REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 130 OF 2011

SUNRISE ORTHOPAEDIC AND

TRAUMA HOSPITAL LIMITED …….....……..…… 1ST PLAINTIFF
DAVID LANGAT …….....……..…….. 2ND PLAINTIFF

VERSUS

DR. LECTARY KIBOR KEIYO LELEI …….....…..…… DEFENDANT

RULING

In the plaint dated 25th July 2011 and filed herein on the 26th July 2011, the first plaintiff, **SUNRISE ORTHOPAEDIC & TRAUMA HOSPITAL LIMITED,** and the second plaintiff, **DAVID LANGAT**, have sued the defendant, **DR. LECTARY KIBOR KEIYO LELEI**, on the basis of an alleged agreement entered between the 2nd plaintiff and the defendant to engage in a joint venture to construct and operate a hospital. The said agreement was allegedly entered in the month of February 2010 and it provided that a company would be incorporated with both the 2nd plaintiff and the defendant taking up shareholding on equal terms and hold directorship as well as operate the hospital as a commercial entity which hospital would be constructed on land parcel **L.R. NO. ELDORET MUNICIPALITY/ BLOCK 8/90** (herein, the suit property) registered in the defendant's name. Further, the defendant would as part of his equity transfer the property to the incorporated company once it was discharged and freed from encumbrances namely a charge registered over the property to secure a debt owed to, Savings & Loan (K) Limited. In addition, the 2nd plaintiff would inject capital into the yet to be incorporated company by way of cash, actual building materials and assist to obtain loan facilities from Eco Bank (K) Limited for the purposes of settling the loan owed to Kenya Commercial Bank Limited and to fund the constructions and procure equipment of the proposed hospital.

It is averred in the plaint that the 2nd plaintiff and the defendant were at all material times, shareholders and directors of the 1st company whose principal object was to take over, maintain, manage and control the whole of the properties of Sunrise Orthopaedic & Trauma Hospital and carry on ancillary business in relation to running the hospital.

It is also averred that pursuant to the said agreement, the 2nd plaintiff and the defendant proceeded to implement the agreement by incorporating the 1st plaintiff with the 2nd plaintiff and the defendant being equal shareholders and by the 2nd plaintiff causing the preparation of a project financial proposal for the

construction and development of a hospital on the suit property. Further, the 1st plaintiff applied for and through the efforts of the 2nd plaintiff obtained loan facilities from Eco Bank (K) Limited and a portion thereof amounting to Ksh. 11,518,046/58 was applied to settle the defendant's debt owed to Saving & Loan (K) Limited, the precursor to Kenya Commercial Bank Limited. The loan facilities were secured by the 1st plaintiff and were to be used in the commencement of the construction of the hospital and in the purchase of hospital equipment.

It is further averred that in addition to the loan facility borrowed from Eco Bank (K) Limited, the 2nd plaintiff also injected amounts of approx. Ksh. 15,000,000/- by way of cash payment to the defendant, a container load of twisted, square and round iron-bars and three truck loads of cement. However, in the month of April, May and June 2011, the defendant purported to repudiate the material agreement and to decline the 2nd plaintiff ingress into the hospital project site on the footing that the property was registered in the defendant's name. The defendant's letter dated 24th June 2011, captured his endevour to unlawfully and unilaterally repudiate and renegade upon the agreements and commitments made by and between himself and the 2nd plaintiff and also as shareholders and directors of the 1st plaintiff.

The 2nd plaintiff thus contends that the defendant's action amount to a breach of the agreement and understanding between him and the defendant and also a breach of the Memorandum and Articles of Association of the Company.

The 2nd plaintiff therefore seeks injunctive orders against the defendant together with order that full accounts be taken of the monies and building materials contributed by both plaintiffs and the defendant in the construction and building works undertaken on the suit property and the purchase of hospital equipment. The 2nd plaintiff also seeks a declaratory order that the defendant holds the suit property in trust for Sunrise Orthopaedic Trauma Hospital Limited.

