



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO. 1549 OF 2013

SULEIMAN MURUNGA.....PLAINTIFF

VERSUS

NILESTAR HOLDINGS LIMITED.....1ST DEFENDANT

GREEN VALLEY LIMITED.....2ND DEFENDANT

CHIEF LANDS REGISTRAR.....3RD DEFENDANT

NATIONAL LAND COMMISSION.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

PIMP MY RIDE EAST AFRICA.....INTERESTED PARTY

RULING

1. In the application dated 5/3/2018, the Plaintiff seeks the following orders: -

- a. A mandatory injunction be granted to the Plaintiff reinstating possession of the property known as L.R. No. 209/918 Simmers Restaurant, Kenyatta Avenue, Nairobi (“the Suit Property”) to the Plaintiff pending the hearing and determination of that application;
- b. A mandatory injunction be granted to the Plaintiff reinstating possession of the property known as L.R. No. 209/918 Simmers Restaurant, Kenyatta Avenue, Nairobi to the Plaintiff pending the hearing and determination of the suit; and
- c. That the directors of the 1st Defendant namely Madatali Abraham, Jamilleh Ebrahim and Jalaledin Ebrahim, together with the directors of the 2nd Defendant namely Margaret Wairimu Magugu and Kinyanjui Magugu, and one Gibson Muchiri Ndungu and Leo Masore Nyangau, Advocate be detained in prison for a period not exceeding six (6) months for reasons of disobeying and being in contempt of the orders of this Honourable Court made on 14th July, 2014 as extended by the consent of the parties on 15th December, 2016.

2. The application is made on the grounds that Order 40 Rule 3(1) of the Civil Procedure Rules expressly provides that in the case of disobedience or breach of an order of injunction, the court granting an injunction may order such a person to be detained in prison for a term not exceeding 6 months and that on 24/12/2013 the court granted the Plaintiff an interim order of injunction restraining the 1st and 2nd Defendants from levying distress upon the Plaintiff’s goods, or trespassing or evicting the Plaintiff from the Suit Property or in any manner interfering with the Suit Property until the Plaintiff’s application dated 24/12/2013 was heard and determined.

3. The Plaintiff claims that that order was served upon the 1st and 2nd Defendants and was extended severally with the 1st and 2nd Defendant’s knowledge and connivance whenever the matter came up in court. On 14/7/2014 the court confirmed that order to run until the hearing and determination of the main suit. The 2nd Defendant’s application that sought to review or set aside the order for injunction was dismissed on 10/9/2015. The Plaintiff claims that unknown to him, while this suit was pending, the 1st and 2nd Defendants unlawfully processed and obtained a title deed over the Suit Property in a bid to circumvent the cause of justice and defeat the Plaintiff’s claim. When the attempts to seek an out of court resolution of the matter failed, the 1st and 2nd Defendants instructed auctioneers who proclaimed the Plaintiff’s goods on 12/10/2016 which the Plaintiff claims it was contemptuous and a deliberate disobedience of court orders. The Plaintiff

filed an application dated 8/12/2016 seeking to cite the 1st and 2nd Respondents for disobedience of court orders. An order was recorded in court by consent of the Plaintiff and the 1st and 2nd Defendants in which the parties agreed to compromise the applications and instead progress the hearing of the suit.

4. While this case was pending, the 1st and 2nd Defendants filed an application being **CMCC No. 1111 of 2018** against the Plaintiff and 3 other persons on 20/2/2018 seeking an order of eviction against them. That application was not served on the Plaintiff. The Learned Magistrate issued an order of eviction against the Plaintiff on 23/2/2019 following which on 3/3/2018 at about 3 p.m., unknown persons descended upon the Plaintiff's suit premises with the assistance of a contingent of police officers from Central Police Station, and hired goons who forcefully evicted the Plaintiff from the suit premises despite being shown the court order. That exercise went on passed 7 p.m. after which the Plaintiff's restaurant was pulled down using a bulldozer. The Plaintiff claims that he lost his entire investment, stock, furniture and equipment and his employees were rendered jobless. The Plaintiff claims that the actions by the 1st and 2nd Defendants were callous, fraudulent, illegal and contemptuous of the orders granted by the court which amounts to gross abuse of the judicial process.

5. At the time of filing the application on 5/3/2018 the Plaintiff was apprehensive that the Defendant might commence development of the Suit Property and defeat his interests in the suit property. The Plaintiff urged that if the court does not take punitive actions against the 1st and 2nd Defendants they will persist with their acts of impunity to the detriment of the Plaintiff and also bring down the dignity, authority and the power of the court.

