksh.87,604/- culminating to the disconnection of the electricity to the bore hole; that as a consequence the 1st, 3rd, 4th and 5th plaintiffs in the counter claim together with the deponent and other owners of houses in the estate agreed to take over the management of the borehole and collected monies to pay for the electricity; that in a complete turn of events on 27th October, 2009 the 1st defendant in the counter claim filed this suit against the 1st, 3rd, 4th and 5th plaintiffs in the counter claim and the deponent; that the suit was filed to restore the water supply to allow the 1st defendant in the counter claim to re-enter the premises and continue with the managing of the borehole; that the said application was struck out on 18th December, 2009; that 27th February, 2010 the pumping machine to the borehole broke down and the plaintiffs in the counter claim attempt to repair the same were thwarted as the 3rd defendant in the counter

claim who was the owner of the premises with the 1st defendant in the counter claim without any justifiable or reasonable cause denied the plaintiffs in the counter claim and other owners of houses in the estate access to the premises wherein the borehole was located; that to-date the pumping machine for the borehole had not been repaired and the houses in the estate had not been supplied with any water; that unless the 1st and 3rd defendants in the counter claim were restrained by an order of the court from denying the 1st , 3rd, 4th and 5th plaintiffs in the counter claim as well as the deponent and other owners of houses in the estate will not have access to the borehole; that the 1st, 3rd, 4th, and 5th, plaintiffs in the counter claim together with the deponent and other of owners of the houses could not repair the machine and could not have water for their daily use; that it was in the interests of justice that an order be issued against the 3rd defendant in the counter claim who is the owner of the premises and the 1st defendant in the counter claim, to allow the plaintiffs in the counter claim and other owners of houses and their servants or agents unlimited access at all time to the premises where the borehole is situated for purposes of repairing and maintaining the borehole and the pumping machine; that it was in the interests of justice that an order be issued for the 3rd defendant in the counter claim compelling him to transfer the ownership and management of the borehole and tower tank to the management company or in the alternative to the plaintiffs in the counter claim; and that an order be issued against the 2nd defendant in the counter claim to dig and erect another borehole in the common area; and that an order be issued against the 4th defendant in the counter claim restraining it, its directors, servants or agents from interfering with the plaintiffs in the counter claim and other owners of the houses access to and use of the borehole situated in the premises.

Several documents were annexed to this affidavit. This application was opposed through grounds of opposition filed by Muturi and Apopo Advocates on 12th May 2010. I will reproduce the grounds of opposition verbatim thereunder.

1. That the said defendants application in an abuse of the process of court and should be dismissed for the following reasons:

(a) No leave to this honourable court has been sought and/or obtained to enable the defendants seek injunctive reliefs against those parties as proposed in the defendants counter claim who are not and have not been made parties as by law provided.

(b) That the defendants defence and the counter claim are incurably defective and should be struck out.

(c) The defendants have not demonstrated a prima facie case with a probability of success to entitle them to the equitable relief of an injunction.

2. That the defendants application is not made in good faith, it is an afterthought and calculated to pervert the cause of justice.

Since the parties counsel agreed that the two applications to be determined together, each filed written submissions covering both applications.

The submissions of Mutuli & Apopo Company advocates for the original plaintiffs were filed on 14th June, 2010. In the said submissions, it was contended that the defendants in the main suit had all along had constructive notice of the plaintiff's interest in the suit property, particularly after having entered into contracts with agents to receive borehole water at an agreed fee. Reliance was placed on provisions of section 3 of the Transfer of Property Act with regard to such constructive notice. Counsel emphasized that the said section 3 provides: -

"A person is said to have a notice of a fact when he actually knows the fact or when, but for wilful abstention from inquiry or such which he ought to have made or gross negligence, he would have known of it."

