



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 437 of 2008

PARK TOWERS LIMITED.....PLAINTIFF

VERSUS

WARETAIL MARKET CO-OPERATIVE

SOCIETY & INVESTMENT LIMITED.....1ST DEFENDANT

TUXY CONSTRUCTION CO. LIMITED.....2ND DEFENDANT

RULING

1. The application before court is the Chamber Summons application dated 11/09/2008 and filed in court on the same day. The application was filed under Certificate of Urgency together with the Plaintiff's suit. By the application, the Plaintiff seeks injunctive orders against the Defendants pending the hearing of the suit and also prays for a mandatory injunction compelling the Defendants, their servants and/or agents to remove all structures they have erected on the Plaintiff's property, which is described as LR No. 209/8409 (hereinafter referred to as the suit property).
2. The application is based on five grounds on the face thereof, the gist of which is that the Defendants had no colour of right to invade the suit property of which the Plaintiff is the legal and registered proprietor. The application is also based on the ground that the Defendants' invasion of the suit property is a threat to the peace and to the rule of law and is a clear violation of the Plaintiffs' constitutional right to own property and the protection guaranteed thereunder.
3. The application is also supported by the sworn affidavit of Sammy D Muathe dated 11/09/2009 and the annexures thereto. The deponent reiterates the averments on the face of the application and adds that at no time has the Plaintiff given the Defendants, jointly and/or severally any authority and/or consent to carry out any construction on the suit property and neither has the Plaintiff sold the suit property to the Defendants or to any other person. The deponent asks the court to injunct the Defendants until this suit is heard and determined.
4. The application proceeded by way of written submissions. Briefly, the Plaintiff's case is that the Plaintiff is the registered owner of the suit property which the Plaintiff says it purchased on 11/04/1995. With the consent of the City Council of Nairobi dated

27/09/1996, the Plaintiff proceeded to charge the suit property to Giro Commercial Bank Limited and Credit and Commerce Finance Limited for extension of two loans of Kshs.25,000,000/= and Kshs.30,000,000/= respectively. Annexed to the supporting affidavit sworn by Sammy D. Muathe as “SDM 4” are copies of charges between the Plaintiff and Giro Bank Limited and Credit & Commerce Finance Limited respectively.

5. The Plaintiff avers that it has enjoyed quiet and peaceful possession of the suit property until on or about 1/09/2008 when the Defendants invaded the suit property and started constructing stalls thereon. On the 24/09/2009, the Plaintiff obtained a temporary injunction pending the hearing of the application interpartes.
6. Counsel for the Plaintiff, M/s Oyatta & Associates, submitted that in the circumstances of this case, and based on the principles for the granting of injunctions as set out in **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**, the Plaintiff herein has shown:?

- (a) that he has a prima facie case with a probability of success
- (b) that if the injunction is not granted, it will suffer irreparable loss
- (c) that the balance of convenience tilts in favour of the Plaintiff/Applicant

7. The Plaintiff says that the suit property herein was the subject in HCCC No. 871 of 1997; that the said suit was settled by consent of the parties before Onyango Otieno J (as he then was), and that therefore, as was held in the **Flora Wasike –vs- Destimo Wamboko case [1982-88]1 KAR 625**, that consent cannot be challenged unless the Defendants can show that circumstances exist that would justify the setting aside of a contract. Hancox JA (as he then was) held at page 626 of the **Flora Wasike case** thus

“It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out -----”

The decision in the **Flora Wasike** case has been applied by the courts in many other cases since then, and counsel for the Plaintiff urged this court to find that this is a proper case for the application of the **Flora Wasike** principle, and to find that the Defendants cannot raise the same issue today. The Plaintiff’s counsel submitted that the 3rd Party herein namely the City Council of Nairobi is barred from questioning the registration of the Plaintiff as the proprietors of the suit property.

