REPUBLIC OF KENYA

unspecified dates, the respondent pulled down a perimeter fence erected on the suit land and threatened the applicant with death if he attempted to take possession of the land. As a result the applicant has suffered loss of rent and *mesne* profits. The prayers sought in the main suit were:

"*(a) A permanent injunction to restrain the defendant his tenants his workers, his servants, sub-tenants and or agents from trespassing, possessing, occupying, letting, assigning, wasting or in any manner dealing with the said property known as Land Reference NO. LR. No. 209/14318 situated in the City of Nairobi in the Nairobi Area which land is leased to the plaintiff by the Government of Kenya for a period of 99 years from 1st June, 1998.*

(b) Immediate vacant possession of Land Reference No.209/14318 which is prime property located along Jogoo Road Nairobi.

(c) The OCS Jogoo Police Station be ordered to assist the court in enforcing prayer (a) and (b) above and to ensure that peace is not breached.

(d) Mesne profits."

On the same day the suit was filed, the applicant took out a chamber summons seeking four substantive orders as follows:

"*(2) That pending the hearing and determination of this application the honourable court be pleased to grant temporary orders compelling the defendant, his servants, agents and tenants to give vacant possession of all that piece of land situated in the city of Nairobi in Nairobi area along Jogoo Road otherwise known as LR. No.209/14318.*

(3) That a temporary injunction be granted to the plaintiff/applicant compelling and restraining the defendant, his workers, servants, tenants and or agents from occupying, letting, assigning, wasting or in any manner dealing with the plaintiffs property known as LR.No. 209/14318 situated along Jogoo Road within the city of Nairobi forthwith.

(4) That further or in the alternative a temporary injunction be granted to the plaintiff/applicant compelling the defendant, his servants, agents and tenants to give vacant possession of all that piece of land situated in the city of Nairobi in Nairobi known as LR. No. 209/14318 forthwith.

(5) That the OCS Jogoo Road Police Station be ordered to enforce the orders of this Honourable Court and to ensure compliance and to prevent breach of peace."

Once again, those orders were curiously framed but the superior court (Angawa, J.) was in no doubt that the applicant was seeking a mandatory injunction at an interlocutory stage. The learned Judge heard the application in the absence of the respondent who was served but failed to respond thereto. Nevertheless, the onus was still on the applicant to persuade the learned Judge that the order sought was deserved before the hearing and determination of the main suit. The applicant produced a title document issued under the Registration of Titles Act on 21st June, 2001 but said nothing in his affidavit about the date of entry into the property by the respondent or when he erected the perimeter fence. The only dates referred to were 2nd May, 2008, seven years after the grant was issued when the applicant issued notices to "*the respondent together with his servants, tenants and agents"* to vacate; and 22nd May, 2008 when he was authorized by the City Council to erect another perimeter fence and instructed contractors to do so the following day, but was stopped in his tracks. He was in a hurry to develop the property because he had obtained a loan to do so.

In rejecting the application, the learned Judge was brief and stated, *inter alia*: -

"*8. The prayers in this application has (sic) been very clearly put. It asks for the plaintiff to be restrained from being on the property. This is a mandatory prayer for an injunction which is not available unless for exceptional circumstances.*

9. The plaintiff should proceed to the main suit for hearing where he wishes to have the defendant evicted from the land. It is not correct to do so by an application.

10. In a situation where the dispute is on ownership of land, then the one whom the court declares is the owner of the land has a right to bring an application to seek the eviction of the other party.

11.In this application the same is declined. It is dismissed with no order as to costs as the defendant was absent during the hearing."

Those are the findings sought to be challenged in the intended appeal.

Mr. Ngoge, argued before us that the intended appeal was arguable because there was no reason to deprive the applicant of a mandatory injunction when there was no opposition to it. Furthermore, there was no dispute that the applicant was the lawful owner of the leasehold title as pleaded and there can therefore be no valid defence. Indeed, the applicant himself had deponed in his affidavit drawn up by Mr. Ngoge, *inter alia*, that Anga'wa, J. was "*dishonest,….biased, and partial"* in dismissing his application. On the nugatory aspect, Mr. Ngoge submitted that the limited leasehold interest in the property continues to be eaten into and the lost term of the lease is irrecoverable. The applicant's intention to develop the property will also be irreversibly affected if the order sought is not granted since the respondent was not in a position to recompense the loss as he is

not a man of means.

