REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 708 OF 2005

PARVI HOLDINGS LIMITED ……PLAINTIFF/APPLICANT

-VERSUS-

NAIROBI CITY COUNCIL ……..…DEFENDANT/RESPONDENT

RULING

A. RESPONDENT IGNORES RUNNING LEASE AND EVICTS: APPLICANT'S APPLICATION, PRAYERS, DEPOSITIONS

The plaintiff's application by Chamber Summons dated and filed on 9th June, 2005 was brought under Order ***XXXIX,*** rules 2 and 9 of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap. 21). The prayers in this application were as follows:

> (a) that, the Court do grant a temporary injunction restraining the defendant by itself, its servants, agents and otherwise howsoever from leasing part of L.R. No. 209/5577 (original No. 209/2394) otherwise known as City Hall Garden Restaurant, pending the ***inter partes*** hearing of this application;
>
> (b) that, the Court do grant an injunction restraining the defendant by itself, its servants, agents or otherwise howsoever from leasing part of L.R. No. 209/5577 pending the hearing of the main suit;
>
> (c) that, the Court do grant a mandatory injunction compelling the defendant to restore the plaintiff to the premises known as part of L.R. No. 209/5577 otherwise known as City Hall Garden Restaurant, in terms of the lease dated 15th December, 1998 and to return the chattels seized;
>
> (d) that, the Court do grant such further or other orders as may be necessary for the ends of justice;
>
> (e) that, the defendant be made to bear the costs of this application.

The supporting grounds are, firstly, that the plaintiff is the lawful tenant of the suit premises, as evidenced by the lease document dated ***1st March, 1998*** – for ten years. Secondly, it is stated that the plaintiff was unlawfully ***evicted*** from the suit premises on ***13th February, 2004***. Thirdly it is stated that the Minister for Local Government had in March, 2004 constituted an arbitration committee on the dispute between the parties herein, and the committee at the end of its sittings in May, 2004 resolved that the plaintiff be reinstated in the suit premises. It is stated, fourthly, that the defendant has at all material times given indications that the plaintiff would be reinstated in the suit premises once repair works, necessitated by fire damage, had been carried out. However, it is stated, fifthly, that the defendant has now, in breach of the said lease of 1st March, 1998 advertised the suit premises for lease; and it is also stated, sixthly, that

the defendant intends to commit the said breach of the existing lease agreement unless restrained by the Court.

M. T. Chege, a director of the plaintiff company, has sworn a supporting affidavit in which he avers that he had on 6th June, 2005 seen an advertisement by the Nairobi Town Clerk in the ***Daily Nation*** newspaper of ***17th May, 2005*** in which bids were being invited for the tender of Lease of City Hall Garden Restaurant (the suit premises). As at 6th June, 2005 the deponent was waiting to be contracted by the defendant who would advise him on the suitable time when he could resume operations at the suit premises, following the completion of repairs which were being undertaken.

The deponent averred that there is at the present time, a running lease executed by the parties herein, and the same would only expire on or about ***28th February, 2008***. It was deposed that on or about ***15th December, 1998*** the parties had entered into a lease agreement for a term of ten years with effect from ***1st March, 1998*** for a monthly rental of Kshs.52,000/= payable quarterly. The said lease, it was averred, had been duly stamped for stamp duty and had been registered.

The deponent avers that on or about ***13th February, 2004*** a gang of some fifty persons acting on the instructions of the defendant, forcefully evicted the plaintiff from the suit premises and confiscated the plaintiff's furniture and equipment, and locked up the suit premises.

The deponent has since learnt that the defendant's reason for the eviction aforesaid was that the plaintiff had allegedly been in arrears of rent, in the sum of Kshs3,905,307/=; he denies that there was any such indebtedness on the part of the plaintiff.

The deponent avers that prior to the date of the plaintiff's eviction as aforesaid, disagreements had arisen between the parties, and the plaintiff had filed ***H.C.C.C. No. 118 of 2003*** and ***also H.C.C.C. No. 291 of 2003***. The then Minister for Local Government, it is deponed, was anxious to have the disagreements settled and had constituted a task force to ensure that the dispute pending was amicably settled.

