



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL APPEAL NUMBER 317 OF 2011**

**TRANSALLIED LIMITED. ....APPELLANT/RESPONDENT**

**VERSUS**

**SAKAI TRADING LIMITED. .... RESPONDENT/APPLICANT**

**R U L I N G**

1. Before me is a Notice of Motion by the Appellant dated 2<sup>nd</sup> December, 2014. The Motion is brought under Order 40 Rules 1, 3 and 4 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A and 63(3) of the Civil Procedure Act. The application seeks two prayers; an order of reinstatement to the premises known as L.R. No. 1/565 Ngong Road and an injunction to restrain the Respondent from interfering with the Appellant's quiet possession thereof.
2. The application was brought under the Vacation Rules. Having been allowed to be heard during the Summer Vacation on 23<sup>rd</sup> December, 2014, the application was served upon the Respondent's and the parties appeared before Aburili J on 29<sup>th</sup> December, 2014 for hearing inter partes. On that day, however, the Respondent applied for more time to be allowed to put in its Replying Affidavit. The adjournment was granted and the parties returned to court on 8<sup>th</sup> January, 2015 when that application was argued before me.
3. The grounds for the application were set out in the body of the Motion and in the Supporting Affidavit of Mary Mwangi Muraya sworn on 22<sup>nd</sup> December, 2014. It was contended by the Appellant that on 4<sup>th</sup> October, 2011 this court made an order in favour of the Appellant restraining the Respondent and its Agents from evicting or interfering in any manner whatsoever with the Appellant's quiet possession of the premises known as Nairobi L.R. No.1/565 Ngong Road (**"the suit premises"**) until the finalization of the present appeal; that on 20<sup>th</sup> December, 2014, the Respondent's agents accompanied with the OCS Kilimani Police Station forcefully evicted the Appellant from the suit premises on the strength of a court order issued by the Nairobi Chief Magistrate's Court in CMCC No. 7046 of 2014; that the Appellant had been carrying out the business of a tyre centre and sale of motor vehicles on the suit premises; that although the Respondent's agents and the OCS Kilimani Police Station were shown the order of this court of 4<sup>th</sup> October, 2011 issued on 18<sup>th</sup> November, 2011, they nevertheless evicted the Appellant from the suit premises.
4. The Appellant denied having participated in the proceeding that culminated in the issuance of the orders in Nairobi CMCC No 7046 of 2014 that resulted in the eviction.
5. Mr. Kounah appearing with Mr. Gitonga for the Appellant submitted that the proceedings in

CMCC No 7046 of 2014 were a total fraud that they were commenced on 26<sup>th</sup> November, 2014 and concluded 14 days later on 11<sup>th</sup> December, 2014 culminating with the eviction orders; that the Respondent was all along aware of the order of 4<sup>th</sup> October, 2011 that was issued on 18<sup>th</sup> November, 2011. Counsel further submitted that the Respondent should not be allowed to retain any benefit arising out of its own illegal act, that the actions of the Respondent were meant to defeat justice; that although he Respondent had demolished the subject premises, the Appellant could still use the parking area to carry out its business. Counsel, therefore urged that the application be allowed.

6. The application was opposed through the Replying Affidavit of Imam Salahudeen a Director of the Respondent sworn on 5<sup>th</sup> January, 2015. It was contended by the Respondent that it is the registered owner of the suit premises which it has been in occupation since 2008 and wherein it carries on the business of sale of second hand motor vehicles; that at the time it purchased the premises, the Appellant was in occupation of one of the maisonettes erected thereon, that the Business Premises Ret Tribunal had struck out the Appellants complaint and ruled that the suit premises was not of a business nature; that the has never been any landlord – tenant relationship between the parties herein; that the Respondent has never been served with the order of this court made on 4<sup>th</sup> October, 2011. That the Appellant had been represented in the CMCC No. 7046 of 2014 by the firm of Waweru Karanja & Advocates and that the Appellant was only in occupation of part of the suit premises.
7. The Respondent further contended that upon executing the orders made in CMCC No. 7046 of 2014, the Respondent demolished the premises on 23<sup>rd</sup> December, 2014 having been allowed to do so by the Nairobi County government; that if the orders of this court had been violated, the proper course should have been to institute contempt of court proceedings and not to bring this application.
8. Mr. Mbugua appeared and held brief for Mr. Okundi for the Respondent. He reiterated what was contained in the Replying Affidavit and further submitted that; the order in CMCC No. 7046 of 2014 directed that the Appellant be evicted from a specific portion of the suit property yet the application sought that the Appellant be reinstated to the entire L.R. No. 1/565 which will amount to evicting the Respondent therefrom; that there will be jurisdictional issues to be raised in the pending appeal; that the application was an exercise in futility as the subject matter of occupation for which reinstatement was being sought was no longer there having been demolished; that the entire appeal had become a cropper as the substratum of the appeal no longer exists and that the best remedy for the Appellant would be to commence contempt proceedings. Counsel therefore, urged that the application be dismissed.
9. I have carefully considered the Affidavits on record and submissions of counsel. I have also considered the record. This is a mandatory injunction application whose principles are well settled. In **Locabail International Finance Ltd Vs Agro export (1986) 1ALL ER 901** Mustill LJ stated at page 906: -

