



REPUBLIC OF KENYA

IN THE ENVIROMENT & LAND COURT AT MOMBASA

ELC CASE NO. 20 OF 2018

FUJI KING MOTORS LIMITED.....PLAINTIFF

VERSUS

GANJONI PROPERTIES LIMITED.....1STDEFENDANT

AL-RIAZ INTERNATIONAL LIMITED.....2NDDEFENDANT

RULING

PLAINTIFF'S APPLICATION DATED 31/1/2018

1. By a Notice of Motion dated 31st January, 2018 brought under Sections 1A and 3A of the Civil Procedure Act and order 40 Rule 1 of the Civil Procedure Rules, the plaintiff/applicant is seeking an order of injunction to restrain the defendants jointly and severally, either by themselves or through their agents, directors, officers, employees, assigns or any other person acting on their behalf from evicting or interfering with the plaintiff's occupation and use of commercial premises situate on plot numbers MSA/BLOCKXX/340 and MSA/BLOCKXX/350 ("the suit premises") located within Mombasa County pending the hearing and determination of this application and pending hearing and determination of this suit. The application is based on the six grounds on the face of the Motion, namely that

- 1) The plaintiff is a tenant of the 1st defendant in the suit premises pursuant to an agreement for lease dated 15th January, 2018.**
- 2) The plaintiff is in current occupation and use of the suit premises and has complied with all the conditions of the lease agreement.**
- 3) The defendants have threatened to evict the plaintiff on the basis of purported court order and proceedings in which the plaintiff is not a party to.**
- 4) The plaintiff has invested heavily in its business in the suit premises where it stores and displays hundreds of motor vehicles and any attempt to evict the plaintiff therefrom without a hearing and against the lease agreement will result to great loss to the plaintiff.**
- 5) The plaintiff being an innocent party who took possession of the premises when the same were vacant should not suffer as a result of dispute between the Defendants to which the plaintiff is not a party.**
- 6) It is in the interest that the orders sought in this application is granted especially because the plaintiff is in occupation of the suit premises.**

2. The application is supported by the affidavit of Saiful Islam, a director of the plaintiff company sworn on 31st January 2018. Briefly it is the plaintiff's case that on or about 15th January, 2018, the plaintiff and the 1st defendant entered into a tenancy agreement pursuant to which the 1st defendant leased out to the plaintiff the suit premises for a term of five (5) years and six (6) months with effect from 15th January, 2018. That the plaintiff immediately took possession of the suit premises upon execution of the lease agreement on 15th January, 2018 and has since been using the same as a motor vehicle showroom. The plaintiff avers that it was a term of the lease agreement that subject to payment of rent and the performance of the covenants in the lease agreement which it duly complied with, the plaintiff shall peacefully hold and enjoy the suit premises during the term granted without interruption.

3. It is plaintiff's contention that on 30th January, 2018 while it was enjoying possession of the suit premises and running its business, a group of about thirty rowdy and unruly persons visited the premises and attempted to evict the plaintiff from the suit premises allegedly in execution of a court order reinstating the 2nd defendant into the premises. The plaintiff avers that it was not aware of any court order and neither was it a party to any proceedings in which an order could have been made requiring the plaintiff to vacate the suit premises and

therefore the plaintiff immediately wrote to the landlord, the 1st defendant herein, seeking clarification on what exactly was happening. That the 1st defendant's response was that an order had been made in Mombasa HCCC NO. 158 OF 2014 requiring the reinstatement of the 2nd defendant into the suit premises. The plaintiff avers that it was not aware of and was not served with the said court order and did not participate in the proceedings leading thereto and therefore it should not suffer as a result of such a dispute since it was not a party and more specifically without being afforded an opportunity to be heard.

4. The plaintiff contends that as at the time it took possession of the suit premises on 15th January, 2018, the same were not occupied by either the 2nd defendant or any other person whatsoever and the plaintiff entered into the lease agreement with the 1st defendant based on the availability of the suit premises. The plaintiff further contends that there was no disclosure from the 1st defendant that the premises were a subject of dispute with the 2nd defendant or any other person.