The deponent averred that after the eviction which took place on ***13th February, 2004*** the suit premises was on ***3rd March, 2004*** consumed by fire; and in that same month of March, 2004 the Ministry of Local Government's arbitration committee started its work on resolving the differences between the parties herein.

On 7th May, 2004 the deponent was arrested and charged in Criminal Case No. 1256 of 2004 with the offence of "wilfully and unlawfully [setting] fire to a building namely City Hall the property of Nairobi City Council …" He was, however, found not guilty in a Court ruling delivered on ***6th June,***

2005; and it is precisely on that date that the deponent learned of the advertisement for lease of the suit premises (via ***Daily Nation*** of 17th May, 2005).

The deponent deposes that the defendant, when evicting the plaintiff as aforesaid, "took away furniture and equipment valued at Kshs.7,635,949/= for which no inventory was taken and signed by both parties." He depones that he has confirmed that the confiscated goods and equipment were dumped at the Dagoretti Yard.

It is deponed that at all material times, the plaintiff had been given the indication by the defendant's officials (especially the Town Clerk) that the defendant was only repairing the suit premises and would thereafter put the plaintiff in possession.

The deponent believes that if the suit premises is leased to a third party, it will become more difficult for the plaintiff to get back into possession thereof; and in this way the plaintiff will have suffered irreparable harm while the lease between the plaintiff and the defendant is still running.

B. NO VALID LEASE EXISTED; WHAT LEASING ARRANGMENT CREATED ON 17.2.1998 WAS TERMINATED ON 13.2.2004 – RESPONDENT'S RESPONSE

John Gakuo the City Council of Nairobi's Town Clerk swore and filed a replying affidavit on 17th June, 2005 averring that it is true, the defendant has publicly invited tenders for the leasing of City Hall Garden Restaurant which has been ***vacan***t from ***13th February, 2004*** (the very day the plaintiff avers it was evicted therefrom).

The deponent makes averments that seek to attach validity to the termination of the applicant's lease. He deposes that the suit premises had been leased to the plaintiff pursuant to minute No. 5 of the Finance Committee meeting dated 25th March, 1997; that there are no available records of Ministerial consent to the leasing – even though the plaintiff's bid had not been the lowest; that the defendant had offered to lease the suit premises to the plaintiff by letter dated 17th February, 1998; that there exists no copy of a formal lease, whether registered or unregistered in the terms of the letter of offer; that the "purported suit lease dated 15th December, 1998 is not in the respondent Council's records and indeed there are no internal memos respecting the said purported lease on usual matters of preparation, execution and/or formalization." It is further deponed that there is "ample and controversial correspondence between the plaintiff and the Council relation to the tenancy." It is averred too that since the commencement of the tenancy the plaintiff has paid only the limited amount of Kshs.416,000/= towards rent.

The deponent avers that the "purported lease … contradicts the terms [of] the letter of offer dated ***17th February, 1998***". He also depones that the "purported lease was merely lodged as an ordinary document but not registered in the manner prescribed by law."

The deponent avers that "the tenancy created under the letter of offer dated 17.2.1998" had ***expired***; and thereupon, the defendant demanded for the surrender of the same, "but the plaintiff did not oblige".

Of the events of ***13th February, 2004*** the deponent deposes that the defendant had prepared an inventory correctly recording the items found on the suit premises – equipment, furniture, goods and materials; and that the plaintiff's parallel inventory which is inconsistent therewith, is wrongly formulated; and further, that the plaintiff when asked by the defendant to retrieve its various items declined to do so.

The deponent avers that there had been no agreement on the part of the defendant, to reinstate the plaintiff in the suit premises. It is deposed that there is ***no relationship of trust***, between the parties herein, and that the plaintiff will suffer no harm "if the suit premises are leased out to a deserving third party". It is, lastly, deponed that "it is in the public interest that the suit premises be forthwith re-utilized so as … to enable the respondent Council to get some revenue".

