



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBSA

ELC NO. 16 OF 2021

BANDARI INVESTMENTS & CO. LTD.....PLAINTIFF

VERSUS

MARTIN CHIPONDA & 139 OTHERS.....DEFENDANTS

RULING

I. PRELIMINARIES

1. For determination before this Honorable Court is the Notice of Motion application dated 30th September, 2021 by the 1st and 18th Defendants/Applicants herein. It is brought under Sections 1A & 3A of the Civil Procedure Act, Cap. 21 and Order 51 of the Civil Procedure Rules, 2010 of the Laws of Kenya.

II. The 1st and 18th Defendants/Applicants' Case

a) 2. The 1st and 18th Defendants/Applicants through the said application seek for the following orders:-

b) Spend;

c) A mandatory Injunction is issued to compel the Plaintiff, its agents, servants, employees, proxies or otherwise howsoever to allow the 1st and 18th Defendants to rebuild their demolished houses in the same place on the suit property and to conserve them until the hearing and determination of this suit.

d) A Prohibitory injunction do issue, barring the Plaintiff itself its agents, servants, employees, proxies or otherwise howsoever from again evicting or attempting to retake possession by demolishing or otherwise howsoever interfering with the 1st and 18th Defendants quiet and peaceful occupation of the suit property, pending the hearing and determination of this suit.

e) The Plaintiff's suit be dismissed or Stayed until the prosecution of its Directors and their Associates for the wrongful demolition and acts of arson visited on the 1st and 18th Defendants among others.

f) Costs of the application to be provided for.

3. The application by the 1st and 18th Defendants/Applicants is founded on the grounds, averments and testimony of the 14 Paragraphed Supporting Affidavit of MARTIN MWABUNI CHIPONDA dated and sworn on 30th September, 2021 and four (4) annexures marked as "MMC-1to 4" annexed thereto. He deposed to be the 1st Defendant herein with full authority to plead and act in the matter on behalf of the 18th Defendant herein annexing the said authority marked "MMC – 1". He indicated being familiar with matters of fact in relation to the suit and hence competent to swear the affidavit.

4. He stated he lived on the suit land with his family where they attended the God Grace Primary School which was situated there. He referred the Honorable Court to the ELC Constitution Petition (MSA) – No. 35 of 2017 where the Petitioner (and the Plaintiff) in this matter sought to evict the squatters was dismissed leading the Petitioner (The Plaintiff herein) to file the current suit seeking the same or substantially similar orders.

5. He deposed that the Plaintiff filed an application seeking for orders that that Defendants be barred from demolishing the Petitioner's perimeter wall or constructing or whatsoever dealing with the suit property pending the hearing and determination of that application.

Pursuant to that a temporary injunction was issued directing for the maintaining of the status quo – but of which the said application was still to be heard as yet.

6. He stated that the Counsel for the 2nd to 17th, 19th to 139 Defendants had on 19th August 2021 filed an application seeking for interim injunction orders from the court following the demolitions of the Defendant's house, hospital, church and a Mosque on 14th August, 2021 at night by the Plaintiff this was happening while the suit and the Plaintiff's application dated 29th January, 2021 was still pending hearing and determination. He stated that the police officers were using tear gas gunshots to disperse people. He informed court that on 19th August, 2021 an injunction order had been issued by court restraining the Plaintiff or its agents from further demolishing and interfering with the occupation of the Defendants in the suit property.

7. He averred that on diverse dates on 14th August, 2021, 28th August, 2021 and 15th September, 2021 at around 1200 hrs past the curfew hours and restriction lockdown imposed by the Government during the global Covid Pandemic a police lorry with some policemen and some unknown people were seen by the 1st and 18th Defendant's entering into the suit property and later on descended on the houses, schools, Church, Mosque and a hospital for the Defendants by demolishing them using a bulldozer which was used to bring down all the stone houses. At the same time, some hired young men were ferried in a canter truck used metal rods and pangas to bring down the mud constructed houses. He annexed a set of photographs to that effect to the application marked as "MMC -2".

8. He deposed that in the process of the demolition meted by the Plaintiff a child was brutally beaten by the police as his father was trying to salvage his household goods from being destroyed by the goons. He held that in the process, a lot of the household goods were burnt and destroyed. He further stated that his house and that of the 18th Defendant were demolished on 14th September, 2021. On the same day his household goods were burnt by arsonists who were guarded by the police officer allowing them to commit criminal acts. All these acts rendered them destitute as they were currently living out in the cold. He opined that he needed to rebuild his house so that he could defend his case from the same footing like he had been before the demolition and arson visited them by the Plaintiff.

