IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Hancox CJ, Kwach & Cockar JJ A)

CIVIL APPLICATION NO NAI 186 OF 1992 (NAI 77/92UR)

KAMAU MUCUHA ……..… APPLICANT

VERSUS

RIPPLES LTD…….……..DEFENDANT

(Intended appeal from the Ruling of the High Court of Kenya at Nairobi (Mwera, J) dated 17th September, 1992 in HCCC No 4522 of 1992)

RULING

Hancox CJ. Rumwe Farmers Co-operative Society is the registered proprietor as lessee from the Government of Kenya of the land and building situated at LR 209/4985 Mfangano Street Nairobi for a term of 99 years from 1st March, 1958. On the ground floor of that building there exists a shop known as Shop No 1 which was let to the applicant, the defendant in the High Court, Kamau Mucuha, for 51/2 years commencing on 1st January, 1988. A month later the applicant sub-leased the shop for 5 years and 5 months less one day, to the respondent, the plaintiff, in the High Court, the one day exception being for the purpose of ensuring that the respondent had a reversion on the sub-lease. Had the sub-lease miriously ended with the head lease, then it would have been invalid.

Thus the initial terms demised were:-

Rumwe Co-operative Society (Head lease) 1st March 1958 to 28th February 2057.

Kanau Mucuha: 1st January, 1988 to 30th June, 1993.

Ripples Ltd: 1st February, 1988 to 29th June, 1993.

However, clause 4 of the sub-lease contained an option in favour of the respondent to renew the lease for a further $2^1/_2$ years, and required the applicant to exercise his option to renew contained in the Head Lease. The only brake, or hindrance, on this exercise of this option, so far as the respondents are concerned, was that they should not have committed any breach of the sub-tenant's covenants and conditions contained in the lease.

Thus, as Mr Regeru, on behalf of the applicant pointed out during his submission, it was inaccurate to say, as Miss Ochande did when presenting her argument on behalf of the applicant, that the sub-lease was on the verge of expiry, and that consequently the injunction granted by Mwera J on the 17th September, 1992, was purposeless; so that there could be no benefit to the respondent corresponding to the detriment occurring to the applicant. Mr Regeru submitted that there was in fact a substantial period to run, because

the extended term under the option would not expire until 30th December, 1995, and later if the period which during which his client had been unlawfully out of the premises, since July 1992, was deducted from the term of the sub-lease.

On the 17th July, 1992, the respondents were unlawfully thrust out of Shop No 1 on the pretext (so the respondents say) that they had failed to pay the rent, the arrears of which amounted to Shs 97,920/- as at the time of filing suit on 21st August, 1992. This fact is substantially disputed, the one side producing letters of demand alleging returned cheques, and the other producing the receipts for several months rent.

The respondents for some reason initially filed suit in the Principal Magistrate's Court at Sheria House sometime between the eviction complained of and the 6th August, 1992, but that suit was discontinued on 19th August, 1992, and the instant one was filed two days later. An injunction in mandatory terms to restore possession of Shop No 1 to the respondents was, *inter alia* claimed, and simultaneously a Chamber Summons claiming similar but temporary relief was filed, asking that service be dispensed with.

It appears that an *ex parte* prohibitory injunction was given against alienating the shop but the mandatory injunction was not. The *inter partes* application was subsequently heard before Mwera J who gave a reasoned ruling on the 17th September, 1992, and who evidently had little hesitation in confirming the *ex parte* order and in adding the mandatory injunction sought. It is from his decision that the instant appeal is brought. The main thrust of Mr Regeru's submission was that not the slightest attempt had ever been made by the applicants to comply with Mwera J's order, in fact they had flouted it, (by failing to return any of the respondents stock in trade, goods and chattels unlawfully distrained upon), and, indeed contempt proceedings in this respect were contemplated.

Moreover, Mr Regeru complained, the party to whom the applicant had unlawfully demised the shop, Unitrade Printers, then sued both the parties to this appeal, claiming *inter alia* that they were the lawful tenants and an order restraining the Respondent from evicting them; an attempt, Mr Regeru says to pre-empt the order of Mwera J. Happily, however, Shields J, refused to rise to the bait so temptingly placed before him in the second suit - High Court Civil Case 5028 of 1992 – and in a characteristically incisive, ruling delivered on 2nd November 1992, in effect held that, so far as the immediate order for restoring possession was concerned, the matter was *res judicata* before Mwera J.