C. LEASE IS CONTRACT INTER PARTES – SUBMISSIONS FOR THE APPLICANT

On the first occasion of hearing, on 21st July, 2005 learned counsel ***Mr. Kiage*** and ***Mr. Waiganjo*** represented the plaintiff, while ***Mr. Njagi Wanjeru*** represented the defendant.

Mr. Kiage presented the application documents, and proceeded to make submissions. He urged that the Court do grant the orders contained in the prayers, on the ground that the defendant's attempts to lease the suit premises to a third party would be contrary to the existing lease executed between the parties. That lease is annexed to the supporting affidavit and marked "MT2". It is dated ***15th December, 1998***; it is drawn by the ***defendant's*** lawyer, ***Ms. Mercy M. Mugo,*** Advocate; it relates to City Hall Garden Restaurant, being part of L.R. No. 209/5577 (original No. 209/2394). The lease is signed by the Mayor of the City of Nairobi, the Town Clerk, director of the defendant, a director and secretary of the defendant, and it is sealed. The lease is stamped for stamp duty, and also bears the stamp of the Registry of Documents, dated 12th November, 2001 at 12.45 hours.

The crucial paragraph in the said lease, which is paragraph 1 on page 2, reads as follows:

"***NOW THIS LEASE WITNESSES*** that the lessee hereby covenant[s] and agree[s] with the Council as hereunder:-

"1. The Council lets and the lessee takes ***ALL THAT*** premises comprising … a kitchen, basement staff changing rooms, the garden, the terraces fronting the garden and adjoining the Charter and Conference Halls, toilet facilities known as ***CITY HALL GARDEN BAR AND RESTAURANT*** (hereinafter called 'the said premises') on a lease for a term of ten years from the first day of March, 1998 ***PAYING [THEREFOR]*** the monthly rent of Kshs.52,000/= payable quarterly."

Learned counsel noted that the said lease remains in force until 28th February, 2008, and therefore it would deny the plaintiff their entitlement under the contract if the suit premises was leased to a third party.

The plaintiff's position is that the eviction effected by the defendant on ***13th February, 2004*** was wrongful – firstly for being in breach of the contract of lease; and secondly for invoking justification in ***non-payment of rents due*** (a factual stance which itself is contested). It is obvious that whether or not the plaintiff was fully paid-up in rent is a matter for determination only by taking evidence in ***full trial***; and precisely for that reason, eviction of the plaintiff on that ground, and without recourse to legal process, would be illegal. So at this interlocutory stage, and on the rent question, I have to state that a ***rent*** cause cannot be a valid reason for evicting the plaintiff. This is even more emphatically so because there has been other litigation between the parties – H.C.C.C. No. 118 of 2003 (for the purpose of inhibiting threatened eviction by the defendant, and for compelling the restoration of electric power); and H.C.C.C. No. 291 of 2003 relating to rent payment. The two other suits, counsel urged – and this is uncontroverted – were pending at the time of the eviction complained of; assuming this to be true, it must follow that the eviction of the defendant on ***13th February, 2004*** was effected in breach of the law.

That the Minister for Local Government endeavoured to have an arbitration of the conflicting claims of the parties following the evictions can, I think, only be viewed as some attempts at atonement or the illegality which I have already mentioned, and which must have been known to the most responsible officers in charge of affairs at City Hall. Indeed, it is not controverted that the arbitration initiative came to the recommendation that the plaintiff be restored to the suit premises unconditionally. But even as the plaintiff waited to be reinstated, the defendant's composite premises was consumed by an inferno which also affected the suit premises – and there is evidence that the defendant ascribed blame to the plaintiff. Indeed the defendant has relied on that suspicion to urge that the prevailing ***loss of trust*** between the parties, renders the plaintiff an ***unsuitable tenant.***

It was urged that the defendant's eviction of the plaintiff on 13th February, 2004 was not in pursuance of a Court order, and was not effected by virtue of any law: "The defendant took the law into its own hands and acted as it did". In the process, the plaintiff has averred, the defendant "took away [the plaintiff's] furniture and equipment". As is on record already, on this question of ***furniture*** and ***equipment*** the two sides give differing facts; therefore the truth will not issue from interlocutory proceedings such as the instant one: the matter must be settled by taking oral testimonies and subjecting the same to cross-examination, at the trial stage. And therefore, I ***cannot make any mandatory orders at this stage,*** regarding the location, custody or possession of such "furniture and equipment". I am not also in a position at this initial stage, to make any finding regarding the plaintiff's Kshs.7,600,000/= value said to have been lost through wrongful handling of the said "furniture and equipment". I will, similarly, make no findings about the competing inventories of goods produced by the respective parties, nor determine any issue related to the claim that the defendant dumped the plaintiff's effects at Dagoretti.

