



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MOMBASA**

**Civil Case 586 of 2011**

**AFRICAN SAFARI CLUB LIMITED ..... PLAINTIFF/APPLICANT**

**VERSUS**

**MIRIAM MUTHONI MAHIHU (sued on her own behalf**

**and as Executor of the Estate of**

**ELIUD MUCHOKI MAHIHU (Deceased)..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**NGARI MAHIHU ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**LUCY YINDA ..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**WACHIRA MAHIHU ..... 4<sup>TH</sup> DEFENDANT/RESPONDENT**

**WANJERI MAHIHU ..... 5<sup>TH</sup> DEFENDANT/RESPONDENT**

**BUSINESS LIAISON COMPANY LTD ..... 6<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

(1) By Complaint dated 3<sup>rd</sup> November 2011, the Plaintiff Company which claims to be the true owner of the suit property being plots of land on which it is developed Flamingo Beach Hotel and Workshop and of which it had 20 years of exclusive possession, seeks declarations of ownership and an order for reinstatement to the suit property, or alternatively compensation therefor following alleged unlawful dispossession by the Defendants on the 17<sup>th</sup> June 2011. Along with the Complaint, the Plaintiff sought by Notice of Motion of the same date the following principal orders:

***“2. That this Honourable Court be pleased to grant an order restraining the Defendants or any of them whether by themselves, agents, servants or otherwise howsoever occupying and or remaining upon the suit properties plot Nos. MN/1/5902, MN/1/856, unsurveyed plot at Shanzu Mombasa reference number 31500/XII/108 on Plan No. 122149/22A whereon stand Flamingo Beach Hotel and a Workshop or interfering therewith pending hearing and determination of the suit filed herein.***

***3. That the Honourable Court do by way of a mandatory interlocutory order compel the Defendants/Respondents together with their agents, servants or anybody claiming under them to forthwith vacate the suit properties being plot Nos. MN/1/5902, MN/1/856, unsurveyed plot at Shanzu***

**Mombasa reference number 31500/XII/108 on plan No. 122149/22A where on stand the Flamingo Beach Hotel and a Workshop thereon pending hearing and determination of the suit herein.**

(2) The Plaintiff's case is summarised in the schedule of grounds of the application as follows:

**“1. The Applicant purchased the suit properties (plots) in the name of the 6<sup>th</sup> Defendant Company, on the agreement that the shares in the said company would be transferred to the Applicant and or its (Applicant's) nominee.**

**2. The suit plots were developed by the Applicant, who financed the erection thereon of both the Flamingo Beach Hotel and a Workshop, lately in use by the Applicant as, inter alia, offices.**

**3. The Applicant has been in exclusive possession of the said properties since 1989 or thereabouts paying thereon all outgoings, including rates.**

**4. On the 17<sup>th</sup> June 2011, the Respondents through use of armed police and without lawful order entered upon the premises and took possession thereof. Effectively, the Applicant was forcibly dispossessed by what were patently sub-legal means, and its employees and private security have since been kept out of the premises.”**

The Applicant's application is supported by the affidavits of its Managing Director sworn on 3<sup>rd</sup> November 2011 and 22<sup>nd</sup> November 2011, respectively.

(3) The Defendants opposed the application through Grounds of Opposition dated 9<sup>th</sup> November 2011 and replying affidavit sworn by the 3<sup>rd</sup> Defendant on behalf of the Defendants on 14<sup>th</sup> November 2011. The Defendants make principally three substantive and technical objections to the Plaintiff's suit and application as follows:

(a) That the entire suit should be stayed in accordance with section 6 of the Civil Procedure Act because there is in existence Petition No. 35 of 2011 previously instituted by the Applicant and which was pending before the Court of Appeal on appeal from the High Court's decision on a similar and replica application.

(b) That the present Notice of Motion is res judicata by virtue of the court's decision in Petition No. 35 of 2011.

(c) That substantively the Applicant is not the owner of the suit property but rather a tenant pursuant to lease executed with the 6<sup>th</sup> Defendant, and which lease had expired in 2004, and the 6<sup>th</sup> Defendant had been transferred to new shareholders taking the 1-5 Defendants out of the business and control of the company.

It was not denied that the Defendants forcibly dispossessed the Applicants without lawful order and took possession of the suit properties.

(4) Counsel for the parties, Mr. Mwakisha and Mr. Buti, respectively for the Plaintiff and the Defendants, made oral submissions and cited case law authorities in support of their client's contentions. It was clear that the Plaintiff had been dispossessed of the suit properties, so that the only relevant order in the circumstances is a mandatory injunction seeking to reinstate the Applicant into the premises. The issues before the court therefore are whether an interlocutory mandatory injunction will issue to reinstate the Applicant; whether the application is res-judicata; and whether the application and the suit are sub-judice. The first issue depends on determination of the other two.