6. The application is supported by the Plaintiff's affidavit sworn on 5/3/2018 in which he depones that the 1st Defendant was previously his landlord in the Suit Property until 31/12/2009 when its lease expired and the government declined to extend it. Subsequently he applied to be allotted the Suit Property in 2011 and the government allotted him the suit premises vide a letter dated 3/11/2011 which set out the terms and conditions for the allotment. The Plaintiff claims that he duly accepted the allotment and paid Kshs. 2,369,200/= in November 2011 and therefore became the legal and beneficial owner of the Suit Property as he awaited the issuance of a title. Based on this, the Plaintiff stopped paying rent to the 1st Defendant since he believed that the landlord tenant relationship with the 1st Defendant had ended. The 1st and 2nd Defendants instructed Frontbench Auctioneers on 23/12/2013 to proclaim the Plaintiff's movable assets in distress for rent while claiming Kshs. 1,620,000/= as purported rent arrears. This prompted the Plaintiff to file this suit in which he seeks a permanent injunction to restrain the 1st and 2nd Defendants from levying distress upon his goods or evicting him from or interfering with the Suit Property.

7. On 24/12/2013, the court granted the Plaintiff an interim order of injunction for 14 days restraining the Defendants from levying distress on the Plaintiff's goods and from trespassing or evicting the Plaintiff from the Suit Property. The 1st and 2nd Defendants were served with the order. The order was extended from time to time when the matter came up. Mr. Justice Mutungi delivered a Ruling on 14/7/2014 granting the Plaintiff a temporary injunction in respect of the Suit Property pending the hearing and determination of the suit.

8. The 2nd Defendant filed an application dated 28/7/2016 seeking to review the order granting the Plaintiff a temporary injunction on 14/7/2014. Mr. Justice Mutungi delivered a Ruling on 10/9/2015 in which he dismissed the application. Through the application dated 28/7/2016, the Plaintiff came to learn that the 1st and 2nd Defendants had obtained a title deed to the Suit Property while this case was still pending. The 2nd Defendant wrote to the Plaintiff on 22/9/2016 asking him to consider having the interlocutory judgement set aside by consent in light of the fact that the 1st and 2nd Defendants now had title to the Suit Property. The Plaintiff declined that overture by his letter of 3/10/2016. The 1st and 2nd Defendants through Kiiru Merchants proclaimed the Plaintiff's immovable properties on 12/10/2016 in a bid to recover the sum of Kshs. 7,560,000/= on account of rent arrears, legal fees of Kshs. 756,000/= and the court brokers commission of Kshs. 910,860/=. The Plaintiff filed the application dated 18/10/2016 seeking to have the 1st and 2nd Defendants together with the 2nd Defendant's advocate committed to civil jail for disobeying the order for injunction. This application and the two applications filed by the 1st and 2nd Defendants were compromised through a consent order recorded in court on 15/12/2016 through which the interim order of injunction was extended until the hearing and determination of main suit. The Plaintiff believes that that order of 15/12/2016 was served upon all the Defendants.

9. The 1st and 2nd Defendants obtained an order on 23/2/2018 from the learned magistrate the Hon. Mr. I Orenge in CMCC No. 2111 of 2018 for eviction of the Plaintiff from the Suit Property without serving the Plaintiff. The Plaintiff was evicted on 2/3/2018 at about 4 p.m. and all his goods, furniture, equipment, stock and investments were thrown out of the premises and the structures which formed the Plaintiff's restaurant were pulled down by a hired bulldozer. The Plaintiff argued that the Defendants unlawfully gained possession of the Suit Property and that in the interest of justice the Suit Property should be returned to the Plaintiff to restore the *status quo* that prevailed at the time of filing this suit. The Plaintiff maintained that Mr. Leo Masore Nyang'au Advocate who mischievously applied for and obtained the eviction order from the magistrates' court despite the existence of this court's order should be punished. The Plaintiff urged that by dint of Section 1A (3) the Civil Procedure Act, a party to civil proceedings or its advocate is under a duty to assist the court to further the overriding objectives of that Act by participating in the court processes and complying with the orders and directions of the court.

10. Pimp My Ride applied to join these proceedings as an Interested Party vide the application dated 9/4/2018 filed the next day. It stated that the Plaintiff had moved this court seeking orders for reinstatement into the Suit Property which it the Interested Party had leased from the 1st and 2nd Defendants on the assurance that it would be given exclusive enjoyment of the Suit Property without interference from any third Party. The Interested Party urged that it became a protected tenant under the Landlords and Tenants Act, Cap 301. The Interested Party stated that when the Plaintiff started interfering with its enjoyment and occupation of the Suit Property, the Interested Party obtained orders on 22/3/2018 from the Business Premises Rent Tribunal (BPRT) in **BPRT Case No. 258/2018 Nairobi**, prohibiting and restraining the Plaintiff from unlawfully interfering with the Interested Party's enjoyment and occupation of the Suit Property.

11. The order was served on the Plaintiff who made an application seeking to set the orders aside. The Interested Party urged the court to stay the orders it had issued earlier since the Interested Party stood to suffer prejudice being the current occupant of the Suit Property. The order issued by the BPRT was attached to the application. It states that the matter came up for hearing on 22/3/2018 before the BPRT Chairman, Mr. Mbichi Mboroki in the presence of the Mariaria for the tenant. BPRT ordered that the Respondents were prohibited and restrained from unlawfully interfering with the tenant's use, enjoyment, occupation and evicting the tenant from L.R. No. 209/198 and L.R.

