Andersen v Mwagandi & 2 others (Environment & Land Case E043 of 2022) [2023] KEELC 19072 (KLR) (4 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19072 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE E043 OF 2022

LL NAIKUNI, J

JULY 4, 2023

BETWEEN

AMINA CAROL ANDANJE ANDERSEN ..... PLAINTIFF

AND

ZECHARIA MWAGANDI ..... 1ST DEFENDANT

DONALD MWAVITA & HABEL MWAKIO (BEING OFFICIALS OF GLORIOUS RIVER CHURCH) ..... 2ND DEFENDANT

CARLOW MAINTENANCE & FABRICATORS ..... 3RD DEFENDANT

RULING

I. Introduction.

1. For the determination by this Honorable Court are two (2) Notices of Motion applications. The first one was brought under a Certificate of urgency dated the 20th April, 2022 by the Plaintiff/Applicant herein against the 1st, 2nd and 3rd Defendants herein while the second one was filed by the 4th Defendant herein dated 21st June, 2022 respectively. Upon service, each party filed their respective replies to all of these applications accordingly.

2. The Honorable Court has decided to deal with the said applications simultaneously though separately herein for ease of reference and good order as hereinbelow.

II. The Plaintiff/Applicant's case

3. The Notice of Motion application dated 20th April, 2022 by the Plaintiff/Applicant sought for the following: -

    a. Spent;

b. Spent.

c. THAT this Honourable Court be and is hereby pleased to issue a Mandatory injunction against all the Defendants especially the 2nd Defendant (Glorious River Church), Their Agents Or Assigns To Deliver Vacant Possession Of The Premises & Land Situated At Mtopanga Within Mombasa County Being Sub - Division Number 1506 (original Number 53/330) I.e.c.r.no.29115; Sub - Division Number 1507 (original Number 53/331) I.e.c:r.no.28292; Sub - Division No.1505 (original number 53/239) pending the hearing and determination of this application and the main suit.

d. THAT this Honourable Court be and is hereby pleased to grant an order allowing the Plaintiff to enter and repossess the suit premises specified in No.2 Above With The Assistance Of The Ocs Kiembeni Police Station to ensure compliance of this order.

e. THAT this Honourable Court be and is hereby pleased to grant the Plaintiff any other consequential relief it deems fit and just in the circumstances.

f. THAT costs of this application be borne by the defendants.

4. The application was premised on the provision of Order 50 Rule 1, Order 40 Rule 2 (1) of the Civil Procedure Rules Cap. 21 and Sections 1A, 1B and 3A of the Civil Procedure Rules, 2010. It was based on the grounds, testimonial facts and the averments made out under the 10 Paragraphed of the Supporting Affidavit sworn by Amina Carol Andaje and dated on 20th April, 2022 together with seven (7) annexetures marked as "ACA – 1 to 7" annexed thereof. She averred that:-

a. She was the registered owner of premises and land situated at Mtopanga within the County of Mombasa being sub - division of Plots numbers 1505, 1506 & 1507 on which premises she had built her residential house with a perimeter wall surrounding the said premises (Herein after referred to as "The Suit Property").

b. While she was absent, her younger cousin and brother without her consent and knowledge entered into a tenancy agreement dated 4th February, 2014 between one Mr. Zecharia Mwagandi, the 1st Defendant herein and Mr. Mohamed Ousman Mukhwana, wherein they agreed that a sum of Kenya Shillings Thirty Thousand (Kshs. 30,000.00/-) per month be paid to him without any option to purchase the property at a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-).

c. Upon discovery of the fraud committed, the Deponent stepped in and revoked the said agreement. By this, it made her take a flight to Kenya wherein she castigated her cousin Brother Mohamed Ousman Mukhwana for entering into such an agreement without her consent. Since she wanted to evict the aforesaid tenants from the premise, a representative of the 3rd Defendant Carlow Maintenance and & Fabricators offered to purchase the property. Her offer was for a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/-). On 21st July, 2015, the terms of the sale were reduced to a sale agreement dated 21st July, 2015 between Amina Carol and Carlow Maintenance & Fabricators.

d. Pursuant to the Sale agreement dated 21st July, 2015, she received the 10% deposit of a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/-) and completion date of 90 days lapsed on 21st October 2015 and after exercising extreme patience the 2nd

Defendant herein on 20th September 2016, undertook to make payments of Kenya Shillings One Million & Fifty Thousand (Kshs. 1, 050,000, 000/=) on or before the 22nd September 2016 and the balance of Kenya Shillings Twelve Million (Kshs. 12,000,000/=) would be paid on or before the 21st October 2016.

e. On 19th April, 2017, she revoked the sale agreement through a termination agreement dated 19th April, 2017 that was executed between herself and the 3rd Defendant and it was agreed that she was to get her premises in the same condition it was in when they took possession.

f. On the 18th April, 2017 through a letter dated on the same day she gave a two months' notice to vacate the premises and the 1st, 2nd and 3rd Defendants took advantage of her absence and also her prolonged illness to ignore the said notices and at some point purported to pay monthly rent and as on 12th October 2021 she instructed her Advocates to distress for the outstanding rent of which they opted to lock the premises & play hide and seek which resulted into breaking in orders being issued on the 18th November 2021.

g. It was her humble request for a mandatory injunction since the 1st, 2nd and 3rd Defendants initially occupied her premises on a strength of a sale agreement upon depositing the 10% but failed to complete the sale transaction and upon her revocation of the sale and notice to vacate, the Defendants took advantage of her prolonged absence from the country due to her sickness and admission in hospital and their continued occupation on her premises should be stopped forthwith since it was neither a tenancy nor a purchaser.

h. This case was an exceptional case that could summarily be determined at the interlocutory stage since the occupation of the Defendants on her premises was full of mischief that had no protection under the Laws of Kenya and the title deed holder ought to enjoy unconditional possession & ownership of the property.

i. This Honorable Court was clothed with the requisite power to issue orders sought for herein and unless this application was heard and determined forthwith a grave injustice was continuously being occasioned against her.