5. The plaintiff avers that it has all the legal rights and entitlements to occupy the suit premises and should not be evicted therefrom without being afforded an opportunity to be heard, hence the filing of this suit and application. The plaintiff states that it has invested heavily in its business in the suit premises where it stores and displays hundreds of Motor vehicle and any attempt to evict it therefrom without a hearing and against the lease agreement will result to great loss to the plaintiff. The plaintiff contends that none of the defendants will suffer loss and prejudice if an interim order of injunction is granted because the 1st defendant has received the due rent and will continue to do so when the same falls due while the 2nd defendant is not in occupation.

6. When the application came up before me on 1st February 2018, I granted an interim order of injunction in terms of prayers 1 and 2 thereof pending inter parties hearing on 19th February, 2018.

2ND DEFENDANTS APPLICATION DATED 7.2.2018

7. By an application dated 7th February 2018 and filed on even date, the 2nd defendant sought to discharge and or set aside in their entirety the orders of temporary injunction given on 1st February 2018. The application was premised upon the affidavit of Rehan Riaz Malik, the 2nd defendant's director sworn on 7th February, 2018 and the grounds on the face of the motion.

8. Briefly, the 2nd defendant contended that vide Mombasa HCCC NO. 158 of 2014, it had sued the 1st defendant seeking inter alia a declaration that the 2nd defendant's tenancy on parcel Ref No. MOMBASA/BLOCK XX/340 (and MSA Block XX 350) as between the 2nd defendant is a controlled tenancy and an injunction order to restrain the 1st defendant from evicting the 2nd defendant from the subject premises and that on 24/8/2015, an interim injunction was granted in favour of the 2nd defendant restraining the 1st defendant from evicting the 2nd defendant and or in any manner whatsoever interfering with its quiet possession and enjoyment of the suit premises pending the hearing and determination of the suit. That despite a myriad of applications on the part of both parties, the status quo pertaining throughout those proceedings was along the lines of the injunctive orders.

9. The 2nd defendant avers that pursuant to a notice of motion application dated 28.6.2017, the court issued orders on 13.10.2017 to the effect that, inter alia, the status quo prevailing as at that be maintained until the hearing of the said application on 14.12.2017 but on 14.12.2017, the parties through their erstwhile advocates on record agreed, inter alia, to maintain the same status quo pending a mention on 25.1.2018 for purposes of recording a possible settlement. That contrary to the spirit of that agreement, on 12.12.2017, the 1st defendant, through Makuri Auctioneers, proceeded to the issue premises and proclaimed and later attached and sold vehicles stored at the subject premises by the 2nd defendant on account of rent arrears allegedly owed by the 2nd defendant to the 1st defendant and that on 7.01.2018 the 2nd defendant was evicted from the suit premises.

10. The 2nd defendant states that on 16/1/2018, the court (in HCCC NO. 158 of 2014) ordered that the status quo appertaining (sic) as at 14th December, 2017 be restored and that on 29.1.2018 the court directed that the 2nd defendant be reinstated to the premises but that the execution of the said orders were never complied with as the premises were locked by the 1st defendant. The 2nd defendant further states that although it briefly regained possession and occupation by driving some of its vehicles into the premises on 30th January, 2018 at about 1400 hours, it was eventually re-evicted by 1530 Hours, forcing the 2nd defendant to seek police assistance who, however could not assist as the premises were locked –up and the orders did not include a directive to break open and enter. This prompted the 2nd defendant to seek amendment of the orders given by the court on 29.1.2018 to omit the issue of a timeline and direct breaking and entering into the premises and the amendment was issued on 1.2.2018 and served on the OCS, Central Police Station Mombasa.