The contention of the counsel was that the defendants had colluded to deny the plaintiffs the right to operate and run the borehole. According to counsel this was supported by the defendants' replying affidavit sworn on the 4th May 2010 in which it was accepted that the defendants had executed supply contracts with the plaintiffs for the supply of water which admission completely negates their contention that the borehole was communally owned and the plaintiff was not entitled to payments. Counsel argued that the requirements for grant interlocutory injunction under the case of **GEILLA VS CASSMAN BROWN & CO. LTD [1973**] EA 358 were satisfied. Counsel emphasized what was stated by the Court of Appeal for East Africa in the case as follows: -

"1, an applicant must show a prima facie case with a probability of success, 2, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which will not adequately be compensated by an award of damages".

On the test of prima facie case, it was counsel's contention that the plaintiff had demonstrated a sufficient interest in the suit property having been granted a lease of 15 years to run the borehole and therefore entitled to supply water and earn proceeds therefrom.

On the second test, as whether the plaintiff will suffer irreparable damage, counsel contended that there can be no adequate substitute for an interest in a parcel of land, and that the plaintiff had invested heavily in sinking the borehole and successfully managed to obtain unique water which is fit for human consumption, unlike other boreholes in the neighbourhood. It was therefore his contention that, if the orders sought in the application dated 3rd March 2010 were not granted, the plaintiff would suffer irreparable loss and damage, which could not be adequately compensated through an award of damages.

On the balance of convenience, which is the 3rd test in the **Geilla case** (supra) it was the counsels contention that the balance of convenience was in favour of the plaintiff, and that the plaintiff will suffer more damage or loss if the court was to deny the injunction. The plaintiff had not refused to supply the defendants with water but merely insisted that they should pay for the use of water. In any event counsel argued, the allegation by the defendants that they had a claim over the land was not supported by any document as required by law. Reliance was placed on section 3 of the Law of Contracts Act (Cap 23) which provides

"3(1) No suit shall be brought where by to charge the defendant upon any special promise to answer for the debt default or miscarriages over another person unless the agreement upon which such suit is brought or some memorandum or note thereof, is in writing and signed by the party to be charged therein or by some other person there unto by him lawfully authorized.

(2) No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit money or goods, unless such a representation or assurance is made in writing signed by the party to be charged thereof.

(3) No suit shall be brought upon a contract for the disposition for an interest in land unless –

(a) the suit upon which the suit is founded

(i) is in writing;

(ii) is signed by all parties thereto

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

On the original defendants' application dated 4th March 2010, counsel submitted that the said application

erroneously introduced three new parties, that is: **Charles Stephen Mbindyo, Walter Kiilu Mbindyo and Real Management Services (2002) Limited**. Counsel contended that this was a grave mistake in law as no leave was obtained from the court to initiate 3rd party proceedings against the three parties as required under Order 1 rule 14 of the Civil Procedure Rules. Counsel highlighted provisions of rule 14 of the Civil Procedure Rules, and stated that the defendant's failure to follow the procedure clearly spelt out in the Civil Procedure Rules was a desperate attempt to evade their contractual obligations with the plaintiff. It was counsel's contention that the application by the defendant was misconceived, fatally and incurably defective, and ought to be dismissed.

The Original defendants counsel, filed their written submissions to the two applications on 11th June 2010. On the Notice Summons dated 3rd March 2010, counsel contended that no prima facie case with probability of success had been demonstrated by the (**plaintiffs**) original plaintiff. It was contended that the original plaintiff is not the registered owner of property L.R. No. 13867/4. The purported lease agreement dated 30th June 2005 was inadmissible and did not confer propriety rights since stamping, payment of duty, and registration of the same was in doubt. Reliance was placed on the case of **WEETABIX LTD –VS- HEALTHY U 2000 LTD (2006) eKLR** wherein the court stated: -

"***With respect to the objection raised against the annexture at pages 7(a) and (e) i.e. the assignment it is not disputed that the same is not stamped. But does the annexture attract some duty? I think it does under 11th schedule of the Stamp Duty Act, Cap 480, Laws of Kenya. The instrument is chargeable with stamp duty under section 23 of the Act. As the instrument was not stamped it is clearly inadmissible under section 19 (1) of the same act..... Since the said instrument is one of the annexture I have found him properly exhibited it cannot be admissible subject to the provisions of section 19 (3). In the premises the said annexture exhibited as "RN" to the affidavit of Richard Matthew Aforesaid as struck out and expunged from the said affidavit".***

It was contended that the said agreement should be struck out and expunged.