Response by the 1st, 2nd & 3rd Defendants to the Plaintiff/Applicants to the Notice of Motion application dated 20th April, 2022

5. On 6th June, 2022, the 1st, 2nd and 3rd Defendants opposed the application dated 20th April, 2022 through a 13 Paragraphed Replying Affidavit sworn by DONALD MAVITA. He averred that:

a. The application lacked bonafide, frivolous, incompetent, null and void and as a such an abuse of the court process.

b. They had made what may be described as a well detained averments of their case in their defence which for purposes of avoidance of repetition.

c. This application, and to a larger extent, the suit itself, was not necessary.

d. The Plaintiff deliberately avoided to tell the Honorable Court the truth on her endeavors to have them evicted prior to the filing of this suit, and the truth was that;

i. The Plaintiff or reason which could only be interpreted as a move to subject them to rent arrears with a view of getting a reason to evict them through auctioneers under the guise of levying distress for rent, refused to accept rent sometimes in the month of July, 2021.

ii. True to their position, the Plaintiff sent Ms. Portway Auctioneers, in the month of November, 2021 to levy distress for the rent she refused to accept.

iii. In order to succeed in her mission, she directed the said auctioneers to levy the said distress against Ms. Carlow Maintenance & Fabricators Limited, the 4th Defendant herein.

iv. In order to keep both of them in darkness, the said auctioneer never served the proclamation of the said distress upon them, or upon the said 4th Defendant.

v. In order to steal a march against them, both the Plaintiff and the said auctioneers moved to the Chief Magistrates Court vide filing a civil case - Misc. Appl. No. 529 of 2021 with an Ex - Parte Notice of Motion application dated 17th November, 2021 which only sought for of what vacant possession.

vi. He did not know whether it was by luck or design for things appeared to be work in for the Plaintiff's favour

vii. The said Ex - Parte Notice of Motion application was filed on 17th November, 2021 before the Chief Magistrate's Court, placed before Honorable Nabibya, Principal Magistrate the following day on 18th November, 2021 and allowed as prayed, basically giving the Plaintiff an order for vacant possession to be executed, not by the Court Bailiff, but by National Police Service.

viii. As had been averred in the Statement of Defence herein, the said order was purportedly executed on the same day.

ix. All the events took place without them being given opportunity to be heard.

x. They had averred in their statement of Defence of the events which took place thereafter. The only thing they wished to say was that they managed to obtain a stay order, vide their application dated 23rd November, 2021, if their application was dismissed then the Plaintiff would proceed with the full execution of her order, if it was allowed then the Plaintiff's aforesaid ex - Parte application would be heard a fresh.

xi. The Plaintiff's Advocates herein had since filed Notice of Appointment in the said Misc. Application. What they never understood was the reason the Plaintiff filed this application instead of proceeding on with that one where she had an order already.

e. He annexed the following documents and marked them as A, B, C, and D respectively:-

SUBPARA a.

Plaintiffs Ex - Parte Notice of Motion application dated 17th November, 2021.

b. Order issued on 18th November, 2021.

c. 1st, 2nd and 3rd Defendant's Notice of Motion application dated 23rd November, 2021.

d. Stay order issued on 25th November, 2021

f. For matters stated in their statement of defence. When they realized that the said stay order could not make the watchmen who stationed on the premises with bows and poisoned arrows to leave, and their application aforesaid could not be heard expeditiously, they moved to the

Business Premises Rent Tribunal (BPRT) vide Complaint No. E110 of 2021 for an order of reinstatement.

g. They were lucky to be given reinstatement orders on interim basis. When the said order was served upon the Plaintiff she instructed Mr. Martin Tindi Advocates on record, who swiftly filed an application for vacant possession in the said Complaint, which application had since been heard and was pending ruling.

h. He annexed the following document and Mark the same as "E", "F", "G" & "H" respectively:-

e. Complaint;

f. Notice of Motion application dated 03rd December, 2021 by them.

g. Order of reinstatement.

h. Notice of Motion application dated 11th April, 2022 by the Plaintiff.

i. It was apparent from the foregoing, the application herein lacked merit and he prayed that the same be dismissed with costs.

III. Supplementary Affidavit by the Plaintiff

6. With the leave of Court, the Plaintiff through a 6 Paragraphed Supplementary Affidavit dated 16th June, 2022 responded to the Defendants' Replying Affidavit and the Statement of Defence. She deponed that:

a. She reiterated under the advise of her Advocate on record that this ground was indeed misleading because the deponent had the notion that she was not within the jurisdiction of Kenya when the Verifying Affidavit was signed. She reiterated and contended that she arrived from Denmark within the month of April 2022 and was currently still within Kenya and therefore ought to have returned to Randers within Demark the month of July, 2022. Hence the Verifying Affidavit was fully in order and just because she resided in Denmark never precluded her from filing a claim within Kenya on her arrival and temporary stay. (Annexed herewith and marked as "ACA - 8A","B, C & D were their travel documents and visa").

b. In Paragraph 4 of her Supporting Affidavit, she had confirmed that the tenancy agreement dated 4th February, 2014 between Mohamed Ousman Mukhwana & Zechariah and marked as "ACA – 4" was revoked upon discovery of the fraud committed and it was the 4th Defendant - Carlow Maintenance & Fabricators who offered to purchase the said property with a Sale Agreement dated 21st July 2015 and marked as "ACA – 5" between herself & Carlow Maintenance & Fabricators for a consideration of a sum Kenya Shillings Fifteen Million (Kshs. 15, 000, 000.00/=) and hence it was false to contend that the said tenancy agreement was valid when it had clearly been revoked.

c. There was no basis why the Respondents were disputing the termination of the agreement dated 19th April, 2017 and marked as "ACA - 6" that clearly demonstrated that both the parties agreed that the agreement stood cancelled and terminated after the lapse of ninety (90) days and the purchaser was to ensure that the building was in the same condition it was when they took possession. Hence, the Respondents had no basis in law or fact to dispute the aforesaid termination that indeed demonstrated that they were illegal occupiers and ought to be evicted forthwith.

d. That in fact on the 20th September, 2016, Mr. Stephen Jumbale Advocate communicated on behalf of the Respondent with an attempt to state that the Respondents would be arranging to settle the remaining outstanding balance of 90% to enable it complete the transaction hence in their capacity as purchasers & not tenants. Hence their occupation on the premises was indeed doubtful. Thus, its could not dispute the termination of the sale agreement.

e. The Respondents were challenging the notice of termination dated 18th April 2017. It was trite law that the owner of a premises had a right to issue notice of termination & vacant possession and it was incumbent upon the Plaintiff to give vacant possession. The Defendants contention that since rent was being received, (which was contested since the 4th Defendant was the one making payments) then they were entitled to continue staying and would not give vacant possession and hence content that the action was time barred within the meaning of the provision of Section 4(1) of the Limitation of Action Act, Cap. 22. This was not a good reason to deny vacant possession especially by a trespasser and the Deponent was advised by the Deponent's Advocates on record that he was entitled to move this court under the provisions of Order 36 Rule (1)(b) of the Civil Procedure Rules, 2010.