9. He held that the demolition without any court order and contrary to the order issued on 19th August, 2021 was intended to permanently remove them from the suit land the evidence of their possession and occupation of it which were key issues in this and previous cases pending before court and other Jurisdiction between the Plaintiffs and the Defendants. He further stated that these acts needed to be first investigated before the matter proceeded further.

10. He argued that the court should be slow at aiding impunity and contempt perpetrated by the Plaintiff. As the 1st and 18th Defendants and they prayed to be allowed to rebuild their demolished houses as they had nowhere else to go to. On the other hand they prayed for the Plaintiff's suit to be stayed generally until the culprits being the Directors of the Plaintiff's company were arrested and prosecuted altogether. He urged court to have the prayers sought in the application be allowed.

II. Replying Affidavit by the Plaintiff:-

11. On 19th October, 2021 while opposing the application the Plaintiff filed a short 10 paragraphed Replying Affidavit sworn and dated 19th October, 2021 by KEN TOBIAS ODERO SUNGU a Director and Chairman of the Plaintiff/Respondents. He deposed that he refuted that the 1st and 18th Defendants had any building structures on the suit land at all as alleged and he if at all they had challenged them to produce approved building plans by the County Government of Mombasa and evidence of the actual construction as such.

12. He denied the 1st and 18th Defendants having ever lived and even been on the suit land as at August, 2021 as they resided elsewhere and were only trying their luck to illegally and wrongfully grab the Plaintiff's land. They would rely on the Replying Affidavit filed in court on 14th September, 2021, the supporting affidavit filed in court on 14th April, 2021 and the Supplementary Affidavit filed on 30th April, 2021 as they denied being involved in the demolitions and any of the illegal acts as alleged by the 1st and 18th Defendants.

13. He relied on the Advice by his Advocate on record to the effect that the 1st and 18th Defendants had not demonstrated the required condition for granting of the orders they sought and prayed for the application to be dismissed with costs to them.

III. SUBMISSIONS

14. On 7th October, 2021 while all the parties were in court, the Honorable Court directed that the said notice of motion application dated 30th September, 2021 by the 1st and 18th Defendants to be canvassed by way of written submissions. Pursuant to that all the parties obliged by filing their submissions accordingly.

Indeed, on 18th January, 2021, the parties Mr. S.M. Kimani Advocate for the 1st and 18th Defendants and Mr. Munyithia for the Plaintiff were accorded ample time by this Honorable Court upon which to highlight their filed written submissions. Thereafter, a ruling date was reserved by court.

A. The 1st and 18th Defendant's written submissions

15. On 10th November, 2021, the Law firm of M/s Stephen (aka Suleiman) Macharia Kimani Advocates for the 1st and 18th Defendants filed their written submissions. The Learned Counsels, submitted that they were seeking from court mandatory injunction to reinstate the 1st and 18th Defendants in the suit land where the Plaintiff had on 14th September, 2021 demolished their houses as well as torched their personal belongings. They sought the leave of court to reconstruct their demolished structures on the same site where the demolished ones had been before.

16. They based their submissions on the grounds that the 1st and 18th Defendants were in the first instance sued by the Plaintiff as persons in “**Wrongful occupation of the suit land**”. Simultaneously, the Plaintiff had filed the Plaint and an application seeking for orders to protect a perimeter wall which had been constructed under the force of an earlier order of Constitution Petition (Mombasa) No. 15/2017 which was dismissed on 28th January, 2021. The Learned Counsel held that when the Plaintiff started demolishing the houses, the other Defendants filed an application dated 19th August, 2021 seeking injunction orders to prevent further demolition of their houses and which were granted by this court. Indeed, at this moment, the said Defendants were armed with the said orders and only needed to effect in order to be reinstated as well the counsels stated.

17. the above notwithstanding, the Plaintiff still proceeded on to demolish the houses belonging to the Defendants and destroying their personal properties and harming them brutally on the suit land, On 28th August, 2021 and 14th and 15th September, 2021 at night without a court warrant to give possession or evict the applicants. The Learned Counsel argued that the demolition was deliberately done as an attempt to steal a match as their Defence to the Plaintiff. Previously the Plaintiffs had claimed that the Defendants had never had actual possession of the suit land, which was in adverse and time having run in their favour the Plaintiff’s title or that of their predecessor, is extinguished and any title papers were held in trust for the Defendants.