I now come to the substance of Miss Ochanda's argument. It is that the learned judge erred in granting a prohibitory injunction in the prevailing circumstances, first because the premises had by then been converted from a catering establishment into a printing press, and secondly because, they had been demised to a person who was not before the Court in the instant case. In consequence Mwera J's order was incapable of being complied with for both these reasons. The judge, Miss Ochanda said, had never even considered the effect of the transformation in his ruling.

Miss Ochanda's first authority was *Shepherd Homes v Sandham,* [1970] 3 WLR 348. In which, Megarry J as he then was, drew the distinction between a prohibitory and a mandatory injunction. He said, at p 356

"whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may (as in the present case) require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials if it is ultimately established that the defendant was entitled to retain the erection."

Next she submitted that Mwera J should not in any event have granted a mandatory injunction, which is a remedy very sparingly granted by the Court as a temporary measure on a notice of motion rather than at the hearing. In support of this proposition Miss Ochanda again cited, *Shephered Homes v Sandham (supra)* and also *Locabail International Finance Ltd v Agroexport* [1986] 1 All ER 901, in which the *Shephered Homes* case was extensively cited and as I understand it, approved. In the second case Mustill LJ said: at p 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, 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."

On clear authority, therefore, Miss Ochanda said that a higher standard has to be applied before a temporary mandatory injunction is granted than in the case with a prohibitory injunction. What is required is a "high degree of assurance that at the trial it will appear that the injunction was rightly granted." This element, Miss Ochanda submitted, was clearly lacking in Mwera J's ruling, and the requirement was all the more important because, in the instant case, the premises are incapable of being restored to the condition in which they were before eviction. Finally in support of her submission that a court should be reluctant to grant a temporary mandatory injunction, a principle to which she said the judge paid lip service but did not apply, Miss Ochanda cited *Wrotham Park Estate Co v Parkside Homes* [1974] 2 All ER 321, which also sets out the same principles as regards the mandatory injunctions which are to be found in the other two cases especially the quotation from *Isemberg v East India House Estate Co* [1863] 33 L J on 392 at p337.

Finally, Miss Ochanda submitted applying the test laid down as regards rule 5(2)(b) applications in *Githunguri v Jimba Credit Corporation*,Civil Application No Nai 161 of 1988 her client had a good arguable appeal with a fair chance of success, and that because of the events she had related, that success would be nugatory if the instant application were not granted.

Speaking for myself, I entirely agree that, historically, the principles laid down with regard to temporary mandatory injunctions are that they will only be granted exceptionally and in the clearest cases. In *Canadian Pacific Railway v Gaud* [1949] 2KB,Cohln LJ said at page 249:

"I entirely agree…….. that the granting of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant, but it can be granted."

The reason for the rule is plain. Megarry J put it succinctly in a subsequent passage in the *Shepherd Homes* case as follows:

" …… .... if a mandatory injunction is granted on motion, there will normally be no question of granting a further mandatory injunction at the trial; what is done is done and the plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or contained."

In the instant case, it is of course, possession rather than destruction that the plaintiff was seeking.

The statements contained in these passages, however, leave out of account, the situation when, as here, it is alleged that the defendant has taken the law into his own hands and taken direct action instead of going through the legally prescribed procedure. In other words he has, by his own act, disturbed the status quo. Is it to be said that the plaintiff may not go to the Court to seek an order which is mandatory in the sense that it compels the other party to do some act which restores the status quo.

The point is neatly illustrated by the decision of Goddard LJ in *Thompson v Park* [1944] 2 All ER 477 in which the question arose as to which of two rival prep schools should occupy the premises which belonged to the defendant but which had been demised to the plaintiff. The Court of Appeal held that it is fallacious for a person who forcibly and riotously enters premises to maintain that his occupation of these premises is the status quo which must be maintained, and not disturbed, which of course in very many cases is the object of a temporary injunction – to keep things in staus quo so that the property in question is maintained, as far as possible, intact until the final determination of the suit. Goddard, LJ held in *Thompson v Park* that the status quo was not that which existed after the intruder's illegal acts, but that which existed beforehand.

In the United Kingdom those who forcibly enter premises especially if the term demised has not expired, may expose themselves to punishment under the statutes of forcible entry, the first of which was the reign of Richard II, and also to an action for trespass *quare clausum freigit* – see *Hemmings v Stoke Pages Golf Club* [1918-1919] All ER 798.