f. Surprisingly, within the contents of the Statement of Defence for the 4th Defendant herein dated 6th June, 2022, they contended that it's dealing with the Plaintiff was limited to that intention to purchase the suit property which collapsed and the 2nd Defendant stepped into his shoes and promised to fulfill the commitment which also collapsed. Hence there was a clear link between the 4th Defendant & the 2nd Defendant being the collapsed sale agreement and the payment of the consideration being same transaction. That there was no way the two could be separated. (Annexed herewith is letter dated 12th October 2021 from Aloise Obanda clearly linking both church & Carlow by saying 'The purchase was being purchased by the church through Calow' marked as "ACA - 8").

g. Through a letter dated 18th April, 2017 the Plaintiff expressed her displeasure with the 4th and 2nd Defendants wherein in the afore-said letter addressed to Advocate J. K. Kanyi titled:- "Withdrawing/Cancelling Sale Agreement wherein she clearly stated: ".....therefore, I ask you kindly to withdraw the sale and request the glorious church to return back my premises as they found it. In the same condition as it was at the time they came to the house. THEY HAVE 2 MONTHS TO VACATE PREMISES..."

h. In response to grounds numbers 7, 8 and 9, Misc. Civil Application No. 529 of 2021 was not suit but a miscellaneous application that had no Plaint filed and hence no defence, pre-trial directions were taken as such as in a normal suit. Therefore, it was a stretch of the imagination to argue that a suit had been heard and determined when there was no Plaint or Originating Summon being the prescribed forms that a suit is commenced.

i. On ground eleven, the Plaintiff herein contents that there was no tenancy agreement between the parties for it to be referred to as a controlled tenancy and the Defendants misled the Business Tribunal by purporting that they were protected tenants and hence sued the Plaintiff who indeed had challenged the jurisdiction of the Business Premises Tribunal when they was no controlled tenancy. The Plaintiff had rightfully filed his claim within the Environment & Land Court in exercising his right of possession & recovery of his land under the provisions of Order 36 Rule 1 Civil Procedure Rules, 2010 before this court that had the jurisdiction to deal with the same unlike the Business Tribunals that were confined to "controlled tenancies".

j. What was very clear within the Replying Affidavit, the Defence of the Defendants was that they was no reason given by the Defendants on why they never wanted to give vacant possession of the Plaintiffs property in the face of notice to vacate. Clearly, there was no defence to the claim by the Plaintiff and the purported defence was unsustainable due to the fact that the Defendants remained trespassers and the Plaintiff was indeed entitled to a mandatory injunction as prayed for within the application.

IV. The 4th Defendant/Applicant's Case

7. The Notice of Motion application dated 21st June, 2022 by the 4th Defendant/Applicant sought for the following: -

    i. That the Plaintiffs suit be struck out with costs for disclosing no reasonable cause of action against Ms. Carlow Maintenance & fabrications (the 4th Defendant).

    ii. THAT costs of this application be provided for.

8. The application was brought under the provision of Order 2 Rule 15(1)(a) of the Civil Procedure Rules, 2010 and was premised on the following grounds:

    a. The Plaint as drawn never pointed out any specific action committed by Ms. Carlow Maintenance Fabricators (the 4th Defendant) to warrant a suit against it.

    b. It was apparent from the Plaint as drafted that it disclosed no specific existing and Fabricators (the 4th Defendant).

    c. It was clear from Paragraph 10 of the Plaint that whatever dealings and/or contractual engagement Ms. Carlow Maintenance Fabricators (the 4th Defendant) had with the Plaintiff was taken over by the 2nd Defendant.

V. Response for the 4th Defendant's Notice of Motion application dated 21st June, 2022

9. The Plaintiff responded to the 4th Defendant's application through grounds of opposition dated 12th July, 2022 citing the following that:

    a. The 4th Defendant's application was frivolous, vexatious and an abuse of the court process.

    b. The cause of action had clearly been spelt out against the 4th Defendant within Paragraphs 13 (1) who breached the sale agreement & were served with a notice to vacate from the premises as admitted within the Statement of Defence of the 1st, 2nd and 3rd Defendants at Paragraphs 7 (ii) which is a triable issue to be determined within the Plaintiff pending application.

    c. The Plaintiff had pleaded a direct link between the 4th Defendant with the other 3 Defendants as demonstrated within the Supplementary Affidavit of Amina Carol Andanje Andersen filed on the 17th June 2022 hence guilty of fraud & misrepresentation as pleaded within Paragraphs 13.

    d. The 4th Defendant's application by itself raises triable issues that the court ought to determine within the Plaintiff pending application seeking for mandatory orders.

    e. The 4th Defendant's application was unmaintainable and serves no other purpose than delay the Court from making a determination.

f. The application should be dismissed with costs as the Plaintiff had demonstrated that the actions of the 4th Defendant to use a revoked sale agreement to allow the other Defendants to occupy the premises that he was supposed to have owned and taken possession of are illegal acts of fraud & misrepresentation.

VI. Submissions

10. On 4th July, 2022 while all the parties were present in Court, they were directed to have the two Notice of Motion applications dated 20th April, 2022 and 21st June, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on Notice by Court accordingly.

A. The Written Submissions by the Plaintiff/Applicant.

11. On 22nd June 2022, the Learned Counsels for the Plaintiff through the firm of Messrs. Martin Tindi & Co. Advocate filed their written submissions. Mr. Tindi Advocate, submitted that the Plaintiff/ Applicant was seeking vacant possession of her premises and land situated at Mtopanga within County of Mombasa being sub - division numbers 1505, 1506 & 1507 and was seeking mandatory injunction to deliver vacant possession of the afore-said premises.