Also sought by the 2nd plaintiff is an order for the defendant to execute a transfer of the suit property to the 1st plaintiff. In the alternative, the 2nd plaintiff seeks the equitable relief of restitution of all the money equivalent to the value of the building materials, labour costs, transport and interest thereon upon taking of accounts employed in the construction of the hospital project.

The present application vide the Notice of Motion dated 25th July 2011 was filed contemporaneously with the plaint.

The application is made under Order 40 Rules 1, 2, 4 (1) and 10 and Order 20 Rules 1, 2, 3 & 4 of the Civil Procedure Rules and S. 1A, 1B and 3A of the Civil Procedure Act.

The basic Orders sought at this juncture are prayers (4) and (5) i.e. that pending the hearing and determination of this suit, the defendant by himself, his employees, servants/agents be restrained by an order of injunction from transferring, leasing, charging or in any way dealing with the suit property and that the defendant by himself, his employers, servants/agents be restrained by an order of injunction from the hospital premises built and erected on the suit property for the use of the members of the public as outpatients or inpatients.

Prayer 6 of the application revolves around the taking of accounts as provided for under Order 20 of the Civil Procedure Rules. However, the prayer ought to have been made by a separate application. It's inclusion in this application is improper.

Be that as it may, the present application is founded on four grounds as follows:-

(1) That, the 2nd plaintiff and the defendant are equal shareholders in the 1st plaintiff company namely Sunrise Orthopaedic & Trauma Hospital Limited.

(2) That the defendant has during the months of April, May and June 2011 acted and conducted himself in a manner to breach an agreement to transfer the suit property to the 1st

plaintiff and has left little doubt that he intends to unjustly enrich himself by claiming ownership of and converting the building and construction work effected through resources provided by the 1st and 2nd plaintiffs pursuant to an agreement between the 2nd plaintiff and the defendant.

(3) That the defendant's acts and conduct constitute a breach of trust, breach of fiduciary obligations and breach of contractual obligations.

(4) That the 2nd plaintiff's investment in the buildings and construction works and his shareholding in the 1st plaintiff company is likely to be prejudiced and diminished and unless restrained by this Court, the defendant will continue his wrongful acts which in effect shall irreparably prejudice the 1st and 2nd plaintiffs.

In his supporting affidavit dated 25th July 2011, the 2nd plaintiff adopted and reiterated the contents of the plaint and contended that it was agreed and understood by and between himself and the defendant that the proposed hospital would be constructed on the suit property registered in the defendant's name and that he (2nd plaintiff) would use his business expertise and contacts to obtain money to facilitate the settlement of a loan owed to Savings & Loans (K) Limited and discharge the charge secured by the suit property and commence building works thereon. The title document i.e. a certificate of lease dated 13th February 2009 is annexed and marked "Exhibit DL 1".

The 2nd plaintiff also contended that in order to carry the joint venture to construct the hospital, it was agreed that a company where he and the defendant would be equal shareholders would be incorporated and that the hospital would be constructed upon the defendant's suit property. It was also agreed that due to the 2nd plaintiff's excellent business relations with Eco Bank (K) Limited, the 2nd plaintiff would assist the Company to procure loan facilities therefrom and that the loan facilities would be used to settle the Ksh. 11,518,046/58 cts debt owed to Savings & Loans (K) Limited secured by a charge upon the suit property and to fund the construction and building works thereon and the purchase of hospital equipment. It was further agreed that the suit property would ultimately be transferred to the Company.

It was further contended by the 2nd plaintiff that the estimated costs of the proposed construction together with the land acquisition was placed at Ksh. 30 million and in that regard a consultant was instructed to prepare financial proposal (exhibit marked "DL 2"). The proposed Company was thereafter incorporated (exhibit marked "DL 3") with the 2nd plaintiff and the defendant being equal shareholders.

The 2nd plaintiff averred that being a newly incorporated Company, the 1st plaintiff could not qualify to borrow the sum of money required but due to his (2nd plaintiff's) relationship with Eco Bank Limited, the facility was availed (See, exhibit marked "DL 4") and was applied to discharge the suit property by the payment of Ksh. 11,518,046/58 cts to Kenya Commercial Bank on 19th October 2010 (See, exhibit marked "DL 5").