8. In his supplementary affidavit sworn on 9/10/2008, Sammy D. Muathe who says he is the Managing Director of the Plaintiff company says that the Defendants have truly invaded the suit property where extension of the retail market is taking place; that the Defendants never got the approval of the City Council of Nairobi to construct on the suit property which is shown to belong to the Plaintiff as per the Deed Plan No. 196870 and that in any event, the Defendants’ permit to extend the retail market was to be done on LR No. 209/6707 and not on the suit property.
9. Counsel for the Plaintiff also submitted that unless the orders sought are granted by this Honourable Court the Plaintiff will suffer irreparable damage. The Plaintiff says that the 3rd Party consented to the Plaintiff charging the suit property for a total of Kshs.55,000,000/= and the Plaintiff contends further that the Defendants have not produced any documents to show that the suit property belongs to them and therefore that they could use the same to secure loans or put up stalls. The Plaintiff says that if the order sought is not granted the two banks to which the suit property is charged are likely to proceed to sell the suit property in exercise of their statutory power of sale, and that such an occurrence would prejudice the Plaintiff very seriously.
10. It is also the Plaintiffs argument that even the balance of convenience tilts in favour of the Plaintiff for the reason that the Plaintiff has established that it is the registered proprietor of the suit property.
11. Regarding the prayer for a mandatory injunction, the Plaintiff’s counsel submitted that mandatory injunctions can only be granted in special circumstances where the Plaintiff’s case is very strong. The court was referred to the Court of Appeal decision in **Shariff Abdi Hassan –vs- Nadhif Jama Adan [2006]e KLR** in which the Court of Appeal referred to its own earlier decision in **Jaj Super Power Cash and Carry Ltd. –vs- Nairobi City Council and 2 Others Civil Appeal No. 111 of 2002**, where the court said the following:—

“This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute, and it is no answer that the alleged acts of trespass are compensable

in damages. A wrong doer cannot keep what he has taken because he can pay for it.”

12. In the **Shariff Abdi Hassan case**, the court referred to the case **LOCABIL INTERNATIONAL FINANCE LTD V AGRO-EXPERT & ANOTHER [1986] 1 AII ER 901** regarding the principles applicable in cases of mandatory injunctions. Those principles are set out at page 8 of the **Shariff Abdi Hassan case** which is that —

“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 where 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 easily be remedied or where the Defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

13. In the local case of **Kamau Mucuha vs The Ripples Ltd.** (Civil Application Nai 186 of 1992 (unreported)), a decision that was applied in the **Shariff Abdi Hassan case** the above principles were restated in the following words which appear at pages 8-9 of the judgment in the **Shariff Abdi Hassan case**:—

“A party, as far as possible, ought not to be allowed to retain a position of advantage, that it has obtained through a planned and blatant unlawful act and, without it in anyway attempting to pre-decide the intended appeal or to influence a decision thereon, I am of the view that the order of the learned judge granting the prohibitory and mandatory injunctions ought not to be disturbed at this stage.”

14. It is on the basis of the above authorities that counsel for the Plaintiff herein says that the Plaintiff is entitled to both prohibitory and mandatory injunctions. Counsel prays for the orders on behalf of the Plaintiff.
15. Before moving on to consider the replying affidavits and the submissions filed and made by the Defendants/Respondents, it is helpful to look at the plaint and the defence in brief. In the plaint dated 11/09/2008 and filed in court on the same date, the Plaintiff is described as a limited liability company duly incorporated in Kenya and that at all times material to this suit, it was and is still the registered owner of all that piece or parcel of land known as LR No.209/8409 together with the developments and/or improvements thereon and situate along Nairobi Landhies road abutting the City Council of Nairobi’s Retail Market within the City of Nairobi. The Plaintiff avers that on or about 20/09/2008, the Defendants invaded the suit property, displaced the licenses thereon and started fencing off the suit property for construction purposes, and that such invasion was done without the consent and/or authority of the Plaintiff. The Plaintiff says that the invasion has deprived it of the proceeds from the daily licensees, which proceeds were being used by the Plaintiff to service loans secured and that unless the Defendants are enjoined, the Plaintiff will be unable to service the loan with the resultant risk of the suit property being sold by the chargees in exercise of their statutory power of sale. The Plaintiff therefore prays for judgment against the Defendants jointly and/or severally for:
- (a) A declaration that the Defendants’ invasion, occupation and construction in all that piece or parcel of land being Land Reference Number 209/8409, the property of the Plaintiff, is illegal and a trespass to property.
 - (b) A permanent injunction compelling the Defendants, their agents, servants and/or employees or any person claiming their authority to give vacant possession of the property, clear of all construction material imported thereon, and in the state in which it was at the time of their illegal occupation.(sic)
 - (c) An injunction restraining the Defendants by themselves, agents, servants and/or employees or any person claiming them authority from now and forever interfering with the Plaintiff’s quiet enjoyment of the property and business thereon (sic).
 - (d) Aggravated damages for trespass
 - (e) Damages for lost business.
 - (f) Cost of this suit.
16. The 1st and 2nd Defendants filed their joint Statement of Defence on 9/10/2008. The two Defendants deny each and every allegation set out in the plaint and further allege that if the Plaintiff has title to the suit property, a fact which the two Defendants deny, the said title was obtained by the Plaintiff by means of fraud, illegality or corrupt dealings. The two Defendants also deny that they have neither invaded the suit property nor displaced any licensees. The 1st and 2nd Defendants’ position is that they have been carrying out construction on LR No. 209/6707 a property of which the City Council of Nairobi is the duly registered proprietor and owner. For the reason that the property the 1st and 2nd Defendants are constructing on does not belong to the Plaintiff, the 1st and

