



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. E034 OF 2022

MARTIN KOOME GIKUNDA.....PLAINTIFF

VERSUS

BOGANI GARDENS MANAGEMENT COMPANY LTD.....DEFENDANT

RULING

INTRODUCTION

1. Vide Notice of Motion Application dated the **26th January 2022**, the Applicant herein sought for the following Orders:

a.(Spent)

b. *This Honourable Court be pleased to issue an Temporary Order of Injunction restraining the Defendant from breaching Clause 2.21 of the Sublease dated the 5th November 2012 between La Nyavu Gardens Ltd, Martin Koome Gikunda and Bogani Gardens Management Company Limited pending the hearing and determination of the suit.*

c. *This Honourable Court be pleased grant a Mandatory Order of Injunction against the Defendant herein to issue to Plaintiff with an unqualified written consent to charge the Plaintiff's Property Parcel No. 16 on Land Reference Number 2259/783 (I.R No. 140102) situate at Karen within fourteen (14) days of this order.*

d. *In default, the Deputy Registrar of the Environment and Land Court, Nairobi be and is hereby authorized to sign, execute, and issue the written consent by the executing any necessary documents on the Defendant's behalf giving consent to charge.*

e. *The costs of this application be provided for.*

2. The subject Application is premised and/or anchored on the basis on the Grounds which are contained on the face thereof and same is supported by the affidavit of the Applicant sworn on the 1st February 2022, and to which the deponent has attached various annexures. For clarity, the annexures run from pages 1 to 104 thereof.

3. Upon being served with the subject Application the Defendant herein filed a Replying affidavit sworn on the 2nd February 2022, and to which the Defendant has attached a total of 23 annexures, running up to 194 pages. For clarity, the Defendant opposes the Notice of Motion Application and essentially the issuance of the orders of mandatory Injunction, seeking the Written Consent to Charge the Subject Property.

DEPOSITIONS BY THE PARTIES:

DEPOSITION BY THE PLAINTIFF:

4. Vide Supporting Affidavit sworn on the 1st February 2022, the Plaintiff herein has averred as hereunder;

5. On or about the year 2012, a company known as La Nyavu Gardens Ltd was the registered Proprietor of the all that Parcel of land known as L.R No. 2259/783 (I.R No. 140102, located at Karen, measuring approximately 24.9 HA.

6. Subsequently, La Nyavu Gardens Ltd, herein after referred to as the vendor proceeded to and subdivided the suit property, namely L.R No. 2259/783 (I.R No. 140102, located at Karen, measuring approximately 24.9 HA into 130 plots, measuring 0.16 HA, on which the vendor

intended to erect Residential houses based on various house designs and thereafter to sell same.

7. On the other hand, it has been averred that the Defendant herein was Incorporated and/or established for purposes of managing the Estate and for purposes of acquiring reversionary interest upon successful sale and transfer of all the portions aforesaid to the Purchasers and to manage the estate in accordance with the Neighbors rule, and Sub-leases at the time of sale.

8. Nevertheless, it has been averred that the Plaintiff herein entered into an Agreement for Sale whereby the vendor, namely La Nyavu Gardens Ltd, agreed to sell to and in favor of the Plaintiff herein one portion known as parcel number 16 at an agreed consideration/purchase price of Kshs.4, 600, 000/= only, which sum was duly paid and acknowledged by the vendor.

9. Besides, the deponent has further averred that pursuant to and/or vide the Agreement, same was also required to pay the sum of Kshs..2, 000, 000/= only, being the provisional costs of Building the infrastructure on the said portion of land, including Road Networks, sewer Drains and other facilities in the Common Areas.

10. Further, the deponent has averred that same proceeded to and paid the sum of Kshs..2, 596, 570.30/= only, (inclusive of other charges) and as such, same fully complied with all the set in the Sale Agreement.

11. It has been averred that on the 5th November 2012, the Company known as La Nyavu Gardens Ltd, the Defendant herein and the Plaintiff, executed a sublease over and in respect of parcel of land known as Number 16, which comprised of the town house erected thereon together with the common area within the estate. For clarity, the deponent has proceeded to and exhibited the duly executed and registered sublease.

