



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ELC (PETITION) No. 360 OF 2017**

**COVE INVESTMENTS LIMITED.....PETITIONER**

**VERSUS**

**JOHANA KIPROTICH RONO &**

**JOSEPH RONO LANGAT AS THE LEGAL**

**REPRESENTATIVES OF THE ESTATE OF**

**MATHIAS KIMNYOLE LANGAT.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is a ruling in respect of Petitioner’s Notice of Motion dated 13<sup>th</sup> June 2018, an application pursuant to which the following orders are sought:

**1. Spent.**

**2. Spent.**

**3. That a mandatory injunction be and is hereby issued compelling the 1<sup>st</sup> respondents, their agents, servants, employees or any other persons whatsoever to vacate from LR. No. Nakuru/Ol’Ongai Phase 11/34 pending the hearing and determination of this suit.**

**4. That the 1<sup>st</sup> respondent be directed to immediately move out and remove all their agents, employees, servants/personnel from L.R Nakuru/Ol’Ongai Phase 11/34 and restore possession to the petitioner/applicant forthwith failing which the petitioner/applicant be at liberty to do so at the 1<sup>st</sup> respondent’s expense.**

**5. That the Officer Commanding Menengai Police Station to supervise and oversee the enforcement of this Order.**

2. The application is supported affidavits sworn by Kenneth Kiplagat, David Bett Kibiwott and David Murithi. The deponents state that early in the morning on Sunday 2<sup>nd</sup> June 2018, the 1<sup>st</sup> respondent accompanied by an armed gang, invaded the suit property, destroyed fences, locks and doors and chased away the petitioner’s permitted occupants. The 1<sup>st</sup> respondent has stationed youth on the suit property who have blocked the petitioner’s staff from accessing it.

3. The 1<sup>st</sup> respondent responded to the application through a replying affidavit sworn by Johana Kiprotich Rono and another affidavit sworn by David Mugira Kayogo. They state that it is false to state that there was any invasion of the land on “Sunday morning 2<sup>nd</sup> June 2018” since the said day was a Saturday and not a Sunday. They further state that the 1<sup>st</sup> respondent could not invade their own land which they have been using throughout their lives. They therefore urge the court to dismiss the application.

4. The 2<sup>nd</sup> respondent did not file anything in response to the application and counsel for the 2<sup>nd</sup> respondent stated that she did not intend to participate in the hearing of the application.

5. Mr Kairaria, learned counsel for the applicant submitted that the petitioner has had possession since 1999, pursuant to a sale agreement.

Referring the court to supporting affidavit of Kenneth Kiplagat sworn in support of petitioner's Notice of Motion dated 22<sup>nd</sup> September 2017, he submitted that the 1<sup>st</sup> respondent's father acknowledged the petitioner's possession in HCCC No. 158 of 2005 in which he sought vacant possession. In the present case, the possession was acknowledged at paragraph 27 in the 1<sup>st</sup> respondent's replying affidavit filed in court on 20<sup>th</sup> April 2018. The possession was interrupted on Sunday 3<sup>rd</sup> June 2018 despite the existence of a court order. He therefore urged the court to grant a mandatory injunction at this stage to restore possession since the 1<sup>st</sup> respondent had attempted to steal a match on the petitioner. He relied on the cases of **Kamau Mukuha –vs- Ripples Ltd [1993] eKLR** and **Gusii Mwalimu Investment Co. Ltd & Others v Mwalimu Hotel Kisii Ltd [1996] eKLR**.

6. Mr Karanja, learned counsel for the 1<sup>st</sup> respondent submitted that although Mr Kairaria stated that the 1<sup>st</sup> respondent invaded the land on 3<sup>rd</sup> June 2018, in the supporting affidavit the petitioner says that possession was disrupted on Sunday 2<sup>nd</sup> June 2018. Further, though the petitioner alleged that the invasion was reported at Menengai Police Station, no police occurrence book number has been availed. He added that the petition herein is not about who is in possession but about constitutionality of the Land Control Act. He relied on the cases of **Mwangi –vs- Braeburn Ltd [2004] 2 EA 196**, **Moses Nyandusi Nyakeramba –vs- Kiamokama Tea Factory Co. Ltd. Kisii HC Petition No. 31 of 2016**, **Lucy Wangari Murigi –vs- Klaus Willis Lutkemier & 2 Others Mombasa ELC case No. 432 of 2010** and **Dian Lee Lasoi & Another –vs- John Kiptoo Cheruiyot & 2 Others Nakuru ELC Case No. 472 of 2016**. He therefore urged the court to dismiss the application.

7. I have considered the application, the affidavits filed and the submissions. The petitioner seeks a mandatory injunction. The principles applicable are that a mandatory injunction should not be granted at an interlocutory stage unless there are special circumstances. It should only be granted in the clearest of cases. An example of special circumstances that would warrant granting a mandatory injunction at an interlocutory stage is where a party is bent on stealing a match on the other. The Court of Appeal has recently restated these principles in the case of **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** as follows:

*It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the interlocutory stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage....*

*Among the special circumstances that may justify the grant of a mandatory injunction at interlocutory stage is where the injunction involves a simple act that could be easily reversed or remedied should the court find otherwise after trial; the defendant has accelerated the development that the plaintiff seeks to retrain, with the intention of defeating the plaintiff's claim or where the defendant is otherwise bent on stealing a match on the plaintiff.*

*On the other hand, the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.*

8. The petitioner's case is that it had possession of the suit property until the 1<sup>st</sup> respondent dispossessed it despite the existence of orders of this court protecting the said possession. The record herein shows that on 27<sup>th</sup> September 2017 the petitioner filed Notice of Motion dated 22<sup>nd</sup> September 2017 seeking an order restraining the 1<sup>st</sup> respondent from interfering with the petitioner's quiet possession of the suit property. The application went before my brother Munyao J. under certificate of urgency on 28<sup>th</sup> September 2017. The judge ordered that the *status quo* be maintained until further orders of the court. Those orders are still in force.

