



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC NO. 202 OF 2014**

**ROSE JACOB LELO.....PLAINTIFF**

**-VERSUS-**

**ELIZABETH OBALA..... DEFENDANT**

**RULING**

1. The Plaintiff/Applicant seeks orders of the court to enable re-entry and repossession of the suit property namely L.R Number 12062/452 situate at Kariobangi South, Nairobi. The Application is pegged on the grounds stated on the face thereof as well as the Affidavit of the Applicant sworn on 24<sup>th</sup> July, 2012. The Application is contested through a Replying Affidavit filed by the Respondent on 14<sup>th</sup> September, 2012.
2. Briefly, the facts are that the Applicant claims to be the owner of the suit property. That the Respondent took occupation of the suit property in the year 2000 as a tenant and has failed to pay rent since the said 2000. The Applicant further says that a notice terminating the tenancy was issued to the Respondent on 11<sup>th</sup> June, 2011 and the Respondent failed to heed the same. For all these, the Applicant states that the Respondent's continued possession of the suit property is putting the Applicant to great loss and that damages would not adequately compensate the Applicant.
3. The Respondent demurs. The Respondent contends that she is rightfully in possession of the suit property. She further contends that she has been in possession of the suit property since the year 1999 not as a tenant but as the widow and beneficiary of the estate of one Jared Otieno Obiero (deceased) who bought the property from the Applicant's father who is also now deceased. The Respondent further contends that she has previously been in court with the Applicant's sister one Anabell Gathoni Jacob who also had a claim of ownership to the suit property and purported to seek rent from the Respondent. The Respondent contests the registration of the suit property in favour of the Applicant as the Respondent had through the Public Trustee allegedly lodged a caveat prohibiting the registration of any interest against the title.
4. I have carefully read through the pleadings. I have also read though both the Supporting Affidavit as well as the Replying Affidavit. The Applicant basically seeks delivery up or recovery of land. The current application is however stated to have been brought under Order 40 Rules 5 and 10. Ideally, the application should have been brought under Order 36 Rule 1(b) of the Civil Procedure

Rules. The former order deals with injunctive orders whilst the latter Order deals with the summary procedure and process of this court. The requirements under each Order are separate and distinct. Rule 10 of Order 40 in my view, is however not applicable at all to the current circumstances. That rule deals with the preservation, detention or inspection of property and not the repossession of property.

5. The nature of the order currently sought is however akin to a mandatory injunction and I will consequently consider the application on that basis as in any event, even if the application is to be allowed the court would first have to make an order for the delivery up of possession within a specified period of time before issuing formal eviction orders: see Order 21 of the Civil Procedure Rules.
6. The guiding principles on the law of interlocutory mandatory injunctions can be found easily in the case of **Kenya Breweries Ltd & another –vs- Washington Okeyo [2002]1E.A. 109**. Simply, put, the applicant need not only satisfy the requirements of **Giella –vs- Cassman Brown & co. Ltd [1973] EA 358** but must also show special circumstances to satisfy the court that the granting of such mandatory injunctions are such that there is basically no doubt that at trial the same orders would have been granted. It must be a very clear case which ought to be decided at once. Has the same situation obtained in this case?
7. From the supporting affidavit the Applicant has easily demonstrated that the Applicant is the registered proprietor of the suit property: See entry No. I.R 38908/5 of 12<sup>th</sup> May, 2010. Yet the Respondent has by deposition claimed to have occupied the suit property since 1999 which would mean that any rights the Applicant’s predecessor by title or the Applicant had over the suit property was extinguished in the year 2011. Even though the Applicant contests the Respondent’s occupation since 1999 that is an issue for the trial court to investigate and arrive at a firm conclusion with certainty. I do not hold the view that the Applicant has shown a prima facie case with a probability of success. Rather I have my doubts that an order for delivery up of possession if issued now could certainly have obtained if a trial was conducted today. Coupled with the fact that there is no proof to show that the Respondent was indeed a tenant as alleged by the Applicant, I would hesitate to lock out the Respondent from these proceedings as that is exactly what the order now sought would do. I hold the view that the orders sought are not merited. They have to wait the trial of this suit as they are the same prayers in the Complaint.
8. I would consequently dismiss the application but with no order as to costs.
9. Orders accordingly.

**Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of November, 2014.**

**J. L. ONGUTO**

**JUDGE**

**In the presence of:-**

..... for the Applicant

..... for the Respondent