In these circumstances is it a bar to the plaintiff coming to the Court for relief merely because the order he seeks is in form of mandatory? I think not. In the *Shepherd Homes* case, Megarry J gave the illustration

"If, of course, the defendant has rushed on with the 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."

Did the respondent plaintiff in this case seek the Court's assistance with reasonable promptitude? Mr Regeru has submitted he did. Certainly the Principal Magistrate's Court action must have been filed before the 6th August when the "applicant's replying affidavit" in that Court was filed. So that case must have been filed almost immediately. Then it was discontinued, and the instant case commenced by the filing of the plaint on 21st August, just over three weeks later. In my opinion this chain of circumstances, initiated on behalf of the plaintiff, does amount to reasonable promptitude. The status quo was in my judgment the state of affairs subsisting before the applicant entered the premises, evicted the respondent and installed another tenant. The learned judge in my view recognised the seriousness of a temporary mandatory injunction but nevertheless decided to grant it and thereby restore the status quo. I think he was right in so doing.

Applying the test laid down by Apaloo J A in giving the judgment of this Court in *Githunguri v Jimba Credit Corporation* (*supra*) and repeated in *Re: Bishop Muge* [1990] 2 KAR 205 at p 208, while I do not say that the intended appeal is frivolous, I would nevertheless refuse this application for the reasons I have endeavoured to state in this ruling.

Before concluding this judgment I would refer to paragraph 4 of the formal order extracted on 22nd September 1992. It says that police assistance may be enlisted to ensure that the plaintiff (ie the respondent) is reinstated in the premises. I have not been able to find any such order in Mwera J's ruling, but it would, in any event be unlawful to utilize the police in a civil action for the purpose of effecting or aiding private evictions or reinstatements. Including that paragraph the Deputy Registrar was acting wholly *ultra vires*.

For the foregoing however, I would dismiss the application, with costs to the respondent.

Kwach JA. This is an application under rule 5(2)(b) of the Court of Appeal Rules seeking a stay of execution of the order of Mwera, J given on 17th September, 1992, in a landlord and tenant case.

Kamau Mucuha (the applicant) had sublet a shop on plot LR No 209/4985, Mfangano Street, Nairobi, to The Ripples Ltd (the tenant), for a term of 5 years and 5 months from 1st February, 1988, at a monthly rent of Shs 10,000/=, payable each month in advance. The reserved rent was to be revised after two and a half years but the revised rent was not to exceed Shs 13,000/= per month. The tenant also had an option to renew the sublease for a further term of 2 years and 6 months by sending a written request to the applicant not less than 3 months before the expiration of the term at a rent of Shs 16,900/= per month. The tenant used the premises for the business of a restaurant.

On 17th July, 1992, the applicant wrote to the tenant claiming Shs 97,970/= by way of arrears of rent and interest. The tenant denied the claim by the applicant that there was any rent outstanding. On 28th July, 1992, the applicant instructed a firm of auctioneers who invaded the tenant's premises and levied distress upon the goods of the tenant and carried them away. The applicant also evicted the tenant from the premises and immediately sublet them to a new tenant, Unitrade Printers Ltd. The said Unitrade Printers Ltd provided the transport used by the applicant and the auctioneers to carry away the tenant's goods. The tenant immediately filed proceedings to challenge the illegal distress and eviction and then took out a

Chamber Summons under order 39 of the Civil Procedure Rules seeking the following, among other, reliefs:

(a) a prohibitory injunction restraining the applicant, his servants and agents from alienating or demising the suit premises; and

(b) a mandatory injunction requiring the applicant to forthwith reinstate and restore full and unconditional possession of the suit premises to the tenant and also to return forthwith the goods attached in their original condition and in default to pay the tenant compensation to the full value of those goods.

The application was supported by an affidavit sworn by Riaz Jivan, the Managing Director of the tenant. The affidavit explains in detail the circumstances leading to the attachment of the tenant's goods and its eviction from the suit premises. Mr Jivan estimated the loss of profit suffered by the tenant to be Shs 7500/- per day.

There was a replying affidavit filed by the applicant in which he deponed that there had been a verbal agreement between him and the tenant to increase rent to Shs 13,000/- per month with effect from 1st July, 1990; that after evicting the tenant he had sublet the suit premises to Unitrade Printers Ltd who had turned the premises into a printing press; that the cost of restoring the premises back to a restaurant would be prohibitive.