11. The 2nd defendant contends that there is, consequently, an impasse herein in respect of which party is legally entitled to possession and occupation of the suit premises, which impasse has arisen due to the issuance of the two (2) separate orders in the two cases. It further contends that the lease agreement between the plaintiff and the 1st defendant constitutes an illegal contract incapable of lawful enforcement or otherwise and is null and void ab initio because it was drawn by the same firm of advocates that represented the 1st defendant in the proceedings in Mombasa HCCC No. 158 of 2014, and that the same was made and purported to take effect while the express orders of court given on 14.12.2017 preferring the subtractum of the suit were still in force. The 2nd defendant avers that the plaintiff herein is underserving of the equitable remedy of injunction subject hereof having procured the same by way of deception and/or material non-disclosure and urged the court to discharge and/or set aside the interim orders herein in their entirety.

PLAINTIFF'S APPLICATION DATED 13.2.2018

12. By a notice of motion dated 13th February 2018, the plaintiff is seeking four main orders, to wit:

i. That Rehan Riaz Malik and Usman Riaz Malik, the 2nd defendants directors and Barnabas Chumo, the officer commanding station (OCS) Central Police Station, Mombasa all be detained in prison for six (6) months for disobeying this court's order given on 1st February 2018;

ii. An order of mandatory injunction to compel the 2nd defendant to remove its or its agents' motor vehicles stored on property known as Mombasa Block XX/350 AND (iii) that the court be pleased to call for and transfer to this court the file of Mombasa HCCC NO. 158 OF 2014 and consolidate the same with this case for hearing and disposal.

13. The application is based on the grounds on the face of the motion and supported by the affidavit of Saiful Islam sworn on 13th February, 2018. It is the plaintiff's case that on 8th February, 2018 the 2nd defendant's said named directors violated the court's order issued on 1st February 2018 by forcing their way into Plot No. MOMBASA/BLOCK XX/350 and parking thereon nine (9) motor vehicles belonging to the 2nd defendant and/or its agents under the supervision and watch of the OCS who had accompanied them to the premises allegedly in execution of a court order in HCCC NO. 158 of 2014. It is the plaintiff's contention that although it was not served with the said court order, it has since obtained a copy from the court file and that the said court order required the 1st defendant to reinstate the 2nd defendant to the premises the subject of the HCCC NO. 158 OF 2014 which the plaintiff states is MOMBASA/BLOCK XX/340 and not MOMBASA/BLOCK XX/350 which is the subject of this suit and from which the defendants were restrained from evicting the plaintiff.

14. The plaintiff states that although it is not a party to HCCC. No. 158 of 2014, the same touches on one of the properties the subject of this case being MOMBASA/BLOCK XX/340 and therefore prays that in the interest of judicial prudence the said case be transferred to this court for hearing and determination together with this case since this court is the right court clothed with jurisdiction to hear and determine disputes relating to use and occupation of land. The plaintiff further states that the transfer of HCCC No. 158 of 2014 to this court will not only save judicial time but will also avoid embarrassment where the two courts may issue conflicting orders. The plaintiff further contended that the High Court has no jurisdiction to deal with HCCC No. 158 of 2014 as the disputes relates to use and occupation of land. The plaintiff added that the invasion of the plaintiff's premises by the 2nd defendant has greatly inconvenienced the plaintiff who is dealing in business of selling of motor vehicles as the 2nd defendant's vehicles parked on the suit premises have not only taken up the space needed by the plaintiff to do its business but the vehicles have also caused great confusion to the plaintiff's customers who have been mistaking them as the plaintiff's leading to great business loss to the plaintiff. The plaintiff avers that it is in the interest of justice that the orders sought in the application herein are granted.

