



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. E408 OF 2021

PATMWA LIMITED.....PLAINTIFF

VERSUS

DIRECTOR GENERAL

NAIROBI METHOPOLITAN SERVICES.....1ST DEFENDANT

NAIROBI CITY COUNTY.....2ND DEFENDANT

CABINET SECRETARY OF MINISTRY OF

INTERIOR AND CORDINATION.....3RD DEFENDANT

KENYA POWER AND LIGHTING COMPANY LIMITED...4TH DEFENDANT

NAIROBI WATER & SEWERAGE COMPANY LIMITED...5TH DEFENDANT

GEORGE KIMANI MBUGEA,

FELIX WACHIRA KIRIKO AND

MIRIAM ANYANGO MALLA as officials of

AIRPORT VIEW NEIGHBOURS GROUP.....6TH DEFENDANT

AIRVIEW EMBAKASI LAND LIMITED.....7TH DEFENDANT

MARY WACEKE MUIGAI.....8th DEFENDANT

FLORENCE CHEMATUN.....9TH DEFENDANT

CHRISTINE MUNYIVA MUTISYA.....10TH DEFENDANT

JOHN MWANGI KAHORO.....11TH DEFENDANT

KEVIN OTIENO MALLA.....	12 TH DEFENDANT
ANN ANJAO SIKOTE.....	13 TH DEFENDANT
JEREMIAH MBORONKO BUNDE.....	14 TH DEFENDANT
PHILIP KAMUNYA.....	15 TH DEFENDANT
IBRAHIM ONGIRI.....	16 TH DEFENDANT
NELSON IKHUTAL.....	17 TH DEFENDANT
SAMSON SAGWE.....	18 TH DEFENDANT
JOSEPH KAMAU.....	19 TH DEFENDANT
ROBERT MAINA.....	20 TH DEFENDANT
ALICE GATHONI.....	21 ST DEFENDANT
SIMON PETER WERU.....	22 ND DEFENDANT
JAMES MAKORI.....	23 RD DEFENDANT
GEOFFREY MUNGAL.....	24 TH DEFENDANT
PIUS SEIF.....	25 TH DEFENDANT
RICHARD ATAMBO.....	26 TH DEFENDANT
JAMES MWANIKI.....	27 TH DEFENDANT
GEORGE OSONGO.....	28 TH DEFENDANT
ALOYCE ONGOTO.....	29 TH DEFENDANT
JOYCE OBADIA.....	30 TH DEFENDANT
EUNICE NJOKI.....	31 ST DEFENDANT
MIRIAM ONYANGO.....	32 ND DEFENDANT
NATHAN NYAKUNDI.....	33 RD DEFENDANT
CATHERINE NDUKU.....	34 TH DEFENDANT
CHARLES GITHUI.....	35 TH DEFENDANT
CHARLES YEWA OLOO.....	36 TH DEFENDANT

DAVID MAINGI.....37TH DEFENDANT

EVANS MUNYASIA.....38TH DEFENDANT

ALEX ODHIAMBO.....39TH DEFENDANT

RULING

1. The Plaintiff herein filed a Notice of Motion Application dated 26th November 2021 seeking for the following orders: -

1) *Spent*

2) *That pending the hearing and determination of this application interpartes, this Honourable court be pleased issue an order allowing the Plaintiff to erect a permanent fence around its property being LR No. 9042/126.*

3) *That pending the hearing and determination of this application interpartes, this Honourable court be pleased issue an order stopping the Defendants, their agents, servants, relatives, cronies, employees and persons acting on their authority, permission and or directions who had vacated the suit property LR No. 9042/126. from re-entering the property or coming back and or from building back any house or erecting any form of structures on the subject parcel of land.*

4) *That pending the hearing and determination of this application interpartes, this Honourable court be pleased issue an order restraining the defendants their agents, servants, relatives, cronies, employees and persons acting on their authority, permission and or directions from erecting any form structures, continuing any form of constructions, building or installations, connections or provision of any form service within LR No. 9042/126 without the express consent of the Plaintiff.*