18. As such any attempt to uproot the debris from the suit land by the Plaintiff was intended to defeat whatever defence, the Defendants shall be making a claim whatsoever that on 16.9.2021 the 1st and 18th Defendants sought leave to file an application for reinstatement. The threshold for granting a mandatory injunction even at an interlocutory stage was for the Applicant to establish a clear case and/or demonstrate that the Defendant had attempted to steal a match, to ensure that no party had obtained an advantage unlawfully and allowed to retain that position. To buttress their point they relied on the famous case of “**Kamau Muchuha –Versus- Ripples Ltd. (1993) eKLR and Charles Mwangi Kamau –Versus- Mohamed Hassan Sheikh Noor (RIR) HCCC No. 2 of 2005**” where Justice D. Maraga had this to say:-

“Sad will be the day when any court of law will, with equanimity allow, may, assist a party to retain a position of advantage that he obtains through a planned act of contemptuous disregard to the law of the land”

19. Their contention was that these cases involving the Defendants here were on all fours to the above cited cases. The tenants had been evicted from the business premises in contravention of court orders and they moved court for a mandatory injunction. The High Court found that the eviction was illegal and an attempt to steal a match on the Plaintiffs it proceeded to issue a mandatory injunction to reinstate the tenants. The third parties who had reportedly been put in possession by the contemptuous landlord were ordered evicted. They were asked to look upon the landlord for redress for any loss suffered. The court observed that their loss, if any, poled in comparisons with the loss suffered by the tenants.

The Learned Counsel averred that in the instant case, the Plaintiffs had been reinstated by a court injunction order of 19.8.2021 and the Plaintiff was restrained from demolishing any of the structures on the suit land but despite being fully aware of the said orders they still proceeded to do so – which act was contemptuous of court order. They emphasized that court orders however disagreeable must be obeyed at all cost until varied, set, aside or stayed.

20. They argued that it’s only the Plaintiff through their Advocates who feigned ignorance of the happenings on the suit land every time this matter was mentioned before court they were the only ones who stood to benefit following the demolition of the defendant’s structures using police force and brutality and not the due process of law. They contended that once all the Defendants lost actual possession of the suit land through the demolition there would be no case to hear as the Plaintiff would have realized vacant possession through the back door. Worse, the possible defence that the Plaintiff’s title was held in trust for the Defendants would whittle away and hence inequality in law and lack of a fair hearing once the Defendants got evicted.

They argued that the Defendant had made out a clear case of mandatory injunction and ought to be granted the orders to rebuild their house on the forcible eviction and malicious damage to private property was also criminal. On this point they relied on the principle in the case of “**Smith & Wife – Versus - Selwyn (1914)3KB 98**”. They prayed that the Plaintiff’s case was stayed until the Plaintiffs Directors were prosecuted for the felonies and they should bear the costs of this application.

B. The Plaintiff’s Written Submissions

21. While opposing the application, on the 17th November, 2021, through the Law Firm of Messrs. Munyiya Mutugi, Umara and Muzna Company Advocates for the Plaintiff filed their written submissions dated 17th November, 2021 opposing the Notice of Motion application by the 1st and 18th Defendants dated 30.9.2021. They commenced by attacking the prayers 4 advanced by the 1st and 18th Defendants/Applicants seeking to strike out the Plaintiff’s suit and stay the suit pending prosecution of the Plaintiff’s directors for alleged criminal act. They relied on the case of “**D.T. Dobbie and Company (Kenya) Limited – Versus - Joseph Mbaria Muchina and Another (1980) eKLR**”

22. On the issue of stay, the Learned Counsel wondered who was prosecuting the Directors as they were not even parties to the suit and as the same offended the Principles of natural justice and the provisions of Article 50 of the Constitution of Kenya.

On prayer 2 of the Application, they held the 1st and 18th Defendants were not in the suit property and they – 2nd Defendant had never had a structure on the suit property. Although they claimed their properties e.g. beddings were burned by arsonists they never produced any evidence such as photographs to that effect. The burden of proof was on them. The counsel argued that the orders sought were mandatory in nature where the burden was higher and the Application ought to demonstrate the existence of special circumstance in granting the orders at interlocutory stage.