Learned counsel urged that the plaintiff has a prima facie case with preponderant chances of success – and therefore merits orders of injunctive relief at this stage. I think, in view of the content of the foregoing paragraph, that such a submission must be restricted to the defendant's legal rights and/or any legitimate expectations from the contractual lease document signed by the parties on ***15th December, 1998***.

Mr. Kiage submitted that: "In the light of a ten-year lease which has involved a huge investment of

money to sustain the plaintiff's business and livelihood, there is a proper case for an injunction to restrain the leasing of the [suit] premises to other parties; and this would be an appropriate and meet remedy."

Learned counsel doubted the import of the claim made for the defendant, that the lease which would bind the parties, in respect of tenancy of the suit premises, was not registered. If such were the case, ***Mr. Kiage*** submitted, it would have been the defendant's responsibility to ensure registration – and so, the defendant "cannot benefit from non-registration". While both parties had seen themselves as drawing benefits from the lease, and so in a generous construction they bore equal duty to ensure registration, counsel urged, "by virtue of having drawn it [the lease], the obligation placed on the defendant was heavier."

Mr. Kiage went further to consider the legal quality of a lease of property registered under the Registration of Titles Act (Cap. 281), such as the one in question; and he submitted that the lease was a contract ***inter partes;*** and hence the defendant was bound by the contract of lease, at the time of eviction of the plaintiff on 13th February, 2004, just as it remains bound today.

Learned counsel contested the defendant's attempts to rely on "public interest" as justifying the said eviction of the plaintiff, and the attempts now to lease the suit premises to a third party. In the response papers, however, this theme, "public interest", was only just broached; but no cogent case was made upon it, by the defendant. "Public interest" is a loose-textured concept, even though properly invoked, its vitality as a positive attribute and a justification for institutional decision-making cannot be doubted. However, "public interest" is at the same time an easy recourse for those making decisions unsupported by law. ***Mr. Kiage*** addressed the point as follows: "There is a greater public interest; contractual obligations are to be honoured; the law is to be upheld; strong-arm tactics are to be deplored; there should be fairness and accountability in dealing with matters of this kind."

Learned counsel relied on the Court of Appeal decision in ***Gusii Mwalimu Investment Company Limited & 2 Others v. Mwalimu Hotel Kisii Limited,*** Civil Appeal No. 160 of 1995. In that case a landlord who was unhappy with his tenant simply evicted the tenant, without following any hearing process, and installed another tenant of his choice. The High Court reversed that course of conduct, a position which was upheld by the Court of Appeal. Now learned counsel noted that the lease in the ***Gusii Mwalimu*** case was ***unregistered***; unlike in the instant matter where it is a disputable question whether or not the lease is registered. ***Mr. Kiage*** urged: "Non-registration is no answer for a landlord who acts riotously".

Mr. Kiage relied on ***Kamau Muchuha v. The Ripples Limited,*** Civil Application No. Nai 196 of 1992 in which the grant of a mandatory injunction against a landlord evicting a tenant in violation of the law, was endorsed. For the same purpose counsel also invoked the High Court decision in ***Wildlife Lodges Limited v. Jacaranda Hotel Limited*** H.C.C.C. No. 521 of 1999; ***Palace Drycleaners Limited & Another v. Kenya Power & Lighting Company Limited*** HCCC No. 837 of 2000.