No. 209/980 along Kenyatta Avenue Nairobi pending the hearing and determination of that application. It further directed that the O.C.S Nairobi Central Police Station was to enforce compliance of the order and that peace was to prevail. Further hearing would be on 26/4/2018. The order lists Suleiman Murunga, Green Haven Properties and Nilestar Holdings Limited as the 1st, 2nd and 3rd Respondents respectively. The 2nd and 3rd Respondents are identified as agents and landlords respectively.

12. The Interested Party attached another order issued by the BPRT on 29/3/2018 which states that the suit came up for hearing on 29/3/2018 before the BPRT Chairman, Mr. Mbichi Mboroki in the presence of Kago for the 3rd Respondent, Mburu Mwangi for the 2nd Respondent, Ndegwa holding brief for Mariaria for the tenant and Waswa for the 1st Respondent. The Chairman directed the Respondents to file and serve their Replying Affidavit by 6/4/2018 with the tenant being given liberty to respond to the Replying Affidavit. The Chairman fixed the matter for hearing on 24/4/2018 and extended the interim orders.

13. The court granted orders for the joinder of Interested Party to the proceedings on 30/4/2018. Before the application for contempt could be heard, the 2nd Defendant filed an application seeking my recusal from hearing this matter, that application was heard and the ruling delivered on 30/4/2018 in which I declined to recuse myself from hearing the case. The 2nd Defendant filed an appeal against this decision and the Court of Appeal did not grant any orders staying these proceedings.

14. The Plaintiff filed submissions on 10/9/2018 in respect of the application dated 5/3/2018. He set out the events prior to 3/3/2018, the events that took place on 3/3/2018 and what happened after this date. The Plaintiff submitted that following his irregular and unlawful eviction from where he was trading as Simmers Bar and Restaurant, Dream Haven Properties Limited entered into a five-year lease with the Interested Party dated 6/3/2018 over the Suit Property. The Plaintiff argued that Dream Haven Properties Limited was not the registered owner of the suit land hence the lease held by the Interested Party is a nullity for failing to satisfy the requirements of Section 56 of the Land Act which stipulates that it is the owner of the land who may lease it out. The Plaintiff further argued that the court should not allow the Interested Party to enjoy the benefits of the lease which was entered into on behalf of parties who are clearly disobeying a court order. The Plaintiff adverted to his application dated 8/10/2016 in which he sought orders against the 1st Defendant for disobeying court orders to show that the 1st Defendant has previously disobeyed a court order. The Plaintiff argued that it will be against public policy to allow the interested party to enjoy the lease it claims over the Suit Property.

15. Further the Plaintiff urged that the injunctive order was obtained by consent of all the parties and the 1st and 2nd Defendants were aware of it. If these Defendants wished to have those orders discharged, they ought to have filed an application before the Environment and Land Court for the discharge of the orders but not sneak to the magistrate's court which lack jurisdiction and prosecute a suspicious and mischievous claim against the Plaintiff who was never served and obtain an eviction order. The Plaintiff urged the court to remove the Interested Party from the suit premises, reinstate the Plaintiff into the property and facilitate the hearing and determination of the suit.

16. Jamille Ebrahim swore the Replying Affidavit on behalf of the 1st Defendant in opposition to the application. He deponed that the 1st Defendant is currently registered as a lessee of the Suit Property and attached a certificate of title issued to the 1st Defendant in March 2015 for a 50-year lease with effect from 1/12/2014. He averred that the Plaintiff had evaded its legal obligations to pay rent to the 1st and 2nd Defendants claiming to be the purported owner of the Suit Property. He stated that the Plaintiff admitted in his affidavit that he stopped paying rent and the rent arrears stood at Kshs. 1,620,000/= as at 23/12/2013. He further stated that the Plaintiff acted with impunity by stopping to pay rent and has been using the court orders of injunction to retain possession of the Suit Property and deny the 1st and 2nd Defendants exclusive ownership. He stated that the Plaintiff had filed two applications before the BPRT being tribunal cases number 51 of 2011 and No. 614 of 2012 and that in both cases the Plaintiff was condemned to pay rent which he did until April 2012. He annexed copies of the decisions made by the BPRT.

17. He denied that the 1st Defendant was involved or that it was aware of the proceedings before the magistrate's court which gave rise to the eviction orders against the Plaintiff and urged that it should not be party to the contempt proceedings. He annexed a copy of the 1st Defendant's application to the Commissioner of Lands dated 28/10/2009 seeking a renewal of lease for a further 99 years. He gave details on the processes that the 1st Defendant's application for extension of lease had gone through in the government offices which had no objection to the renewal of its lease. He challenged the letter of allotment issued to the Plaintiff stating that it was not genuine and attached a copy of the letter dated 18/2/2014 written by the National Land Commission to the Plaintiff. The letter made reference to the court order given on 3/11/2011 which prohibited any registration in respect of the ownership, leasing, subleasing, allotment, user or occupation of any title or interest over L.R. No. 209/908 and L.R. No. 209/918. The letter withdrew the letter of allotment for L.R. No. 209/918 pending conclusion of the suit filed by Green Valley Ltd. The 1st Defendant argued that if the Plaintiff had acquired any rights over the Suit property by virtue of the letter of allotment then the rights were extinguished when the said allotment was revoked by the government vide its letter dated 18/2/2014. The Director stated that the 1st Defendant has been paying rates to the Nairobi City County. He urged that the Plaintiff is not deserving of the protection under the law as is not the rightful owner and lacks any proprietary interest in the suit premises.

