

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 262 OF 2012

RAZOR INVESTMENTS LIMITED..... PLAINTIFF

VERSUS

MURABAHA HOLDING LIMITED.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion application dated 10th April 2013 and brought under Section 1A, 1B and 3A of the Civil Procedure Act and Orders 40 and 51 of the Civil Procedure Rules , 2010. It seeks for the following orders:-

1. Spent.

1. That the Honourable Court be pleased to issue mandatory orders compelling the Respondent, his agents, servants or whosoever otherwise in illegal occupation of all that parcel of land known as L. R. No. 330/55 (Original No. 330/51/2) (hereinafter referred to as the “Suit Property”) to immediately vacate the Suit Property and with the help of the Court Bailiff to put the Plaintiff in possession thereof.
2. That the Honourable Court be pleased to issue an order directing the Officer Commanding Station Muthangari Police Station and/or officers under his direction to give assistance to the Court Bailiff in enforcing the order in prayer No. 2 above.
3. That the costs of this application be provided for.

The application is premised upon the grounds appearing on the face of the application and the Supporting Affidavit of Nanji Kalyan Hirani in which he averred that he is one of the Directors of the Plaintiff Company and the Plaintiff Company is the registered owner of the Suit Property. He further averred that about December 2011, the Respondent unlawfully and forcefully ejected the Applicant’s guards from the Suit Property and installed their own guards thereby starting an illegal occupation that continues to date. He further swore that in addition, the Respondent is demolishing the Applicant’s structures and buildings in order to reconstruct illegal structures on the Suit Property. He further swore that on 2/5/12 the Applicant wrote a letter to the Respondent demanding that the Respondent vacate the Suit Property and return it in the same condition as it was before the illegal entry but the Respondent has ignored that demand. He also stated that despite the Respondent being duly served with all requisite court documents the Respondent has failed to enter appearance nor file a defence leading to interlocutory Judgment being entered against the Respondent. He stated further that despite neglecting the Court process, the Respondent continues to occupy the Suit Property illegally and further continues with their process of wanton destruction of the Suit property thus adding more losses to the Applicant.

The application is unopposed.

In the case of *Locabail International vs. Agro Export [1986] 1 ALLER 901*, the court stated as follows:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thought that the matter ought to be decided at once, or where the injunction was directed at 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 interlocutory injunction the

court had to feel a high sense 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”

Turning to the facts of this case, it is true that the Respondent has failed to respond to the Court process and in fact, interlocutory judgment was entered against it on 21/3/13. The matter was then supposed to proceed for formal proof but the applicant elected to file and prosecute this application instead. Looking carefully at the prayers sought in this application, particularly prayer No. 2 is for an eviction order as well as a mandatory injunction against the Respondent. These are the same prayers sought in the Plaint dated 14/5/12.

A mandatory injunction should only be granted where there are special circumstances and only in clear cases. While the applicant appears to have a strong case in regards to its ownership of the Suit Property, this court does not see any special circumstances that would warrant the grant of a mandatory injunction at this interlocutory stage of the proceedings herein. There is nothing to show that this matter ought to be decided at once and conclusively at this interlocutory stage.

No case has been established by the applicant for the grant of such final orders at this stage. This being the case, I decline to allow the application. I instead direct that the Suit be fixed for formal proof. Accordingly, the application is hereby dismissed. No order as to costs.

SIGNED AND DELIVERED AT NAIROBI

ON THE 28TH DAY OF JUNE 2013.

MARY M. GITUMBI

JUDGE