D. UNANSWERED PLEADING OF FRAUD; NO REGISTERED LEASE; NO LIKELIHOOD OF IRREPARABLE DAMAGE – SUBMISSIONS FOR THE RESPONDENT

Learned counsel for the defendant, ***Mr. Njagi***, began upon his submissions on 23rd November, 2005 by contesting the validity of the document of lease relied on by the plaintiff. Earlier on I had set out the key elements of the said lease which, though dated ***15th December, 1998*** states that the term of the lease is ten years as from ***1st March, 1998.*** As I have noted earlier, the said lease document carries all the trappings of official solemnisation and, quite clearly, it is not at the stage of interlocutory proceedings that it would be appropriate to establish as a fact, its authenticity. In the absence of any competing documentation of the defendant, at this stage, orders can properly be made based on ***prima facie*** evidence such as is brought before the Court through affidavits.

Learned counsel ***Mr. Njagi,*** however, contended: "The defendant contends that the 'lease' of 1st March, 1998 is illegal …; it has now been challenged in the [statement of] defence; and there is no reply to that defence." Learned counsel stated that he was "also relying on the defence; the pleadings deserve to be seen". And it is from the statement of defence that he drew the scenario of illegality as attaching to the

lease document relied upon the applicant.

Such an approach to the conduct of the instant application would no doubt present difficulties; for although it is the case that the main pleadings are always the foundation of interlocutory applications, the fundamental issues of the plaint and the defence cannot be squarely taken up during interlocutory applications. The purpose of an interlocutory application is to provide short-term relief owing to passing conditions of hardship, pending the authoritative resolution of the main dispute. And such ultimate solution cannot, in most cases, be achieved through the brief procedures of applications; in particular it cannot be achieved without full evidence tendered with cross-examination. Hence it is not, in general, proper use of Court process to dig deep into the main pleadings, or to attempt to prove major allegations such as illegality, fraud, etc. during interlocutory applications.

Mr. Njagi, proceeding from the supposition that illegality tainted the plaintiff's lease document, submitted that as equity follows the law, the plaintiff's prayers could not attract equitable remedies.

In his endeavour to impugn the application for interlocutory relief, ***Mr. Njagi*** resorted to the ***assertion in the statement of defence*** dated 21st July, 2005, that **"**The purported lease dated 15th December, 1998 was obtained by fraud and is indeed a forgery as borne out by … Council resolution dated 25th March, 1997 and the letter of offer dated 15th December, 1998" [17th February, 1998?]; and he charged that, to that pleading the plaintiff had failed to file a ***reply to defence***.

Mr. Njagi's position, I think, amounted to ***prosecuting the main suit*** and was not limited to the interlocutory claim. For the serious claim of fraud in the statement of defence, could only be established through the ordinary motions of ***trial***; and moreover, it would not be obvious that the plaintiff had to file a reply to defence; for if there is no reply to defence it means issues are joined at that point, and resolution would emerge from full trial. I am not, therefore, in agreement that the claim of fraud in the main pleadings should be a major element in the determination of the instant application.

Mr. Njagi contended that the making of the lease upon which the plaintiff relies was not attended with ***Ministerial consent***. I would assume, however, that the City Council, which is a public authority placed under the superintendency of the Minister for Local Government, is the party that bore the obligation to secure that consent. Hence the defendant, I believe, would not be able to plead its internal ethical or management shortfalls to stave off such liabilities as might fall upon it after it has contracted with outsiders. But learned counsel cited the decision of this Court (***Ringera, J*** as he then was) in ***Telkom (K) Limited v. Kamconsult Ltd.*** [2001] 2EA 574 for the proposition that in any case in which Ministerial consent is required, for an undertaking by a public body, if the same has not been given then any action taken is a nullity.

On the point about registration of the lease document, ***Mr. Njagi*** cited s.4 of the Registration of Documents Act (Cap.285) as requiring that the lease be registered. However, from the marks on the lease document which I have set out earlier, registration would have to be assumed to have taken place – and if not, then there is an unusual circumstance which is not for proof on affidavit evidence and cannot be resolved at this interlocutory stage. Learned counsel while noting the plaintiff's position that the first duty to register the document rested on the defendant, maintained that what would be significant was simply, that the lease document was ***not registered***; and that by s.26 of the Registration of Documents Act (Cap.285) there should have been a certificate of registration signed by the Registrar.