5) *That pending the hearing and determination of this application interpartes, this Honourable court be pleased issue an order directed to the 6th to the 39th Defendants their agents, servants, relatives, cronies, employees and persons acting on their authority, permission and or directions from continuing any acts of trespass onto the Plaintiff's parcel of land being LR No. 9042/126.*

6) *That pending the hearing and determination of this application interpartes, this Honourable court be pleased issue an order allowing the Plaintiff to erect a permanent fence around its property being LR No. 9042/126.*

7) *That pending the hearing and determination of this application interpartes, this Honourable court be pleased issue an order stopping the Defendants, their agents, servants, relatives, cronies, employees and persons acting on their authority, permission and or directions who had vacated the suit property LR No. 9042/126. from re-entering the property or coming back and or from building back any house or erecting any form of structures on the subject parcel of land.*

8) *That pending the hearing and determination of this application interpartes, this Honourable court be pleased issue an order stopping the Defendants, their agents, servants, relatives, cronies, employees and persons acting on their authority, permission and or directions erecting any form structures, continuing any form of constructions, building or installations, connections or provision of any form service within LR No. 9042/126 without the express consent of the Plaintiff.*

9) *That pending the hearing and determination of this application interpartes, this Honourable court be pleased issue an order directed to the 6th to the 39th Defendants their agents, servants, relatives, cronies, employees and persons acting on their authority, permission and or directions from continuing any acts of trespass onto the Plaintiff's parcel of land being LR No. 9042/126.*

10) *That the OCS (Officer Commanding Station) Embakasi Police Station does assist in the enforcement of any orders issued herein.*

11) *That this Honourable court be pleased to grant such further orders as may be necessary to ensure compliance with its orders.*

12) *That the costs of this application be borne by the Defendants.*

2. The application is based on the grounds on its face and supported by the affidavit sworn by **Rosalind Ruth Kabura M. Mwangi** sworn on the 26th November 2021.

3. Pursuant to the directions of this Court issued on **1st December 2021** and in view of the Court of Appeal ruling delivered on **19th November 2021** in respect to **Nairobi Civil Application No. E084 OF 2021 Philip Kamunya & 24 Others vs Patmwa Limited**, this Court directed that the said application be served upon the defendants for consideration on **3rd December 2021**.

4. On **3rd December 2021**, **Mr. David Kirimi Advocate** attended and made oral submissions for the Applicant while **Mr. Emmanuel Gisemba Advocate** submitted for the 8th Defendant and **Mr. James Makori** submitted for the 9th -15th Defendants and **Mr. Samuel Gichigi** submitted for the 9th -15th Defendants.

5. The Applicant submitted that they had served all defendants some directly and others through their advocates. **Mr. Kirimi** submitted that most of the defendants had already vacated the suit property **L.R No. 9042/126** and they filed this application seeking inter alia for orders to be allowed to fence the property and bar those defendants who had left from returning to the suit property. He further stated that there was also a Court of Appeal ruling which had issued stay orders against the eviction of 15th -39th Defendants from the suit property pending the hearing of the appeal filed in respect to **Nairobi ELC case No. 56 of 2012 (OS)**. In view of the foregoing, Counsel sought for status quo orders to be issued and also the Court to grant payer 2 and 10 of the application.

6. In response, **Mr. Gichigi** opposed the grant of any interim orders. He submitted that his clients are not party to the Court of Appeal case and further that the Applicant had already obtained eviction orders from another suit and there was no need to file a fresh suit. Counsel submitted further that the Court of Appeal had stayed the eviction and owing to the same he had no objection for grant of status quo orders.

7. **Mr. Makori** contended that this application should not be entertained by the Court at all in view of the pending stay issued by the Court of Appeal. He submitted that the issue was about ownership of the land and the Plaintiff had no right to put a fence while the matter was still pending before the Court of Appeal. It was his further contention that allowing the same would go contrary to the Court of Appeal's Ruling. Counsel opposed the grant of any interim orders since in his view granting the same would create further confusion in the matter.

8. **Mr. Gisemba** associated himself with the submissions of **Mr. Gichigi** and added that he had no objection to the grant of the status quo order orders.