***“The matter before court is not only application for a mandatory injunction which if granted would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in clear cases.”***

At page 901 the court held: -

***“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 easily be remedied or where the Defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory 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 on a different and higher standard that was required for a prohibitory injunction.”***

10. In the case of Canadian Pacific Railway Vs Band (1949) 2 KB 245, Cohen LJ stated at page 29 thus: -

***“I entirely agree... that the granting of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant but it can be granted.”***

11. In the case of Kamau Mucuha vs Ripples Ltd CA No. 106 of 1992, the Kenya Court of Appeal when granting an interlocutory mandatory injunction delivered itself thus: -

***“A party as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act.”***

Finally in Malindi Air Services ltd Vs Halima Abdnoor Hassan CA No. Nai No. 202 of 1998 (UR) the Kenya Court of Appeal held that: -

***“A mandatory injunction at an interlocutory stage is rarely granted only when the Plaintiff’s case is clear and incontrovertible”.***

12. How do these principles apply in the present case? As set out above, the Appellants position is that there was an order of this Court made on 4<sup>th</sup> October, 2011 and issued on 18<sup>th</sup> November, 2011 which restrained the Respondent from interfering with the Appellant’s quiet possession of the suit premises. The Appellant produced the said order as “DMM1”. Part of that order directed that: -

***“2. THAT there be a temporary injunction restraining the Respondent, its agents, employees or anyone claiming under them from evicting and or interfering in any manner whatsoever with the Appellant’s quiet possession of that premises known as Nairobi L.R. No. 1/565, Ngong Road till the finalization of this appeal.”***

13. The appeal herein has not been finalized. In this regard, the said order is for all purposes and intents still in force. It is not in dispute that that order was neither appealed against, reviewed nor set aside. In this regard, at all times the Respondent who participated in the proceedings that culminated in the granting of the said order by this court is still bound by the said order; that is; not to interfere with the Appellant’s quiet possession of the suit premises.

14. In view of the foregoing, what is the position of the actions of the Respondent that the Appellant complains of? The Respondent argued that it was only complying with or executing the order made by the Chief Magistrate’s Court in CMCC No. 7046 of 2014 made on 11<sup>th</sup> December, 2014. The Respondent further argued that it was unaware of the order of this court of 4<sup>th</sup> October, 2011.

15. Firstly, I find the argument by the Respondent to be strange. When I asked Mr. Mbugua Learned Counsel for the Respondent whether the order of this court of 4<sup>th</sup> October, 2011 was still in force, he answered in the Affirmative. That order had not been set aside. The lower court could not purport and did not set aside that order. This means, therefore, that so long as the order of 4<sup>th</sup> October, 2011 by this court remained in force, it has to be complied with. Accordingly, the Respondent could not disobey the order of 4<sup>th</sup> October, 2011 and interfere with the Appellant’s quiet possession of the suit property purporting to obey the order of the lower court. It is the very Respondent who applied for that order in that court. It cannot turn around and feign ignorance of the order of 4<sup>th</sup> October, 2011 in the guise of complying with an order of the lower court.

16. Secondly, the order of 4<sup>th</sup> October, 2011 was never appealed against or reviewed. It is only this court or the Court of Appeal or another court Superior to the High Court that could vary or override that order. The order made in CMCC No. 7046 of 2014 could not and did not override the order of 4<sup>th</sup> October, 2011.

