



**Mohamed & another v Nyagaga (Environment & Land Case
265 of 2008) [2023] KEELC 20148 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20148 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 265 OF 2008
NA MATHEKA, J
SEPTEMBER 28, 2023**

BETWEEN

AMIRALI HASSANALI MOHAMED 1ST PLAINTIFF

ZARINA AMIRALI HASSAN ALIM MOHAMED 2ND PLAINTIFF

AND

JOHN ODERO NYAGAGA DEFENDANT

RULING

1. The application is dated April 3, 2023 and is brought under order 50 of the [Civil Procedure Rules](#) and sections 3 and 3A of the [Civil Procedure Act](#) cap 21 Laws of Kenya seeking the following orders;
 1. That the matter be certified as urgent and service be dispensed with in the first.
 2. That the honourable court do issue an order to allow the defendant to access his five storey building standing on plot No Mombasa/Block V/ Mainland South and to re-occupy the unit he was residing in and to generally inspect and have control of the storey building pending the hearing and determination of this application.
 3. That the honourable court do issue an order to allow the defendant's tenants whom have been locked out of the premises to access the units they were occupying pending the hearing and determination of this application.
 4. That the defendant to be allowed access and control of the five storey building standing on plot No Mombasa/Bock V/ Mainland South/ 133 until such a time the plaintiff shall move to have the storey building dealt with as per the judgment of the honourable court.
 5. That cost of this application be provided for.



2. It is based on the following grounds that the plaintiff has locked the defendant and his tenants out of the five storey building standing within plot No Mombasa/ Block V/ Mainland South/ 133. That the plaintiff has now turned the five storeys building into a lodging with all and sundry gaining access to the house. That the plaintiff and his agents have broken all the doors of the building and left the doors open with the intention to have the building run down and fall into disrepair. That the plaintiff and his agents have broken into the unit within the storey building and purported to take inventory of the items within the premises leaving out several items to the detriment of the defendant. That the plaintiff has refused him access to his house and he does not know its status. That the plaintiff has broken into the unit being occupied by the plaintiff without first obtaining break on orders from the honourable court.
3. The respondents stated that on November 1, 2017, judgement was entered in this suit in their favor whereby the court declared the defendant to be a trespasser and ordered the defendant/applicant to voluntarily surrender vacant possession sixty days from the date of judgement. In default, the plaintiffs were given liberty to use lawful means to obtain vacant possession. (annexed and marked as AH-1 a copy of the judgement dated November 1, 2017)
4. That subsequently, the defendant filed an appeal and on June 26, 2018 obtained an order of stay of execution of the decree dated November 1, 2017 and issued on January 8, 2018 pending hearing and determination of the appeal. That on February 4, 2022 the Court of Appeal in civil appeal No 127 of 2019 struck out the intended appeal with costs on the grounds that the appeal was incompetent. That on June 21, 2019, they filed a notice of motion dated June 19, 2019 seeking to set aside the order of stay of execution issued on June 26, 2018 on the ground that the appeal had been struck out and therefore the stay orders should be struck out as of right. That on June 29, 2022, Honorable N. A Matheka delivered a ruling setting aside the order for stay of execution. (annexed and marked as AH-3 a copy of 'he ruling dated September 26, 2022). That despite the judgement of November 1, 2017 and there being no standing orders staying the judgement, the defendant refused to grant them vacant possession of the suit property and continued his unlawful occupation of the suit property. That despite the court discharging the Stay order the defendant refused to vacate the suit premises. that they filed notice of motion dated October 3, 2022 seeking orders to evict the defendant from the suit property and for the OCS Shell Beach Police Station to assist in the eviction exercise which was granted.
5. That they have already executed the judgement of November 1, 2017 and order of January 26, 2023 and they have been in possession of the suit property. (annexed and marked as, 41-1-5 is a copy of the certificate of vacant possession dated March 6, 2023 issued by the court bailiff). On March 21, 2023, through their agents Swiftway Auctioneers, they issued the defendant with a notice of goods collection requesting the defendant to collect his goods which were then in their possession within 14 days. (annexed and marked as AH-6 a copy of the notice dated March 21, 2023). That the defendant was on March 30, 2023 served with the notice but refused to collect the goods. (annexed and marked as AH-7 is the return of service dated March 30, 2023).
6. The second application is dated May 16, 2023 and is brought pursuant to order 51 rule 1 and order 22 rules 6 and 7 of the [Civil Procedure Rules](#) and section IA, 1B, 3B and 63 (e) of the [Civil Procedure Act](#) seeking the following orders;
 1. That the defendant/respondent to vacate possession from plot No Mombasa/Block/V/ Mainland South/133 measuring 0.267 ha as per order by the court in judgement delivered on November 1, 2017 within the next 7 (seven) days upon service of this court order and in default an order for forceful eviction to issue forthwith.