9. I have considered the application and the oral submission of the parties. The issue which in my opinion arise for determination is *whether the Applicant has made out a case for the prayers sought.*

10. Counsel for the Applicant had urged the Court to consider at this stage granting prayers 2 and 10 of the Application and also a status quo order with a view of protecting the suit property. At prayer 2, the Applicant has sought for an order allowing the erection of a permanent fence around its property L.R No. 9042/126 while prayer 10 seeks for orders directing the OCS Embakasi Police Station to assist in enforcement or prayer 2 if it will be granted.

11. This in essence means that the Applicant is seeking for a mandatory order at the interlocutory stage. It is a well settled general proposition of law that mandatory injunction at the interlocutory stage should not normally be granted which has the effect of granting the final relief. However, there is no such mandate by any law that in all circumstances such a relief at an interlocutory stage has to be refused. Thus, general proposition of law is not an absolute principle of law. Needless to say, that it is only under exceptional circumstances such a relief at interlocutory stage can be granted by the courts.

12. In the case of *New Ocean Transport Limited & Another v Anwar Mohamed Bayusuf Limited [2014] eKLR*, the Court of Appeal expounded on the different types of injunctions. It was stated: -

"We appreciate that an injunction is an order of the Court directing a party to the proceedings to do something or refrain from doing a specified act. It is granted in cases in which monetary compensation does afford an inadequate remedy to an injured party. See Halsbury's Laws of England 3rd edition, vol. 21 at pg. 343. Basically, there are 2 types of injunctions; positive and

negative. The positive injunction would direct a party to do something whereas a negative one will restrain such a person from doing something. Among the positive injunctions will be mandatory injunction. This injunction orders some act to be done. Part of this family is the restorative injunction being sought by the applicants in the instant application. This type of injunction requires the person against whom it is directed to undo a wrongful act, to restore the status quo ante so that the damage does not continue. Then there is the mandatory injunction per se which compels a party to carry out some positive act to remedy a wrongful omission. As for negative injunctions, these would include prohibitory, perpetual, interlocutory and Quia Timet injunctions.” [Emphasis added]

13. The principles of granting a mandatory injunction are well settled and set out in the following cases;

In the case of *Nandan Pictures Ltd. Vs. Art Pictures Ltd & others, Air 1956, Cal 428*, Chakravartti, CJ. of the High Court of Calcutta set out, in the following passage, the rather limited scope in which a mandatory injunction is available at the interlocutory stage:

“At the same time, I may point out what the accepted principles have been and what has been, according to the reported cases, the practice of the Courts. It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where, with notice of the institution of the plaintiff’s suit and the prayer made in it for an injunction to restrain the doing of a certain act, the Defendant does that act and thereby alters the factual basis upon which the plaintiff claimed his relief. An injunction issues in such a case in Order that the Defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the Defendant to undo what he has done with notice of the plaintiff’s suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit.”

In *Shepherd Homes Limited Vs Sandahm Homes Limited V. Sandahm [1971] 1 CH. 34*, Megarry, J. stated:

“it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects 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”

14. As well the principles for granting a temporary injunction are set out in the case of *Giella vs Cassman Brown (1973) EA 358*, which are: that firstly, an Applicant must show a prima facie case with a probability of success, secondly 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 thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.

15. A mandatory injunction is different from a prohibitory injunction in the sense that an applicant for mandatory injunction must prove his case on a standard higher than the standard in prohibitory injunctions.

16. 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 or 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.”

17. 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 demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

18. The above cited cases lay 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.

19. In the instant case, the Applicant submitted that it was not disputed that the land is registered in its name and that they were seeking to fence off the property to stop any persons who had left the property from coming back and putting up new structures. On this aspect, the Applicant has established a prima facie case with chances of success. I find that the applicant has demonstrated to the satisfaction of this court, that there are special and exceptional circumstances that warrant the granting of the orders of mandatory injunction sought.

20. Counsels herein save for the Counsel for 15th -39th Defendants had no problem to the grant of the status quo orders herein. In the specific context of such applications where parties are agreeable to grant of status quo order, the Court can grant the same pursuant to **paragraph 32 of Practice Directions on Proceedings in The Environment and Land Courts, and on Proceedings Relating to The Environment and The Use and Occupation Of, And Title to Land and Proceedings in Other Courts (Gazette Notice No. 5178 of 2014)** which provides:

“During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.”