18. The director maintained that neither the 1st nor the 2nd Defendants had done anything to warrant being accused of contempt of court and that the application mischievously sought to commit their father Madatali Hasham Abraham to civil jail yet he passed away on 27/7/2012. He denied issuing instructions to auctioneers to demolish the Suit Property and urged the court not to grant the orders sought.

19. Margaret Wairumi Magugu swore the affidavit in opposition to the application on behalf of the 2nd Defendant. She stated that the letter of allotment that had been issued to the Plaintiff was cancelled by the 4th Defendant. She stated that she sought legal advice on the status of the orders issued on 14/7/2014 and was advised that they would lapse 12 months after they were issued based on Order 40 Rule 6 of the Civil Procedure Rules. She admitted that the orders issued by the court were extended on 15/12/2016 by consent of the parties and that she believed that those orders would have lapsed on 15/12/2017 unless they were extended. She was aware that the orders were not extended and that the injunction could only have been valid for 12 months. She argued that the consent recorded in court on 15/12/2016 purporting to extend the interim orders issued on 14/7/2014 was a nullity in law and an exercise in futility. She further argued that if indeed the orders issued on 14/7/2014 had been granted pending the hearing and determination of the suit, then the Plaintiff could not have consented to extension of these orders on 15/12/2016 as the orders would still have been in force.

20. She argued that the Plaintiff is estopped from denying the fact that he knew that the injunctive orders issued on 14/7/2014 were not valid until the case was heard and determined for that is why he sought the Defendant's indulgence to extend the orders. She stated that the 2nd Defendant and its agents acted in the honest belief that there were no orders in place stopping it from acting or dealing with the Suit Property in any manner. She further stated that if by any chance the 2nd Defendant breached or disobeyed the injunctive orders issued on 14/7/2014, then that was an honest mistake of fact and the parties should not be punished for it since the law does not envisage an instance where one is punished for actions done as an honest mistake of fact. She attached a copy of the court order issued by Mutungi J. on 14/7/2014. The order read as follows:

“THAT the Defendants by themselves or through their servants, agents or assigns be and are hereby restrained from levying distress on the goods of the Plaintiff/Applicant, and from trespassing upon or evicting the Plaintiff/Applicant from the property known as L.R. No. 209/918, Simmers Restaurant, Kenyatta Avenue, Nairobi or in any way interfering with the said property or the Plaintiff's occupation thereof pending the hearing and determination of this suit.

THAT costs of the Application be in the cause.”

21. Tom Aziz Chavangi swore the 3rd Defendant's replying affidavit. He stated that the 3rd Defendant was not a party to or privy to the evictions carried out on the Suit Property on 3/5/2018 and only learnt of this from the media reports. He stated that the Plaintiff deserves and had met the conditions for grant of a mandatory injunction to reinstate him into possession of the Suit Property since he was dispossessed of the land through unlawful means during the pendency of this suit. He stated that the doctrine of *lis pendens* militated against the eviction while this suit was going on. He stated that when the 3rd Defendant filed its defence the court would learn that the lease agreement between the 1st and 2nd Defendants and the Interested Party emanated from a void process and cannot confer any proprietary interest to the lessee to justify its continued occupation of the suit land. He also stated that orders of the BPRT or those of eviction issued by the magistrates' court are not binding on this court and they cannot be relied on to overturn the decisions of this court. He stated that the court cannot sit back and helplessly fold its arms when the Plaintiff stands evicted from the suit land during the pendency of the case and the violation of the express court orders. He urged the court to preserve its image, reputation and orders by enforcing the previous orders of 14/7/2014 and 15/12/2016. He produced a copy of a letter dated 20/4/2018 from the 3rd Defendant to the Plaintiff which withdrew the letter dated 18/2/2014 to allow the court to determine the issues before it. The letter stated that National Land Commission would ventilate its position on the issues before the court. He maintained that there was a binding contract between the government and the Plaintiff in light of the fact that stand premium was paid and has not been refunded by the government.

22. He further stated that due process must be followed before the Plaintiff's letter of allotment is withdrawn. He further stated that at the time the 1st Defendant's lease expired all the directors of the 1st Defendants were foreigners and could not hold the interest in the suit land and that the Commissioner of Lands had declined to renew its lease. He stated that as matters stood, the subsequent letter of allotment said to have been issued to the 1st and 2nd Defendants amounted to double allocation and was issued in respect of land which had already been allocated. He stated that the 1st and 2nd Defendants had no proprietary interest over the Suit Property and urged the court to assert its authority and punish anyone disobeying court orders to assure the public that orders of the court are meant to be obeyed, have force of law and are not mere suggestions made to parties.