23. To buttress their point, the Learned Counsels relied on the cases of:- “**Robert Mugo Wa Karanja –Versus- Eco Bank (Kenya) Limited and Another(2019) eKLR, and Canadian Pacific Railway –Versus- Rand (1949) 2kb 239 AT PAGE 249 AND Localbail International**

Finance Limited –Versus- Afro Export (1988) EB 901 and the principle of granting mandatory injunction. Further the Learned counsel argued that for the Applicants to succeed in being reinstated they ought to prove also that they had met the principles in the “ Giella – Versus - Cassman Brown Company Limited 1973 EA 358”

25. They held the 1st and 18th Defendants had no “Prima Facie” case in that they had even filed a Defence to the case but instead filed a notice of Preliminary Objection dated 12.3.2021. The Learned Counsel referred Court to the 1st and 18th Defendant supplementary Affidavit filed in on 3.11.2021 particularly annexure ‘B’ for instance the Plaintiff was not a party to SPMCC No. 822 of 2015 as the complainant was one Mahamoud Kassam Mivanyi. They extensively referred court to the judgment of the trial court at Page 1 Plot No. MN/II/819, Page 2, showed 60 acres of Land was sold Page 5 – in 2018 Court Visited and there were neither squatters nor houses on the suit land. They held that under Pages 16 - 17 of the said Judgement this fact was confirmed.

26. According to the Learned Counsel the Applicants failed to demonstrate the damages they would suffer taking that as late as the year 2018 had never had any structures on the suit property. Further, they urged court to consider the angle of security as the property was a security risk. Since the month of December, 2017 the suit property had been under the armed security of the Kenya Police. They held the Defendants had on several occasions stated they have no control over other squatters who would invade the suit land.

27. They submitted that the insecurity of the suit property had compelled the Plaintiffs to incur substantially by pulling up an expensive perimeter wall around the surrounding the whole of the suit land. Further they drew court attention to an order restraining any one from entering the suit land and therefore they urged court to maintain the status quo pending the hearing and final determination of the suit they prayed that the application be dismissed with costs.

IV. ANALYSIS AND DETERMINATION

a) Whether the Notice of Motion Application dated 30th September, 2021 by the 1st & 18th Defendants meets the threshold for granting the Permanent Injunction orders sought against the Plaintiff hereof.

b) Whether the parties are entitled to the orders sought.

c) Who will bear the Costs to the application.

ISSUE No. a). Whether the Notice of Motion Application dated 30th September, 2021 by 1st & 18th Defendants meets the threshold for granting the Permanent Injunction orders sought against the Plaintiff hereof.

The Brief facts.

28. Before embarking on the analysis of these issues afore stated, it is imperative that the Honorable Court extrapolates on the facts of the case briefly. This is rather a protracted, complex and convoluted almost a replica of “a cat and mouse” game matter. It is on a claim of land within an informal settlement area. The dispute has led towards mass destruction of properties, evictions and institution of series of civil and criminal cases.

On 29th January, 2021 the Plaintiff – Bandari Investments Company Limited instituted this suit through a Plaint. On 10th March 2021 the Plaintiff filed an Amended Plaint against 139 Defendants. The Plaintiff is incorporated as a private company wholly owned by the Bandari Savings and Credit Co-operative Society Limited, a member based SACCO. Unfortunately, this court has not been able to see any certificate of its incorporation or proof of the legal registration as yet. It averred that its membership is composed of 19, 000 who had constitutional or statutory mandate to defend their properties against armed invaders such as the Defendants. By filing this suit, their intention was to protect their parcel of land.

29. The 1st to 139th Defendants are male and female adults of sound mind and understanding residing in the County of Mombasa, Kisauni Constituency, within Kiembeni location. At all material times of this suit they were operating at Kaguta Self Help Group and Nguu Tatu Self Group while the 140th Defendant is the Honorable Attorney General who is the Chief legal officer of the Government of Kenya sued in this suit on his own behalf and on behalf of the Ministry of Interior and internal Co - ordination as the Ministry in charge of protecting private property and lives of all Kenyans under the Constitution of Kenya.

30. The Plaintiff stated that it acquired for a valuable consideration plot sub - division No. 817 (Original Number 324/2) section II/MN. It measures approximately 59 acres situated at Nguu Tatu area Kiembeni within the County of Mombasa in the year 2012. (herein after referred to as “the suit property”). For this reason, the Plaintiff has claimed being the proprietor to the suit property absolute discretions to use it for its benefits in exploitation of constitutional and statutory rights and the Constitution of Kenya. They held that at the time of its acquisition, the property was an open farm actively utilized by the previous owner with no squatters on it. Upon acquiring the suit land, it engaged and installed some private security guards to watch on it.