12. Pursuant to the foregoing, the deponent has therefore averred and reiterated that same is the lawful and registered proprietor of the suit property, denoted by the sublease and in this regard same is entitled to enjoy the benefits attendant thereto, subject only to lawful and reasonable limitation, known to law.

13. On the other hand, the deponent has also averred that same has paid and/or settled the various charges, service levies and all other payments that are due and payable over and in respect of the suit property.

14. Be that as it may, the deponent has averred that on or about January 2021, same desired to acquire a Banking facility for purposes of enhancing his business and in this regard same approached Absa Bank Limited (formerly Barclays Bank Ltd) for purposes of acquiring Banking Facility.

15. Further, the deponent has averred that upon approaching Absa Bank Ltd, the Bank wrote back and confirmed their willingness to finance the deponent and thereby issued the deponent with a Letter of offer, which contained various terms and conditions, which the Bank invited the deponent to comply with and/or adhere to within the stipulated period and/or time frame.

16. It has been averred by the deponent that one of the terms of the intended Banking facility was to avail a security and in this regard, the deponent was desirous to offer the subject property, namely parcel number 16, situate at the suit property as security.

17. In the premises, the deponent has averred that same therefore approached the Defendant herein with a request for a written consent in line with clause 2.21 of the sublease, to enable the deponent to charge the subject property to and in favor of Absa bank Limited for purses of acquiring the banking facility herein before alluded to.

18. However, the deponent has averred that upon seeking the written consent of the Defendant, same was requested to avail assorted documents, as part of proof that the deponent truly owned the subject property and that same had paid all the requisite charges, levies and fees. In this regard, the deponent has averred that same forwarded and/or availed the documents that were requested for.

19. Nevertheless, the deponent has further averred that despite availing and/or supplying the Documents that were required, the Defendant herein failed to sign or issue the Written consent that was requested for and same has continued to persist in such neglect to date.

20. Finally, the deponent has averred that the failure and/or refusal by the Defendant to grant the Written consent and thereby facilitate the charging of the subject property by the deponent, amounts to and/or constitute a serious infringement on the Deponent's Proprietary rights to and/or in respect of the suit property and in this regard, it is appropriate that the court be pleased to intervene.

RESPONSE BY THE DEFENDANT:

21. Vide a Replying affidavit sworn Vincent Kiptoo, the Defendant herein has responded to the subject Application and has averred as hereunder.

22. First and foremost, that the Applicant herein has withheld material facts from the court and particularly, that the transfer of the suit property to his name was a fraud upon the Members of La Nyavu Savings & Credit society Ltd (La Nyavu Sacco), who in 2008 contributed monies to purchase the larger property known as title number land known as L.R No. 2259/66, Bogani Road, which was subdivided to make title number 2259/703 and latter changed to title 2259/783, from which the suit property was excised.

23. It has further been averred that the Defendant received an Application for consent to charge the suit property and that the letter under reference was responded to vide letter dated 1st October 2021 by the Defendants advocates, wherein it is stated that the Defendant explained to the Plaintiff the reasons and/or basis, upon which the written consent sought, could not be allowed and/or granted.

24. Further, it has been averred that the Plaintiff herein, though aware of the said response, same did not attach and/or exhibit the response letter to his affidavit and in this regard it is contended that the Plaintiff has therefore withheld a material fact from the court.

25. On the other hand, it has been averred that the intended charge, which the Plaintiff desires to undertake is a plot by the Plaintiff herein to defeat and/or circumvent the ongoing audit being carried out and/or undertaken by the Defendant to ascertain the legitimacy and/or irregularity of how the Plaintiff alongside others, acquired their respective properties, yet same were not members of the society.

26. Further, it has been averred that when the Plaintiff herein was requested to avail the preliminary documents underlying his acquisition of the subject property, same was unable to show how he acquired the suit property and more particularly that the Plaintiff herein was unable to show that he was a contributing member who contributed the basic sum of Kes.4, 400, 000/= only, per plot in the year 2008.

27. However, the deponent has also averred that the Plaintiff herein was also unable to provide evidence and/or to show that same indeed paid the additional sum of Kshs 2, 000, 000/= only in the year 2010 towards infrastructure development and/or that he entered and concluded the relevant Sale Agreement of the suit Property.

