



**Bosco Farm Limited v Nicoletti (Environment and Land Case Civil Suit
3 of 2019) [2022] KEELC 13847 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13847 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE CIVIL SUIT 3 OF 2019
MAO ODENY, J
OCTOBER 25, 2022**

BETWEEN

BOSCO FARM LIMITED PLAINTIFF

AND

STEFFANO NICOLETTI DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated November 28, 2021 by the defendant/ applicant seeking the following orders: -
 - a. That pending the hearing and determination of this suit, this honourable court be pleased to order the plaintiff to release the defendant's movable property currently in their possession and on the subject property Plot No. 41 within seven (7) days of service of this order in default of which, the defendant be at liberty to remove the said property.
 - b. Spent.
 - c. Spent.
 - d. That the OCS Malindi Police Station to facilitate the enforcement of the orders.
 - e. Costs of the Application be provided for.
2. The plaintiff/respondent filed a replying affidavit and deponed that he did not have any objection to the defendant's application for leave to amend the defence to include a counterclaim.



3. The respondent further deponed that when the defendant vacated the suit premises, he was not present and as such, he did not know what property he may have had in the suit premises and that he did not find any of the goods as outlined in paragraph 10 of the supporting affidavit sworn by the defendant.
4. He further asserted that the company sold and parted with possession of the suit premises soon after the defendant vacated the premises and as a result, he did not have access to the said premises.

Defendant/Applicant's submissions

5. Counsel for the applicant gave a brief background to the suit and stated that the applicant did not have time to collect the listed equipment on the attached inventory namely a compressor diving machine, power generator, grass cutter, digging machine, diving equipment, crates, car tyres, digging hoes, 4 canvas chairs, and drip irrigation, that it has been impossible for the applicant and his agents to regain access to the said premises for purposes of collecting the said property.
6. Mr. Atiang' identified two issues for determination as follows, whether the applicant has made a good case for mandatory orders of release and whether such orders of the court if granted are enforceable.
7. It was counsel's submission that in an application for mandatory injunction the Court must seek to interrogate the special circumstances that arise in the matter that invites the court's application of its discretion and inherent power under section 3A of the *Civil Procedure Act* and he relied on the case of *Malier Unissa Karim vs Edward Oluoch Odumbe* (2015) eKLR.
8. Counsel submitted that the equipments have remained in the suit property to date and are wasting away, and a mere allegation that the plaintiff has no control over the property makes it a risky affair to the defendant's equipment and property.
9. Mr. Atiang' also submitted that the plaintiff's assertion that it had sold the suit property is not tenable as the Plaintiff has not attached any documents to prove the lack of possession.
10. Counsel therefore urged the court to allow the application as prayed with costs.

Analysis and Determination

11. This application came up for hearing but counsel agreed to compromise part of the application by allowing the applicant to amend the defence to include a counterclaim. The only limb that was not agreed upon was the issue of release of the applicant's equipment that was detained by the respondent.
12. The issue for determination is whether the court should issue a mandatory order for the release of the Applicant's equipment.
13. In the case of *Nation Media Group Ltd & 2 Others v John Harun Mwau* [2014] eKLR the Court of Appeal expressed the following view: -

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction 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 injunction can only be granted in exceptional and in the clearest of cases.”
14. The respondent does not deny that the applicant was evicted from the suit premises, it only states that they no longer have control of the property as they sold it to a third party. The respondent has not



tabled any evidence to show that they no longer have control of the suit property, no sale agreement has been attached to verify the same.

15. The respondent's replying affidavit to the application is a manifestation that if the order of release of the Applicant's equipment is not granted then there will be further loss or risk as the Respondent is trying to shift blame and responsibility to third parties who are not parties to this suit. The Respondent is still under a duty to deliver the equipment that was at the premises when the eviction took place.
16. In the case of *Moses Kipkoech Rotich v Kenya National Highways Authority & 7 others* [2017] eKLR the court ordered for the release of a motor vehicle that had been detained pending the hearing and determination of the suit.
17. I am therefore satisfied that this is a case where a mandatory order for release of the applicant's equipment is warranted to rescue them from further loss or deterioration. Application allowed as prayed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF OCTOBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

MALINDI ELC CASE NO. 3 OF 2019 RULING 3