The 2nd plaintiff averred that notwithstanding the full settlement of the debt owed to KCB, the defendant failed to transfer the suit property to the 1st plaintiff and instead kept it in his own name which fact came to the knowledge of the 2nd plaintiff when charge documents were availed to him for his signature (see, exhibit marked "DL 6") and even though the suit property constituted security for banking facilities extended by Eco Bank Limited to the 1st plaintiff with clear understanding that the defendant would effect transfer of the suit property in favour of the 1st plaintiff and its value be taken as his equity contribution.

The 2nd plaintiff averred that when he sought from the defendant the reason for his failure to transfer the suit property to the 1st plaintiff, the defendant become defensive and demanded a sum of Ksh. 24 million from the 2nd plaintiff to effect the transfer. The defendant also demanded that the 2nd plaintiff

reduces his share in the 1st plaintiff to 30% and his (defendant's) lawyers wrote to the 2nd plaintiff indicating that he (defendant) did not recognize the 2nd plaintiff as a partner in the hospital project (see exhibits marked "DL 7 (a)" and "DL 7 (b)"). Further, on 27th June 2011, the defendant called the 2nd plaintiff and demanded that he (2nd plaintiff) surrenders 20% of his shares to him in return of his execution of a transfer of the suit property to the 1st plaintiff.

The 2nd plaintiff contended that the conduct and acts of the defendant have imperiled the hospital project. His ability to participate in the management of the project has been greatly prejudiced and he stands to lose financially given that the project is almost complete and is expected to start business. Further, the defendant intends to exclude his (2nd plaintiff's) participation and deny him a refund on his very substantial investment. He stands to lose a considerable amount of money and even then he shall be liable as a guarantor to pay off the Eco Bank loan.

In arguing the application on behalf of the 2nd plaintiff, learned Counsel, **MR. AMOLO**, more or less repeated and elaborated the foregoing averments and contentions contained in the 2nd plaintiff's supporting affidavit. Accordingly, learned Counsel contended that the 2nd plaintiff expended over Ksh. 19 million towards the construction of the medical facility by purchasing materials, engaging consultants, physical planners among other things and all these was indicative of an agreement for the transfer of the suit property to the 1st plaintiff rather than a disposal of an interest in land.

Learned Counsel contended that the suit property is held in trust by the defendant on behalf of the1st plaintiff. The existence of such trust whether implied or constructive may only be determined by evidence. Learned Counsel further contended that the 2nd plaintiff has sufficiently shown that a sum of Ksh. 30 million was borrowed and that matters raised in the defendant's replying affidavit are suitable for trial.

Therefore, learned Counsel urged this Court to grant the orders sought herein.

In an attempt to amend the application, the 2nd plaintiff filed an amended Notice of Motion dated 1st August 2011 in which additional injunctive orders are sought pending the hearing and determination of the suit. These include that the defendant by himself, his employees, servants or agents be restrained from removing medical and hospital equipment itemized in the quotation dated 24th March 2009 and packing list valued at U.S dollars 163,300 (approx. Ksh. 15,000,000/-) dated 2nd November 2009 issued by Medical Devices International 3328 Blueberry lane, Springfield in 62711 United States of America from the hospital project being constructed upon the suit property.

The 2nd plaintiff also prayed for an order to allow him at his own cost to engage and deploy a security firm at the hospital project being constructed upon the suit property.

In opposing the application, the defendant filed a replying affidavit dated 22nd August 2011 in which he avers that the suit property was purchased by himself on the 2nd July 2007 from one Karam Singh Bhamra at a total consideration of Ksh 16 million which was fully paid thereby causing the transfer of the property into his name. His registration as the owner of the suit property was done on 13th February 2009 and to date, he holds such registration.

The defendant avers that at the time of the purchase of the property, it was already developed with a six (6) bedroom permanent house, a garage and store and one semi-permanent house. Neither the 2nd plaintiff nor the 1st plaintiff were parties to the purchase agreement. Indeed, the 1st plaintiff came into existence on 2nd February 2010 long after the suit property had been purchased.