12. The Learned Counsel submitted that the Plaintiff had filed Notice of Motion application dated 20th April 2022 and was seeking the following orders:-

a. Spent;

b. Spent;

c. THAT this Honourable Court be and is hereby pleased to issue a Mandatory injunction against all the Defendants especially the 2nd Defendant (Glorious River Church), their agents or assigns to deliver vacant possession of the premises & land situated at Mtopanga Within Mombasa County being sub - division number 1506 (original number 53/330) i.e.C.R.NO.29115; sub – division number 1507 (original number 53/331) i.e. C.R. NO. 28292; sub - division number 1505(original number 53/239) pending the hearing and determination of this application and the main suit.

d. THAT this Honourable Court be and is hereby pleased to grant an order allowing the plaintiff to enter and repossess the suit premises specified in No. 2 Above With The Assistance Of The Ocs Kiembeni Police Station To ensure compliance of this order;

e. THAT this Honourable Court be and is hereby pleased to grant the Plaintiff any other consequential relief it deems fit and just in the circumstances;

13. The Learned Counsel submitted the 1st, 2nd and 3rd Defendants have filed a Replying Affidavit sworn by Donald Mwavita, in addition a Statement of Defence jointly by 1st,2nd & 3rd Defendants whilst the 4th Defendant has filed only a Statement of Defence. This indeed is an application with exceptional circumstances because a mandatory injunction is sought wherein the Plaintiff contention that it was a clear case and one in which the Court ought to decide once and in a summary manner as demonstrated within her grounds and supporting affidavit.The Plaintiff shall also content that the provisions of Order 36 Rule 1(B) of the Civil Procedure Rules, 2010 on recovery of land upon notice to quit ought to apply against the Defendant who did not have sufficient reason to continue their occupation on

the premises. The Defendants had filed bulky pleadings but confined their address on points of law but failed to give reasons on why they ought to continue staying on the said premises when they were illegal occupiers/ trespassers.

14. The Learned Counsel asserted that it was trite law that mandatory injunctions could be granted under the inherent jurisdiction being the provision of Section 3A of the *Civil Procedure Act*, Cap. 21 and not under the provision of Order 40 of the Civil Procedure Rules, 2010. The granting of a mandatory injunction on interlocutory relief was a very exceptional form of relief to grant but could be granted and the principles to be considered for grant of mandatory interim injunction are also based on "the ratio decidendi' in the case of ""Giella – Versus - Cassman Brown & Co. Ltd (1973) EA 358. Hence Mandatory injunctions should be granted only in clear cases where the guilty party has undertaken a blatantly illegal course of action which the Court needed to remedy.

15. Within this case, the illegal course the Defendant herein undertook was upon failing to fulfill the payments of the consideration amount of a sum of Kenya Shillings Fifteen Million (Kshs.15, 000, 000.00/=) within a sale agreement that was breached and ,the Defendant despite being given Notice To Give Vacant Posession had illegally continued to stay on the premises taking advantage of the absence of the Plaintiff who resided in Denmark and the Defendants were forcefully staying on the premises and attempting to create a tenancy agreement which the Plaintiff had never been agreeable to and wanted the Court to make right the situation by removing the Defendants from the premises.

16. The Learned Counsel deponed that Paragraph 3 and 4 demonstrated that the 1st Defendant came into occupation of the premises through a Tenancy agreement marked as "ACA – 4" annexed herein. The Plaintiff argued that whilst she was in Denmark, her brother without her authority entered into the said agreement and upon discovery she revoked the said tenancy agreement. Upon revocation, she was eventually convinced by the 4th Defendant by him offering to purchase the said property for the amount of a sum of Kenya Shillings Fifteen Million (Kshs. 15, 000, 000.00/=) as demonstrated within the Sale Agreement dated 21st July, 2015. That indeed the Plaintiff received the 10% deposit but the 4th Defendant failed to complete the payments of the balance as a consequence on the 19th April, 2017, a termination agreement was signed and it was agreed that the Plaintiff would get back her premises in the same condition in which it was when they took possession of the same.

17. The Learned Counsel asserted that the contents of Paragraph 7 of the Supporting Affidavit with annexure marked as "ACA - 7" demonstrated and dated 18th April 2017 the Defendants were given two months' notice to vacate the premises and the Plaintiff contents that the Defendants never comply with the aforesaid notice because they took advantage of her absence in the country and also her prolonged illness wherein she was admitted in hospital to ignore the said notice. The same paragraph demonstrates how the Defendants under the cover of being tenants ignored the notices to quit the premises. At this juncture, they submitted that it was incumbent upon the Defendants to give vacant possession upon being served by notice of termination.

18. The Learned Counsel opine that the law recognizes a notice to terminate by a landlord. They referred to provision Order 36 Rule 1 (1) (b) of the Civil Procedure Rules, 2010 which provides:

> "In all suits where a plaintiff seeks Judgment for:--------(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or breach of covenant, or against a trespasser where the Defendant has appeared but not filed a defence, the Plaintiff may apply for Judgement for the amount claimed ,or part thereof, and interest, or for recovery of the land and rent or mesne profits.

19. Hence the Plaintiff had demonstrated that the Defendants were given a notice to quit but they have ignored the same and hence the Plaintiff had moved the court to recover her land from the possession of the Defendants.

20. In the case of "Risper Kerubo Onsare – Versus - Dr.Vijay Kumar & 2 Others (2021) eKLR, at Para.17, Counsel emphasized that it was within the Plaintiff's right to issue a notice of termination upon expiration of a lease and it was incumbent upon the Defendant to give vacant possession. Hence the exceptional circumstances that are illegal by the Defendants were: Firstly, they were purporting to be in occupation of the premises as protected tenants of which they content that there was no lease agreement between the Plaintiff and the Defendants; No letter of offer was exhibited and there were no agreed terms of an existing lease; No duration period when it commenced and was terminated. Hence, the tenancy could not be referred to as a controlled tenancy. They urged the Court to rely on the case of "Kenya Breweries Ltd & Another – Versus - Washington O. Okeyo Civil Appeal NO.332 OF 2002 IEA 109 where the Court held : "a mandatory injunction could be granted on an interlocutory application as well at the hearing but in absence of special circumstances, it would not be granted. However, if the case was clear and one in which the Court thinks it ought to be decided at once or if the act done was simple and summary one which could easily be remedied or if the Defendant attempted to steal a march on the Plaintiff, a mandatory injunction would be granted on an interlocutory stage.

21. Within this case, there was no doubt that the Defendants were stealing a march on the Plaintiff because they had clearly demonstrated that they occupied the premises under the cover of a purchaser on a sale agreement for purchase which consideration they failed to pay and hence a notice to vacate issued against them but they opted to act as protected tenants and were attempting to seek relief within a tribunal court which had no jurisdiction on their issues that never fall under controlled tenancies. In the case "Babubhai M. Shah – Versus - M & M Science Ltd". JUSTICE L. GACHERU relied on Volume 24 Halsbury Laws of England 4th Edition Paragraph 945, in the instance case, there was no doubt that the Defendant's lease expired and notice to terminate was issued. The same became effective on 19th April 2013. The Defendant was therefore not a tenant of the Plaintiff and its continued stay on the suit premises amounted to trespass. This was therefore a clear case which ought to be decided at once. The Defendant's continued stay and allegations that its tenancy was a controlled was an attempt to steal a march against the Plaintiff. This was therefore a plain and obvious case and the court finds and holds that a mandatory injunction could issue.