28. It has further been averred that though the Applicant herein holds a title, namely a sublease over and in respect of the suit property, same was acquired without any lawful consideration and that in fact, the Plaintiff herein was not the intended beneficiary of the suit property and therefore same ought to surrender the suit property with the title without more.

29. After making several scathing allegation against the previous office holders of the organization known as La Nyavu Savings and Credit Society Ltd, La Nyavu Sacco Ltd, La Nyavu Gardens Ltd and Bogani Gardens Management Company Ltd, the latter, which is the Defendant herein and by extension the previous leadership of Citam (Christ is The Answer Ministry), the deponent further avers that there have been complaints by many Members who contributed the set price of a plot in the estate but were not given a plot nor were they refunded the Purchase price.

30. In this regard, the deponent has averred that the Defendant herein has commenced a legitimate enquiry in to all the titles that were issued in the estate and that many members have been cooperating in producing the relevant documents for purposes of auditing.

31. On the other hand, the deponent has further averred that when the audit and/or enquiry started the owners of questionable plots, including the Applicant herein, have moved either to Sell and/or encumber their plots, a move calculated to defeat the audit and recovery process.

32. It is further averred that the Plaintiff herein is keen to invite the court to overlook the concerns raised by the Members who paid for those plots but were not given any nor were they refunded their monies and be allowed to charge the suit property.

33. On the other hand, the deponent has further averred that same is a valuer by profession and that he knows and/or understands that the Plot within the subject Property, has an open market value estimated to Kes.30, 000, 000/= Only, and that the present attempt to charge the suit property to secure personal development loan of Kes.40, 000, 000/=, is suspect and likely to be a trick by the Applicant to exit the estate because he would have received more than the value of the suit property.

34. Further, the deponent has averred that he verily believes that the Plaintiff herein did not meet the set conditions set out at clauses 1, 3 and 4 of the lease now produced as evidence of his title to the suit property.

35. For clarity, it is averred that the Plaintiff herein holds the title to the suit Property for the simple reason that same is the son of Dr. Joyce Gikunda, who was a Director of La Nyavu Gardens Ltd and not because he purchased the suit property.

36. In the premises, the deponent contends that the subject Application therefore does not meet the threshold for the grant of the Mandatory Injunction, in the manner sought by the Plaintiff herein or at all.

SUBMISSIONS:

37. The subject Application came up for hearing on the 7th March 2022, when same was canvassed vide Oral submissions. On his part, counsel Mr. Nyaburi who appeared for the Plaintiff submitted that the Plaintiff herein is the lawful and duly registered proprietor of the sublease over and in respect of the parcel of land known as plot number 16 situate within the suit property. In this regard, counsel referred to the sublease which was duly executed on the 5th November 2012 and thereafter registered on the 4th April 2013.

38. It was the Plaintiff's further submissions that prior to the execution and registration of the sublease, same had paid all the preliminary payments, inter-alia the purchase price, the service charges, the building infrastructure fees and other levies that were required of him and that the payments alluded to, were duly received and/or acknowledged by the vendor as well as the Defendant.

39. On the other hand, counsel further submitted that the Plaintiff has similarly performed and/or executed all the obligations required of him under the terms of the sublease and in the premises, the Plaintiff herein has therefore adhered to and complied with his part of the bargain as far as the contract is concerned.

40. Based on the foregoing, counsel for the Plaintiff therefore submitted that it was unreasonable of the Defendant herein to decline and/or to withhold the issuance of the consent and that in any event the refusal to issue the consent was contrary to the provisions of Clause 2.21 of the sublease.

41. In the premises, counsel for the Plaintiff contended that it is not open for the Defendant to decline to issue the consent to charge the suit

property, yet the same lawfully belongs to the Plaintiff. For clarity, counsel for the Plaintiff reminded the court about the import and tenor of the Plaintiff's rights to property under Articles 40 (1) of the Constitution, 2010.

42. In response to the Plaintiffs submissions, Counsel Mr. Ojiambo, who appeared for the Defendant relied on the lengthy Replying affidavit sworn on the 22nd February 2022 and submitted that the Plaintiff herein is not entitled to the suit property.

43. In counsel's view, the Plaintiff herein has forged the purported Sale agreement, which same has relied upon and/or placed before the court.