The defendant contends that he has never entered into any formal and/or oral agreement for the sale, lease and/or any other disposition of his interest in the suit property with the 2nd plaintiff and there is no

sale, lease or any other written agreement in force signed by him with the 2nd plaintiff wherefore he was to transfer title over the suit property to the 2nd plaintiff or the 1st plaintiff.

The defendant denies that he agreed to enter into a joint venture with any of the plaintiffs that would lead to the transfer of the suit property to either of the plaintiffs. Also denied by the defendant is the allegation by the 2nd plaintiff that the construction of the hospital and the cost of acquisition of the suit property was to be Ksh. 30 million.

The defendant avers that he met the 2nd plaintiff in or about the month of January 2010 and the idea of entering into a joint venture was discussed. The intention to enter into a joint venture was based on the fact that the defendant was a medical doctor and owned the suit property while the 2nd defendant had no suitable land for the construction of a hospital. It was intended that once incorporated, the 1st plaintiff would manage the business which would be run on the suit property and that any material contributed by the 2nd plaintiff would be recouped through the long term profits which the Company would make from operating from the premises which the defendant would manage since he was an Orthopaedic and Trauma Surgeon Doctor while the 2nd plaintiff not being a doctor could not himself treat patients.

The defendant denies the 2nd plaintiff's allegation that he (2nd plaintiff) made a contribution of Ksh. 15 million towards the construction of the hospital and contends that he (defendant) has financed and continues to finance the construction of the hospital upto the time he decided to charge the suit property as a collateral and continue to finance the project. The defendant avers that he was taken aback when the 2nd plaintiff on or about the month of June 2011 demanded that he transfers the suit property to him (2nd plaintiff) or be bought out. The defendant contends and reiterates that it has never been agreed between himself and any of the plaintiff's that he would sell or transfer the suit property to any of the plaintiffs and that he does not intend to continue with a joint venture where he is to transfer the suit property.

In arguing the defendant's opposition to the application, learned counsel, **MR. GICHERU**, submitted that the 2nd plaintiff has not established a prima-facie case with a probability of success and referred this Court to the ruling of the Court made on 12th October 2011 by Azangalala J. respecting the Preliminary Objection raised by the defendant in which the 1st plaintiff was struck out of this suit on ground that the 2nd plaintiff had no authority to file the sit on its behalf.

Learned Counsel contended that the 2nd plaintiff is required to establish a prima facie case which must flow from the pleadings yet all the annextures in this application belong to the 1st plaintiff which is a separate legal entity from its shareholders and directors. Further, the substantive reliefs sought by the 2nd plaintiff are prayers (e) and (f) of the plaint which deal with the suit property.

A transfer is sought in favour of the 1st plaintiff and it is alleged that the suit property is held in trust by the defendant on behalf of the 1st plaintiff. This being the cause of action which cause of action has been struck out, the defendant wonders where a prima-facie case would come from.

Learned Counsel, **MR. GICHERU**, went on to contend that there was no single document executed between the 2nd plaintiff and the defendant to enter into any joint venture and that the 2nd plaintiff is not claiming the property for himself but for the 1st plaintiff. Further, there is nothing to show that the 2nd plaintiff purchased materials for the construction of the medical facility. No banking statements, slips, delivery notes and invoices have been exhibited.

It was further contended on behalf of the defendant that the change of user of the property was applied and made by the defendant in 2009 prior to the alleged joint venture. Therefore, the 2nd plaintiff could not have applied for change of user nor facilitated the construction of the medical facility.

In reference to S. 27 and 28 of the RLA, the defendant submitted that being the absolute proprietor of the suit property, he enjoys the protection of the law and that although the property is charged to a bank, the bank is not enjoined in this suit. The interest in the property is with a bank and therefore the

prayers sought herein by the 2nd plaintiff are incapable of being enforced. The present circumstances do not favour a temporary injunction since it cannot be used to evict a party in possession. The defendant cannot be restrained from entering property already in his possession.