22. The Learned Counsel opined that the Defendants had filed Replying Affidavit & two Statement of Defence of the 1st, 2nd & 3rd Defendants plus the statement of defence of the 4th Defendant and their main line of attack was they were disputing the termination of the sale agreement, statute of limitation under provision Section 4 (1) of the *Limitation of Actions Act*, 22; "Sub – Judice" & "Res judicata and initially, they attempted to create a doubt on whether or not the Plaintiff appeared before Collins Khisa whilst she was a resident in Denmark. The 1st, 2nd & 3rd Defendants had definitely not addressed the main issue being, why they should not be considered as trespassers & illegal occupiers of the Plaintiffs premises when they had already been served with a notice to quit.

23. The Learned Counsel averred that in response to the above – mentioned Reply Affidavit, they filed a Supplementary Affidavit filed on 17th June, 2022 sworn by the Plaintiff on the 16th June 2022 of which the same addressed in detail the contention of the 1st, 2nd & 3rd Defendants on issues law and facts of which deponent ought emphasize hereunder as:

> "Annexure ACA 8A,B,C & D are travel documents confirming that the Plaintiff arrived within Kenya from Denmark within the month of April 2022 and travelled back on 18th

June 2022 and hence her affidavits are very much in order and the contention that the pleadings ought to be struck out fails;

24. The 1st, 2nd & 3rd Defendants attempted to rely on a revoked tenancy agreement based on fraud failed because the same was null & void ab initio and hence replaced by sale agreement dated 21st July 2015 for a consideration of Kenya Shillings Fifteen Million (Kshs.15,000,000/=) that was also terminated. The Learned Counsel therefore submitted that they were no written document that the Defendants had to give them a basis to continue their illegal occupation for another day and in fact should have left the premises as soon as yesterday, meaning they was no basis to extent their stay and they should be removed forthwith. Their weak attempt to content that they were not involved in the sale agreement dated 21st July 2015 failed due to the fact that on 20th September, 2016, Mr. Stephen Jumbale Advocate communicated on behalf of the church promising to settle the remaining 90% in their capacities as purchasers and not tenants and this demonstrated that the Defendants were stealing a march from the Plaintiff under the pretence of purporting now to be protected tenants. It was indeed obvious that their occupation on the premises of the Plaintiff was doubtful and hence the Court should not allow them to stay another day.

25. In response to their issue of statute of Limitation was that, the Learned Counsel held that the provision of Order 36 Rule 1(1)(b) of Civil Procedures Rules, 2010 entitled recovery of land against a trespasser. He affirmed that, there was no way the limitation statute could allow them free pass on someone else's land being trespassers. The Defendants attempted to delink themselves from the 4th Defendant failed in view of a letter dated 12th October 2021 and marked as "ACA - 8" demonstrating a "clear link between the 4th Defendant and the 2nd Defendant where Aloise Obanda states: – "the purchase was being purchased by the church through CARLOW...." and furthermore, on 18th April 2017, marked as "ACA - 9" and the Plaintiff upon giving her notice to vacate clearly stated:- "---------- therefore, I ask you kindly to withdraw the sale and request the Glorious Church to return back her premises as they found it in the same condition as it was at the time they came to the house, they had two (2) months to vacate premises.

26. The Learned Counsel was of the view that they should not dwell so much on both the arguments of the suit having violated the doctrines of "Sub Judice & Res Judicata' based on the simple reasoning that the - Misc. Civil Application No. 529 of 2021 was not a suit but a miscellaneous application. It had no Plaint filed and hence no Defence, Pre - trial directions were not necessary as a pre-requisite of a suit. Therefore, it was a stretch of the imagination to argue that a suit had been heard and determined taking that there was no Plaint nor Originating Summons being the prescribed forms that a suit was commenced by parties. To buttress on this point, the Leaned Counsel relied on the case of "Dorcas Njoki Mugo – Versus - Crispis Kienyu Kang'ethe & Another(2021)eKLR" where – Justice A.K Kaniaru supported the objection and held as such:- ".....the application and entire suit is said to be incompetent by way of Miscellaneous Application instead of plaint. The suit essential seeks for removal of caution/restriction and eviction orders against the Respondent. As a general rule suits are instituted by way of plaint unless the rules prescribe any other manner. This is provided under Order 3 Rule 1 of the Civil Procedure Rules which stipulates that: Every suit shall be instituted by presenting a Plaint to the Court, or in such manner as maybe prescribed." Additionally, the Counsel stated that this was also provided for under the provision of Section 19 of the *Civil procedure Act* Cap. 21 which provides that: 'Every suit shall be instituted in such manner as maybe prescribed by rules". Therefore, the Learned Counsel submitted that the Miscellaneous Application no. 529 OF 2021 only sought some specific orders and the same was filed by Portway Auctioneers.

27. The Learned Counsel submitted that hence the said Application were commenced by Auctioneers who were seeking breaking in orders upon instruction for distress for rent and the 1st, 2nd & 3rd

Defendants who had locked the premises and proceeded to hide from the distress. This motion was therefore not a suit and hence the issue of "Res Judicata" could not remotely apply herein since parties were completely different & more importantly, the miscellaneous application was not even a suit. There was a contention that a similar application was pending hearing and determination before the tribunal. On this allegation, the Counsel contended that there was no tenancy agreement duly executed between the Parties for it to be referred to as a controlled tenancy. Thus, the 1st, 2nd and 3rd Defendants misled the Business Tribunal by purporting that they were protected tenants and hence sued the Plaintiff. Pursuant to that, the Plaintiff indeed challenged the jurisdiction of the Business Premises Tribunal to the effect that they were not controlled tenancy. The Plaintiff had rightfully filed his claim within the Environmental & Land Court in exercising her right of possession & recovery of her land under the provision of Order 36 Rule 1 before the Court that had jurisdiction to deal with the same unlike the business tribunals that were confined to as "controlled tenancies".

28. The Learned Counsel submitted that in the case of "Total Kenya Ltd – Versus - Drumcon Kenya Ltd (2022) eKLR - at Paragraph 15 where Justice Munyao Sila held:-

> " I therefore find that the BPRT had no jurisdiction to entertain the dispute. The proceedings and decisions are a nullity and must be set aside. The parties must proceed as if no dispute was ever determined by the Tribunal."