23. A director of the Interested Party, Patrick Nderitu swore the Replying Affidavit on its behalf. He stated that the Interested Party entered into a lease agreement with the 1st and 2nd Defendants on the basis of a title shown to it which had no encumbrances. He stated that the Interested Party took possession of the Suit Property on 6/3/2018 and started to develop an ultra-modern car wash, motor vehicle accessory shop and a modern parking yard after fencing and cementing the entire property and constructing structures and shops on the Suit Property. Further, that the Interested Party was in the process of constructing permanent building or structures on the suit premises. He produced photographs showing the developments it had made on the Suit Property after it took possession. He argued that the Interested Party would be affected by any orders made in respect of the Suit Property based on the heavy investments and ongoing developments it had made on this land. He also stated that the Interested Party had entered into agreements with third parties and that any interference on the ownership and occupation of the Suit Property would not only cause great panic but would also lead to suits by these third parties which would cause financial difficulties and strain to the parties.

24. The Interested Party further stated that it was given peaceful vacant possession of the Suit Property by the Defendant and that there were no structures or developments suggesting the existence of a restaurant on the property. Further, that the Plaintiff's prayer for reinstatement is not practical since what exists on the property are the developments the Interested Party had made to the land. He maintained that the Interested Party is lawfully in possession and is entitled to remain on the Suit Property and that if an order for mandatory injunction were granted, it would deprive the Interested Party of possession. The Interested Party urged the court to dismiss the application for contempt and a mandatory injunction.

25. The Plaintiff swore a further affidavit which was filed in court 6/6/2018. He stated that he was previously a tenant in the suit premises but the circumstances changed when the 1st and 2nd Defendants lease expired and the Plaintiff applied to be allocated the suit land. He challenged the 1st and 2nd Defendants on the issue of whether Mr. Leo Masore Nyang'au Advocate filed the suit in the magistrates' court without the 1st and 2nd Defendant's instructions by stating that no complaint had been lodged against Mr. Leo Masore Nyang'au with the Law Society of Kenya. He produced a copy of the judgement to show that on 20/2/2018 he was in the High Court in Bungoma for the delivery of the judgement in **Election Petition No. 2 of 2017 Suleiman Murunga v Independent Electoral Boundaries Commission, Moses Munyesi and Didmas Barasa** to show that he was not in Nairobi on 20/2/2018 when it is alleged that he was served with the papers for the suit in the Magistrates Court. He also produced a copy of the lease issued to the 1st Defendant in March 2015 over L.R. No. 209/908.

26. Parties filed submissions. The 1st Defendant submitted that the orders issued on 14/7/2014 and 15/12/2016 did not display a penal notice on the order giving a warning of the consequences of breaching the order. The 1st Defendant also submitted that the application does not meet the procedural requirements of Section 5 of the Judicature Act as read with the Supreme Court of England Rules and Order 40 Rule 3 of the Civil Procedure Rules. It relied on Rule 81.9 Civil Procedure (Amendment No. 2) Rules, 2012 which provides that a judgement or an

order to do an act may not be enforced unless a warning is prominently displayed on the front of the copy of the judgement that disobedience of the order would amount to contempt of court punishable by imprisonment, a fine or sequestration of assets. The Defendant relied on the cases of **Sam Nyamweya and 3 others v Kenya Premier League Ltd and 2 others [2015] eKLR**, **Charity Mpano Ntiyione v China Communications Construction Company Ltd and NEMA [2017] eKLR** on this point.

27. The 2nd Defendant filed submissions on 3/12/2018 and 18/1/2019. It submitted that the legal requirements that must precede citing a person for contempt are; firstly, the terms of the order must be clear, unambiguous and binding on the Defendant; secondly, the Defendant had knowledge or proper notice of the terms of the order; thirdly, the Defendant has acted in breach of the terms of the order and lastly, the Defendant's conduct was deliberate. It submitted that these requirements were not met by the Plaintiff who had failed to show that the order was served upon Margaret Wairimu Magugu, Gicho Kinyanjui or any of the other Directors who are domiciled abroad. The Defendants relied on the case of **Woburn Estate Ltd v Margaret Bashforth [2016] eKLR** on the need to prove personal service. The 2nd Defendant further submitted that the existence of the application for stay of the proceedings before the Court of Appeal and the appeal against this court's order refusing to recuse itself was a very important point to consider before giving the intended ruling on contempt and that it was only fair and just to await the outcome of the appeal. The court notes that no orders were issued by the court of appeal staying the proceedings before this court.

