



REPUBLIC OF KENYA



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**Okola v Wanjiru & another (Environment & Land Case E280 of 2022)
[2023] KEELC 20268 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20268 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E280 OF 2022
OA ANGOTE, J
SEPTEMBER 28, 2023**

BETWEEN

MARTIN OTENYO OKOLA APPLICANT

AND

ALICE GICHANE WANJIRU 1ST RESPONDENT

JUMBI INVESTMENTS LIMITED 2ND RESPONDENT

RULING

Background

1. Before the Court for determination is the Applicant's Notice of Motion dated November 12, 2022 and brought under Sections 1A, 1B, 3A, 63(e) of the *Civil Procedure Act*, Order 40 Rule 1, Order 50 Rule 1 of the *Civil Procedure Rules* and Sections 4, 5, 27 and 29 of the *Contempt of Court Act*. The Applicant is seeking orders that:
 - a. The Court be pleased to issue an order of mandatory injunction to compel the Respondents, their agents and/or servants to restore the Applicant's possession back to all that property known as LR No 13330/305 (hereinafter 'the suit property') pending the hearing and determination of the suit.
 - b. The 1st Respondent and directors of the 2nd Respondent be committed to six months imprisonment and/or such hefty fines be placed on the Respondents for disobeying orders issued by the Court.
 - c. The OCS Kasarani assist in the enforcement of the order.
 - d. Costs of the application be provided for.



2. The application is supported by an affidavit sworn by the Applicant who deponed that on October 18, 2022, the Respondents evicted him from the suit property where he had resided with his family for 25 years with their full knowledge.
3. It was deponed by the Applicant that the eviction was against a Court order issued on September 6, 2022 and calling for the maintenance of the status quo and that the eviction was enforced by the Respondent fencing off the suit property thus rendering him homeless.
4. The Applicant avers that there was no justification for the Respondent to disregard the Court order and that the Court should order for his reinstatement onto the suit property and to have his belongings returned.
5. The 1st Respondent filed a replying affidavit sworn on January 12, 2023. She denied the Applicant's deposition and further stated that she did not evict the Applicant from the suit property which she avers was allocated to her late father who was issued with certificate no 1654 by Thome Farmers No 5 Limited on March 27, 2000.
6. According to the 1st Respondent, the suit property was registered in the name of the 2nd Respondent, a company where the 1st Respondent's parents were directors; that they managed the property which remained unoccupied during their lifetime and that following the demise of their parents, he started managing the property.
7. The 1st Respondent deponed that he met the Applicant in 2016 when he was residing in the neighbouring property (LR No 13330/306) and that in 2018, the Applicant was asked to vacate the said property and that he allowed him to reside on the suit property on humanitarian grounds as he had nowhere to go.
8. When the 1st Respondent found a prospective buyer for the suit property on August 17, 2022, it was deponed, the Applicant agreed to vacate the suit property and that she gave the applicant Kshs 150,000 to facilitate the move. In conclusion, the 1st Respondent stated that she did not disobey any court orders.

Submissions

9. The Applicant filed his submissions on April 28, 2023. Relying on the case of *Kamau Mucuba vs Ripples Ltd* [1993] eKLR, the Applicant submitted that a party ought not to be allowed to retain a position of advantage that was obtained through an unlawful act.
10. The Applicant submitted that he was in possession of the suit property when the suit was filed; that the Respondents illegally evicted him despite the existence of a court order calling for maintenance of status quo and that the Respondents should therefore not be allowed to benefit from the eviction.
11. Relying on the cases of *Kibiy Arap Yego vs Emily Tuyu*, Civil Appeal No 73 of 1985 and *Republic vs Ahmad Abolfathi Mohammed & another* [2019] eKLR, the Applicant submitted that the he did not willingly vacate the suit property but was evicted by the Respondents who did so in contempt of a court order. In conclusion, he asked the Court to allow his application as prayed.
12. The Respondents submitted that there was no evidence showing that the eviction took place nor that the same was reported to the police by the Applicant and that the current application was brought a month after the eviction was allegedly carried out which in their view is an afterthought.



13. It was submitted by the Respondents that the 1st Respondent was humane and not only allowed the Applicant to stay on the suit property but also financially facilitated his move when the property found a buyer.
14. Relying on the case of *Mutitika vs Babanini Farm Limited* [1985] KLR 227, the Respondents submitted that the standard of proof in contempt matters is higher than on a balance of probabilities but not beyond reasonable doubt.
15. It was submitted that the Applicant had not adduced evidence to show that there was an eviction carried out nor that the same was carried out by the 1st Respondent nor showing the status of the suit property after the eviction had been carried out.

Analysis and Determination

16. Based on the foregoing, the following issue arises for determination:
 - i. Whether a Mandatory Injunction should be issued;
 - ii. Whether the Respondents should be committed to civil jail for being in contempt.
17. In *Kenya Breweries Limited & another vs Washington O Okeyo* [2002] eKLR the Court stated as follows concerning mandatory injunctions:

“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4th Edn. para 948 which reads:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application”.

Also in *Locabail International Finance Ltd V Agroexport and others* [1986] 1 All ER 901 at pg 901 it was stated:- “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 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 high 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.”

18. In the case of *Nation Media Group & 2 Others v John Harun Mwau* [2014] eKLR, the Court of Appeal stated as follows:

“We agree with Mr Mogere that in an application for a mandatory injunction the balance of convenience is not the only principle which an applicant has to satisfy as stated by the learned Judge at page 34 of the ruling. A different and higher standard than that in prohibitory injunctions is required before an interlocutory mandatory injunction is granted. Besides, existence of exceptional and special circumstances must be demonstrated as we have stated,



a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases.”

19. The import of the above is that mandatory injunctions require a standard higher than that of prohibitory injunctions. They can only be issued in special circumstances and in the clearest of cases.
20. In the present case, the Applicant has not directly pleaded any special circumstances warranting the issuance of an order of mandatory injunction. However, it would appear that the Applicant wants this court to infer the special circumstances from the pleadings, that is, the fact that he was evicted from the suit property.
21. The 1st Respondent has denied that any eviction took place and has put the Applicant to strict proof thereof. Having perused the documents on record, I am not convinced that the Applicant has proven that the eviction took place.
22. Outside of the averments in his affidavit, the Applicant has not presented any evidence to support his claims that he was evicted from the suit property or that the Respondent fenced off the suit property. In the absence of such evidence, I find that the requirement for special circumstances to be proven in order for a mandatory injunction to be granted have not been met.
23. The Applicant has also sought for the conviction of the Respondents for being in contempt of the order of status quo that was issued by this court on September 6, 2023.
24. As was held in the case of *Mutitika vs Bahanini Farm Limited* [1985] KLR 227, the standard of proof in contempt matters is higher than on a balance of probabilities but not beyond reasonable doubt.
25. The Applicant did not adduce evidence to show that there was an eviction that was carried by the Respondents or their agents, if at all. In fact, neither photographs showing the alleged eviction of the Applicant from the suit property nor the status of the suit property after the eviction had been carried out were exhibited by the Applicant.
26. For those reasons, I find the application dated November 12, 2022 to be unmeritorious. The application is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF SEPTEMBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for Plaintiff

No appearance for Defendant

Court Assistant - Tracy