With regard to damages, the defendant's learned Counsel submitted that the 2nd plaintiff has not established that he would suffer irreparable damages and since prayers (a) and (g)of the Plaint are for restitution and compensation, damages would be payable in this particular instant. Further, the pleadings acknowledge damages as a remedy and since the defendant has been in medical practice for twenty-five (25) years as an Orthopaedic Surgeon and that he purchased the suit property for Ksh. 16 million, he is capable of paying damages to the 2nd plaintiff if so ordered.

On the balance of convenience, learned Counsel, submitted that the defendant is the person who has charged the suit property and is required to repay the loan. The defendant therefore wonders, how he can repay the loan if the proposed medical facility cannot operate to serve members of the public. Therefore, it is the defendant's contention that the balance of convenience would tilt in his favour.

The defendant further contends that the 2nd plaintiff would not suffer any prejudice as the defendant is the registered owner of the property and has possession thereof. Further, the law does not permit a joint venture to be entered in anticipation of a Company yet to be incorporated. Such an agreement would not even be validated by the company at a later stage.

The present application is made under Order 40 of the Civil Procedure Rules which provides for temporary injunction and interlocutory orders. Rules 1 and 2 of the Order specifies the instances in which a temporary injunction may be granted while Rule 10 deals with the detention, preservation and inspection of property. Having considered the rival submissions by both parties, and taking account of the underlying factors leading to the present disputes, it now behoves upon this Court to determine whether the applicant/second plaintiff would be entitled to the equitable remedy of injunction in terms of the relevant prayers contained in the Notice of Motion dated 25th July 2011. The attempt to have the application amended vide the Notice of Motion dated 1st August 2011 was thwarted by the Court when it was ruled that the amended Notice of Motion was incompetent for want of necessary leave. The Court also struck out the first plaintiff's suit against the defendant following a Preliminary Objection by the defendant.

This application relates to the suit against the defendant by the second plaintiff even though the submissions by both parties invariably had to refer to the first plaintiff. In any event, the second plaintiff's case against the defendant revolves around the first plaintiff, a company formed by both the second plaintiff and the defendant with the intention of operating a hospital for commercial purposes. The proposed hospital is already under construction on the suit property. The suit itself relates to the suit property and the developments thereon pertaining to the proposed medical facility.

While Order 40 of the Civil Procedure Rules provides for the grant of temporary or interlocutory injunction, an applicant is required to meet the conditions for such grant as set out in the leading authority on the subject i.e. the case of **GIELLA VS. CASSMAN BROWN & CO. LIMITED [1973] EA 358**. The said conditions are that:-

(i) An applicant must show a prima-facie case with a probability of success.

(ii) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

(iii) If the Court is in doubt, it will decide an application on the balance of convenience.

The grant of an interlocutory injunction is therefore an exercise of judicial discretion. An application towards that end is of an interlocutory nature. The Court is expected to refrain from making a final

determination on matters raised in the pleadings. The Court is thus not required to make any conclusive and definitive findings of facts or law on the basis of affidavit or disputed propositions.

With regard to whether the second plaintiff has established a prima-facie case with probability of success, let it be noted that probability of success means that the Court is only to gauge the strength of the plaintiff's case and not to adjudge the main suit at that stage since proof is only required at the hearing stage (see, **HABIB BANK A. G. ZURICH VS. EUGEN MARION YAKUB NBI C/APPEAL NO. 43 OF 1982 (C/A)**.

All that is necessary is that the Court should be satisfied that the claim by the applicant is not frivolous or vexatious, that there is a serious question to be tried (see, **AMERICAN CYNAMID COMPANY LIMITED VS. ETHICON LIMITED [1975] ALL E.R. 504**). As per prayer four (4) of the present application, the second plaintiff seeks a restraining order against the defendant to prevent him from transferring, leasing and charging the suit property.

Undoubtedly, the suit property is registered in the name of the defendant and it is already charged to a bank.