28. The 3rd Defendant filed submissions on 14/5/2018. It relied on the cases of **Maher Unissa Karim v Edward Oluoch Odumbe [2015] eKLR** on grant of mandatory injunction at the interlocutory stage. The cases indicate that a mandatory injunction will not normally be granted in the absence of special circumstances. However, it can be issued if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can easily be remedied. The 3rd Defendant urged that the Plaintiff has made a case for the grant of a mandatory injunction, the 1st and 2nd Defendants having unlawfully moved the magistrates' court to issue orders of eviction without disclosing the existence of the orders of this court issued on 14/7/2014 and 15/12/2016. The 3rd Defendant urged that the mandatory orders are necessary to ensure that the parties deal on equal footing and the *status quo* which obtained before 3/3/2018 is restored. The 3rd Defendant further argued that it will not be difficult to reverse the mandatory injunction by requiring the Plaintiff to give possession to the 1st and 2nd Defendants if the court were to find in its judgment after hearing the matter that the orders ought not to have been issued. The 3rd Defendant further argued that damages will not suffice since what is at stake in the eyes of the public is the reputation of this court and the authority of the court will be open to ridicule. The 3rd Defendant urged that even if there were no orders of injunction in force, the doctrine of *lis pendens* militated against the conduct of the 1st and 2nd Defendants of evicting the Plaintiff during the pendency of the suit.

29. The 4th Defendant filed written submissions on 21/5/2018 and made reference to the Contempt of Court Act which was declared unconstitutional. In **Akber Abdullahi Kassam Esmail v Equip Agencies Limited & 4 Others, Nairobi Civil Appeal No. 267 of 2004**, the court stated that the power to punish for contempt is an important and necessary power for protecting the cause of justice and the rule of law, and for upholding the authority of the court and the supremacy of the law. The Court of Appeal cited Lord Justice Clerk in the case of **Stewart Robertson v Her Majesty's Advocate**, 2007 HCJAC 63 where he stated that the power of the court to punish contempt is inherent in a system of justice and that that power is held by every judge and described contempt of court as follows:

“Contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

30. The Judges of Appeal observed that the power to punish for contempt has never been about protecting a judge's feelings, egos or dignity, rather that it is intended to prevent undue interference with the administration of justice. They also quoted Lord President Clyde who stated in **Johnson v Grant** 1923 SC 789 at 790 that:

“The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged.”

The Judges cautioned that the power to punish for contempt is a drastic power to be exercised cautiously and responsibly to avoid undermining the very cause of justice and the rule of law that it is intended to safeguard and quoted the speech of Lord Jessel **In Re Clements, Clements v Erlanger (1877) 46 L.J. Ch. 383** thus:

“It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of the judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject.”

The court further stated that there were sufficient decisions that firmly established that Order 39 of the Civil Procedure Rules was a self-sufficient provision and that an application for contempt of court did not require leave before it was filed.

31. What the Court of Appeal was dealing with in the appeal was the disobedience of a court order obtained *ex parte* and which was not served on the parties. The next question for determination is whether there was a valid court order which the alleged contemnors defied. In this case the court order which the alleged contemnors are said to have disobeyed was recorded by consent of the parties on 15/12/2016. Order Number 5 of that consent reads as follows:

“**That** the Plaintiff's notice of motion dated 18/10/2016 is compromised on terms that the prayer to commit the Respondents for disobedience of court order be and is hereby abandoned and 1st and 2nd Respondents/Defendants be and hereby restrained by an order of injunction from levying distress or evicting the Plaintiff or in any manner interfering with the Plaintiff's quiet occupation of the suit premises pending the hearing and determination of the suit.”

The order states that it was made before Hon. Lady Justice Gacheru in the presence of counsels for the Plaintiff and Defendants upon hearing the counsels.

32. The question then becomes, must a party whose advocate attends court and records a consent to maintain an order of injunction until the suit is finalised be served with a copy of that order and a penal notice? The court thinks not. Having been represented by an advocate when the consent was recorded in court, it is expected that the advocate will inform his client of the terms of the consent recorded and the ramifications of wilfully disobeying the order recorded by consent. The 1st and 2nd Defendants directors did not in the court's view, need to be personally served with a copy of the order made by consent since it is deemed that the consent was entered into by their advocate with their full knowledge and authority. The terms of the consent recorded on 16/12/2016 were clear and unambiguous and it was expected that the 1st and 2nd Defendants had notice of the terms of that consent.

33. This court is satisfied that the 1st and 2nd Defendants had proper notice of the terms of the consent order made on 16/12/2016. The persons said to have defied the court order are the directors of the 1st Defendant Madatali Abraham, Jamilleh Ebrahim and Jalaledin Ebrahim; and the directors of the 2nd Defendant Margaret Wairimu Magugu and Kinyanjui Magugu and one Gibson Muchiri Ndungu and Leo Masore Nyangau, Advocate. Leo Masore Nyangau, Advocate.

34. Leo Masore Nyangau, Advocate claimed that he was not aware of the orders issued by the Environment and Land Court in 2016 and that when he learnt of the orders, he sought to withdraw from acting for the 1st and 2nd Defendants in the suit before the Magistrate's court and that his application for withdrawal was allowed. In his Replying Affidavit filed in court on 4/4/2018, Mr. Nyang'au deponed that he first came to know of the 1st and 2nd Defendants in mid-February 2018 when he was instructed to institute eviction proceedings against the companies which were tenants in premises along Kenyatta Avenue. He averred that he was informed that there were no cases pending over the suit premises involving the same parties. He deponed that he was not present when the eviction was carried out following the orders issued by the Honourable Magistrate based on the suit he had filed on behalf of the 1st and 2nd Defendants. He stated that he became aware of this suit on 7/3/2018 when he read in the *Daily Nation* that he had been sued in connection with the disobedience of court orders issued by the Environment and Land Court.