31. According to the Plaintiff herein, on or about the month of September, 2016, the 1st to 139th Defendants and their agents without any good reasons and/or justifiable cause invaded the suit property by wrongfully and illegally entering and taking possession of portion of the suit property and commenced constructions of some temporary structures and remained on it which was a clear case of trespass. Upon the said invasion onto the suit land, they chased away the private security guards amidst threats of causing their deaths if they resisted or refused to abide. It appears this has been going on for many years from the year 2016. The Plaintiff lodged a complaint at the Bamburi Police station whereupon some of the Defendants were arrested and charged in court.

32. As a result of the illegal invasion and trespass by the squatters, it has generated several cases pending before the sub – ordinate and other courts being the SRMCC No. 1686/2016, Judicial Review 7 of 2017 and over other 8 criminal cases where orders of eviction had been

issued. There has existed 8 Civil and Criminal Cases over the said property (ELC 201/2013; ELC No. 298 Const. Pet. No. 74/2014; ELC No. 301 of 2013 (O.S.); Criminal (Shanzu) No. 822 of 2015; Criminal Shanzu 1252 of 2015; Criminal Shanzu 1040 of 2016) which are still to be heard and determined thereof.

On 1.12.2017 the Plaintiff filed a Constitutional Petition No. 15 of 2017, ELC, Mombasa whereupon some orders were issued on 4th December, 2017, 19th December, 2017 and 8th July 2019 restraining the squatters from selling, sub-dividing and interfering with the construction of the perimeter walls. They obtained orders to continue and complete constructing the perimeter wall around the site property. On the other hand, the Defendants claim that they had been living on this land from time immemorial. It is actually their ancestral land. They argued that the Plaintiff who term them as commercial squatters, has been trying to remove them from the land illegally and using force and police brutality. They contend that the Plaintiff while purchasing the land overlooked the overriding interest/rights of occupation or claim under land adverse possession or rights by prescription. They averred that the issues of wrongful entry or trespass and squatting on private land or even forcible entry of detainer of development with intent to annoy did not raise any constitutional issue or issue involving the constitutional interpretation.

33. On the contrary they have submitted that trespassers who enter land with intent to annoy are dealt with under the Trespass Act and the Penal Code. If they damage any property or take anything of value they are subject to criminal law on Malicious Damage to Property or theft as well as an action for damages or ejection.

On several occasions they have had their structures demolished, property destroyed and faced brutality. They had nowhere else to go to. The Defendants have argued that their eviction or invaders of private land physically dispossess the title owners was not the work of the National Police Service or the County Government of Mombasa. They have pleaded that trespass or squatting upon private land which physically dispossess the title owners is neither criminal nor does such trespass or squatting contravene the right against discrimination of property under the provisions of Articles 27 and 40 of Laws of Kenya.

34. In order to evict them formally and take possession of the suit land, they instituted the Environment & Land Court Constitution Petition (Mombasa) No. 15 of 2017. It was heard and on 28th January, 2021, dismissed it in favour of the Defendants. While dismissing it, court held that the remedy for the Petitioners relied in ordinary Civil Law and not in Constitutional Petition and that no construction issue arose termed as "*Principle of Constitutional avoidance*" court would not determine a constitutional issue when a matter may properly be decided on another basis. It relied on the Supreme Court Cases of "*Communication Commission of Kenya & 5 Others –VS- Royal Media Services Limited & 5 others [2014] eKLR*."

Immediately after the dismissal of the Constitution Petition, the Plaintiff herein instituted a fresh suit being ELC No. 16 of 2021. From the filed pleadings, the Plaintiff sought for the following prayers:-

(a) A permanent injunction restraining the 1st to 139th Defendants from entering upon, remaining continuing in occupation, constructing destroying the existing perimeter wall or any other way interfering with the Plaintiffs quiet possession and enjoyment of the suit property.

(b) A mandatory injunction compelling the 1st to 139th Defendants by themselves, their servants and/or agents at their own costs to demolish the constructions erected on the suit land property, remove and dispose the materials from the suit land, to so demolish, remove and dispose the material and in default the Plaintiffs be at liberty to demolish, remove and dispose the materials and in default plaintiffs be at liberty to demolish the structures and dispose of the materials at the Defendants Costs.

(c) Vacant possession of property.

(d) An order for compensation of the value of destroyed wall since February, 2018.

(e) An order directing 140th Defendant through the County Commander Mombasa, OCPD Kisauni and OCS Kiambeni to ensure full implementation of the Decree.