44. Secondly, counsel also submitted that the Sale Agreement which is being relied upon by the Plaintiff is heavily disputed and in any event same have not been attested by any advocate and/or person. In this regard, the sale agreement is therefore illegal and incapable of anchoring the title in favor of the Plaintiff herein.

45. Thirdly, counsel Mr. Ojiambo submitted that the issues subject in the matter are heavily disputed and hence same are not clear to warrant the grant of the order of mandatory injunction, either in the manner sought by the Plaintiff or at all. In this regard, learned counsel invited the court to take cognizance of the decision in the case of Nation Media Group Ltd v John Harun Mwu (2014) eKLR.

46. Finally, learned counsel Mr. Ojiambo invited the court to find and hold that the Application before the court, does not meet the threshold for the grant of an Order for Mandatory Injunction in the manner sought and hence same should be dismissed with costs.

47. In a short rejoinder, counsel Mr. Nyaburi submitted that there is no dispute that La Nyavu Ltd was the proprietor of the suit property and that same is the one that sold the suit property to the Plaintiff and that up to and including to date, the said Company, has never challenged and/or impeached the sale.

48. Secondly, learned counsel Mr. Nyaburi also submitted that the allegation of Fraud and/or forgery which have been alluded to by counsel for the Defendant, have no legal basis whatsoever. For clarity, counsel submitted that no complaint has ever been mounted before the Directorate of Criminal Investigation to commence any investigation to seek the alleged Fraud.

49. Thirdly, counsel also submitted that the sublease which confers title to and in favor of the Plaintiff herein was duly executed by the La Nyavu Ltd, the Plaintiff and the Defendant and that to date, that sublease has never been the basis of any proceedings, seeking to invalidate same.

50. Consequently, counsel submitted that the Defendant herein is therefore estopped from making any allegation, which contradict the execution of the sublease by herself, which execution, has never been challenged and/ or invalidated.

ISSUES OF DETERMINATION:

51. Having reviewed the Notice of Motion Application dated the 26th January 2022 together with the Supporting Affidavit in support thereto, the Replying Affidavit in opposition thereto and having considered the Oral submissions which were made by the respective Parties, the following issues Do arise and are germane for Determination;

a. Whether the Plaintiff herein is Prima facie the registered Owner of the sublease in respect of Plot number 16 L.R No. 2259/783 (I.R No. 140102).

b. Whether the failure and/or refusal by the Defendant to issue the Consent to charge is reasonable in the circumstances and whether an order of Mandatory Injunction should issue to compel the issuance of the requisite Consent.

ANALYSIS AND DETERMINATION

ISSUE NUMBER ONE:

Whether the Plaintiff herein is Prima facie the registered owner of the sublease in respect of Plot number 16 L.R No. 2259/783 (I.R No. 140102).

52. From the Affidavit Evidence placed before the court, it is common ground that a company known as La Nyavu Gardens Ltd was the proprietor and/or registered owner of all that Property known as L.R No. 2259/783 (I.R No. 140102), hereinafter referred to as the suit property, situate at Karen and which property appear to have been measuring 29.4 HA or thereabout.

53. Secondly, it is also settled and/or there appears to be no dispute that the said company proceeded to and caused the suit property to be subdivided into a number of Plots, for purposes of the development of Residential houses and for sale to various members and it appears that the said company, namely La Nyavu Gardens Ltd entered into a Sale Agreement with the Plaintiff herein over and in respect of the Plot known as Plot Number 16, which was sold to and in favor of the Plaintiff.

54. Subsequently, the said Company, which was the registered owner of the suit property, caused a sublease to be prepared over and in respect of the subject property, namely parcel number 16, between herself, the Plaintiff and the Defendant and the sublease was thereafter duly executed by the 3 parties and same was engrossed and subsequently registered.

55. For clarity, the duly executed sublease was produced and exhibited to the court by the Plaintiff and same is at Pages 43 to 64 of the

Bundle containing the subject Application.

56. It is imperative to note that the said sublease was executed by the duly authorized Officers/Directors of the Defendant herein, who were mandated to act for and/or on behalf of the Defendant herein at the material point in time.

