



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 280 of 2005**

1. Land and Environmental Law Division
  2. Subject of main suit:
    - i) Land LR 9042/158 Embakasi, Nairobi
    - ii) Trespass
    - iii) Eviction of 1<sup>st</sup> and 2<sup>nd</sup> defendant
    - iv) To restrain 1<sup>st</sup> and 2<sup>nd</sup> defendant from wasting plaintiffs land
  3. Plaintiffs application by way of chamber summons 10 March 2005 under certificate of urgency
    - i) To issue interlocutory injunction on defendant 1 and 2 from wasting/constructing on property
    - ii) Mandatory injunction requiring defendants to vacate plaintiffs land forcible eviction
    - iii) OCPD Embakasi police to effect
    - iv) APPLICATION granted on 8.4.05 by Ransely J
- Para 3 and 4 chamber summons 10.3.05
- (is mandatory injunction to vacate and OCPD to effect orders).
4. Defendants application Chamber summons 29.7.05 under certificate of urgency
    - i) Defendant 1 and 2 seek orders to restrain plaintiff from evicting them.
    - ii) Alternative be a stay of order 8 April 2005
    - iii) Reasons:-
      - a) Never severed with pleading
      - b) Ownership a dispute

c) Land occupied by Embakasi slum dwellers self help Group – over 600 members

d) Ransely J has 29.7.05 vacated orders issued 8.4.03 for eviction.

5. Application 27.9.05 by plaintiff

i) Seeking to forcefully evict the 2<sup>nd</sup> defendants pending

6. Application of 11 October 2005 by plaintiff

i) Court to set aside orders of 29.7.03

(vacating eviction orders)

ii) Court to reinstate orders of 8.4.05 evicting the defendants.

7. Subject matter of ruling 11.10.05 application (6 above)

i) Defendant served, absent through advocate

ii) 3 application before court – not heard inter-parties

iii) Issues eviction – cannot be given orders by way of Interlocutory application but by way of trial.

iv) No summons to enter appearance has been served

8. Held:

i) Application to reinstate order of 8.4.05 that Ransely J vacated is refused

ii) Orders – summons to enter appearance be served upon defendants to give opportunity for defendants to file a defence.

9. Case law – Nil

10. Advocates

L.M. Nyangau for Masore Nyangau & Co. Advocates for the plaintiff

Mutisya Ngala for Mutisya Ngala & Co. Advocates for the defendant

**HELLEN MUTHONI KIBORA .....PLAINTIFF**

**VERSUS**

**JAMES KIBORO .....1<sup>ST</sup> DEFENDANT**

**JOHN MAINA .....2<sup>ND</sup> DEFENDANT**

**RULING**

## **1: BACKGROUND TO THE APPLICATION**

**11 OCTOBER 2005**

1. The subject of the main suit is that of Trespass by the 1<sup>st</sup> defendant, James Kiboro and 2<sup>nd</sup> defendant, John Maina. They are alleged by Hellen Muthoni Kirera, the plaintiff herein to have trespassed on to her parcel of land known as LR 9042/158 Embakasi Nairobi.

2. This suit was filed on the 10 March 2005 accompanied by a certificate of urgency of the same date seeking an application for a mandatory injunction requiring both the defendants to vacate the plaintiffs land. The plaintiffs prayed that the OCPD Embakasi Police Division to implement the orders of eviction.

3. The duty judge, Ransely J, directed that the application be served. On 15.3.05 the plaintiffs advocate appeared before Ransely J and notified him that the 1<sup>st</sup> and 2<sup>nd</sup> defendant had been served with the application. The application was adjourned to 8 April 2005. The defendant 1 and 2 respondents were absent. The court gave orders in terms of prayer 3 and 4 namely:-

“1. That the Hon.Court be pleased to issue a mandatory injunction requiring both the defendants to forthwith vacate the plaintiffs land parcel LR 9042/158, Embakasi Nairobi and in default of it vacating an order of forcible eviction of the defendants from the said parcel LR No.9042/18 pending the hearing and determination of this suit.

2. That the Honourable court be pleased to direct the OCPD Embakasi police Division to implement the court orders”.

4. Armed with these orders the plaintiff sought to execute the same. The fact at this point was that summons to enter appearance had never been served upon the defendant 1 and 2. The main suit involved an eviction order. The application also involved an eviction mandatory injunction. Mandatory injunction are never issued on an interlocutory application. (This means compelling the defendants 1 and 2 to vacate the land. The act of being on the land having already been committed). If it is, it is issued sparingly and in straight forward cases.

5. Orders of mandatory injunction were issued in the absence of defendant 1 and 2 although duly served.

6. On 29 July 2005, the defendant 1 and 2 filed an applications dated 29 July 05 and under certificate of urgency. The plaintiff and the advocate were absent and or never served with this application. The said application sought orders:-

“6.1. That this application be certified as urgent and be heard ex parte in the first instance.

6.2. That the plaintiffs her servants and or agents be temporarily restricted from evicting the defendants from the suit land or otherwise interfering with the defendants quiet possession thereof pending the hearing and determination of this application.