(f) Costs of the suit together with interest.

35. Despite of all this, in the month of July and August, 2021 the Plaintiff caused demolition and forceful eviction of the Defendants from the suit land which compelled them to move court.

On 19th August, 2021 they were granted injunction orders but still the demolitions continued and wanton disobedience of the court order.

On 30th September, 2021, the 1st and 18th Defendants filed the instant application which is here for determination. On the 19th November, 2021, the Honorable court conducted an elaborate site visit ("*Locus in Quo*") in the presence of all the parties and a detailed report was prepared. That is basically the facts of the case in a nutshell.

The Principles on mandatory Injunction orders

36. Before proceeding further, its significant to appreciate the great distinction between the prohibitory injunction as envisaged in the "*Locus Classicus*" case of "*Giella – Versus - Cassman Brown, 1973 E.A. Page 358*" and a Mandatory Injunction. The first authority on making this distinction was "*Shepard Homes – Versus – Sandham (1970) 3 WLR Pg. 356 Case*" in which Megarry .J as he then was stated follows:-

“Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the Defendant was entitled to retain the erection”.

38. Whether the 1st and 18th Defendants are entitled to be granted the Permanent Injunction restraining the Plaintiff on the suit property. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined.

Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.

39. It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The Honorable Court must be very cautious and vary that the matter before court is not only an application for mandatory injunction, but is one which, if granted would amount to the grant of a major part of the relief claimed in the action. Such applications should be approached with great circumspect and caution and the relief granted only in a clear case lest the suit is finalized at the interlocutory stage and there is nothing left to be heard and determined at the chagrin of the opposing party. Certainly, that would not be equity, fair and just at all to the other party.

The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of ***“Malier Unissa Karim –Versus - Edward Oluoch Odumbe (2015) eKLR*** as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella –Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Ltd-Vs- Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

“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, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

40. Further the same Court of appeal in the case of ***“Jay Super Power Cash and Carry Ltd –Versus - Nairobi City Council and 20 others CA 111/2002”*** held that:-

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it”.

Additionally, based on a passage from 24 Halsbury Laws of England, Page 248, the case of ***Locabail International Finance Limited - Versus - Agro Export and others (1986) All ER 906***, the court held thus:-

‘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 ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the Defendant attempted to steal a march on the Plaintiff...a Mandatory injunction will be granted on an interlocutory application.’

The reason for this rule on granting of Mandatory Injunction is plain. Megarry .J put it succinctly in a subsequent passage in the case of ***“Shepard Homes Case (Supra)*** as follows:-

“.....if mandatory injunction is granted on motion, there will be normally be no question of granting a further mandatory injunction at the trial; what is done and the Plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or contained”

41. From the facts herein, the 1st & 18th Defendants have been in occupation of the suit land from time memorial until they were forcefully evicted by the Plaintiff. It follows therefore that the 1st and 18th Defendants have a ***“prima facie”*** evidence and legal inclination to the Suit property.

What is disputed and main contention herein is the suit property. The demolition and eviction were all illegal. They were carried out contrary to the due process and procedures enshrined under Section 151A, B, C, D and E of the Land Act, of 2012.

42. For these reasons therefore this Court finds that the 1st and 18th Defendants have demonstrated their case and mets the fundamental threshold on being granted Permanent Injunction as laid down in law. They should be reinstated and allowed to re – build their structures and continue habiting there until the case is heard and finally determined.

ISSUE b). Whether the parties are entitled to the orders sought.

43. Under this Sub heading I fully concur with the authority cited by the Learned Counsel for the 1st and 18th Defendants - **CA. Appli No. 186 of 1992 - Andrew Kamau Mucuha –Versus- Ripples Ltd. (2001) eKLR**

This was an appeal from the Superior court by the Appellant (the Defendant there) In this case the Appellant as the Land Lord to all that property known as Plot. LR. No. 209/4985 in Rumwe House on Mfagano Street, Nairobi had sub – leased a shop to The Ripples Limited as the Tenants for a term of five (5) years and five (5) months from 1st February, 1988 at a monthly rent of Kenya Shillings Ten thousand per month. The Respondents (as the Plaintiffs there) were running catering business on the premises. The Land lord had unlawfully evicted the Respondents Defendants as the tenants from along Mfangano street Nairobi where the latter had been sub – leases.