1ST DEFENDANT'S RESPONSE TO THE APPLICATIONS

15. The 1st defendant, in response to the plaintiff's application dated 31/1/2018, the 2nd defendant's application dated 7/2/2018 and the plaintiff's application dated 13/2/2018, filed a replying affidavit sworn by Kamlesh Pandya, a director of the 1st defendant on 19th February 2018. The 1st defendant supports the plaintiff's applications and states inter alia that it has had possession of both plot No. MOMBASA/BLOCK XX/340 and MOMBASA/BLOCK XX/350 from 15/1/2018 and that they leased the suit premises to the plaintiff after the 2nd defendant vacated therefrom on or about 5/1/2018. That the 2nd defendant had failed or refused to pay rent to the 1st defendant since 1/1/2015 in spite of multiple court orders to do so. The 1st defendant further states that it filed an application dated 28/6/2017 in HCCC No. 158 of 2014 to have that suit transferred to this court for hearing and determination as the High Court has no jurisdiction over the matter and the application is still pending. The 1st defendant supports the plaintiff's prayer to have HCCC No. 158 of 2014 transferred to this court and to be consolidated with ELC No. 458 of 2017 and this case.

PLAINTIFF'S RESPONSE TO 2ND DEFENDANT'S APPLICATION DATED 7/2/2018

16. In response to the 2nd defendant's application dated 7th February 2018, the plaintiff filed a replying affidavit sworn by Saiful Islam on 16th February 2017 in which it states inter alia, that the subject of HCCC. No. 158 of 2014 together with the interim injunction of 24/8/2015 is the property known as MOMBASA/BLOCK XX/340 and not MOMBASA/BLOCK XX/350 which is currently occupied by the plaintiff alongside the former property. It contends that the attempt by the 2nd defendant to include MOMBASA/BLOCK XX/350 as part of HCCC. No.158 of 2014 is mischievous and deliberately calculated to mislead the court. The plaintiff further contends that it is not and has never been a party to HCCC No. 158 of 2014 and the orders issued therein are not binding on it and cannot be used as a reason to set aside the orders issued herein in favour of the plaintiff.

17. The plaintiff avers that it has, since taking possession on 15th January 2018, been in full occupation and use of the suit premises save for an incident on 8/2/2018 where the 2nd defendant drove and parked nine motor vehicles into plot No. MOMBASA/BLOCK XX/350. The plaintiff further avers that there has never been a tenancy relationship between the defendants concerning MOMBASA/BLOCK XX/350 and therefore it is ill advised for the 2nd defendant to seek the setting aside of the interim orders which also relates to MOMBASA/BLOCK XX/350 which does not concern the 2nd defendant at all. The plaintiff denied that the lease agreement between the plaintiff and the 1st defendant is illegal because at the time the lease was executed, the 2nd defendant had vacated plot No. MOMBASA/BLOCK XX/340 and the lease also relates to an additional property that is not and has never been subject of the proceedings in HCCC No. 158 of 2014.

SUBMISSIONS

18. The applications came up for hearing on 19th February 2018 and 20th February 2018. Mr. Oluga appeared for the plaintiff, Ms. Muyaa appeared for the 1st defendant while Mr. Mutiso and Mr. Oloo appeared for the 2nd defendant.

19. Mr. Oluga begun by reiterating the facts in the applications and affidavits in support and submitted that the plaintiff has met the test as set in the case of *Giella -vs- Cassman Brown & Co. Ltd (1973) EA 358* and has established a prima facie case with a probability of success in that it is not disputed that the plaintiff is the one in current occupation and use of the suit premises. He pointed out that the plaintiff has a

valid lease agreement with the 1st defendant over the suit premises and that the plaintiff is not a party in HCCC. No. 158 of 2014 which is a case between the defendants, and any orders made in that case cannot bind the plaintiff.

20. Mr. Oluga submitted that the plaintiff will suffer irreparable injury that cannot be compensated by an award of damages should it be evicted from the suit premises as it may not easily get equivalent premises to display its hundreds of motor vehicles and may lose its customers who come to the suit premises. He further submitted that the balance of convenience tilts in favour of the plaintiff who is in current occupation and use of the suit premises.