17. Thirdly, I have perused the entire record. I note that the order of 4<sup>th</sup> October, 2011 culminated from an inter partes hearing of an application lodged in this court by the Appellant. The order was made on the 4<sup>th</sup> October, 2011 in the presence of Mr. Kounah for the Appellant and Mr. R Yator

holding brief for Ms Okundi for the Respondent. Accordingly, it cannot lie in the mouth of the Respondent that it was unaware of the existence of the order of 4<sup>th</sup> October, 2011 as issued on 18<sup>th</sup> November, 2011.

18. Finally, I am almost certain that if the order of 4<sup>th</sup> October 2011 was brought to the attention of the lower court, the order of 11<sup>th</sup> December, 2014 that led to the eviction of the Appellant could not have been made.
19. After having carefully considered this matter, I find three (3) things that are very disturbing. First, on 17<sup>th</sup> September, 2010, the Respondent properly filed Civil Suit (ELC) No. 431 of 2010 seeking vacant possession of the suit premises from the Appellant. That suit is still pending. Having in mind that the order of 4<sup>th</sup> October, 2011 directed that that file be brought before this court for further directions, nothing has been said about it. While the suit seems to be pending, the Respondent rushed to the Chief Magistrate's Court, Nairobi in CMCC No. 7046 of 2014 and sought the very same orders.
20. The second disturbing issue is that, the suit in the Chief Magistrate's Court was allegedly commenced on the 26<sup>th</sup> November, 2014 and on the 11<sup>th</sup> December, 2014, a record 14 days, the same had been determined. Nine days later, 20<sup>th</sup> December, 2014 the orders were executed. On 23<sup>rd</sup> December, 2014, the premises erected on the suit premises was demolished. I do not think that Article 159 (2) (c) of our Constitution presupposed such a scenario. Be that as it may, the lesser I comment on the efficacy and propriety of those proceedings the better. I struck out the Appellant's Further Affidavit in these proceedings for the reason that there had been no leave given to file the same but more importantly because it raised issues of fraud and impropriety. I thought those are issues that should be argued before that court when a proper application for setting aside the proceedings and a claim for damages suffered, if thought necessary, are made.
21. The third issue is the order of 11<sup>th</sup> December, 2014 in CMCC no. 7046 of 2014 and the conduct of the Respondent itself. That order directed, inter alia, that: -

***“2. That in default of the above, Plaintiff/applicant be at liberty to forcefully evict the Defendant/Respondent under the supervision of the Officer Commanding Police Station OCS Kilimani Police Station, Nairobi County on condition that there be no demolition.”***

22. At paragraphs 18 and 19 of the Replying Affidavit Imam Salahudeen, a Director of the Respondent swore: -

***“18. THAT having evicted Respondent in execution of the orders issued in CMCC 7046 of 2014 the Respondent applied and was granted the authority to demolish the structures on the premises on 22<sup>nd</sup> December, 2014 from the Nairobi Country Government.***

***19. THAT on or about 23<sup>rd</sup> December, 2014, the Respondent as the absolute owner of the suit premises proceeded to demolish the structures which included the Maisonette previously in occupation by the applicant thus rendering the reinstatement ought impracticable.” (Underlining mine).***

23. It is very clear from the foregoing that the Respondent is not a party who is in the business of obeying or complying with court orders. Although the order of the lower court was categorical that no demolition was to take place, the Respondent proceeded with speed and demolished the premises within three (3) days of evicting the Appellant from the suit premises. Out of its said actions, the Respondent has resisted the Appellants application, inter alia, on the ground that there can be no order for reinstatement as the substratum of such reinstatement has been extinguished.
24. In the case of **Kamau Mucuha Vs Ripples EALR (1990 – 1994) EA 388 at 94**; Hancox CJ after considering the principles under which mandatory injunctions are granted on interlocutory relief observed: -

***“the statements contained in these passages, however, leave out of account the situation when, as here it is alleged that the Defendant has taken the law into his own hands and***

***taken direct action instead of going through the legally prescribed procedure. In other words he had, by his own act disturbed the status quo. Is it to be said that the plaintiff may not go to the court to seek an order which is mandatory in the sense that it compels the other party to do so act which restores the status quo?***

25. In answering the question he had posed, Hancox CJ referred to the decision of the **House of Lords in Thompson Vs Parle (1944) 2All ER 477** wherein the court held that in such circumstances, the status quo to be maintained was the one existing before the wrongful act. In **Shepherd Homes Vs Sandham (1970) 3 WLR 348 Megarry J** held: -

***“If, of course, the defendant has rushed on with the work in order to defeat the Plaintiff’s attempts to stop him then upon the Plaintiff promptly resulting go the court for assistance is likely to be available for this will in substance be restoring the status quo and the Plaintiff’s promptitude is a badge of the seriousness of his complaint.”***

I entirely agree with the foregoing sentiments.