2. That the officer in charge (OCS) Shelly Beach Police Station to supervise the exercise of the above order and provide police assistance for the purpose of maintaining law and order.
 3. That the defendant/respondent be held in contempt for willful disobedience of orders of this court dated November 1, 2017 and January 26, 2023 and the order issued herewith and be arrested and committed to civil jail for 6 (six) months.
 4. In any event, the court grant a mention date to confirm compliance and further orders.
 5. The costs of this application be provided for.
7. It is based on the grounds that on November 1, 2017, judgement was entered in this suit in favor of the plaintiff whereby the court declared the defendant/respondent to be trespasser ordered the defendant/applicant to voluntarily surrender vacant possession sixty days from the date of judgement. In default, the plaintiffs were given liberty to use lawful means to obtain vacant possession. The plaintiff/applicant filed an application dated October 3, 2022 seeking orders to evict the defendant from the suit property and for the OCS Shell Beach Police Station to assist in the eviction exercise which was granted. The plaintiff/applicant has already executed the judgement of November 1, 2017 and order of January 26, 2023 and has been in possession of the suit property since March 6, 2023 when he evicted the defendant through the assistance of the officer in charge (OCS) Shell Beach Police Station. There is a need to cite the respondent of contempt because he has actual and constructive knowledge of the orders of the court but has deliberately refused to obey.
8. This court has considered the application and the submissions therein. The defendant seeks to be allowed access and control of the five storey building standing on plot No Mombasa/Bock V/ Mainland South/ 133 until such a time the plaintiff shall move to have the storey building dealt with as per the judgment of the honourable court. I have perused the court record and find that on November 1, 2017, judgement was entered in this suit in their favor whereby the court declared the defendant to be a trespasser and ordered the defendant/applicant to voluntarily surrender vacant possession sixty days from the date of judgement. In default, the plaintiffs were given liberty to use lawful means to obtain vacant possession. The defendant filed an appeal and on June 26, 2018 obtained an order of stay of execution of the decree dated November 1, 2017 and issued on January 8, 2018 pending hearing and determination of the appeal. That on February 4, 2022 the Court of Appeal in civil appeal No 127 of 2019 struck out the intended appeal with costs on the grounds that the appeal was incompetent. It is on record that on June 21, 2019, they filed a notice of motion dated June 19, 2019 seeking to set aside the order of stay of execution issued on June 26, 2018 on the ground that the appeal had been struck out and therefore the stay orders should be struck out as of right. That on June 29, 2022, this court delivered a ruling setting aside the order for stay of execution. That despite the judgement of November 1, 2017 and there being no standing orders staying the judgement, the defendant refused to grant vacant possession of the suit property and continued his unlawful occupation of the suit property. That despite the court discharging the stay order the defendant refused to vacate the suit premises. That they filed notice of motion dated October 3, 2022 seeking orders to evict the defendant from the suit property and for the OCS Shell Beach Police Station to assist in the eviction exercise which was granted. That the respondent has already executed the judgement of November 1, 2017 and order of January 26, 2023 and they have been in possession of the suit property. In the case of *Kenya Breweries Ltd & another v Washington O. Okeya* [2002]eKLR, the Court of Appeal stated as follows on mandatory injunctions.
9. 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.”

10. In the case of *Nation Media Group & 2 others v John Harun Mwau* [2014]eKLR, the court of appeal said;
11. 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.”
12. 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 that the application by the defendant that he be allowed access and control of the five storey building standing on plot No Mombasa/Bock V/ Mainland South/ 133 until such a time the plaintiff shall move to have the storey building dealt with as per the Judgment of the honourable court, ambiguous frivolous and vexatious and no existence of special and exceptional circumstances have been shown. The respondent has already executed the judgement of November 1, 2017 and order of January 26, 2023 and they have been in possession of the suit property and litigation must come to an end. I find that application dated April 3, 2023 has no merit and I dismiss it with costs. Consequently, I find the application dated May 16, 2023 is merited and I grant prayer 1 and 2 as prayed with costs.
13. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA

JUDGE