29. Based on this authority, he submitted that the 1st, 2nd & 3rd Defendants filed a suit against the Plaintiff on the issue of the premises owned by the Plaintiff, They did so on the issue of the premises owned by the Plaintiff whilst aware that they never had any written tenancy agreement. Hence their tenancy not being a controlled tenancy clearly demonstrated that the BPRT had no jurisdiction to deal with the matters related to recover of land against a trespasser/illegal occupier especially in the face of Order 36 Rule 1 of Civil Procedure Rules, 2010. They prayed that the Court allowed the application as prayed.

B. The written Submission by the 1st, 2nd and 3rd Defendants

30. On 30th June, 2022, the Learned Counsel for the 1st, 2nd & 3rd Defendants herein through the Law firm of Messrs. Odongo B.O. & Co. Advocates filed their written submissions dated 20th June, 2022. Mr. Odongo Advocate commenced his submission by providing an introduction and brief facts of the case. He informed the Honorable Court that the 1st, 2nd and 3rd Defendantsherein while opposing the application filed by the Plaintiff filed a Replying Affidavit sworn on 6th June 2022 and filed on 9th June,2022.

31. The Learned Counsel submitted that the Honorable Court would note that the prayers sought by this application were substantially the prayers sought in the Plaint. Granting them, basically would mean allowing the whole suit without the benefit of hearing both parties orally with an advantage of cross examination, and therefore dismissing the defence summarily without being heard.What was being sought was not just an ordinary mandatory injunction which could be granted without allowing the suit. The moment this application was allowed, that would be the end of these proceedings. In other words, he argued, there would be nothing left for hearing.This was one such application which should only be allowed in the rarest of the rare cases.

32. The Learned Counsel argued that the Plaintiff, both by her application itself, and the written submission by her advocates on record, had not made a case which calls for such drastic orders. The Counsel stated that there were several decisions on the issue of mandatory injunction, all of which settled on the threshold of special circumstance. For instance, in the case of: "Kenya Breweries Ltd & Ano – Versus - Washington O. Okeya (Supra)

33. According to the Learned Counsel, the Plaintiff's case was just a normal case like any other case for vacant possession between Landlord and Tenant which should just follow the normal channel provided by the Civil Procedure Rules. To him, there was nothing special in it which exempted it from the due procedure. This was not such a suit which could be tried by way of affidavits and legal submissions. The Learned Counsel submitted that they had looked at the Supplementary Affidavit filed by the Plaintiff, and begged to say that the Plaintiff only concentrated her averments and submissions on issues which were only relevant for the suit itself and not the present application.

34. The Learned Counsel asserted that the issue of where the Verifying Affidavit and the Supporting Affidavit were sworn vis-a vis the place of abode was an issue which became apparent on face of those affidavits. The requirement of indication of a place of abode was a requirement of the provision of Order 19 Rule 4 of the Civil Procedure Rules, 2010. It was apparent that the Plaintiff deponed that she was a resident of Randers, Denmark, which obviously was outside the country. How could she, therefore, be before a Commissioner for Oath in Mombasa at the time when she saying, basically, that she was out of the country.

35. The Learned Counsel submitted that the Court should take note that the Plaintiff never explained in these affidavits that even though she ordinarily resided out of the country, she came to Kenya for purposes of swearing those affidavits. She only attempted to make some clarifications in her Supplementary Affidavit. Even if the said clarification was something to go by, it was apparent from the boarding pass annexed to the said Supplementary Affidavit that the Plaintiff's departure from Nairobi to Mombasa was at 23:15 hrs (11:15pm) on 21st April, 2022. This meant that she arrived in Mombasa that night slightly past mid-night, which already was on 22nd April, 2022 a day after this suit had been filed.It was apparent from the foregoing that the Plaintiff could not have been before Collins Khisa in Mombasa on 21st April, 2022 and travelling to Mombasa at the same time. What was also apparent was that the suit was prepared for filing on 20th April, 2022 as shown by the date of the Plaint, which was a day before she even departed for Kenya from wherever she was.

36. The Learned Counsel argued that on the issueof whether this suit was bad for having offended the doctrine of both "Res Judicata" and "Sub Judice" was also an issue for the main suit, but since it had been addressed in the Supplementary Affidavit and the Plaintiff's submission, they begged to say that this was a fact which was "res ipso".It was not in dispute that the Plaintiff had filed a Misc. Application No. 509 of 2021 where she sought an order for vacant possession, and which was granted. The said Order was still in existence, only that it was stayed. The same had been annexed to the Replying Affidavit. See page 12 of the Replying Affidavit-Annexure "B". It was clear from the foregoing that the prayers being sought in this suit for vacant possession had been sought in a previous proceeding and granted. They had seen the Plaintiff's Counsel, by his submission, struggling to define a suit, which in the Leaned Counsel's view was not taking this issue anywhere.

37. The Learned Counsel averred that the fact remained that the Plaintiff had approached court for order of vacant possession which was granted. But even if the Defendants were to take that route of definitions, what was "a Suit" was defined by the provision of Section 2 of *Civil Procedure Act*, Cap. 21 to mean all civil proceedings commenced in any manner provided. The Misc. Application herein was a civil proceeding commenced in a manner provided, that was why it was allowed, otherwise it would have been dismissed. Thus, in that case, why was the Plaintiff running away from that application where she was seeking the same orders as the one in this instant suit? Besides the foregoing, it was also not in dispute that the issue of the subject tenancy was still pending before the Business Premises Rent Tribunal (BPRT) where the Plaintiff had also made a similar application for vacant possession.

38. The Learned Counsel argued that the Plaintiff's counsel, by his submissions, purported to raise the issue of jurisdiction of the said Tribunal while he made exactly a similar application for mandatory injunction to compel the Defendants herein to give vacant possession. See the same at page 44 of the Replying Affidavit, Annexure marked as "H". This Honorable Court had no original jurisdiction on matters pertaining to the determination as to whether a tenancy was or was not a controlled one within the meaning of the Landlord & Tenant (Shops, Hotel& Catering Established) Act, Cap.301.This power was given to the said Tribunal by virtue of the provision of Section12 (1) of the said Act, which provided as follows:

12(1)"A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power-

a. to determine whether or not any tenancy is a controlled tenancy;

1. In the case of "Syedna Mohamed Burhannudin Saheb – Versus - Mohamed Haddanally Civil Appeal No. 28 of 1980 (unreported) the Court of Appeal had this to say on the issue of jurisdiction created by an Act of Parliament.

'In construing an Act as this, the ordinary rule as laid down by Esher, M. R.in R. - Versus - Judge of Essex County Court (1887) 18 Q.B. 704, must be applied i.e.....In the case of an act which creates a new jurisdiction, a new procedure, new forms or new remedies there prescribed, and no other, must be followed until altered by subsequent legislation.'