26. In the present case I have found that the eviction was wrongful. The same was carried out on Saturday 20<sup>th</sup> December, 2014, the following Monday 22<sup>nd</sup> December, 2014, the Appellant rushed to court with the present application. On the following day 23<sup>rd</sup> December, 2014, the Respondent demolished the premises erected on the suit premises. To my mind, the Respondent had wrongly rushed with the proceedings on CMCC No. 7046 of 2014 and had had the same concluded with 14 days, the Appellant promptly came to court on the earliest available time after eviction, that is Monday 22<sup>nd</sup> December, 2014. The Respondent once again rushed to demolish the premises on the following day with a view not only to defeat the present application, but also the order of this court of 4<sup>th</sup> October, 2011 and the appeal generally. Surely, the Respondent had by its own acts, stolen a match against the Appellant!

27. The Respondent contended that the remedy available to the Appellant is to file contempt proceedings against the Respondent and not re-instatement. To my mind, justice is achieved when the rights of parties are not only guaranteed but actually restored. To pursue contempt proceedings will seek only to punish the Respondent for its unbecoming conduct. The Appellant will be left with a **“bloodied Nose”** forever without any remedy. It will have to wait years on to pursue damages for wrongful eviction. To my mind, that will not be just. Justice will be served by telling the Respondent in no uncertain terms that there can be no short cut in legal process. This country is under a rule of law. The courts will not only restrain but they will use all the power bestowed upon them by the Kenyan People under Article 159 of the Constitution to ensure compliance with the law. In this case, what commends itself to this court is not punishment of the Respondent, but restoring upon the Appellant its right and telling the Respondent, loudly and clearly, that Kenya is not under the law of the jungle but the rule of law. That, however, painful it may be, the law must be complied with to the letter and court orders are not and will never be made in vain!

28. Accordingly, I am satisfied that the application is meritorious. Mr. Kounah submitted that even though the maisonette which the Appellant was using on the suit premises had been demolished, the Appellant can still use the parking area it had hitherto used for the sale of its motor vehicles and tyres.

29. In order to maintain the status quo ante, and for the avoidance of any doubt as to the meaning and tenor of the order herein, I allow the application in the following terms: -

- a. **The Respondent, its agents, employees, or anyone claiming under them are hereby directed and ordered to forthwith give vacant possession to the Appellant of the area the Appellant occupied on the premises known as Nairobi L.R. No. 1/565 Ngong Road before 20<sup>th</sup> December, 2014 pending the hearing and determination of the Appeal herein.**
- b. **Upon giving vacant possession of the Appellant of the portion it hitherto occupied on L.R. no. 1/564 Ngong Road before 20<sup>th</sup> December, 2014 as ordered in (a) above, the Respondent, its officers, servants, agents and/or employees are restrained from in anyway whatsoever**

**interfering with the Appellants quiet possession thereof until the hearing and determination of the appeal.**

- c. For the avoidance of any doubt, the Appellant is to be forthwith put into possession of the yard or parking area it hitherto used to occupy on L.R. No. 1/565 before 20<sup>th</sup> December, 2014.**
- d. As to the maisonette previously occupied by the Appellant, the Respondent is to erect the same at its own cost and put the Appellant into possession thereof within nine (9) months of this order.**
- e. The costs of the application are awarded to the Appellant in any event.**

30.As to the prayer for the assistance of the OCS Kilimani Police Station, the Court to Appeal has again and again held that it is irregular to involve the police in Civil Process unless it is absolutely necessary. In this case, I do not think that there is any necessity. A court bailiff of this court will be sufficient in ensuring compliance.

It is so ordered.

Dated and delivered at Nairobi this 12<sup>th</sup> day of January, 2015.

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**A MABEYA**

**JUGE**