2nd Defendants say they did not need to obtain any consent or authority from the Plaintiff. The 1st and 2nd Defendants want the Plaintiff's suit dismissed with costs to themselves.

17. Though the Interested Party, the City Council of Nairobi is yet to file a defence, all the Respondents are opposed to the Plaintiff's application for prohibitory and injunctive orders. The Replying Affidavit on behalf of the 1st and 2nd Defendants is dated 17/09/2008 and is sworn by Judy Wambui who describes herself as the chairperson of the 1st Defendant whom she says has been delegated by the City Council of Nairobi the task of managing and running the affairs at the Retail Market situated on Landhies Road and standing on LR No. 209/6707 within the City of Nairobi. The deponent denies the Plaintiff's allegations as contained both in the plaint and the chamber summons application and in addition says that the Plaintiff has not authorized Sammy D. Muathe to file this suit on its behalf. The deponent says that the persons who purportedly signed the charge documents as Directors of the Plaintiff company are different from the person who swore both the Verifying and Supporting Affidavits as the Director instituting this suit. M/s Judy Wambui avers that the existence of the injunctive orders is injurious to the project which is being undertaken by the 1st and 2nd Defendants herein for the benefit of over 50 allottees. According to the charge documents produced by the Plaintiff in support of the injunctive orders, the signatories on behalf of the Plaintiff were Hudson Omemu Likuvi and Kephher Otichilo Susu. The two signatories signed the charge documents in their capacity as Directors of the Plaintiff.
18. The Replying Affidavit on behalf of the City Council of Nairobi (the Third Party) is sworn by **Saruni Ole Kudate** and is dated 18/12/2008. Mr. Ole Kudate says he is the Director of Social Services in the 3rd Party's Local Authority. Mr. Kudate avers that the Plaintiff's suit is frivolous and is an abuse of the court's process and alleges that the Plaintiff's acquisition of L.R. No. 209/8409 is suspect and that the same is currently a matter before the Kenya Anti Corruption Commission for investigation. The 3rd party also avers that the suit property, is also known as Old Machakos Country Bus Station. The 3rd Party says the developments being undertaken by the 1st and 2nd Defendants are being undertaken on LR No.209/6707 and that the 3rd Party approved the said developments through a resolution passed by the Social Service and Housing Committee on 19/05/2005. The 3rd Party also says through the affidavit sworn by Mr. Kudate that the 2nd Defendant met all the requirements under the Physical Planning Act, Cap 286 Laws of Kenya, and that in the final analysis there is neither infringement nor abhorrent threat, to the Rule of Law to the Plaintiff's constitutional rights as alleged by the Plaintiff or at all.
19. The Respondents also filed their written submissions in opposition to the application. In their submissions dated 4/08/2008 and filed in court on 7/08/2008, the 1st and 2nd Defendants contend that the suit property is the parcel of land that lies adjacent to the Wa Retail Market since 1964, and that at the request of the 1st Defendant to the Interested Party, the property is was surveyed and later allotted to 50 allottees for construction of stalls. That the tender for the construction of the stalls was won by the 2nd Defendant. That the Interested Party obtained a loan of Kshs.8,978,116/60 from K-Rep Bank, Moi Avenue to finance the construction. The 1st and 2nd Defendants deny the allegations that they invaded the suit land.
20. Citing the case of **Kenleb Cons Ltd. –vs- New Gatitu Service Station Ltd. & Another [1990] KLR 557** the two Defendants contend that the Plaintiff is not entitled to the orders of injunction sought by reason of material non-disclosure namely failing to divulge that the Defendants were in occupation of the suit property and also excluding the 3rd Party from these proceedings until they were brought on board by the Defendants. In the **Kenleb case**, Bosire J, (as he then was) said that for a party to succeed on an application for injunction, he must give “a full and frank disclosure of all relevant facts to the just determination of the application” and must also show “that he has a right, legal or equitable which require protection of an injunction”.
21. The two Defendants also contend that the construction work being undertaken by and on their behalf is on LR No. 209/6707 and not LR No.209/8409 as alleged by the Plaintiff/Applicant. The two Defendants argue that the Plaintiff is not entitled to the equitable remedy because it has not cleared its own name as far as regards the non-disclosure of the fact that the Defendants herein were allottees of the 3rd Party.
22. Further, the two Defendants contend that the Plaintiff has not met the conditions for the granting of injunctions as set out in **Giella –vs- Cassman Brown** case (above);that the Plaintiff has not demonstrated that it has a prima facie case with probability of success. The two Defendants also argue that the Plaintiff is not entitled to the mandatory injunction sought for reasons that the suit property has not been shown to clearly and specially belong to the Plaintiff. The two Defendants based their argument on this Honourable