(5) **Whether the application is res-judicata.**

**and Mburu Kinyua v. Gachini Tuti (1978) KLR 69** on the position that the plea of res-judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce Judgment but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. But like Madan, JA in **Mburu Kinyua's** case, I do not see that there is res-judicata in this application for mandatory injunction. The learned Judge in Petition No. 35 of 2011 did not pronounce a judgment on a prayer for mandatory injunction which she found had not been sought. Indeed, the Judge suggested that she would have looked upon a request for mandatory injunction favourably had it been sought and lamented that she could not grant what had not been sought. The Judge ruled:

*“What is material is that the Applicant has been in possession of the suit premises. Regardless of whether the Applicant is an owner or lessee of the suit property, the 4<sup>th</sup> Respondent could only have possession of the suit premises from the Applicant through legal means. It is evident that the 4<sup>th</sup> Respondent has purported to take possession of the suit premises from the Applicant. The 4<sup>th</sup> Respondent has not however demonstrated its authority to do so....*

*A look at prayers (c) of the Chamber Summons dated 30<sup>th</sup> June 2011 shows that what the Applicant seeks is orders restraining the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents or their servants, or agents from “getting into or remaining upon” the suit property upon which is built the Flamingo Beach Hotel and Workshop. While prayer (d) seeks an order that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents, their servants or employees “to forth with leave and vacate the suit property.” Therefore what the Petitioner is seeking is to have the status quo ante reinstated by having the Respondents vacate the suit premises and restrained from getting into or remaining on the premises....*

*In the circumstances of this case, the position at the moment is that the Applicant has been removed from the suit premises. An order restraining the Respondents, its staff or agents from getting into or remaining upon the suit property; or an order directing the Respondents forthwith to leave and vacate the suit property is not an order for preserving the status quo. It is an order for reinstating the status quo ante i.e. the position before the alleged breaches occurred. It would be premature and prejudicial for the court to issue such an order at this stage. Thus the Applicant has not satisfied the court that the conservatory orders it is seeking are necessary to preserve the subject matter of the suit....*

*As regards the Applicant's rights over the suit property, this part of the Applicant's claim can be rendered nugatory by subsequent actions of the Respondents. The court has however not been asked to restrain the Respondents from dealing with the suit property nor has the Applicant specifically requested for an order to reinstate it back into the suit property. Indeed that is an order which could have been appropriately obtained by way of a mandatory injunction if the circumstances so justified. Nevertheless the Applicant has chosen not to go that way. The court cannot give what has not been sought.”*

Even if it were argued that the Applicant was under a duty to seek the mandatory injunction order and, having not so sought the order was bound by the decision of the court by the principle of res-judicata, the exception of “**special circumstances**” or “**special case**” under the formulation of the principle in **Henderson v. Henderson (1843) 67 ER 313**, would take the present case out of the plea of res-judicata, in my view, because of the need to strike a blow against impunity by taking away any benefit obtained by unlawful eviction of the Applicant in circumstances which may amount to the criminal offence of forcible entry under section 90 of the Penal Code, Cap. 63. I would hold therefore that the Applicant's application for interlocutory mandatory injunction is not res-judicata by virtue of Petition No 35 of 2011, not only because no decision has been made on the matter but also because of the special circumstances of the forcible dispossession of the Applicant in this case.

(6) **Whether the suit is sub-judice.**

Section 6 of the Civil Procedure Act provides:

***“No court shall proceed with the trial of any suit or proceeding which the matter in issue is also directly and substantively in issue in previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”***

In the Memorandum of Appeal dated 23<sup>rd</sup> September 2011 filed in the Court of Appeal by the Applicant herein as Appellant from the decision of the High Court in Petition No. 35 of 2011, the Appellant contends at paragraph 11 thereof that

***“the learned Judge erred in law and in fact by failing to consider ruling that prayers (b) and (d) in the Chamber Summons application dated 30<sup>th</sup> June 2011, if granted would have amounted to an order for reinstatement or a mandatory injunction and that therefore the Appellant need not have sought orders of reinstatement or mandatory injunction in those specific words.”***

Based on that plea, the Appellant’s prayer (d) of the Memorandum of Appeal dated 23<sup>rd</sup> September 2011 is in these terms:

***“(d) In the alternative to prayer (b) above the court be pleased to issue a mandatory injunction reinstating or restoring the Appellant to Plot Nos. MN/1/5902, MN/1/856, unsurveyed Plot at Shanzu Mombasa reference number 31500/XII/108 or Plan No 122149/22A upon which is built the Flamingo Beach Hotel Mombasa and a Workshop pending the hearing and determination of the Petition.”***

This prayer is in the same substantive terms, as the prayer No. 3 of the Notice of Motion of 3<sup>rd</sup> November 2011 herein and prayer No. (ii) of the Plaint dated 3<sup>rd</sup> November 2011.