44. The Appellant had at the same time and while alleging that the Respondents were owing outstanding rent arrears as at the time of eviction, also levied distress on the latter’s goods. The catering facilities, stock – in – trade etc had been carted away by the agents of the Plaintiff to an unknown place whereupon the Respondents had suffered loss and damage as well as embarrassment and indignity. They had been evicted from the business premises in contravention of court orders and they moved court for a mandatory injunction. The Respondents filed proceeding at the High Court to challenge the illegal distress and eviction. They sought for a) Prohibitory injunction restraining from alienating or demising the suit premises; and b). A Mandatory injunction requiring the Appellant to forthwith reinstate and restore full and unconditional possession of the suit premises and return all their possessed goods. The High Court proceeded to issue a mandatory injunction to reinstate the tenants. The third parties who had reportedly been put in possession by the contemptuous landlord were ordered evicted.

45. They were asked to look upon the landlord for redress for any

loss suffered. Here the Court held:-

“.....In all treatises, precedents and court arguments etc, whenever the issue of Mandatory Injunction arises, it is clearly understood and accepted that such an injunction should only issue in exceptional, the clearest and special cases only. It should issue with utmost care and even reluctance. This Court appreciates this stance well. The rationale for this stance should be that the effect of an order for a Mandatory injunction is that the party against whom the order is made should do or undo something. Many side effects may follow such an act. So its well understood as to why Courts issue such orders with case and even reluctance....”

46. In the instant case, should Mandatory Injunction issue or not? The answer is in the affirmative. In saying so, this Court has based its decision on a number of reasons. Firstly, its agreed that a Mandatory Injunction will issue not as a matter of course. The case should under special circumstances and calling for such an order. Undoubtedly, this is an extremely and extra ordinarily special case. From the facts, the Plaintiff though denying that there were no structures nor people having lived on the suit land. Be that as it may, on 19th November, 2021 this Honorable Court conducted a site visit on the land in the presence of all the parties. A site report was prepared. Its findings and observation all contained from the said detailed site visit report was shocking. These were lifted from the extract of the report:-

(a) The land measures – 59.5 acres or thereabout.

(b) There is a 6ft tall concrete perimeter wall well - constructed around the land.

(c) There were no activity taking place on the land as at the moment. It was quiet and serene.

(d) There were about 200 people around the area but very peaceful

(e) We learnt that there existed a well documented Bill of Quantities (BQ) report available it had been used as evidence in the various court cases.

(f) There was no Mutation form, title deed nor a map for the area.

(g) The land is Land Reference Number. 817. The land is sloppy and not fully even with nice vegetation of brownish light soil. There are other parcels land surrounding it being LR. No. 819 about 350 acres which belongs to one Mr. Hussein Daily Limited on the Southern part. He has sold to many people including this parcel to Bandari Holding Limited. There were also other parcels of land being Land Reference Numbers 818, 820 & 823 on the northern part of the suit land. There is a well-built Mosque at the left had side corner of the gate. It is built on Land No. 818.

(h) In Southern West – Exists the famous Bamburi Cement Sanctuary. On the Northern/Right – there is a 9 meters wide earth/rough road linking the Nyali Bridge. Towards the ocean which belongs to Thathini Limited it’s full of squatters.

(i) On the way to the suit land, close to 5 to 10 Kilometers from the tarmac road there is visible the Kiembeni Estate full of permanent structures on it and Ngatubi Village which we learnt has a pending case before the Environment and Land Court Mombasa.

(j) There are a few indigenous trees scattered all over the suit land – These includes the acacia, Neem, Tamarind trees, several homesteads with euphoria short fences, some banana stems, scattered Cassava plantations and some organic vegetables among the few we could identify. There are also some phobia fences here and there. From what appeared to have been human

settlements prior to the main demolitions and forceful eviction taking place.

(k) Evidently, there were aspects of attempts to demolition and remove the perimeter wall. Further, there were several human settlements, but no structures now left following the recent demolition having taken place. There were several debris scattered, broken, unkempt, clothings, utensils, furniture, hospital medical remains and wastages, building blocks, ballasts, sand, all over the suit land an indication of evidence or recent demolitions of some semi-permanent and permanent structures with a pit latrine, well set out connecting foot - paths and road and evidence of recent human waste. There were deep foot prints of heavy machinery having been there and which we learnt were for bulldozers and other machineries used for the demolitions.

(l) There is a long green swampy area in the middle of the land.

(m) There were a few concrete electricity poles which we learnt had been put up by the World Bank for electricity supply to the people who lived on the land. We noticed approximately 5 water manholes which we learnt were mounted by the Mombasa Water Supply Corporation’.