Court's decisions in **Nderu –vs- Kenya National Chamber of Commerce & Industry & Another – [2003] KLR 160** where Onyango J (as he then was) reiterated earlier holdings by the courts that

“A mandatory injunction at an interlocutory stage is rarely granted; only when the Plaintiff's case is clear and uncontrovertible.”

23. In the instant case, the two Defendants contend that there are no special circumstances to warrant the issuance of the mandatory injunction, that in any event the Plaintiff's application for such an order is premature and further that the Plaintiff should not be allowed to retain his vantage position over the Defendants on the suit property that has been investigated and concluded by the Commission of Inquiry appointed under the Commission of Inquiry Act (The Ndungu Commission). Counsel for the two Defendants urged the court to apply the principle in the **Locabil International case** (supra) and to rule that the Plaintiff should not be allowed to steal a march on the Defendants. (see also **Wanjiku Gathoronjo vs Ann Njeri Karanja [2006]e KLR**. Counsel for the Defendants argue that the two Defendants will suffer greater harm than the Plaintiff if the orders sought by the Plaintiff are granted (see **Shepherd Homes Ltd. –vs- Sandham [1970]3 AII ER 402**).
24. The 3rd Party's written submissions are dated 19/08/2009 and filed in court on 20/08/2009. The 3rd Party has reiterated the averments contained in the Replying Affidavit of Mr. Ole Kudate sworn on 18/12/2008. The 3rd Party says that the two Defendants were duly authorized to carry out development on LR No.209/6707 vide Minute No. 9 of the Social Services and Housing Committee Meeting held on 19/05/2005. As regards the law the 3rd Party cited the case of **ALI & 3 Others –vs- City Council of Nairobi [2003] KLR 596** and **Marion Holding Limited –vs- City Council of Nairobi – HCCC No. 432 of 2008 at Nairobi**. In both of these cases, the court held that “where one is dissatisfied with the decision of a local authority declining permission to undertake development on a specified parcel of land he is entitled to appeal against such decision pursuant to the Physical Planning Act Cap 286” and further “that an injunction cannot lie against a local authority.”
25. The 3rd Party also contends that the construction being undertaken by the two Defendants is not on suit property but is on LR No. 209/6707. The 3rd Party argues that in the absence of a surveyor's report to establish whether the 2 Defendants have indeed trespassed on the Plaintiff's suit property, it would be unfair to the two Defendants for the court to grant the injunctive orders sought and in particular the mandatory order of injunction.
26. Thirdly, the 3rd Party argues that the Plaintiff's ownership of the suit property was the subject of the Ndungu Report and that the Plaintiff has not exhibited before this court a resolution by the 3rd Party authorizing the allocation of the suit property to the Plaintiff. The 3rd Party also argues that the Plaintiff has not shown what damage if any, it is likely to suffer if the orders sought are not granted. In essence, the 3rd Party is saying that the Plaintiff has failed to meet the standards for the granting of an injunction as set out in the **Giella case**. The 3rd Party asks this Honourable Court to dismiss the Plaintiff's application for injunction with costs to the Respondents and the 3rd Party.
27. In reply to the submissions by the 1st and 2nd Defendants and the 3rd Party, the Plaintiff submits that the purported survey by the 3rd Party's surveyor was inconclusive in that the surveyor did not indicate which property was to be surveyed and further that there was no Beacon Certificate to show that the survey was carried out. The Plaintiff also questions minute No. 9 of 19/05/2005 which says did not refer to the particular plot that was to be developed by the two Defendants herein. The court has looked at annexure marked “SOK 1” to Mr. Kudate's replying affidavit. There is an extract from the Ndungu Report showing LR No. 209/8407 whose reserved/planned user is “Retail Market-Parking Bay – Public Parking Space. The court has also seen the 3rd Party's Minute 9 of 19/05/2005 which refers to “a request received from the Market Committee at the Councils Landhies Road Retail Market for extension of the market to the open space adjacent to the market which was currently occupied by food and fruit vendors who had rendered the space a great risk owing to the poor standard of cleanliness maintained.” What comes out from the above is that though the LR Number was not given/quoted, the description given clarifies the particular parcel of land which was meant, the open space adjacent to the Wa Retail Market.
28. As regards the two Defendants' allegations that the Plaintiff failed to enjoin the 3rd Party in these proceedings the Plaintiff submits that it was the duty of the two Defendants to enjoin the 3rd Party and that in any event, the property mentioned in the Ndungu Report is LR 209/8407 and not LR 209/8409 which belongs to the Plaintiff. As to whether or not a mandatory injunction should issue in this