21. Mr. Oluga argued that the 2nd defendant seeks to set aside the interim orders because of the order given in HCCC No. 158 of 2014 ordering reinstatement of the suit premises. He submitted that the plaintiff is not party in HCCC. No. 158 of 2014 and therefore the orders given in that case cannot be binding on the plaintiff. He added that the subject matter in HCCC. No. 158 of 2014 is only plot No. MOMBASA/Block XX/340 whereas the orders sought to be set aside relate to plot No. 340 as well as plot No. MOMBASA/Block XX/350.

22. Regarding the application dated 13/2/2018, Mr. Oluga submitted that the order of 1/2/2018 was duly served but in utter disregard of those orders, the 2nd defendant on 8/2/2018 forcibly and under the supervision of the OCS, Central Police Station drove nine (9) vehicles into plot No. MOMBASA/Block XX/350 which is not a subject of HCCC. 158 Of 2014, hence acted without legal justification and in violation of a valid court order. He further submitted that there is no affidavit on record to counter the factual averments contained in the application. He urged the court to confirm the orders issued on 1/2/2018 and to dismiss the 2nd defendant's application dated 7/2/2018, and allow the plaintiff's application dated 13/2/2018 as it is about upholding the dignity of the court by the obedience of court orders.

23. Mr. Mutiso for the 2nd defendant pointed out that on 9/2/2018 he indicated to the court that the facts as deponed to in the 2nd defendant's affidavit were sufficient both in support of the 2nd defendant's application and in opposition to the plaintiff's application dated 1/2/2018. He submitted that it is not contested that prior to the filing of these proceedings, the 2nd defendant had been in long term occupation of the 1st defendant's premises. He pointed out that the subject of the relationship is the lease agreement dated 20/1/2011 in which the property is described as MOMBASA/BLOCK XX/340. Mr. Mutiso admitted that the suit herein touches on plot Nos. 340 and 350 but added that plot No. 340 is the showroom while plot No. 350 is the yard. He submitted that the two premises were leased by the 1st defendant to the 2nd defendant without distinction.

24. Mr Mutiso submitted that the interim orders issued by this court in favour of the plaintiff were defective ab initio because there was material non-disclosure on the part of the plaintiff. He referred the court to an order issued on 29/1/2018 in HCCC. No. 158 of 2014 in which that court directed that the 2nd defendant be reinstated to the premises. He submitted that that order was executed in part and the 2nd defendant had momentary occupation of those premises before it was re-evicted by the plaintiff who, according to counsel, was aware of the order for reinstatement.

25. Mr. Mutiso submitted that the lease between the plaintiff and the 1st defendant was drawn by firm of Kinyua Muyaa & Co. Advocates who are the same advocates on record for the 1st defendant in HCCC. No. 158 of 2014 and therefore were aware of all the orders in that matter. He noted that in its replying affidavit, the 1st defendant supports the plaintiff's claim. He urged the court to weigh the plaintiff's claim which is based on a time lapse of one month against that of the 2nd defendant's occupation of 15 years. He further submitted that the orders issued in HCCC. No. 158 of 2014 are in rem and not in personam.

26. Mr. Mutiso submitted that the application for contempt is fatally defective for the reasons that it is an omnibus application as it contains orders that cannot be mixed with an application for contempt. He further submitted that the acts complained of are subject of a court order by which order the 2nd defendant accessed the premises, and that the acts of the plaintiff and the 1st defendant were obtained through a planned and blatant unlawful act. Mr. Mutiso suggested that the suit premises should in the meantime be closed to both parties.

27. Mr Oloo who appeared alongside Mr. Mutiso for the 2nd defendant submitted that there was mischief in the conduct of the 1st defendant as it is clearly aligned to the plaintiff. He submitted further that had the court been told of the existence of HCCC. No. 158 of 2014, it could not have issued the orders. He referred the court to the case of *Harvey's Bar & Restaurant Ltd – vs – Fernando Vischi* and urged the court to discharge the orders issued on 1st February 2018 in favour of the plaintiff and to have the plaintiff's application for contempt dismissed.