Even if the court would consider this agreement on merit, the plaintiffs in the counter claim are not party to the said agreement. That agreement was only between the original plaintiff and the 3rd defendant in the counter claim. Therefore, it was argued that the plaintiffs in the counter claim are not bound by the terms of that agreement. Reliance was placed on the case of **KENINDIA ASSURANCE COMPANY LTD – VS- OTIENDE (1991) KLR 38** wherein it was stated as follows: -

"Accordingly, on the plain wording of the subsection, an essential precondition of liability did not exist, as it is axiomatic that a 3rd party cannot sue on a contract if he is not a party to it (as the respondent was not), then in the absence of any statutory exception, he cannot sue on that contract."

Reliance was also placed on the case of **AGRICULTURAL FINANCE CORPORATION VS LENGETIA LTD (1985) KLR 765** where it was held that the effects of a contract only affects parties to it and cannot be enforced by or against a person who is not a party. It was contended therefore, that the original plaintiff did not have any locus standi nor had he demonstrated any breach of rights to enable the grant of an injunction in his favour. On irreparable injury, counsel contended that the original plaintiff had not demonstrated any irreparable injury that it would suffer if the injunction is not granted. In any event the claim by the original plaintiff to the borehole was doubtful and questionable.

On the test of the balance of convenience, counsel argued that the original plaintiff had not demonstrated that any of their rights had been breached to warrant the court exercises its discretion in his favour. The balance of convenience was in favour of refusing the restraining and mandatory injunction.

It was contended that the test for the grant of mandatory injunction was set out in the case of **KENYA BREWERIES LTD & 2 OTHERS VS WASHINGTON OKELLO** Nairobi Civil appeal No. 332 of 2000 wherein the Court of Appeal, citing Halsbury's Laws of England Volume 24, 4th Edition Par. 948 as follows:-

"A mandatory injunction can be granted on an interlocutory application as well as the hearing but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act is done is as simple and summary one which can easily be remedy or if the defendant attempts to steal a match on the plaintiff..... a mandatory injunction will be granted on an interlocutory injunction."

On the application dated 4th of March 2010 (by the original defendants), it was contended that the original defendants, who are the plaintiffs in the counter claim have established a prima facie case with probability of success to justify the grant of a restraining injunction. It was contended by counsel that the original defendants bought their respective property from the 2nd defendant in the counter claim upon an unqualified representation that the houses purchased enjoyed the benefits of a borehole, therefore, the said borehole was to be accessible to all residents of the 11 houses in Karen Plains Country Homes. The said borehole was constructed within property LR. No.13867/4 registered in the name of the 3rd defendant in the counter claim, which is part of the 11 houses. Impliedly therefore, the original defendants were entitled to access to the borehole which was not waived by the fact that the borehole was constructed within the premises owned by the 3rd defendant in the counter claim. It was contended that the original defendants relied on the representation by the 4th defendant in the counter claim that the access to the borehole water came as a benefit for the purpose of their respective properties. Therefore, it was contended that the defendants in the counter claim was estopped from denying the existence of an easement. Reliance was placed on the case of **DOGES VS KENYA CANNERS LTD [1988] KLR 127** wherein the court stated: -

"If a party is made to believe in a certain state of facts and that party acts on those facts, to it detriment, the other party is estopped from changing is stand. If one says to A - go ahead, this is land, but you may build on it, spend money, we will go into formalities of transfer letter later – and A does all that, the representer is estopped from denying the right accrued to and acquired by A."

Counsel therefore, argued that the original defendants relied on representations that they had access to the borehole water and on that reliance, they purchased the individual houses.