57. To the extent that the said officers and/or directors, were so mandated to act for and on behalf of the Defendant, their acts and/or actions were/ are binding for and/or on behalf of Defendant herein. Consequently, it cannot be said that the Defendant herein was not knowledgeable and/or privy to the transactions that culminated into conferring the title to and in favor of the Plaintiff herein.

58. On the other hand, if the Defendant herein was not privy to and/ or aware that the sublease was executed by and/or on behalf of her, or by persons claiming to be her Directors, no doubt the Defendant herein, would have long commenced civil proceedings in her own name, seeking to challenge the authenticity and/or validity of the sublease in favor the Plaintiff.

59. To my mind, the Defendant's counsel did not refer to any such civil proceedings which have since been commenced and or undertaken by the Defendant to impeach and/or invalidate the Plaintiff's Title and/or sublease. For clarity, the Sub- Lease herein remains in- situ.

60. On the other hand, counsel for the Defendant also contended that the agreement for sale which has been alluded to by the Plaintiff was a forgery and therefore same cannot sustain and/or anchor the Plaintiff's claim to the suit property. Well said. However, counsel did not indicate whether any complaint was lodged and/or mounted with the Directorate of criminal investigation as pertains to the issues of the alleged fraud.

61. Other than the foregoing, I must point out that counsel for the Defendant did not address the validity or otherwise of the sublease, which on the face of it appears to have been executed by the Defendant. In this regard, the validity of the sublease remained un-impeached.

62. In my humble view, the Proprietor of the suit land, lawfully entered into a sale agreement with the Plaintiff herein together with the Defendant (the latter which was constituted as the management company and to date the vendor, which was itself a limited liability company, has never challenged the sale agreement or at all.

63. In my humble view, the Defendant herein having participated in the preparation, execution and engrossment of the sublease instrument, which was thereafter registered on the 4th April 2013, same cannot now be heard to contest what they lawfully executed.

64. For clarity, the Defendant is in my humble view, estopped from contradicting what was apparently undertaken and/or done by and/or on her behalf by duly appointed and authorized directors.

65. On the other hand, having duly executed the sublease, the Defendant herein was indicating and/or signifying that the recipient of the sublease, was therefore accruing legal rights over and in respect of the property, which rights bestowed upon the recipient some Legitimate expectation.

66. Suffice it to say, that based on the sublease, which was duly executed and thereafter registered, the Plaintiff herein became the lawful and legitimate owner (sub-lessee), over and in respect of Plot number 16, situate within the suit property and therefore same acquired lawful and legitimate rights thereto.

67. In this regard, the Plaintiff herein is therefore entitled to the benefits stipulated pursuant to the provisions of Sections 24 and 25 of the Land Registration Act, 2012, until and unless, the Sub- Lease shall have been negated vide a lawful Court Process.

68. For clarity, the provisions of Section 24 and 25 of The Land Registration Act, provides as hereunder;

24. Interest conferred by registration Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

ISSUE NUMBER 2

Whether the failure and/or refusal by the Defendant to issue the Consent to charge is reasonable in the circumstances and whether an order of Mandatory Injunction should issue to compel the issuance of the requisite Consent:

69. Before venturing to address the issue herein, it is important to understand the content and import of the provision of Clause 2.21 of the sublease which is the basis of contention between the Plaintiff and the Defendant herein and which actually grounds the basis for issuance of the written consent.

70. For clarity, Clause 2.21 of the sub-lease executed on the 5th November 2022 provides as hereunder;

“not to assign charge or part with possession of the said premises or any part thereof without the previous written consent had and obtained of the lessor and/or the manager such consent however not to be unreasonably withheld if evidence is produced that the sublessee has complied with the obligation on his part. A fee has determined from time to time by the lessor and/or the manager will be charged by the lessor and/or the manager for such consent. In addition the full scale fees of the advocate of the manager and/or the lessor shall be payable by the lessee”.

71. The Plaintiff herein submitted that same tendered and/or made an Application to the Defendant, whereby same requested to be issued with a written consent to charge the suit property to Absa Bank Limited, to secure a banking facility in the sum of Kshs.40, 000, 000/= only.