35. The court is of the view that it cannot find Mr. Nyang'au Advocate to have disobeyed the orders of injunction granted by the ELC court since there is no evidence that he was personally served with the order or that he knew about it since he was not representing the 1st and 2nd Defendants in this suit. Which leaves the 1st and 2nd Defendants directors whom he averred that they told him that there no cases pending over the suit premises. If indeed the directors of the 1st and 2nd Defendants instructed Mr. Nyangau Advocate and did not disclose the existence of this suit and the orders of injunction, that demonstrates that these directors wanted to subvert the cause of justice when they instructed Mr. Nyangau to obtain *ex parte* orders for the eviction of the Plaintiff from the Chief Magistrates Court knowing very well that there were injunction orders issued in this case.

36. In **Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another [2017] eKLR** which dealt with the issue of contempt of court, the Supreme Court judges quoted Romer LJ in **Hadkinson v Hadkinson [1952]2 All ER 567** as follows:

“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

37. The court finds that the directors of the 1st and 2nd Defendants disobeyed the court order made on 14/7/2014 and extended by the consent of the parties on 15/12/2016 restraining the eviction of the Plaintiff from the suit premises and were therefore in contempt of the court's orders. Madatali Abraham is said to be deceased and so the court cannot make orders against him.

38. In **Mutitika v Baharini Farm Ltd (1982-88) 1 KAR 863**, the court held that a person who knowing of an injunction does something to break the injunction is liable to be committed for contempt of court as such a person has by his conduct obstructed justice. The court further held that the jurisdiction to commit for contempt should be carefully exercised with the greatest reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.

39. In **Woburn Estate Limited v Margaret Bashforth [2016] eKLR** the court observed that the power to punish for contempt of court previously was under Section 5 of the Judicature Act but for injunctions Section 63 (e) of the Civil Procedure Act makes provisions. The court also stated that Section 29 of the Environment and Land Court Act provided for the punishment of a person on conviction for the offence of refusing, failing, or neglecting to obey a court order or direction of the court given under the Act. Such contempt is an offence punishable upon conviction to a fine not exceeding Kshs. 20 Million, or imprisonment for not more than two years or both. The Environment and Land Court can punish a person convicted of the offence of contempt of court on conviction under the ELC Act without recourse to the law of contempt applicable in England.

40. The Plaintiff in his supplementary submissions filed on 21/12/2018 urged that his application was brought under Order 40 of the Civil Procedure Rules and invoked the inherent power of the court and all enabling provisions of the law. He argued that the Contempt of Court Act was not applicable to its application and relied on Order 40 Rule 3 of the Civil Procedure Rules which states that in cases of disobedience or of breach of any terms the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such a person to be detained for 6 months unless the court directs his release. The Plaintiff argued that this provision derives its authority from Section 63(c) of the Civil Procedure Act which empowers the court to grant a temporary injunction and in case of disobedience, commit the person guilty to prison and order that his property be attached and sold in order to prevent the ends of justice from being defeated. The Plaintiff further urged that arguments that applications for disobedience must accord with Section 5 of the Judicature Act must fail for failing to appreciate the distinction between citing a party for disobedience of court order and citing a party for contempt of court. The Plaintiff referred to the cases of **William Mark Shipiri v James Ngegi Muigai & Another Nairobi HCCC No. 2966 of 1981, and reported, Wildlife Lodges Ltd v County Council of Narok [2006] EA 344 and Sifa International Ltd v**

National Social Security Fund Board of Trustees [2007] eKLR in which the thread runs that for an application to cite a party for disobedience of a court order, leave need not be sought. This is the correct position in the court's view.

41. On the argument by the Defendants and the interested Party that under Order 40 Rule 6 of the Civil Procedure Rules, the injunction in question had lapsed and the application dated 5/3/2018 for contempt does not lie, the Plaintiff argued that that provision of law is bad and cannot be applied since it is *ultra vires* Section 63 (c) of the Civil Procedure Act, which is the parent statute that anchors Order 40 of the Civil Procedure Rules. The Plaintiff submitted that the parent statute does not contemplate or provide for the lapse of an order of injunction.

42. The Plaintiff submitted further that Order 40 Rule 6 of the Civil Procedure Rules is otiose because Order 40 Rule 7 of the Civil Procedure Rules gives a party the liberty to apply for variation, discharge or setting aside an order of injunction and that Rule 7 is anchored upon Section 63(e) of the Civil Procedure Act. The Plaintiff submitted that order 40 Rule 6 is an unreasonable provision in that it proceeds to punish and prejudice a party who has been granted an injunction for matters he has no control over including a judiciary that is operating below capacity and which does not have enough judicial officers to hear and determine cases and the vagaries of litigation. He contended that a party may be diligent in prosecuting its case but the inability to obtain a hearing date is beyond his control.