Mr. Njagi continued with his submissions on 13th March, 2006 and urged that the person to present a document for registration, by s.12 of the Registration of Documents Act (Cap.285), was the person claiming an interest. That person, learned counsel submitted, was the plaintiff.

Mr. Njagi submitted that the lease document relied upon by the plaintiff, since it was not registered, could not, by s.18 of the Registration of Documents Act (Cap.285), even be produced in a civil Court and so the application had no foundation in law. Counsel urged that as equity could not be set up against a statute, the application for interlocutory relief must be dismissed. He urged that there was no valid lease, and consequently there was no ***prima facie*** case which would be the basis for interlocutory relief. Counsel

relied on the decision of this Court (***Ringera, J***) in ***Supa Brite Ltd. v Pakad Enterprises Limited*** [2001]2 EA 563 for the proposition that the plaintiff was unlikely to suffer any harm and so was not entitled to injunctive relief; and it was submitted that irreparable harm – harm on a scale that could not be computed in terms of damages – would not fall upon the plaintiff.

E. REGISTRATION OF LEASE NOT MANDATORY; DUTY REGARDING MINISTERIAL CONSENT FALLS ON DEFENDANT – APPLICANT'S REPLY

Learned counsel ***Mr. Waiganjo*** for the plaintiff, who made his reply on 22nd March, 2006 submitted that the submissions made for the respondent had been based on a misapprehension of the Registration of Documents Act (Cap.285), the Registration of Titles Act (Cap.281) and s.143(5) of the Local Government Act (Cap.265) (which relates to ministerial consent to contractual obligations assumed by the City Council).

Section 143(5)(a) of the Local Government Act (cap.265) thus provides:

> "**A local authority may accept any tender which, having regard to all the circumstances, appears to it to be the most advantageous, and may take security for the due and faithful performance of every contract, or the local authority may decline to accept any tender:**
>
> **"Provided that the local authority, before accepting any tender other than the lowest, shall obtain the consent of the Minister in writing".**

Mr. Waiganjo urged the importance of the above proviso to s.143 (5)(a) of the Local Government Act: Ministerial consent is only to be sought ***where there were several tenders.*** He further urged that the task of seeking the Minister's consent ***was*** the responsibility of the defendant, not the plaintiff. The defendant's minutes exhibited with the replying affidavit had not indicated how many tenders had been considered.

On the main question upon which turns the defendant's case, namely the ***registration status*** of the lease in reference, learned counsel submitted that it was not compulsorily registrable under the Registration of Documents Act (Cap.285); and he invoked the provisions of s.4 of the Act, which contains a proviso that certain documents are not compulsorily registrable. Documents in that category include [s.4 (vii) of the Act]:

"**any document registrable under the provisions of the Government Lands Act [cap.280], the Registration of Titles Act [Cap.281], the Land Titles Act [Cap.282] or the Registered Land Act [Cap.300] …"**

Mr. Waiganjo submitted that since the suit premises herein falls under the Registration of Titles Act (Cap.281) it followed that the registration requirement under the Registration of Documents Act (Cap.285) was inapplicable. Indeed, it was submitted, the relevant lease ***could*** have been registered under the Registration of Documents Act, save that this was not ***mandatory***.

Learned counsel had in effect, established a foundation for contesting the claim mode for the defendant, that the circumstances of this case were not meet for the grant of equitable relief. It was not possible, ***Mr. Waiganjo*** submitted, for the defendant to invoke the ***letter of offer*** of 17th February, 1998 as a demonstration that some sort of fraud coloured the document of lease being relied on by the plaintiff. For the said letter was not a contract and indeed, it was not signed by either of the parties. By contrast the lease document was duly signed, and it had not at all been contended that the signatures appended to the same had been forged.

Mr. Waiganjo considered the charge of fraud to have been invoked in vain; for fraud is a criminal offence, and hardly any evidence existed that the criminal process had been pursued in the matter.

Learned counsel prayed for a mandatory order, and stated that the plaintiff had suffered irreparable harm

on account of the eviction effected by the defendant on 13th February, 2004. There could not have been any rent arrears justifying the eviction, counsel submitted – for otherwise the defendant could not have failed to make a ***counterclaim***, but this was not done.