regard, the Plaintiff submits that it is entitled to the mandatory injunction because it is not trying to steal a match on the Defendants.

29. With regard to the 3rd Party's submissions, the Plaintiff says that the only issues for determination by the court are whether the Plaintiff is the registered owner of the suit property and secondly whether the Defendants have trespassed on the suit property. The Plaintiff maintains that it is the rightful and legal owner of the suit property especially so in light of the consent in HCCC No. 871 of 1997. Unfortunately, the Plaintiff has not exhibited a copy of the consent order in HCCC 871 of 1997 nor have any of the Respondents done so. The Plaintiff has also referred to annexure "SM 2" to the Plaintiff's supplementary affidavit saying that the Plaintiff was given licence to operate an open air market but the document so exhibited as "SDM 2" to the Supplementary Affidavit is a set of photographs showing the construction allegedly going on on the suit property. The court has however seen an order issued on 14/06/2000 in CMCC No. 2854 of 2000 by J.W. Lesiit, Chief Magistrate (as she then was). The case was between the Plaintiff herein as Plaintiff and Moses Chege & 6 Others (as 1st Defendant) and the Nairobi City Council as 2nd Defendant. The 1st Defendant was restrained from interfering with the Plaintiff's maintenance and management of LR Nos. 209/8408 and 209/8409 pending hearing and determination of the suit while the 2nd Defendant was restrained from cancelling revoking or in any way interfering with the Plaintiff's existing business permits. Nos. 0022633, 0023451 and 0023491.
30. The above is the information now before the court. The issues that arise are (a) whether Sammy D. Muathe was duly sanctioned by the Plaintiff to institute this suit and if not what is the consequence of it? and (b) whether the Plaintiff has demonstrated that it has a prima facie case with a probability of success and therefore deserving of the orders sought and (c) whether the prayer for a mandatory injunction is justified in this case.
31. The question on the competency of this suit was raised by the Replying Affidavit of Judy Wambui at paragraph 18 of the affidavit in which she said that the suit is void ab initio for lack of authority to Sammy D. Muathe to swear any documents on the Plaintiff's behalf or to institute the suit on behalf of the Plaintiff and to appoint the firm of Oyatta & Associates Advocates to act for the Plaintiff in this case. Surprisingly, neither the Plaintiff nor the Defendants pursued this point in their submissions, yet it is vital point in these whole proceedings. It is now settled law that unless the authority of a company is given, either through a resolution of the Board of Directors or of the General Meeting of the Company, whether a special or general meeting, then those who purport to act on behalf of the company do so in vain. Sammy D Muathe, who swore both the Verifying Affidavit and the affidavit in support of the Chamber Summons states in the Verifying Affidavit thus:?
- “**THAT** I am the Managing Director of the Plaintiff Company herein sufficiently familiar with the facts of this case, hence competent to swear this Affidavit.”
- and in the Supporting Affidavit thus:?
- “**THAT** I am the Managing Director of the Plaintiff Company herein hence competent to swear this affidavit.”
32. Whether as Managing Director or as Director in any other capacity the authority to act on behalf of the company comes and must come from the Company itself. Sammy D. Muathe has not exhibited any such authority to show that he was authorized to file this suit and to appoint the firm of Oyatta & Associates Advocates to act on the Plaintiff's behalf. Decided cases in point on this issue abound and in particular **Salomon –vs- Salomon [1897] AC 22**.
33. For the reasons given above I find that the suit herein which was filed without the authority of the Plaintiff being exhibited could be incompetent and void *ab initio*. What does this mean then as regards the application for injunction? The Chamber Summons application is premised on the Plaintiff's averments in the plaint, and if the plaint is not competently before this court can the application be? I think that the application cannot possibly succeed because it may transpire that the suit is incompetent and void ab initio. My view therefore is that the Plaintiff has not established a prima facie case with a probability of success. On that ground the prayer for a prohibitory injunctive order must fail.
34. What about the prayer for a mandatory order of injunction? The law states that such an injunction can only be granted where the Plaintiff's case is clear and uncontrovertable. (See **Kamau Mucula's case** above). After considering all the circumstances surrounding this case, I do not think that the Plaintiff's case herein is clear and uncontrovertable. It is true that the Plaintiff has the title deed in respect of LR 209/8409 to his credit, but there are allegations that the property on which the Defendants are