72. It was the Plaintiff's further submission that upon the Application, same was requested by the Defendant to supply and/or avail assorted documents as proof of ownership and compliance with various rules and regulations of the Defendant and that upon receipt of the request to avail the assorted documents, same forwarded the various documents that were required of her. For clarity, the Plaintiff alluded to the documents which were forwarded vide paragraph 14 and 15 of the supporting affidavit.

73. Besides, it was further submitted that the Defendant herein dully received the assorted documents that were forwarded by the Plaintiff and same were acknowledged vide Email correspondence of 12th July 2021.

74. On their part, the Defendant herein has submitted that upon receipt of the request by the Plaintiff, to be supplied with a written consent to charge, same responded to that request vide letter dated 1st October 2021 and in which same raised various issues pertaining to inter-alia, abuse of office by the previous trustees and directors of La Nyavu Gardens Ltd, which included one Dr. Joyce Gikunda, who is said to be the Mother of the Plaintiff herein.

75. Based on the contents of the letter dated the 1st October 2021 and coupled with the allegations that the previous directors and trustees of La Nyavu Gardens Ltd abused their offices, the Defendant therefore contended that same cannot issue the written consent sought for.

76. With respect, there appears to be a tussle and/ or grudge between the current directors and/or trustees of La Nyavu Saco Ltd, La Nyavu Gardens Ltd and Bogani Gardens Management Company Ltd as against the Previous directors and trustees, but that tussle cannot be sorted out and/or addressed in the subject matter.

77. At any rate, it must be remembered that during the time when those officials, trustees and/or directors, were in office, same were duly mandated to act for and on behalf of the respective companies and their acts, are prima facie, taken to be acts of the said Companies.

78. In the premises, I have found and held, while dealing with issue number one that the Plaintiff herein ipso facto appears to the legitimate owner of the subject property and same is therefore entitled to the benefit of the Rights and Privileges arising therefrom.

79. The question therefore is, if the Plaintiff is keen to charge the suit property, in pursuance of the enjoyment of his rights and privileges thereto, ought the Defendant withhold the consent, merely because the current office holders have an issue or better still, a bone with the previous Directors or otherwise.

80. In my humble view, to find and hold that the Defendant can Withhold the written consent, by clinging onto to such straw, yet the previous, officials and/or trustees, were executing their lawful mandate, would amount to trifling with the lawful Property Rights of the Plaintiff herein.

81. It is in such circumstance, that Equity foresaw that an order of Mandatory injunction would suffice to remedy and/or address the default, to avert, a Party being exposed to a serious and/or grave infringement of a right, at the instance of another unyielding Party.

82. In my humble view, the circumstances belying the subject matter are such that a clear case has been made, because the registered and legitimate owner of sublease, is being denied and/or deprived of a written consent, which is a legitimate entitlement, albeit on reasons, which *ex-facie*, appear to be contradictory to the Provisions of Article 47 of the Constitution, 2010.

83. In the circumstances, a strong case has been made out by the Plaintiff to warrant the grant of an order for Mandatory injunction and in this case I am compelled to find and hold that the Plaintiff herein has met the higher threshold for the granting of the order sought.

84. In support of the foregoing observation, I am obliged to pay homage to the Decision in the case of **Kenya Breweries Limited & another v Washington O. Okeyo [2002] eKLR**, where the court observed as hereunder;

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.”

85. Most recently, the higher threshold before granting an order for Mandatory Injunction at an Interlocutory stage was reaffirmed by the Court of Appeal in the case of **Nation Media Group & 2 others v John Harun Mwau [2014] eKLR**, the Court of Appeal had this to say;

“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”.

FINAL DISPOSITION:

86. Having addressed the issues which were outlined herein before for determination, I come to the conclusion that the Plaintiff herein has met and/or established the higher threshold envisaged for the grant of an order of Mandatory Injunction. For clarity the Application herein is meritorious.

87. In the premises, the Application dated the 26TH of January 2022, be and is hereby allowed in terms of prayers 3 and 4 thereof.

88. Costs of the Application herein shall abide the cause.

89. It so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

IN THE PRESENCE OF;

JUNE NAFULA COURT ASSISTANT

MR. NYABURI FOR THE PLAINTIFF/APPLICANT

MR. DR. OMONDI R. OWINO H/B FOR MR. OJIAMBO FOR THE DEFENDANT/RESPONDENT