Being the registered proprietor, the defendant is certainly protected under S. 27 and 28 of the Registered Land Act (RLA). He may as an absolute proprietor, if he so wishes, transfer or lease the suit property together with any existing encumbrances. He may also discharge the charge and effect a transfer or lease. He may even charge the property further for additional banking facilities. Such circumstances call for the protection and preservation of the suit property pending determination of the suit.

The second plaintiff has in his supporting affidavit indicated that his interest in the property is based on an agreement or understanding between himself and the defendant to the effect that the property was to be transferred to a company yet to be formed by themselves with a view to putting up and operating a medical facility i.e. a hospital to be known as Sunrise Orthopaedic and Trauma Hospital.

The second plaintiff further indicated that the proposed Company known as Sunrise Orthopaedic and Trauma Hospital Limited has now been incorporated and that construction works for the hospital are underway.

Apparently, the second plaintiff places a stake in the proposed venture on account of his membership of the now incorporated company and his alleged monetory and material contribution towards the construction of the medical facility.

The Certificate of Lease respecting the suit property (i.e. exhibits marked "DL 1" and LKL 1") shows that the property was registered on the 13th February 2009 with an existing charge of Ksh. 12 million to Savings & Loans (K) Limited.

The property was further charged to Eco Bank (K) Limited for a loan of Ksh. 30 million on the 23rd August 2010 (see, annextures marked exhibit "DL 6" and LKL 5"). A further Ksh. 15 million was provided on 29th April 2011 (see annexture marked "DL 4").

The purpose of the latest loans was to facilitate the completion of the construction of the proposed hospital. It is notable that the latest loans were obtained on behalf of the Company (former first plaintiff) but the suit property remained the property of the defendant.

Whether, as the second plaintiff contends, there was an agreement and/or understanding that the suit property would be transferred to the company or whether the second plaintiff was instrumental in having the company obtain the loan from Eco Bank (K) Limited are matters which are suitable for a full hearing of the suit and a final determination.

The question of finally deciding whether or not there was an agreement and/or understanding between the second plaintiff and the defendant if there was, what terms ought to be implied is best not

determined by affidavit evidence. What is however certain is that this suit and indeed the present application raises weighty issues which are better subjected to the salutary test of cross-examination. It may therefore be safely stated herein that with regard to prayer four (4) of the application, a prima-facie case with probability of success has been established. Consequently, prayer four (4) may be granted for purpose of preserving or conserving the suit property inclusive of the hospital under construction and also to preserve the rights of the parties in the suit.

While it may be argued that the suit property is already charged to Eco Bank (K) Limited thereby rendering an injunctive order towards that effect of no use or incapable of being effected, it must be appreciated that prayer four (4) does not only deal with charging the property but also transferring and leasing. In any event, an existing charge can always be discharged. The suit property may also be subjected to a further charge.

Indeed, the suit property vis-à-vis the rights of the second plaintiff and the defendant thereto need to be preserved and protected by a temporary injunctive order.

It is not disputed that the second plaintiff is a director and shareholder of the company putting up the proposed hospital. He has shown that his interest in the suit property and the proposed hospital is sufficient for the grant of an equitable remedy. The prima-facie owner of the suit property is the defendant and although his proprietory interest is protected under S. 27 and 28 of the RLA, the mere fact of registration of land cannot defeat a claim based on a trust. A trust is protected by the provisions of S. 28 and 30 of the RLA (see, **HEZBON PANDA NYAIDHO VS. EDWARD KENNETH OLANDO WAMBIA C/APPEAL NO. 174 OF 2003 AT KISUMU (C/A)**.

Prayer (e) of the Plaint is for a declaration that the defendant holds the suit property in trust for the company. For such a declaration to issue, the Court would require more than affidavit evidence since a trust may be implied or constructive.

In is instructive to note that in his replying affidavit, the defendant denies that there was any formal or oral agreement entered between himself and the second plaintiff for the sale, lease or transfer of the suit property to the company and for the construction of the medical facility on the suit property at an estimated cost of Ksh. 30 million. However, in the same replying affidavit, the defendant acknowledges that he met the second plaintiff in or about the month of January 2010 and the two discussed the idea of entering into a joint venture based on the defendant's medical profession of being a medical doctor and also being the registered proprietor of the suit property which was suitable for the construction of a hospital. The two intended that a company be incorporated to run and operate the hospital from the suit property. They also intended that any material contributed by the second plaintiff towards the construction of the hospital be recouped through long term profits expected to be made by the Company.