9. I note that it was deposed at paragraph 3 of the supporting affidavit of Kenneth Kiplagat, sworn and filed in support of Notice of Motion dated 22<sup>nd</sup> September 2017, that the petitioner has been in quiet possession of the suit property since 1999. Indeed, the 1<sup>st</sup> respondent acknowledges the petitioner's aforesaid possession at paragraph 27 of the replying affidavit of Johana Kiprotich Rono sworn on 19<sup>th</sup> April 2018 and filed herein on 20<sup>th</sup> April 2018 in response to Notice of Motion dated 22<sup>nd</sup> September 2017. Further, the 1<sup>st</sup> respondent's father acknowledged the petitioner's possession in HCCC No. 158 of 2005 in which he sought among others, judgment for vacant possession in respect of the suit property. The possession is also acknowledged in a letter dated 20<sup>th</sup> April 2018 from the 1<sup>st</sup> respondent's advocates to Mr David Kibiwott, the petitioner's farm manager. Part of that letter reads:

*For your information, there are no positive orders granting the petitioner the right of use, leasing or dealing with this land. The only interlocutory order is the one restraining our clients from interfering with the petitioner's quiet possession of the said land.*  
...

*We therefore now demand that you forthwith vacate the land and cease from dealing with it in any way or at all in the next three days from today's date in default whereof, our clients shall resort to such legal remedies open to them either by pressing for criminal charges to be preferred against you for forceable detainer; civil action (if need be) or forceful removal from our clients' parcel of land through the appropriate legal means.*

10. It is therefore beyond argument that the petitioner has been in possession and was in possession as at 28<sup>th</sup> September 2017 when an order maintaining the status quo was made. The question that then emerges is: did the 1<sup>st</sup> respondents dispossess the petitioner as is alleged? There is some confusion as to whether the alleged act of dispossessing the petitioner took place on Sunday 2<sup>nd</sup> June 2018 as is stated in the application and supporting affidavits or on Sunday 3<sup>rd</sup> June 2018 as was submitted by Mr Kairaria. The 1<sup>st</sup> respondents have stated in the replying affidavit that they now have possession. They have not stated when and how they took possession. They have disputed that 2<sup>nd</sup> June 2018 was a Sunday as is alleged by the petitioner. They have however not expressly denied dispossessing the petitioner.

11. In view of the 1<sup>st</sup> respondents admission that they now have possession and further in view of the 1<sup>st</sup> respondents admission that the petitioner had possession as at 20<sup>th</sup> April 2018 when there was an order of this court in force protecting the said possession, it is immaterial whether the dispossession took place on a Saturday, a Sunday, 3<sup>rd</sup> June 2018 or on any other date after 20<sup>th</sup> April 2018. It is sufficient that it has been demonstrated that the 1<sup>st</sup> respondents regained possession contrary to an order of this court protecting the petitioner's possession. In view of the letter from the 1<sup>st</sup> respondent's advocates dated 20<sup>th</sup> April 2018, the dispossession was premeditated and done in the full knowledge that there was an order in force whose effect was to maintain the petitioner's possession. That is a most unfortunate situation.

12. Court orders must be obeyed. The only avenue available for a party who is not satisfied with an order of the court is to approach the court seeking variation or setting aside. The Court of Appeal recently rendered itself in **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR** as follows:

*When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.*

13. The 1<sup>st</sup> respondents' action of dispossessing the petitioner in flagrant disregard of an order of the court constitutes special circumstances that calls for immediate action by the court to restore the *status quo ante*. It warrants granting an interlocutory mandatory injunction to restore possession to the petitioner. By dispossessing the petitioner in the manner they did, the 1<sup>st</sup> respondents have manifestly exhibited an intention to steal a march on the petitioner. The court must correct this by 'resetting the system' to where it was on 28<sup>th</sup> September 2017 when the court ordered that status quo be maintained. I am therefore satisfied that this is a clear case which deserves granting a mandatory injunction as sought.

14. In the end, I make the following orders:

- i. I grant a mandatory injunction compelling the 1<sup>st</sup> respondents, their agents, servants, employees or any other persons acting on their behalf in any manner whatsoever to vacate from L.R. No. Nakuru/Ol'Ongai Phase 11/34 pending the hearing and determination of this suit.
- ii. The 1<sup>st</sup> respondents are hereby ordered to immediately move out and remove all their agents, employees, servants, personnel or any other persons acting on their behalf in any manner whatsoever from L.R Nakuru/Ol'Ongai Phase 11/34 and restore possession to the petitioner within three (3) days from the date of delivery of this ruling. In default, the petitioner shall be at liberty to remove them from the said property.
- iii. That the Officer Commanding Menengai Police Station to provide security during the enforcement of these orders.
- iv. Costs of the application are awarded to the petitioner.

15. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 27<sup>th</sup> day of July 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Kairaria for the Petitioner/applicant

Mr Karanja for the 1<sup>st</sup> Respondents/respondents

No appearance for the 2<sup>nd</sup> respondent

Court Assistants: Gichaba & Lotkomoi