6.3. That in the alternative thereby stay for orders granted by this Hon. Court on 8 July 2005 until further orders.

6.4. That orders dated 8 April 05 be set aside and there be an injunction restraining the plaintiffs by herself her servants and or agents from evicting the defendant from the subject premises or and/or otherwise interfering with the defendants quiet possession until the hearing and determination of this suit.”

7. The duty judge, Ransely J heard the advocate for defendant 1 and 2 ex parte and made orders:-

“The order of 8 April 2005 are vacated.”

Those were the only proceeding for that day. The applicant/defendant 1 and 2 were permitted to photocopy the orders made on 29 July 05.

8. It seems that the plaintiff was not aware of these orders as on

27 September 05 the plaintiff through her advocate filed a further application seeking the courts orders to forcefully evict the two defendants. This application is still pending (and came 2 months after the original orders of 8 April 2005 were stayed.)

9. On realizing this, the plaintiff filed an application dated 11 October 2005 seeking the setting aside of the ex parte order that caused the Hon. Judge to vacate his orders evicting the defendant 1 and 2 from the suit land. It is the said application that is a subject matter of this ruling herein.

## II Application 11 October 2005

10. The application of 11 October 05 was filed on 19 December 2005. It sort orders that:

10.1. The Hon court be pleased to certify this application urgent and the same be heard exparte in the first instance.

10.2. That the Hon. Court be pleased to set aside its order granted exparte on the 29<sup>th</sup> July 2005.

10.3. That the Hon. Court be pleased to reinstate its orders issued on 8 April 2005 and pursuant thereto issue orders in terms of the plaintiff’s action dated 27 September 2005.

11. The application was not certified as urgent. Further the advocate for the plaintiff was unable to trace the defendants advocate. He managed to service and on 21 June 07 the hearing of his application proceeded before the Land and Environmental Law Division of the High court of Kenya at Nairobi. It proceeded under order IXb r 3 (a) Civil Procedure Rules, namely that defendants being served were absent.

12. The gist of the application being that the plaintiff wants her orders to evict the defendants from the suit land reinstated. That she was never served with the application asking that the orders be stayed which were in fact vacated. The defendants now continue to put up structures on the property. The plaintiff insists that she be given back her orders evicting the said defendants. That the orders vacating the said prayers from eviction be actually vacated as under order XXXIX r 4 Civil Procedure Rules any injunction orders can be vacated on application

## III Finding

This is an unfortunate case that clearly contravenes the rules of procedures, the rules of natural justice, the rule of law and fairness in the administration of justice.

14. The main suit prays for eviction of defendant 1 and 2 from the suit land. The rules of procedure requires that the defendant 1 and 2 be served with summons to enter appearance and filed defence. Instead the plaintiff files a certificate of urgency application seeking orders to evict defendant 1 and 2 from her parcel of land. These orders were granted on 8 April 05. The orders were and did amount to a mandatory injunction which cannot be issued by court at an interlocutory stage. In Kenya, mandatory injunction at an Interlocutory stage is not available to court to issue and if it is, it is issued sparingly and in a straight forward and clear case.

15. The plaintiff’s next step would have been to serve the said summons to enter appearance. Instead, without extracting the court orders she proceeds to evict the defendants from the premises. The application and the main suit are seeking the same prayers. This means if the application is granted there

is no main suit. The effect herein is that the rule of law and those of natural justice that demands in fair hearing are contravened.

16. It is therefore not in order for the defendant 1 and 2 to file a fresh application seeking orders of injunction. They should have sort the setting aside of the ex parte orders made under order IXb r 8 (b) Civil procedure Rules giving the reasons why they failed to attend court when the said orders of 8 April 2005 were given ex parte evicting them from the land.

17. The Hon. Judge on seeing this application vacated his orders (what convinced him to do this may perhaps have been the number of persons involved as squatters on the suit land numbering 200 to 600 persons this is not clear).

18. Both advocates have been filing separate applications without the other coming to court. As it stands four applications have so far been filed. The one before me is the forth and latest one.

19. I decline to grant the application of 11 October 05 and filed on

19 December 05 seeking to vacate the orders of Ransely J.

20. Ransely J has since retired from the bench under Order 17 r 10 Civil

Procedure Rules, I proceeded to hear this application which I did to determine whether the orders made by Ransely J should be vacated and eviction orders reinstated?

21. I believe Ransely J was correct in vacating his orders of eviction of the two defendants from the suit land. The two parties require to be heard at a full trial on the issue in question namely should the 1<sup>st</sup> and 2<sup>nd</sup> defendant be evicted from the suit land? This cannot be heard on an interlocutory application ex aprte as had been the case herein.

22. The application of 11 October 05 is accordingly dismissed. There will be no costs to the defendants as they were absent during the hearing of the application.

Dated this 6<sup>th</sup> day of June 2007 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**

L.M. Nyangau for Masore Nyangau & Co. Advocate for the plaintiff present

Mutisya Ngala for Mutisya Ngala & Co. Advocates for the defendant absent