40. It was obvious from the said decision that this court was not allowed to usurp the powers of the said Tribunal and assume its role. The Plaintiff made an application for mandatory injunction before the said Tribunal, and not an objection on the issue of jurisdiction.

41. The Learned Counsel urged the Court to note that said application was word to word with the application before the Honourable Court. The Plaintiff was only preparing a fallback option. This was an abuse of the court process. This application offended "the sub – Judice" rule as enshrined under the provision of Section 6 of the *Civil Procedure Act*, Cap.21. This application also brought out the fact that someone was busy forging the Plaintiff's signature.They held this view for reasons that the supporting affidavit to the said application before the BPRT was purportedly signed by the Plaintiff on 11th April, 2022 before a Commissioner for Oath at Mombasa.Now if the Plaintiff arrived in Kenya, presumably on 21st April, 2022, who was this one who signed the said Supporting Affidavit on 11th April, 2022. See the contents of page 49 of the Replying Affidavit.

42. The Learned Counsel averred that everything here was a fraud. These included the case before Honorable Nabibya, the Senior Principal Magistrate, the application before the BPRT and even this one. They prayed that this Honorable Court should not allow these frauds to succeed. The success of this case would hurt good people who wanted to live a clean and honest life and elate these who believe in deceit. What the Plaintiff called a notice was not one at all. This was a letter which the Plaintiff wrote to Ms. Kanyi J. Advocates withdrawing/cancelling the sale agreement. It could not be a notice at all to the Defendants judged by any standard of reasoning. Besides, it had been overtaken by events since the Plaintiff went on to receive rents thereafter.

43. On the issue as to whether the Plaintiff's brother rented out this premises to the 15th Defendant without her consent was a matter which could only be canvassed at the main hearing. He reiterated their submissions hereinbefore made that there was no special circumstance shown in this application, or

as the case may be, this suit warranting the grant of mandatory injunction. This application failed to meet the threshold for such injunction and did pray that the same be dismissed with costs.

VII. Analysis and Determination

44. I have carefully read and put into account all the filed pleadings, herein, the written submissions, cited authorities relied on by all the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the appropriate and enabling laws with regard to the applications filed in this court.

45. In order to arrive at an informed, Just, Fair and Equitable decision, I have framed the following three (3) salient issues for determination. These are:-

    a. Whether the Notice of Motion application dated 20th April, 2022 by the Plaintiff and 21st June, 2022 by the 1st, 2nd & 3rd Defendants have any merit?

    b. Whether the reliefs sought by the parties herein through the said filed applications should be granted.

    c. Who bears the costs of the Application dated 20th April, 2022 and the Notice of Motion application dated 21st June, 2022

ISSUE NO. a). Whether the Notice of Motion application dated 20th April, 2022 by the Plaintiff and 21st June, 2022 by the 1st, 2nd & 3rd Defendants have any merit?

46. Under this Sub - heading, the main substratum of the application filed by the Plaintiff is on whether or not to be granted mandatory injunction at the interlocutory stage. Legally speaking, a mandatory Injunction is different from a prohibitory injunction. This is in the sense that while an in prohibitory injunction the applicant must, as was stated in the celebrated case of: "Giella – Versus - Cassman Brown (Supra), establish the existence of "a prima facie case with high chances of success, and that he will suffer irreparable loss/damage which cannot be adequately compensated by an award of damages if the injunction is not granted, and further that the balance of convenience tilts in his favor, an applicant in a mandatory injunction must, in addition, establish the existence of special circumstances. Furthermore, an applicant for mandatory injunction must prove his case on a standard higher than the standard in prohibitory injunctions.

47. The principles on the concept of mandatory Injunction have been well explained from a myriad of cases. This Court therefore finds no need to re – invent the wheel hereof. In the case of "Kenya Breweries Ltd & Another – Versus - Washington O. Okeya [2002] eKLR, the Court of Appeal stated as follows on mandatory injunctions.

> "A mandatory injunction ought not to be granted on an interlocutory application in the absence or 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 higher 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."

48. Additionally, in the case of Nation Media Group & 2 Others – Versus - John Harun Mwau [2014] eKLR, the Court of Appeal said:

> " 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 demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."

49. Further to this, in the case of "Joseph Kaloki t/a Royal Family Assembly – Versus - Nancy Atieno Ouma [2020] eKLR" the Court of Appeal reaffirmed its decision in the case of "Kenya Breweries Limited & another – Versus - Washington O. Okeyo (Supra) and stated that:-

> " The test whether to grant a Mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edition. paragraph 948 which reads:
>
> "a Mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a Mandatory injunction will be granted at an interlocutory application."

50. Additionally, the said decision also captured the ratio in "Locabail International Finance Ltd. – Versus - Agroexport and Others [1986] 1 ALL ER 901 at page where 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."

51. The above cited cases lay down the principles of law to be considered in an application for mandatory injunction and the condition that stands out are that:-

    a. the Applicant must establish the existence of special and exceptional circumstances;

    b. where the Defendant had attempted to steal a march on the Plaintiff.

    c. It must be an exceptional and in the clearest of cases.

    In order for the Court to warrant the granting of orders of mandatory injunction.

52. The Court also reaffirmed its decision in Shariff Abdi Hassan -Versus - Nadhif Jama Adan [2006] eKLR where it stated that:

> " The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case."

53. In the instant case, I find that the Plaintiff/Applicant has demonstrated to the satisfaction of this court, that there are special and exceptional circumstances that warrant the granting of the orders of mandatory injunction sought. Undoubtedly, the Plaintiff/Applicant has shown through her Supporting Affidavit that she was the legal bona fide proprietor of the suit property and that the Defendants/Respondents were in her property without her express consent. From the evidence adduced through empirical documentation, the Applicant has further obtained that the tenancy by the Defendant'soccupation since the revocation of the sale agreement dated 18th April 2017. It is a fact that there existed no tenancy agreement between the Plaintiff/Applicant and the Defendants clearly then no Land Lord – tenants relationship in existence as envisaged under the provision of Section 12 (1) of the Land Lord and Tenant (Shops, Hotels and catering Establishments) Act, Cap. 301. Therefore, the two months' notice to vacate the premises clearly demonstrates that the Defendants were attempting to steal a march on the Plaintiff/Applicant since there was no existing tenancy agreement between them and to date there is no monies being paid to the Plaintiff on the illegal occupation of the suit premises by the Defendants. Hence the Defendants were e illegally occupying the Plaintiff's premises without any right since there was no existing agreement (be it lease/tenancy) and the nature of the occupation of the 2nd Defendant on the Premises was neither a tenant or a purchaser and hence the continued occupation should be haled immediately since the Defendants were trespassers on the property belonging to the Plaintiff. I reiterate that The Plaintiff is the sole owner of the suit property and where she contends that she is not in knowledge of persons in her property then the court is incline to grant her the said orders as the tenancy is found to be illegal. In my own view, in the given circumstances, there is really nothing to be determined by Court during the full trial as the matter is 'fait compli".