From the foregoing, it is apparent that the agreement and/or understanding alluded to by the second plaintiff may have been made considering that the company was incorporated on 2nd February 2010 with the defendant and the second plaintiff being the directors/shareholders (see exhibit marked "DL 3"). Thereafter, the construction work for the hospital project commenced on the suit property following a project financial report (see, exhibit marked "DL 2") placing the estimated cost at Ksh. 55 million.

It has been indicated herein that the hospital is not yet operational and that construction is still in progress. Whatever the case, it is imperative that the suit property inclusive of the erections thereon be preserved pending the final determination of the dispute between the second plaintiff and the defendant.

On the same basis and with regard to prayer five (5) of the application, it is imperative that the defendant be restrained from putting into effect the operation of the hospital if construction is completed prior to the determination of this suit; pending hearing and final determination of the dispute.

While this Court fully understands that being the absolute proprietor of the suit land, the defendant cannot be barred from accessing his own property, the Court also fully understands that the suit property

and the hospital under construction thereon are subject of a serious dispute between the defendant and the second plaintiff. If the dispute is finally resolved in favour of the second plaintiff, the defendant may just as well be lawfully deprived of the property in favour of the Company formed by the two of them. In the circumstances, prayer five (5) would be restricted to the commencement of the operation of the hospital by the defendant rather than to his accessibility to the suit land. In any event, he is already in possession of the property.

In sum, it is the finding of this Court that the second plaintiff has fulfilled the first condition for the grant of an interlocutory injunction in terms of prayers four (4) and five (5) of the appropriate Notice of Motion.

With regard to the second condition for the grant of an interlocutory injunction, it may be noted that the pleadings by the second plaintiff indicate that the defendant's conduct and actions in relation to the alleged agreement are intended to unjustly enrich himself by retaining ownership of the suit property and thus taking over the ownership of the proposed hospital and converting it to his own use using medical equipment purchased on behalf of the company.

The second plaintiff therefore prays for the equitable relief of restitution of all the money equivalent to the value of the building materials, labour costs, transport costs etc. The foregoing pleading and prayer are indicative that if the second plaintiff were to suffer an injury as a result of the alleged breach of contract by the defendant, the same would not be irreparable as it would adequately be compensated by an award of damages.

The principle of unjust enrichment presupposes three things:-

(1) That the defendant has been enriched by the receipt of a benefit.

(2) That he has been so enriched at the expense of the plaintiff.

(3) That it would be unjust to allow him to retain the benefit (see, "*Law of Restitution*" by Goff & Jones).

With regard to the doctrine of unjust enrichment and the remedy of restitution, the English Case of **FIBROSA SPOLKE V. FAIRBARN LAWSON COMBE BARBOUR LIMITED (1943) AC**, was cited by our Court of Appeal in the case of **KENYA COMMERCIAL BANK LIMITED & ANOTHER VS. SAMUEL KAMAU MACHARIA & OTHERS C/APPEAL NO. 181 OF 2004 AT NAIROBI** in which the following remarks by Lord Wright in the former case were noted:-

"**It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort and are now recognized to fall within a third category of the common law which has been called quasi contract or restitution."**

From the foregoing comments on the doctrine of unjust enrichment and the remedy of restitution, it is clear that although a value can be placed on the suit property inclusive of the buildings erected thereon, the second plaintiff has nonetheless demonstrated that he has an arguable case against the defendant which calls for the preservation and protection of the property pending the hearing and final determination of this suit.

In the end result, the present application is allowed in terms of prayers four (4) and five (5). Prayer five (5) shall however be restricted to the intended operation of the hospital and not accessibility.

The second plaintiff will be entitled to the costs of the application.

Ordered accordingly.

J. R. KARANJA
JUDGE

[Read and signed this 1st day of December 2011]