



**Mushanki v Mombasa Cement Limited & another (Environment & Land  
Case 37 of 2022) [2023] KEELC 18111 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18111 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 37 OF 2022**

**NA MATHEKA, J  
JUNE 21, 2023**

**BETWEEN**

**JAMES MUSHANKI ..... PLAINTIFF**

**AND**

**MOMBASA CEMENT LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**COAST GENERAL TEACHING & REFERRAL HOSPITAL .. 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application is made under Section 13 and 19 of the *Environment and Land Court Act*, Article 40 and Article 159 of the *Constitution* of Kenya 2010, Sections 1A, IB, 3, 3A and 63(e) of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010 Laws of Kenya, Sections 24 and 25 of the *Land Registration Act* 2012, Laws of Kenya seeking the following orders;
  1. That this Application be certified urgent and service be dispensed with in the first instance.
  2. That this Honourable court be pleased to issue an order to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves, their agents, assignees, servants and/or third parties to give the Plaintiff access to suit property by demolishing a small portion of the erected perimeter wall and erect a gate pending hearing and determination of the suit.
  3. That this Honorable court be pleased to order the OCS Tononoka police station to offer police assistance in effecting demolition of the small portion of perimeter wall and gain access to the suit property.
  4. That the costs of this Application be in the cause.
2. It is based on the affidavit of James Mushanki and grounds that the Applicant is the duly registered owner of plot Mombasa Block X/315 having obtained the same through letters of administration filed



in the High Court of Kenya and having obtained a grant as representative of the estate of his late mother one Nancy Nasieku. That the said parcel of land is a leasehold from the Government of Kenya which is running for a term of 99 years from the year 1999. That the Applicant upon trying to access his property found out that the same has been illegally fenced off by the 1<sup>st</sup> Defendant without his consent and/or knowledge. That the 2<sup>nd</sup> Defendant has put up illegal temporary structures and put broken beds and other debris putting the property at a bad state and a health hazard. That the Applicant intends to dispose off the said property and has already gotten potential buyers but are unable to proceed since the Respondents have erected a wall and built structures in the said plot making it difficult for buyers to gain access and inspect the suit property making them lose interest in the subject property and the Plaintiff might end up losing the clients.

3. The Director of the 1<sup>st</sup> Defendant/Respondent Company stated that sometime on or about September 2017 the 2<sup>nd</sup> Respondent approached the 1<sup>st</sup> Respondent who was in the course of doing CSR projects within Mombasa County. That the request related to repair and painting of an existing fence surrounding the hospital. That the management of the hospital stated that there was increased cases of trespass, wanton destruction of hospital property, pilferage and break in within their open grounds. That due to the foregoing and in the interest of the public safety and concern, they accepted and therefore proceeded to donate by way of renovating the entire hospital perimeter wall (Annexed and Marked H.K.P-1 "is a copy of the acceptance letter). That the act of willing to renovation/repair and painting was effected with no malice, ill will or intent whatsoever but charity donation to the people of Mombasa County. That the orders sought by the applicant does not in any way involve the 1<sup>st</sup> Respondent who has clearly demonstrated lack of ownership and/or interest claim on the suit parcel. The 2<sup>nd</sup> Respondent submit that the ownership of the said suit land is in dispute.
4. This court has considered the application and the submissions therein. The Applicant states that he is that registered owner of plot Mombasa Block X/315 having obtained the same through letters of administration filed in the High Court of Kenya and having obtained a grant as representative of the estate of his late mother one Nancy Nasieku. That the Applicant upon trying to access his property found out that the same has been illegally fenced off by the 1<sup>st</sup> Defendant without his consent and/or knowledge. That the 2<sup>nd</sup> Defendant/Respondent has put up illegal temporary structures and put broken beds and other debris putting the property at a bad state and a health hazard. 1<sup>st</sup> Defendant/Respondent Company states that sometime on or about September 2017 the 2<sup>nd</sup> Respondent approached the 1<sup>st</sup> Respondent who was in the course of doing CSR projects within Mombasa County. That the request related to repair and painting of an existing fence surrounding the hospital. The Applicant now seeks a mandatory injunction to demolish the wall and structures therein. 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. The Applicant seeks final orders at this interlocutory stage. I find this has not been established but however the Applicant has raised a prima facie case and hence I order that the parties comply with order 11 and set the suit down for hearing. This application is dismissed and costs of this application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21<sup>ST</sup> DAY OF JUNE 2023.**

**N.A. MATHEKA**

**JUDGE**