28. Ms. Muyaa counsel for the 1st defendant submitted that no sufficient reason has been given why the interim orders given by the court on 1/2/2018 should be discharged or set aside. She added that all facts were disclosed including the fact that the 2nd defendant had vacated from the suit premises on or about 5/1/2018. Ms. Muyaa further submitted that the lease agreement drawn by her firm was in respect of the two properties, plot Nos. MOMBASA /BLOCK XX/340 and 350 and was made on 15/1/2018 when there was no order stopping letting or reinstating the 2nd defendant. She added that the orders in HCCC. No. 158 of 2014 to break-in were only given ex-parte on 1st February 2018, the Same day this court also issued ex-parte orders in favour of the Plaintiff in this case. She denied that there was any collusion or fraud to warrant the discharge of the orders and that the court is being asked to discharge the orders yet the subject relates to two plots whereas the subject in HCCC No.158 of 2014 is one plot No.340 and that the plaint refers to a building and not a yard.

DETERMINATION

29. I have considered the applications, the affidavits in support and against and the rival submissions made as well as the authorities cited. The only issues for determination are:-

i. Whether this court should grant the order for an interlocutory injunction as prayed for by the Plaintiff or the interim orders issued should be discharged and or set aside as sought by the 2nd Defendant.

ii. Whether the 2nd Defendant's Directors and the Officer Commanding Station (O.C.S.), Central Police Station, Mombasa disobeyed the court's order given on 1st February, 2018 and therefore liable to be detained in prison for a period of six (6) months as prayed by the Plaintiff.

iii. Whether an order of mandatory injunction should issue to compel the 2nd Defendant to remove its motor vehicles stored on the property known as MOMBASA/BLOCK XX/350.

iv. Whether the court should call for and transfer to this court Mombasa HCCC NO.158 of 2014 and consolidate the same with this case for hearing and disposal.

30. The Principles upon which an interlocutory injunction may be granted are well settled. One has to establish a prima facie case with a probability of success; an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages, and if in doubt, the court will decide the matter on a balance of convenience.

See the case of **GIELLA VS. CASSMAN BROWN & CO. LTD (1973) EA 358.**

31. I am aware that at this stage the court is not mandated to delve into the merits of the case itself. However, the court is under obligation to consider whether the Plaintiff has satisfied the conditions for granting of temporary injunction as laid down in the Giella case (Supra).

32. It is not in dispute that the 1st Defendant is the proprietor of the suit premises. It is also not in dispute that the Defendants herein entered into a lease agreement pursuant to which the 1st Defendant leased out the premises to the 2nd Defendant. According to the Lease Agreement between the Defendants dated 20th January, 2011 marked as annexure 'B' in the Replying Affidavit of the Plaintiff dated 16th February, 2018, the premises leased is described as the ground floor of the building comprised in "Title number MOMBASA/BLOCK XX/340. It is also not in dispute that a disagreement arose between the Defendants resulting in Mombasa HCCC No.158 of 2014. Paragraph 3 of the Plaintiff in HCCC No.158 of 2014 states that the 2nd Defendant herein is a tenant of the 1st Defendant in respect of a building in plot No. Mombasa/Block XX/340.

33. There is also no dispute that the dispute between the Defendants culminated in the eviction of the 2nd Defendant from the leased premises on or about 5th January, 2018. It is clear from the evidence on record that on 15th January, 2018, the Plaintiff and the 1st Defendant entered into an agreement to lease pursuant to which the 1st Defendant leased out to the Plaintiff, who immediately took possession and is still in occupation of the properties known as MOMBASA/BLOCK XX/340 and MOMBASA/BLOCK XX/350 for a term of five (5) years and six (6) months from 15th January, 2018. The lease agreement between the Plaintiff and the 1st Defendant was entered into while the suit premises were vacant as the 2nd Defendant had been evicted.