On the test of irreparable injury, counsel contended that the original plaintiff is neither in possession of the suit property nor the borehole. The original defendants are actual residents of Karen County Homes Estate. It was contended that Karen Area was notoriously known to have a problem of water supply. If the orders sought were not granted to the original defendants by allowing them continue having access to the borehole water, they would as a consequence suffer irreparable damage which could not be compensated by an award of monetary damages.

On the test of balance of convenience, counsel for the original defendants contended that his clients had demonstrated prima facie that they were entitled to unlimited access to the borehole water. Therefore, it would be equitable to restrain the defendants in the counter claim from interfering with the legal rights of the original defendants who are the plaintiffs in the counter claim. I was urged to allow the application dated 4th March 2010.

I have considered both applications, the submissions and the law. Both applications relate to requests for grant of interlocutory injunctions. The considerations to be taken by a court in such an application have long been settled. They were clearly set out in the case of **GEILLA VS CASSMAN BROWN & CO. LTD [1973] EA 358** wherein the Court of Appeal for East Africa stated: -

"- an applicant must show a prima facie case with a probability of success.

- ***An injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury.***

- ***When the court is in doubt, it will decide the application on the balance of convenience."***

In this particular matter, there was filed a plaint, by the original plaintiff as well as a defence and counter claim by the original defendants. The original plaintiff is one person. However, the defendants in the counter claim are 4 people. There is an addition to the original plaintiff of Charles Stephen Mbindyo 2nd defendant in the counter claim, Walter Kiilu Mbindyo 3rd defendant in the counter claim and Real Management Services (2002) Ltd as 4th defendant in the counter claim. There was no order from the court to join these new defendants in the counter claim as parties. The original plaintiffs' counsel raised this issue in their submissions. The defendants' counsel did not address the issue in their submissions. I was urged by the counsel of the original plaintiff to find that the application dated 4th March 2010 by the defendants (original defendants)was fatally defective because Order 1 rule 14 of the Civil Procedure Rules was not followed in bringing in additional parties.

Indeed, the original defendants having not obtained any leave of the court to join parties, were wrong to bring in those parties in the said application and in these proceedings. The said parties are not parties in this suit. They do not or cannot shoulder any responsibility or liability in these proceedings before they become parties. Therefore, any reference to those parties and any purported transaction or commitment by them cannot arise in these proceedings and cannot be held against any of the parties in these proceedings. They could later be called witnesses, but they are not parties now and their commitments or otherwise, if they are in dispute, cannot be taken to give an advantage or disadvantage to any of the genuine parties in these proceedings. I hold that **Charles Stephen Mbindyo, Walter Kiilu Mbindyo and Real Management (2002) Ltd** are not andcannot be parties in the application dated 4th March 2010. Therefore, any purported commitment or liability by them cannot be considered in these two applications. As was held in the case of **AGRICULTURAL FINANCE CORPORATION VS LENGETIA LTD** (supra) which was relied upon by the counsel for the original defendants, a contract binds only those people who are parties to the same. If the original defendants want to bring in other parties in this proceedings, they should do so not through the back door but through the proper legal process provided in our law.

Now, coming to the tests in the case of **GEILLA VS CASSMAN BROWN** (supra), has the original plaintiff demonstrated a prima facie case with probability of success in the application dated 3rd March 2010? On the converse side, have the original defendants demonstrated their prima facie case with probability of success in the application dated 4th March 2010? In my view, with the facts placed before me, the original plaintiff has established a prima facie case while the original defendants have not. The original plaintiff has shown a copy of an agreement for the plot where the borehole is situated. That agreement is not disputed by any party to it, except that the original defendants challenged the same on technical issues relating to payment Stamp duty and registration. It is apparent from the documents and even submissions filed therein, that the borehole is in a plot outside the individual plots of the house that were bought by the original defendants. It is also apparent that the plaintiffs have been running/managing the borehole and the water.