I am aware that the constitutionality of section 6 of the Civil Procedure Act has been challenged as shown in the decision of **Church Road Development Co. Ltd v. Barclays Bank (K) Ltd & Others (2007) 1 EA 48** but I am not aware of a definitive determination thereon. However, I have held in a previous decision that an order for stay of proceedings or suit does not affect the power of the court to deal with interlocutory matters. See **Harji Kalyan Hirani v. Mohamed Walusanda & 8 Others, Msa HCCC No. 385 of 2010** ruling of 14<sup>th</sup> May 2012 where I cited **Mulla on the Code of Civil Procedure (1980) 16<sup>th</sup> Ed. 2001 at p. 151** so far as material that **“a stay [under section 10 similar to our section 6 of the Civil Procedure Act] does not take away the power of the court in the stayed suit to make interlocutory orders, such as orders for a receiver or an injunction, or an attachment before judgment.”**

Therefore, while the Court is, in terms of Section 6 of the Civil Procedure Act, prevented from proceeding with the **trial** of the Plaintiff’s suit set out in the Plaint, the court could competently determine interlocutory applications such as the Notice of Motion of 3<sup>rd</sup> November 2011 herein.

**(7) Whether an order for interlocutory mandatory injunction will issue in the circumstances of this case.**

Having found that the application for interlocutory mandatory injunction is not res-judicata and that the court has power to deal with interlocutory applications despite the stay of proceedings under section 6 of the Civil Procedure Act, it is open for this court to deal with the Applicant’s application for interlocutory mandatory injunction herein.

I consider that I am not sitting on appeal or a review on the decision of the learned Judge in Petition No. 35 of 2011. I respectfully agree that the learned Judge is entitled to the exercise of discretion in the manner that Her Honour did on the question before the court. On the specific question before me – whether an interlocutory mandatory injunction will issue in the circumstances of this case - I have considered the principles of the grant of an interlocutory mandatory injunction as set out in **Shepherd Homes Ltd v. Sandham (1970) 3 ALL ER 402, Locabail International Finance Ltd v. Agro Export**

**& Others (1986) 1 ALL ER 901; and Muchuha v. Ripples Ltd (1990-94) EA 388** among others, being that mandatory injunctions at the interlocutory stage will only be granted in special circumstances and clear cases such as where the Defendant has attempted to steal a march on the Plaintiff. See also **Gusii Mwalimu Investments Co. Ltd & Others v. Mwalimu Hotel Kisii Ltd Court of Appeal Civil Appeal No. 160 of 1995, [1995-1998] 2 EA 100.**

As I have ruled above, the dispossession of the Plaintiff by the Defendant without a lawful court order in circumstances which may amount to the offence of forcible entry under section 90 of the Penal Code presents special circumstances in this case. Whether the Plaintiff was in possession as an owner of the suit property, as it contends, or as a lessee as contended by the Defendants, the Plaintiff/Applicant was entitled to occupy the suit premises until dispossessed through a valid and lawful order of court in that regard. That the Defendants used self-help, with the assistance of the police, offends the basic principles of the Rule of Law.

In these circumstances, and without prejudice to the respective parties' contentions with regard to the ownership of the suit property and of other proprietary claims on the property, which will be determined at the trial, it is the duty of the court to uphold the rule of law and reinstate the wrongly dispossessed Applicant into the suit property. The mission of the Court under the Constitution to rehabilitate the Rule of Law as one of the basic principles of the Constitution under Article 10 thereof exists for the remedy of such situations by pursuing the triumph of the Rule of Law over the Defendants' impunity in stealing a march on the Plaintiff.

(8) Accordingly, for the reasons set out above, I grant prayer No. 3 of the Notice of Motion dated 3<sup>rd</sup> November 2011 with costs to the Plaintiff. The order of the court will take effect on the expiry of 30 days from the date of this ruling to allow for smooth take-over/hand-over between the parties. Mention on the 22<sup>nd</sup> October 2012 for compliance.

**EDWARD M. MURIITHI**

**JUDGE**

**Dated and delivered this 21<sup>st</sup> day of September 2012.**

**F. TUIYOTT**

**JUDGE**

In the presence of:

Mr. Mwakisha for Plaintiff/Applicant

Mr. Buti for Defendants/Respondents

Miss Moriasi - Court Clerk