54. Be that as it may, and in order to balance the scale of justice, its imperative that the Honorable Court considers the arguments brought out by the Defendants. Firstly, this suit and all the other pleadings herein by the Plaintiff were shrouded with fraud. Fraud is a very serious issue. It is now well established that one where the burden of proof is applicable as the person alleging as clearly stated in the provision of Section 109 to 112 of the *Evidence Act*, 80. The person alleging fraud must satisfy the legal requirement that fraud must be pleaded with meticulous particularity and proved strictly. Indeed, I am compelled to cite the cases of "Viajy Morjaria -Versus – Nansing Madhu Singh Dardar & Others (2000) eKLR (Civil Appeal No. 106 of 2000) Tunoi JA rendered himself on this issue as follows:-

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts (Emphasis is mine)

55. Additionally, the case of "Central Kenya Ltd -Versus - Trust Bank Limited & 4 Others [1996] eKLR the Court of Appeal stated:-

> " The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary case.....". Despite of having made this allegations, the Defendants have not only failed to plead fraud nor provide the Court with clear, plain or any particulars of fraud whatsoever. In my view, this was purely an after thought and mere accusation not to be taken so seriously.

56. Secondly, the 1st, 2nd and 3rd Respondents on the other hand contends that the Plaintiff deliberately avoided to tell the Honourable Court the truth on her endeavors to have them evicted prior to the

filing of this suit, and the Plaintiff has under the guise of rent arrears has levied them distress for rent andrefused to accept rent sometimes in the month of July 2021. The Plaintiff sent Ms. Portway Auctioneers, in the month of November, 2021 to levy distress for the rent she refused to accept. In order to succeed in her mission, she directed the said auctioneers to levy the said distress against Ms. Carlow Maintenance & Fabricators Ltd, the 4th Defendant herein. The Honorable Court finds this route as lacking any basis at all.

57. Thirdly, is on whether the suit herein should be struck out for failing to disclose a reasonable cause of action. Both applications have been brought under the provisions of Order 2 rule 15 of the Civil Procedure Rules which provides as follows:-

> "At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
>
> a) it discloses no reasonable cause of action or defence in law; or
>
> b) it is scandalous, frivolous or vexatious; or
>
> c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

58. The provision of Order 2 Rule 15 (2) of the Civil Procedure Rules, 2010 provides that no evidence is admissible on an application under sub rule (1) (a) and therefore, it should be evident from the pleadings sought to be struck out that no reasonable cause of action has been disclosed without reference to further evidence.

59. It is settled law that the court's power to strike out pleadings is to be exercised sparingly and cautiously, because the court exercises the power without being fully informed on the merits of the case through discovery and oral evidence. This was the finding in the case of D.T. Dobie & Company (Kenya) Ltd. – Versus - Muchina (1982)KLR 1 at p. 9 where it was stated as follows:

> "No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

60. The overriding principle to be considered in an application for striking out a pleading therefore is, whether triable issues have been raised. I do take note however that the said application was not filed accompanied by the Supporting affidavit.

61. Order XXXV Rule 1 (2) States as follows:

> "The application shall be made by motion supported by an affidavit either of the Plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed."

62. An applicant seeking interlocutory orders, even in an appeal, one should file a Notice of Motion accompanied by a Supporting Affidavit stating the facts upon which the applicant is relying upon. The respondent has filed a Notice of Motion application to strike out and without a Supporting Affidavit.

63. An application without a Supporting Affidavit lacks in a material way. It is filed against the Rules of the Court. such stands alone as unsupported. Notwithstanding the provision of Article 159 (2) (d) of *the Constitution* of Kenya and the Sections 3, 13 and 19 of the Environment & Land Court Act, No, 19 of 2011, this is not a mere technicality that can be cured in any manner by the court. it has to suffer the obvious. Being struck off for want of a Supporting Affidavit.

ISSUE NO. c). Who bears the costs of the Application dated 20th April, 2022 and the Notice of Motion application dated 21st June, 2022?

64. It is now trite law that the issue of Costs is at the discretion of the Court. Costs mean the award of granted by Court at the conclusion of the legal action or proceedings hereof of any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By events it mean the results or outcome of the legal action or proceedings.

65. In this case, as Court finds that the Plaintiff/Applicant has fulfilled the conditions set out under the Civil Procedure Rules, 2010, Indeed, the orders sought are hereby granted as this application shall be deemed to have merit and is hereby allowed. It follows that the Plaintiff/Applicant is entitled to costs as against the Defendants herein.

VIII. Conclusion and Disposition

66. Consequently, based on the framed issues herein, the Honorable Court on preponderance of probabilities hold that the Plaintiff/Applicant has managed to establish its case. From the foregoing analysis, therefore, I do proceed to order as follows: -

    a. THAT the Notice of Motion dated 20th April, 2022 is found to have merit and the same is allowed entirely.

    b. THAT the Notice of Motion application dated 21st June, 2022 is struck out for being defective.

    c. THAT this Honourable Court be and do hereby be pleased to issue a Mandatory injunction against All The Defendants Especially The 2Nd Defendant (glorious River Church),their Agents Or Assigns To Deliver Vacant Possession Of The Premises & Land Situated At Mtopanga Within Mombasa County Being Subdivision Number 1506(original Number 53/330) I.e.c.r.no.29115; Subdivision Number 1507 (original Number 53/331) I.e.c:r.no.28292; Subdivision No.1505 (original number 53/239) pending the hearing and determination of this application and the main suit.

    d. THAT this suit is now concluded and file closed.

    e. THAT the costs of the two applications to be in the suit.

67 It Is So Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS .....4TH .....DAY OF .....JULY.....2023.

.....

HON. JUSTICE L.L NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT, AT

MOMBASA

Ruling delivered In the presence of:-

a. M/s. Yumna – the Court Assistant

b. Mr. Martin Tindi Advocates for the Plaintiff/Applicant.

c. No appearance Advocates for the 1st, 2nd and 3rd Defendants/Respondents.