34. Although the 2nd Defendant obtained an order in HCCC No.158 of 2014 directing that it be reinstated to the premises, the Plaintiff had likewise obtained an interim order of injunction in this case restraining the Defendants from evicting or interfering with the Plaintiff's occupation and use of the suit premises. The 2nd Defendant has accused the Plaintiff of failure to disclose the existence of HCCC No.158 of 2014. I have perused the application dated 31st January, 2018 and the affidavit in support. The Plaintiff did disclose that it was informed of the order in Civil Suit No.158 of 2014 requiring the reinstatement of the 2nd Defendant into the suit premises but added that it was not aware of and had not been served with the said court order and did not participate in the proceedings leading to the issuance of that order as it was not a party to that suit. I do not therefore agree with the submissions by the 2nd Defendant that the Plaintiff is guilty of material non-disclosure. In my view, the Plaintiff disclosed all the information that was within its knowledge.

35. It is apparent that both the plaintiff and the 2nd Defendant have an interest in the suit premises. Whereas the Plaintiff's interest comprises both title No. Mombasa/Block XX/340 and Mombasa/Block XX/350 as shown in the lease agreement between the Plaintiff and the 1st Defendant, the evidence on record show that the 2nd Defendant had only been leased the premises in plot No. Mombasa/Block Xx/340. The Plaintiff is in possession and occupation of the suit premises having entered the premises when the same were vacant as the 2nd Defendant had apparently been evicted. The crucial issue for determination is whether the Plaintiff should be granted the orders sought given the circumstances of this case.

36. In the case of **Mrao Ltd Vs. First American Bank & 2 others (2003) KLR 125**, the Court of Appeal held that:-

"a prima facie case.....in civil cases, is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter....."

37. In this case, the acts complained of by the Plaintiff are not denied. To my mind, the injunction sought is for purposes of maintaining the respective parties positions in the suit premises until the dispute is determined. Courts have granted injunctions on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing of the case, find that a greater injustice has been occasioned. See **Suleiman V.s Amboseli Resort Ltd (2004) KLR 589**. The guiding principle of the overriding objective is that the court should do justice to both the parties before it and their interests must be put on scales. The Plaintiff has a running lease in its favour and it is in possession and occupation of the suit premises. On the other hand, the 2nd Defendant had already been evicted, though the issue of whether or not the eviction was lawful is still a subject of another court of competent jurisdiction. The main dispute as to which party is entitled to lease the suit premises is an issue that can only be ascertained at the trial. Until that fact is established, it is only fair that the status quo prevailing be maintained.

38. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is clear that the Plaintiff has established a prima facie case with a probability of success against the Defendants. In my view it is clear that the Plaintiff has shown their rights over the suit premises having entered into a lease agreement with the 1st Defendant and having fulfilled its obligations under the said lease agreement. As regards irreparable damage, I take the view that the damage the Plaintiff will be subjected to if evicted will be enormous that cannot be quantified in damages as the plaintiff who has displayed its motor vehicles for sale may lose its customers.

39. The balance of convenience, if I had doubt, would tilt in favour of the Plaintiff who is in current occupation and use of the suit premises for the prevailing circumstances to be maintained.

40. I am thus satisfied that the facts as presented in this case demonstrate that the Plaintiff has satisfied the threshold for grant of an interlocutory injunction.

41. In the application dated 13.2.2018, the Plaintiff is also seeking to have the 2nd Defendant's directors and the O.C.S, Central Police Station, Mombasa committed to Civil Jail for disobeying the order of the court given on 1.2.2018. The standard of proof in matters of contempt of court is well settled. It must be higher than proof on a balance of probabilities but not exactly beyond reasonable doubt. See the case of Mutika Vs. Baharin Farm Ltd (1985) KLR 227 and the case of Refrigerator & Kitchen Utensils Ltd. Vs. Gulabchand Popatlal Shah & Others, Civil Appeal No.39 of 1990. This is because the charge of contempt of court is an offence of Criminal character and a party may lose his liberty. I must therefore satisfy myself beyond any shadow of a doubt that the 2nd Defendant's Directors and the O.C.S disobeyed the orders of the 1st February, 2018.