F. FURTHER ANALYSIS, AND ORDERS

The defendant's case, which hangs on whether or not the lease of 15th December 1998 was registered, and on whether the plaintiff had committed a fraud, and so does not deserve equity, was argued strenuously and with many judicial decisions cited. That effort, however, has not convinced me that the said lease was a document ***required to be registered***, but was not registered and the plaintiff was in any way, in this regard, remiss. I would accept as valid the submission of counsel for the applicant, that s.4 (vii) of the Registration of Documents Act (Cap.285) excludes the lease in question from the requirement of registration.

Although learned counsel for the defendant raised the point that the lease in question could also not be valid because the Minister had not given his consent to the contract, I do not accept this contention; for any obligation to secure such consent would in the first place have rested upon the defendant.

The defendant endeavoured to collate grounds such as the nature of the letter of offer of 17th February, 1998 and the question of lack of Ministerial consent, to show that the plaintiff had committed some fraud, which goes to taint his claim. The defendant also sought to focus this Court's attention on claims in the statement of defence, that the plaintiff was guilty of fraud.

I have already determined, however, in this ruling that claims so far-reaching as fraud, must await dependable proof during the hearing of the ***main suit.*** They cannot properly be grafted onto an interim-relief application such as the instant one, and relied on to resist an otherwise valid claim at the interlocutory stage.

My determination of those points, in the manner just set out, does mean that the defendant's argument that the plaintiff is not entitled to equitable relief, must fail – even though the mandatory orders sought would be best considered at the full-hearing stage.

It is also clear, at this stage, that non-payment of rent would not have been a valid ground for the eviction of the plaintiff effected by the defendant on 13th February, 2004; and if there are genuine rent grievances, then they will be settled at the hearing of the main suit. The question of the competing inventories of goods which were in the suit premises at the time of eviction, will also be resolved during the trial of the suit.

Upon reading the application and reply documents and upon hearing counsel for the defendant, I have formed the impression, on ***prima facie*** considerations, that the defendant's claims herein are almost sentimental, but not based on the beacons of legality. The Court has been urged to take into account that there is ***lack of trust*** between the parties – and so it is the defendant's fervent hope that the plaintiff is not going to be inflicted upon the Council as a tenant. The defendant has even invoked the ***public interest***, as a reason for denying the plaintiff's prayers.

I have considered the emerging scenario broadly, but come to the conclusion that the first task of this Court is to uphold and to promote legality. And legality here rests, firstly, upon the ***lease document*** of 15th December,

1998. This document cannot be wished away. It gives certain legal rights to the plaintiff, and it imposes legal obligations upon the defendant. I hold that the defendant is bound to comply with the law, and to perform its obligations towards the plaintiff. The Defendant can, however, exit from those obligations through a negotiated arrangement with the plaintiff; or the defendant could remain in breach, at the cost of paying ***damages***.

The act of eviction of the plaintiff on 13th February, 2004, I will hold, was a serious violation of the law and a gross infringement of the plaintiff's rights which cannot be allowed to stand, in a civilised society where law has a central role in the life of the people. For that reason alone, that eviction is something that inherently calls for injunctive relief.

I will, therefore, make orders as follows:

1. I hereby grant an injunction restraining the defendant by itself, its servants, agents or otherwise however, from leasing that part of L.R. No.209/5577 (original No.209/2394) otherwise known as City Hall Garden Restaurant, pending the hearing and determination of the suit herein.

2. The main suit herein shall be listed for hearing on the basis of priority, before a Judge of the Civil Division.

3. The defendant shall bear the plaintiff's costs in this application.

DATED and **DELIVERED** at Nairobi this 28th day of April, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk – Mwangi

For the Plaintiff/Applicant: Mr. Kiage, Mr. Waiganjo, instructed by M/s Macharia Waiganjo & Nyoike Advocates

For the Defendant/Respondent: Mr. Njagi Wanjeru, instructed by M/s Njagi Wanjeru & Co. Advocates