47. The suit land was habited by over 200 people who included the 1st and 18th Defendants herein. They had homesteads there. There were schools, a Mosque and a hospital. The Plaintiff caused an illegal and forceful eviction and the demolition of the Defendant’s structures using police force and brutality and not the due process of law. In the course of all these, all the Defendants lost actual possession of the suit land through the demolition and hence ideally there would be no case to hear as the Plaintiff already realized and seized vacant possession through unfair means.

48. Undisputedly, Evidently, there was blatant use of police force to harass, molest and brutalize human beings and children and their property in order to have them vacate the suit premises. While this was happening, there was a court order on force like the sword of the Damocles, but the Plaintiff willfully disobeyed it. At all costs court orders are to be obeyed, unless they are set aside, reviewed or an appeal is preferred against them. Worse, the possible defence that the Plaintiff’s title was held in trust for the Defendants whittled away. All these led to a case of inequality in law, stealing of the match and lack of a fair hearing once the Defendants got evicted.

49. In the given circumstances, this Court holds that a party as in the case of the Plaintiff herein, as far as possible ought not be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act in any way attempting to pre – decide the intended suit or influence a decision thereon.

It is will not be out of the way to say the Plaintiff’s action were not justifiable or excusable so that a mandatory injunction is refused or denied. In fact, this special situation has been compounded by the illegal and forceable eviction and the brutality to human beings, destruction of property etc as indicated above.

50. While making this ruling, this court has derived its inherent powers vested on it in what is now termed as the overriding objectives (or loosely known as “the Oxygen rule”). The said powers are founded under the provisions of Sections 1, 1A, 1B, 3 and 3A of the Civil Procedure Act, Cap. 21, Sections 3 and 19(1) of the Environment Land Court Act, No 19 of 2011 and Article 159 (1) and (2) of the Constitution of Kenya and in particular the principles which guide proceedings before this court being “the Practice directions on proceedings in the ELC” developed pursuant to the Provisions of Sections 18, 19, 20, 24 and 30 of the ELC Act specifically being just, expeditious disposal of cases, proportionate and accessible to resolution of disputes pertaining to land.

51. Clearly, the 1st and 18th Defendants had made out a clear case of mandatory injunction and ought to be granted to rebuild their house on the forcible eviction and malicious damage to private property was also criminal in nature.

ISSUE c). Who will bear the Costs of the application.

52. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction

especially those allowed in favour of one party against the other”

Indeed, the provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. The events in this case are the result of the case whereby the 1st and 18th Defendants/Applicants have succeeded in his case. For that very fundamental reason, therefore, the costs of this suit will be made to the 1st and 18th Defendants/Applicants by the Plaintiff herein.

V. DETERMINATION

53. Ultimately, based on the detailed and elaborate analysis conducted herein, I am fully satisfied that the Notice of Motion Application by the 1st and 18th Defendants/Applicants has merit and on preponderance of probability succeeds with Costs. For avoidance of doubt, I make to the following orders:-

a) THAT a mandatory Injunction order be and is hereby issued to compelling the Plaintiff, its agents, servants, employees, proxies or otherwise howsoever to allow the 1st and 18th Defendants to rebuild their demolished houses in the same place on the suit property and to conserve then until the hearing and determination of this suit.

b) **THAT** a Prohibitory injunction order be and is hereby do issued, barring the Plaintiff itself its agents, servants, employees, proxies or otherwise howsoever from again evicting or attempting to retake possession by demolishing or otherwise howsoever interfering with the 1st and 18th Defendants quiet and peaceful occupation of the suit property, pending the hearing and determination of this suit.

c) **THAT** in the interest of natural Justice, Equity and Conscience the suit should be fixed for full trial within the next Ninety (90) days from this date of the ruling. For expediency sake, there be a Pre – Trial Conference on 15th March, 2022.

d) **THAT** costs of the application be awarded to the 1st and 18th Defendants/Applicants to be borne by the Plaintiff/Respondent herein.

IT IS SO ORDERED ACCORDINGLY.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 9TH DAY OF FEBRUARY, 2022.

HON. JUSTICE L.L. NAIKUNI (JUDGE)

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna Hassan – the Court Assistant

Mr. Mkoba holding brief for Mr. Munyithia for the Plaintiffs

Mr. Mkan Advocate for 19th to 139th Defendants

M/s. Kimani Advocate holding brief for Mr. S.M. Kimani Advocate for 1st and 18th Defendants

Mrs. Langat Advocate for the 140th Defendant