



**Saab Enterprises Ltd v Mwambura (Environment & Land Case
42 of 2017) [2023] KEELC 16386 (KLR) (21 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16386 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 42 OF 2017
NA MATHEKA, J
MARCH 21, 2023**

BETWEEN

SAAB ENTERPRISES LTD PLAINTIFF

AND

BUSARA MWAMBURA DEFENDANT

RULING

1. The application is dated October 13, 2022 and is brought under the provisions of Under sections 152A, 152B, 152E, 152G of the Land Act, under order 51 rule 1 of the Civil Procedure Rules 2010 seeking the following orders;
 1. That this application be certified as urgent and service thereof upon the defendant be dispensed with in the first instance and be heard ex-parte and thereafter on priority basis.
 2. That the defendant/ respondent herein his servants, agents and/or employees be evicted from the parcel of land known as Subdivision No. 1865 (Original No. 1483/69) Section II Mainland North.
 3. That the Honourable Court be pleased to order the Officer Commanding Station Kiembeni Police Station Mombasa County to provide police escort to the Court bailiff for the purpose of peace and order during the process of eviction and demolishing the existing structures by the Defendant on subdivision No 1865(original No 1483/ 69) of section II Mainland North.
 4. That costs be in the cause.
2. It is based on the grounds that the plaintiff Company is the registered owner of subdivision No. 1865(original No 1483/69) of Section II Mainland North, Number C.R 28738 measuring 1.6157 following a transfer registered on June 11, 2014 registered as CR NO. 28738/6 at the Lands Registry in Mombasa. The plaintiff filed an application on January 21, 2020 seeking that the Defendant be cited



for contempt for disobeying court orders issued on the June 15, 2017 as well as an order seeking for demolition and removal of all developments on the suit property. The application was served upon the defendant who failed to file a response and on the September 16, 2022, the Honourable Court allowed the application dated January 21, 2020 as drawn. The order was extracted and duly served upon the defendant herein on the 3rd November 2020 and despite service the Defendant has failed to demolish the structures on the suit portion to date. This has necessitated the Plaintiff to file the instant application seek security from the OCS Kiembeni Police station to provide security during the eviction and demolition of the structures from the suit portion erected by the Defendant who has failed to remove them. That this application is made in the interests of justice.

3. The respondent stated that no or any eviction orders were ever issued by this Honourable Court in relation to any/or the application dated January 21, 2020, to warrant the filing of the application herein. Further, and without prejudice to the foregoing there is no tangible evidence placed before this court to make a finding that he disobeyed and disregarded the said court order, to warrant the grant of the eviction orders being sought by the Plaintiff. That current application is based on the application filed on January 21, 2020 for contempt of court orders which orders were allegedly issued on June 15, 2017, it is trite law that Orders for contempt of court proceedings should be served personally to the contemnor. That the said orders were never personally served to them neither were they aware of any ongoing application for contempt and the orders issued. In addition, the Plaintiff acknowledges the same and consequently filed an affidavit of non-service. Annexed and marked "BM 1" is the said affidavit. In addition, the plaintiff/applicant knows full well that he works and resides in the Republic of Maldives but however the Plaintiff failed to take the necessary steps to have them served with the said application and the orders issued. Annexed and marked BM 2 is a copy of an extract of his passport. That in the premises it is clear that the application consists of inaccuracies of facts and full of misrepresentation and untruths, The applicant herein has come to court with unclean hands and the application herein should not be given the light of day. The he will stand to suffer prejudice and or irreparable damage over and above, if the application is allowed since he will have been condemned unheard contrary to and in total disregard of his paramount and inalienable constitution right to a fair hearing. That the application herein is not merited, the same is frivolous, vexatious and is an abuse of the court process.
4. This court has considered the application and the submissions therein. The application is based on the fact that the plaintiff filed an application on January 21, 2020 seeking that the defendant be cited for contempt for disobeying court orders issued on the June 15, 2017 as well as an order seeking for demolition and removal of all developments on the suit property and the same was allowed. The respondent submits he was never served personally. I have perused the court record and find that the Judge satisfied himself that the respondent had been duly served and allowed the application. I find that court orders must be obeyed. Be that as it may there was no eviction order given in the said ruling. In the case of *Kenya Breweries Ltd & another vs Washington O. Okeya* (2002) eKLR the Court of Appeal stated as follows on mandatory injunctions.

A mandatory injunction ought not to be granted on an interlocutory application in the absence or 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 be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree 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.”



5. In the case of *Nation Media Group & 2 others vs John Harun Mwau* (2014) eKLR the court of appeal said;

It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

6. The above cited cases lay down the principles of law to be considered in an application for mandatory injunction and the condition that stands out is that the applicant must establish the existence of special and exceptional circumstances that warrant the granting of orders of mandatory injunction. I find this has not been established, this is a 2017 matter and I see no reason why it has never been concluded. Parties are advised to comply with order 11 and in the meantime the status quo be maintained pending the hearing and determination of this suit. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF MARCH 2023.

N.A. MATHEKA

JUDGE

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