developing is LR No. 209/6707. There is also some considerable doubt as to whether the property referred to in the Ndungu Report is not LR No. 209/8409. The description of the property in the Ndungu Report fits in with the parcel of land described by the 3rd Party in Minute No. 9 of 19/05/2009 by the Social and Housing Committee. Moreover, the suit property is the subject of investigations by Kenya Anti Corruption Commission, and such investigations which are still pending cast a cloud over the Plaintiff's title to the suit property.

35. I also find that the Plaintiff has not proved that the Defendants are the trespassers in this case. If the Plaintiff had done so, the court would not have hesitated in finding that the Defendants ought to give way (as trespassers) pending the determination of this suit, whether or not such acts of trespass are compensable in damages. The Plaintiff has not established on balance of probability that the Defendants are in the wrong. I do not feel at this interlocutory stage that there are special circumstances to warrant the granting of a mandatory order of injunction against the Defendants. Nor do I find from the facts before me that the Defendants herein attempted to steal a match on the Plaintiff. If a problem exists in this case as to what allocations were made or not made, as to what approvals were given or not given as to what licences were issued or not issued, then such a problem is between the Plaintiff and the 3rd Party. There are mechanisms in the Physical Planning Act for resolving such problems between the Plaintiff and the 3rd Party. The court recognizes that the transactions touching on the suit property took place at a time when any transactions could pass any eye, and the 3rd Party in this case may not be so clean as it cries foul over the Plaintiff's suit. The court truly takes pity on the Plaintiff, but for the reasons given above, the court is unable to grant the orders sought.
36. An issue also arose touching on some consent order recorded in HCCC 871 of 1997, but as I have stated elsewhere in this ruling a copy of the said order has not been exhibited by either the Plaintiff or the Defendants or the 3rd Party who alleged that it was a party to the consent order. The court is thus unable to say whether or not such a consent order was to the benefit of the Plaintiff as alleged. The court does not know who the parties in that suit are and concludes that the consent order is of no consequence in this suit.
37. The upshot of what I have said above is that the Plaintiffs Chamber Summons application dated 11/09/2008 lacks merit. The same is hereby dismissed in its entirety with costs to the 1st and 2nd Defendants. The 3rd Party shall bear its own costs.

It is so ordered.

Delivered and Dated at Nairobi this 25th day of February, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mrs. Shamalla (present for the Plaintiff/Applicant)

No appearance for the Defendants

Weche – court clerk