On the other hand, Mr. Obar Odera, learned counsel for the respondent, urged us to reject the application because the intended appeal was not arguable at all. The learned Judge, he submitted, had a discretion to exercise and it cannot be interfered with lightly. The Judge was correct that a temporary mandatory injunction could not be issued until the main suit was determined and it was not correct to state, as the applicant does, that there was no dispute on ownership of the property, when the respondent was in possession of it. As for the nugatory aspect, Mr. Obar submitted that there was no material in the affidavit in support of the application to suggest that the respondent was a man of straw and cannot compensate any loss suffered by the applicant. A long list of authorities was placed before us by Mr. Obar to emphasise the well known principles for consideration in an application under ***rules 5 (2) (b).***

We have considered the application, the affidavit in support thereof, the submissions of counsel and the authorities placed before us. There is no denying that there is a suit before the superior court pleading ownership by the applicant of the property specified therein and alleging trespass thereon by the respondent. It was not shown before the superior court nor is it the applicant's case before us, that summons to enter appearance had been served on the respondent and that the respondent has no likely defence to file in the matter when he is so served. For purposes of the application placed before the superior court, the main suit was still pending, and as far as we know, it is still pending before that court. The application that fell for consideration before the superior court sought a temporary mandatory injunction pending the hearing of that suit and the prayers sought in both matters are reproduced above.

We think for our part that the learned Judge was alive to the principles applicable in considering prayers for grant of a temporary mandatory injunction, and, perhaps, she can only be faulted for failure to cite her authoritative sources for such principles. The learned Judge stated clearly that such orders may only be granted in exceptional circumstances and was not prepared to order the eviction of the respondent before evidence in the main suit is heard, or the suit is otherwise determined in summary manner. In that approach the learned Judge was echoing many past authorities such as **East African Fine Spinners Ltd (In Receivership) & 3 Others vs. Bedi Investments Ltd Civil Appl. NAI. 72/94 (ur**) where Gicheru, JA (as he then was) cited Megarry J (as he then was) in **Shepherd Homes Ltd v Sandahm [1971] 1 ch. 34**, stating in part:

"**……., it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation. If, of course, the defendant has rushed on with his work in order to defeat the plaintiff's attempts to stop him, then upon the plaintiff promptly resorting to the court for assistance, that assistance is likely to be available; for this will in substance be restoring the status quo and the plaintiff's promptitude is a badge of the seriousness of his complaint."** (emphasis added).

As stated earlier there are no dates in the pleadings on record to show when the respondent entered into the parcel of land or that he was stealing a march on the applicant. Megarry J. continued:

"**The matter is tempered by a judicial discretion which will be exercised so as to withhold an injunction more readily if it is mandatory than if it is prohibitory. Even a blameless plaintiff cannot as of right claim at the trial to enforce a negative covenant by a mandatory injunction. Second, although it may not be possible to state in any comprehensive way the grounds upon which the court will refuse to grant a mandatory injunction in such cases at the trial, they at least include the triviality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff. The basic concept is that of producing a "fair result," and this involved the exercise of a judicial discretion. Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."** (emphasis added).

Referring to the application of those principles this Court in **Kenya Airports Authority v Paul Njogu Muigai & 2 Others Civil Application No**. **NAI. 29/97** (ur) said:

"**An order which results in granting a major relief claimed in the suit, which may not be granted at final hearing, ought not to be granted at an interlocutory stage. Again referring to the principle in the Shepherd Homes case (supra) as adopted in the case of Locabaill International Finance Ltd. v. Agroexport [1986] 1 ALL E.R. 901 Mustil LJ said at page 906:**

"***The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case. I feel bound to say that, to my way of thinking, this was not the approach adopted by the judge because, as I understand the position, a specific argument was not directed at the hearing before him to the level of conviction which required to be conveyed to the court before a mandatory injunction could properly be granted."***

So that in the final analysis, as regards principles governing the grant of a temporary mandatory injunction the passage in Halsbury's Laws of England volume 24 paragraph 948 is germane to the issues before us and it would bear

setting it out. It reads:

"***A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, 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 be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notices that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application."*** (emphasis added)

We have found it necessary to go into some detail on the legal principles and their application because they are the self-same principles we have to apply in exercise of our original jurisdiction here and also because we are skeptical about the arguability of the applicant's intended appeal. It is, of course, the applicant's right to pursue the intended appeal and upon the appellate court to pronounce itself finally on that appeal. In our view, granting the mandatory injunction sought at this stage would leave nothing further to await in the intended appeal and we are not inclined to do so. We are also of the view that the success of the intended appeal will not be rendered nugatory.

The applicant seeks orders for vacant possession of the disputed plot as well as *mesne* profits. These are quantifiable. We find no averment in the supporting affidavit that the respondent is incapable of meeting any monetary compensation that may be ordered by the court.

In all the circumstances we decline to grant the order sought and we order that this motion be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 23rd day of October, 2009

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR