



REPUBLIC OF KENYA



**Marete v Mwidau & another (Environment & Land Case 224 of 2021)  
[2023] KEELC 15671 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15671 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 224 OF 2021  
NA MATHEKA, J  
FEBRUARY 21, 2023**

**BETWEEN**

**JANE GAKII MARETE ..... PLAINTIFF**

**AND**

**AHMED ABDALLA MWIDAU ..... 1<sup>ST</sup> DEFENDANT**

**PRIME BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application is dated March 17, 2022 and is brought under Order 40 Rule 10 (1), (a), (b) of the [Civil Procedure Rules](#) and Section 7, 1A, 1B, 3 and 34 of the [Civil Procedure Act](#) seeking the following orders;
  1. That this Application be certified as urgent and be heard ex parte at the first instance.
  2. That this Honourable Court be pleased to issue a temporary Order for the preservation of the Suit Property by ordering the Plaintiff to vacate the Suit Property known as Plot CR 15351 Subdivision No 2544 Section 1 Mainland North and the 1<sup>st</sup> Defendant who is the registered owner and or his Agents be authorized to enter upon the Suit Property forthwith pending the hearing and determination of this Application.
  3. That an Order for preservation of the Suit Property do issue by ordering the Plaintiff to vacate forthwith the Suit Property known as Plot CR 15351 Subdivision No 2544 Section 1 Mainland North and the 1<sup>st</sup> Defendant who is the registered owner and or his Agents be authorized to enter upon the Suit Property pending the hearing and determination of this Suit.
  4. That the Court be pleased to make any other or further Orders as it may deem fit and just to grant.
  5. That the costs for the Application be granted to the 1<sup>st</sup> Defendant/Applicant.



2. The Application is based in the following grounds that the Plaintiff unlawfully, illegally and forcefully took possession of the Suit Property. The Plaintiff has been taking actions intended to destroy the Suit Property and to deny the Applicant who is a lawful registered owner access to his Property. The Plaintiff has been interfering with the 2<sup>nd</sup> Defendant's interest over the Suit Property. The Plaintiff has no right whatsoever to remain in the suit property at the exclusion of the 1<sup>st</sup> Defendant who is a duly registered owner. The Court has pronounced itself severally that the Plaintiffs interest is known and is quantifiable and that the 2<sup>nd</sup> Defendant has priority to realize the security which is the Suit Property and hence the 2<sup>nd</sup> Defendant has first priority over the Suit Property than any other Party, however the Plaintiff actions are denying the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant from accessing the Suit Property and hence there is need to issue the Orders sought. The Plaintiff remedy if any is provided in the alleged Sale Agreement which does not include entering and or remaining in the Suit Property and hence the Orders sought herein should issue. The 1<sup>st</sup> Defendant cannot lawfully use and develop the Suit Property in order to pay off the 2<sup>nd</sup> Defendant the outstanding loan facility if the Orders of preservation sought herein are not issued. The Court has made a number of Orders in three (3) separate matters to the effect that the Plaintiff has no right to interfere with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' interests over the Suit Property but the Plaintiff has never stopped interfering with the Suit Property and hence the orders sought should issue. The interest of fairness, justice and to protect rights of duly registered owners of the suit Property the Orders sought should issue.
3. The Plaintiff/Respondent stated that the Applicant has not established a prima facie case to warrant a mandatory order such as this one. That he has not filed a counterclaim seeking her eviction. That the application is premised by mere allegation and the matter would need to go to full trial. That no irreparable damage shall be suffered by the 1<sup>st</sup> Defendant/Applicant having acquiesced to waive his proprietary right to the suit property.
4. This court has considered the application. The Applicant seeks a mandatory injunction order for preservation of the Suit Property do issue by ordering the Plaintiff to vacate forthwith the Suit Property known as Plot CR 15351 Subdivision No 2544 Section 1 Mainland North and the 1<sup>st</sup> Defendant who is the registered owner and or his agents be authorized to enter upon the Suit Property pending the hearing and determination of this Suit. A mandatory injunction is different from a prohibitory injunction in the sense that while an in prohibitory injunction the applicant must, as was stated in the celebrated case of *Giella vs Cassman Brown & Co Ltd* (1973) EA 358, establish the existence of a *prima facie* case with high chances of success, and that he will suffer irreparable loss/damage which cannot be adequately compensated by an award of damages if the injunction is not granted, and further that the balance of convenience tilts in his favor, an applicant in a mandatory injunction must, in addition, establish the existence of special circumstances. Furthermore, an applicant for mandatory injunction must prove his case on a standard higher than the standard in prohibitory injunctions. In the case of *Kenya Breweries Ltd & Another vs Washington O Okeya* (2002) eKLR, the Court of Appeal stated as follows on mandatory injunctions;

"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 to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."



5. In the case of *Nation Media Group & 2 Others vs John Harun Mwau* (2014) eKLR, the court of appeal said;

"It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."

6. The above cases set down the principles of law to be considered in an application for mandatory injunction and the condition that stands out is that the applicant must establish the existence of special and exceptional circumstances that warrant the granting of orders of mandatory injunction. In the instant case, I find that the applicant has not established the existence of special and exceptional circumstances to warrant these orders. I find that these are substantive orders and cannot be granted at this interim stage and the matter would need to go to full trial. I find that the application dated March 17, 2022 is not merited and I dismiss it with costs. Parties are advised to comply with order 11 and set the matter down for hearing.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21<sup>ST</sup> DAY OF FEBRUARY 2023.**

**N.A. MATHEKA**

**JUDGE**