42. In this case, there is no dispute that the order was granted on 1.2.2018 when only the Plaintiff was in occupation and use of the suit premises. It is however not in dispute that there was another order issued in HCCC NO.158 of 2014 in favour of the 2nd Defendant. There is an impasse herein of which party is entitled to possession and occupation of the suit premises which impasse has arisen due to the issuance of two separate orders whose individual of each is at cross-purpose with the other. From the evidence on record, I cannot safely hold that the 2nd Defendant's Directors and the O.C.S disobeyed the orders of the court issued on 1.2.2018 as there was a separate albeit, conflicting order issued by the court in HCCC No.158 of 2014. I am not satisfied that the Plaintiff has proved the alleged contempt on the part of the alleged contemnors. I therefore decline to grant the order sought for committal to civil jail.

43. The Plaintiff is also seeking an order of mandatory injunction to compel the 2nd Defendant either by itself or through its authorized agents and/or officers to remove its or its agents motor vehicles stored on property known as Mombasa/Block XX/350 in default of which the Plaintiff to be at liberty to remove the said motor vehicles from the said premises. The law as regards the principles to be applied when considering whether or not to grant an interlocutory mandatory injunction is different from the principles set out in the Giella -Vs- Cassman Brown Case for the standard of approach is higher.

44. In the case of Locabail International Finance Ltd Vs Agro Export & Another (1986) ALL 901, 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 of be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted that being a different and higher standard than required for a prohibitory injunction.”

45. In this case, the Plaintiff has been leased both the properties known as MOMBASA/BLOCK XX/340 AND MOMBASA/BLOCK XX/350. The court had on 1.2.2018 granted the Plaintiff an interim order of injunction. As I have already noted, the subject of HCCC No.158 of 2014 between the Defendants and in which the Plaintiff is not a party is the suit premises known as MOMBASA/BLOCK XX/340. Having carefully considered the material before me, in my humble view a case of a mandatory injunction has been made out. The motor vehicles sought to be removed were taken into the suit premises after this court had already issued restraining orders against the Defendants. And having looked at the two lease agreements between the 1st Defendant and the 2nd Defendant and the one between the 1st Defendant and the Plaintiff, I can safely consider this a clear case that can be decided at once or in a summary manner. I am therefore satisfied that the prayer for a mandatory injunction can be granted.

46. The Plaintiff is also seeking an order to call for and transfer to this court the file of Mombasa HCCC No.158 of 2014 and consolidate the same with this case for hearing and disposal. This court is one of the superior courts established under Article 162(2)(b) of the Constitution of Kenya. Although the court as the status of a High court, it is a different court with a separate and distinct jurisdiction from that of the High Court. Each of the superior courts in Kenya has a separate and distinct original jurisdictional competence to decide matters before it. In my view, this court does not have the jurisdiction and therefore cannot issue orders in respect of matter that is pending before the High Court. A matter before the High Court can only be dealt with by that court. It would be improper and against the Constitution and the law for this court to intrude into a matter before another court, more so when this court does not have supervisory jurisdiction over that court. In the premises, it is my finding that this court has no jurisdiction to grant the order for transfer sought and I decline to allow the same.

47. Upon hearing the three applications, herein and arising from all the above reasons, the final orders of this court are as follows:-

a) The Notice of Motion dated 31st January, 2018 is allowed in terms of prayers 3 and 4 thereof.

b) The Notice of Motion dated 7th February, 2018 is dismissed.

c) The Notice of Motion dated 13th February, 2018 is allowed in terms of prayers 4 and 5 thereof but to the extent that the 2nd

Defendant is to remove the said motor vehicles within five (5) days of this order in default of which the Plaintiff to be at liberty to remove them from the said premises.

d) Each party to bear their own costs.

It is so ordered.

Delivered, dated and signed at Mombasa this 23rd day of April, 2018.

C. YANO

JUDGE