Obviously, there are some issues to be resolved. Those issues can only be determined after evidence is tendered on both sides. The original defendants seem to rely on the presentations or impression made by persons who are not parties to this suit. It does not help them at this stage. I appreciate that the original defendants need supply of water. The original plaintiff claims that they are capable of supplying water, provided the original defendants pay for supply of the same. It is also instructive to note that the owners of the houses in the estate are 11 in number. However, the original defendants herein are only 5 people. In my view, the original plaintiff who is the applicant, in the application dated 3rd March 2010, has demonstrated a prima facie case. He has an interest in the plot where the borehole is situated and has a sufficient interest to manage the borehole water. This of course is subject substantive proof in the main proceedings, after hearing the evidence of all parties. In the meantime however, I find that the applicant in the application dated 3rd March 2010, who is the original plaintiff, has demonstrated a prima facie case with probability of success.

The applicants in the application dated 4th March 2010, who are the original defendants, have failed to demonstrate a prima facie case with success. Their application attempts to bring in parties and issues through the back door.

The second test is whether the original plaintiff will suffer irreparable loss that cannot be adequately compensated in the award of damages. Because the original plaintiff has demonstrated a prima facie case, and this is a matter that relates to ownership or interests or use in a parcel of land, I find and hold that the original plaintiff who is the applicant in the application dated 3rd March 2010 has demonstrated that they will suffer irreparable loss or damage, if an injunction is not granted before the determination of this suit.

Having found in favour of the original plaintiff on the basis of the first two tests in the case of **Geilla Vs Cassman Brown** (supra), I have no doubt that interlocutory injunction orders deserve to be issued. Therefore, I will not go into the 3rd parameter on the balance of convenience.

It is not disputed that the injunctive orders sought by the original plaintiff are of a mandatory nature. In **KENYA BREWERIES LTD VERSUS WASHINGTON OKELLO NAIROBI CIVIL APPEAL 332 OF 2000**, the Court of Appeal cited with approval what was stated in **AOCABAIL INTERNATIONAL FINANCE LTD VS AGRO-EXPORT & OTHERS (1986) 1 ALL ER 901** where the English court held as follows: -

" A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either aware the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act. Which could be easily reminded or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high of assurance that at the trial it would appear that the injunction had highly been granted. That being a different, and higher standard that was required for a prohibitory injunction."

The standard that is required for the grant of an interlocutory mandatory injunctions is higher than that of a prohibitory injunction. In the present case, where an apparent proprietor of leasehold interest is asking through prohibitory injunction to be put in a position that they were before the other parties did something that changed the whole situation not through the court but on their own initiative and reasoning in my view, a mandatory injunction of a interlocutory nature is justified in favour of the apparent proprietor, before the hearing and determination of this matter substantively. Consequentively, I dismiss the application by the original defendants dated 4th March 2010. I allow the application by the original plaintiff dated 3rd March 2010 and order as follows: -

1. I hereby issue an order of interlocutory mandatory injunction against the 1st, 2nd, 3rd, 4th, and 5th defendants herein, whether by themselves, their agents, servants, employees or whomsoever directing them to return the electric circuit board and to restore the water supply on the suit premises known as plot No. L.R. 13867/4 situate within an estate known as Karen Country Homes, Karen Plains, Nairobi and allow the plaintiff/applicant to re-enter the said premises and continue with his peaceful business of managing and supplying borehole water pending the hearing and determination of this suit. And the Officer Karen Police Officer do assist in the execution of this order.

2. An order of interlocutory injunction is hereby issued against the 1st, 2nd, 3rd, 4th and 5th defendants herein, whether by themselves, their agents, servants, employees or whomsoever acting for them restraining them from preventing and/or interfering with the plaintiff's management of the borehole water within the suit premises known as L.R. 13867/4 until the hearing and determination of the suit.

3. **Costs will abide the decision in the main case**.

Dated and delivered at Nairobi this 15th day of February, 2011.

.....
GEORGE DULU
JUDGE

In the presence of
Mr. Owino holding brief for Mr. Apopo for original plaintiff

Mr. Anzola for original defendant
Catherine Muendo – court clerk