43. The Plaintiff submitted that the court should be minded to employ its judicial conscience, authority and power to refuse to apply order 40 Rule 6 not only in these proceedings but also in other proceedings for being otiose and *ultra vires* the principal Act. The Plaintiff argued that the grant of orders of injunction is discretionary and informed by the principles of equity one of which is that equity will not allow a statute to be used as a cloak for fraud the way the Defendants and the Interested Party are using Order 40 Rule 6 to perpetuate fraud.

44. The rules under Order 40 of the Civil Procedure Act give effect to Section 63 of that Act. Rule 6 was intended to cure the mischief through which parties would fail to progress suits for years on end upon being granted injunctive orders to the chagrin, detriment and inconvenience of the person against whom the orders were issued. The rationale for the rule limiting the validity of interlocutory injunctions for one year is that parties are enjoined to take steps towards the determination of the dispute within a year and do not enjoy interim relief indefinitely.

45. In the court's view, it does not contravene Section 63 (c) of the Civil Procedure Act which gives the court discretion to make other interlocutory orders that appear to be just and convenient to prevent the ends of justice from being met. It may be necessary in certain instances for the court to make orders for interim orders to be in force for limited periods if it appears just to the court. Rule 7 of the Civil Procedure Rules allows a party to apply to court to set aside or vary the order for injunction. There is no inconsistency between Rule 6 of Order 40 and Section 63 (c) of the Civil Procedure Act which did not set time limits for the validity period for injunctive orders. Other Orders in the Civil Procedure Rules give time frames for the conduct of civil processes such as the validity of summons to enter appearance and the times for filing responses to pleadings. For instance, Section 20 of the Civil Procedure Act provides that a defendant will be served in the manner prescribed. Order 5 Rule 1 (6) provides that the summons shall be collected within 30 days of issue and Rule 2(1) provides that the summons shall be valid for 12 months. These Rules are not inconsistent with Section 20 of the Act.

46. The National Land Commission (NLC) through its letter of 18/2/2014 which was served on the Plaintiff on 23/7/2014 withdrew the letter of allotment that had earlier been issued to the Plaintiff. The Plaintiff protested against this withdrawal as being unprocedural and unlawful through the letter dated 25//7/2014 addressed to the 3rd Defendant.

47. Upon evaluating the evidence in this case, the court notes that the main issue for resolution in this suit is who between the Plaintiff on the one hand, and the 1st and 2nd Defendants on the other hand holds better title to the suit premises. Initially, the Plaintiff was the 1st and 2nd Defendants tenant and paid rent to them. When the 1st and 2nd Defendants, lease over the suit premises expired, the Plaintiff applied for and was issued a letter of allotment by the Government, which was purportedly later cancelled. It seems the 1st and 2nd Defendants were granted an extension of lease over the same premises for a further term of 50 years. The 3rd Defendant took the position that the Plaintiff had been allotted the suit premises. These are some of the issues which will have to be determined at the hearing of this case.

48. It is almost one year since the Plaintiff was evicted from the suit premises where he previously ran a restaurant. Another party has been in occupation of the suit premises for almost a year. The Plaintiff's restaurant and business was demolished and in its place now stands an ultra-modern car wash, motor vehicle accessory shop and modern parking yard developed by the Interested Party. The substratum of the case has been removed and the Plaintiff cannot be restored to the premises in light of the fact that the Suit Property has been materially altered and cannot serve as a restaurant. A mandatory injunction would not therefore be the most appropriate remedy to grant in the circumstances.

49. The court is of the view that the mode which can be brought to bear on the directors of the 1st and 2nd Defendants is to order that they make good the damage and loss suffered by the Plaintiff when through their actions or their agents, the Plaintiff was forcefully evicted from the Suit Property in March 2018. The Plaintiff is to submit a valuation report within 30 days to the 1st and Defendants showing the goods, stock, furniture and equipment that were damaged or lost during his eviction and the demolition of his restaurant. In addition, the 1st and 2nd Defendants will pay the Plaintiff a sum equivalent to six months' rent which would have catered for his relocation to other premises had the unlawful eviction not taken place as it did. The rent will be calculated based on the last rent the Plaintiff was paying to the 1st and 2nd Defendants. The Plaintiff, 1st and 2nd Defendants are directed to file submissions on the financial loss suffered by the Plaintiff within 14 days of the date of service of the Plaintiff's valuation report.

50. The court declines to grant a mandatory injunction sought by the Plaintiff. This being an old suit filed in 2013, parties are directed to take steps to fix the matter for hearing within the next one month. The Plaintiff is awarded the costs of this application to be borne by the 1st and 2nd Defendants.

Dated and delivered at Nairobi this 25th day of February 2019.

K. BOR

JUDGE

In the presence of: -

Mr. K. Moseki holding brief for Mr. Amolo for the Plaintiff

Ms. C. Mpoza for the 1st Defendant

Mr. C.Thuku holding brief for Mr. J. Kariuki for the 2nd Defendant

Mr. A. Kamau for the 4th Defendant

Mr. D. Okatch for the Interested Party

Mr. V. Owuor- Court Assistant

No appearance for the 3rd Defendant