21. During the submissions, Counsel for the Applicant indicated that he is aware that the Court of Appeal had granted stay orders against the eviction of some defendants and that while still being aware of the same he had filed this suit seeking for interim orders as were outlined in the Application. **Counsel Makori** for 15th -39th Defendants urged the Court not to entertain the Application in view if the orders issued by the Court of Appeal.

22. The claim naturally follows the subject, and jurisdiction does likewise. In essence, once a court is seized of jurisdiction over a certain subject, that divests all others of jurisdiction over the same. This is what this court may refer to as momentary suspension of all other jurisdictions until that subject moves legally to any such other judicial body as provided by law. And once the subject moves to that other judicial body properly authorized to handle it, the next body legally assumes jurisdiction over that subject thereby causing the previous forum to experience momentary suspension of its jurisdiction. It is momentary in the sense that there is a possibility that once done with the subject, the Court of Appeal, may issue orders or directions that may affect the jurisdiction of this Court as to the hearing and disposal of the suit. This means that as long as the matter is legally before one forum for adjudication, other forums can only watch and wait for the decision of the forum with currency in the subject. In this case, the subject is in the hands of the Court of Appeal at the moment.

23. A court is only empowered to determine issues before it when it is vested with the jurisdiction. I have explained previously above how jurisdiction may keep moving from one court to another but cannot vest in two forums at the same time over the same issues by same parties. In the instant case, the Application has been brought when the Court of Appeal has already rendered its Ruling on 19th November 2021 to the effect of staying the eviction of the 15th - 39th Respondents/Defendants from **L.R No. 9042/126** pending the hearing and determination of the intended Appeal.

24. Having seen the Ruling delivered on 19th November 2021 by **D.K Musinga J.A, H.A Omondi J.A and Dr. K.I. Laibuta J.A in Nairobi Civil Application No. E084 of 2021** and having heard from the Counsels of the parties herein, I must say that this Court is bound by the same, I cannot vary or give any orders contrary to my Lordships of the Court of Appeal. That being the position, the jurisdiction of this court is held in abeyance until the Court of Appeal holds otherwise. I say so because, two courts of different jurisdictions cannot have the jurisdiction to deal with the same subject matter at the same time. There is no provision of allowing courts to have parallel jurisdictions.

25. I have stated as much that this court is of the considered view that momentarily it does not have the jurisdiction to hear and

determine the Application dated 26th November 2021 in view of the Ruling issued by the Court of Appeal. In the circumstances, the appropriate order that comments itself for granting at this stage is to pend this suit and await the further directions and or orders from the Court of Appeal.

26. Flowing from the above findings, I make the following orders: -

i) Status quo obtaining as at the time of filing the suit be maintained. For the avoidance of doubt the status quo means that only the defendants in occupation of the subject property L.R No. 9042/126 will continue being in occupation pending further orders from the Court of Appeal.

ii) The suit pending/proceedings herein, is hereby stayed under Section 6 of Civil Procedure Act, pending further orders from the Court of Appeal in respect to the subject property L.R No. 9042/126.

iii) This suit to be considered and mentioned together with Nairobi ELC No. E049 of 2021 (OS) Florence Chematun & Others vs Patmwa Limited and Nairobi ELC No. E372 of 2021 Mary Waceke Muigai vs Nairobi Metropolitan Services and Patmwa Limited which relate to the same subject property L.R No. 9042/126.

27. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF DECEMBER 2021

E. K. WABWOTO

JUDGE

In the Presence of: -

Mr. David Kirimi for the Applicant/Plaintiff.

Mr. Emmanuel Gisemba for the 8th Respondent/Defendant.

Mr. Samuel Gichigi for the 9th -14th Respondent/Defendants.

Mr. James Makori for the 15th -39th Respondent/Defendants.

N/A for 1st -7th Respondents/Defendants.

Court Assistant: Caroline Nafuna.

E. K. WABWOTO

JUDGE



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