There was annexed to that affidavit a copy of a letter dated 29th July, 1992, addressed to Charles Munge of Unitrade Printers Ltd setting out the terms to be contained in the tenancy agreement between the applicant and Unitrade Printers Ltd. The rent was to be Shs 17,000/=, payable quarterly in advance. This was to be increased automatically after 2 years by 30% to Shs 22,000/- pm.

The application in due course came before Mwera J who after hearing submissions, wrote a very careful and well-reasoned ruling issuing the two injunctions sought by the tenant. The ruling was delivered on 17th September, 1992. On 21st September, 1992, the applicant filed a notice of appeal and on 23rd September, 1992, filed the present application.

Mrs Ochanda, for the applicant, submitted that in granting the injunctions, the judge did not apply the proper test. She said that since the premises had been altered, they can no longer be of any use to the tenant. The premises had been sublet to another tenant who was now using them for a printing business.

She referred to a passage in the judgment of Megarry J in the case of *Shepherd Homes Ltd v Sandham* [1970] 3 WLR 348 at page 356, dealing with the distinction between prohibitory and mandatory injunctions.

Mrs Ochanda also criticised the judge for not weighing detriment against benefits arguing that by the time the premises are restored to their original condition, the lease would have expired. I cannot see the basis of this submission because there is nothing in the judge's order requiring the applicant to undertake such a restoration.

Mrs Ochanda also submitted that the order should not have been made because the tenant had been guilty of delay in seeking redress, but this cannot be correct because the record shows that the tenant went to law almost immediately after the illegal distress and eviction by filing a suit in the Resident Magistrate's Court at Sheria House in Nairobi.

The main thrust of Mrs Ochanda's argument was that the injunctions should never have been issued at all. On that basis, she went on to say that the applicant has an arguable appeal, or put another way, that the intended appeal is not frivolous. That may well be so but in this application, we do not have to decide whether the judge was right or wrong. That determination will be made at the hearing of the appeal itself. In his affidavit in support of the application, the applicant has put great emphasis on the inconvenience and cost to which his present tenant will be put if the stay is refused. To express a concluded view on the various submissions of Mrs Ochanda at this stage would certainly prejudice the appeal and I do not,

therefore, propose to do so. It is clear, both on authority and principle, that there is jurisdiction to grant a mandatory injunction in an appropriate case.

For my part, I am content to, decide this application purely on the track record of the applicant since the order complained of was made last September. He was required to do three things. First, he was ordered not to alienate or demise the suit premises. Secondly, he was required to reinstate the tenant. And thirdly, he was required either to return the goods of the tenant or pay him compensation. Up to this day, he has made no attempt to comply with any of these orders. With regard to the first and the second, he could have gone back to the judge and explained his difficulties having in the meantime put a new tenant into possession. But with regard to the return of the goods wrongfully attached, what possible excuse can he have for not complying? None at all. He is, in my opinion, in flagrant disobedience of the order of the judge and now comes to this court for temporary dispensation. He should not be allowed to use the process of this court for such a patently mischievous purpose. As Lord Goddard LJ said in the case of *Thompson v Park* [1944] 2 All ER 477 at page 479 - E: Having got back into the house with strong hand and with multitude of people, he has established himself in the house, and, he then says:

'I ought not to have an injunction 'given against me to make me go because I got back here and got my boys back and, therefore, the *status quo* preserved..'

The status quo that could be preserved was the status quo that existed before these illegal and criminal acts on the part of the defendant. It is a strange argument to address to a Court of law that we ought to help the defendant, who has trespassed and got himself into these premises in the way in which he has done and say that that would be preserving the status quo and that it would be a good reason for not granting an injunction".

In the case of *Canadian Pacific Railway v Gaud* [1949] 2 KB 239, Cohen LJ put the matter beyond doubt when he said at page 249:

"Mr Collard's fourth point raises the question whether interlocutory relief should be granted. I entirely agree with what he said at the end of his argument, that the granting of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant, but it can be granted."

The only valid criticism of the order of the judge which I can see as of now, but which does not swing the scale one way or the other in this application, is the direction that the assistance of the police should be enlisted to secure compliance by the applicant. The police should never be involved in such matters as there is specific provision for the enforcement of an injunction under order 21 rule 28 of the Civil Procedure Rules.

For these reasons, I would decline to grant the relief sought, and dismiss the application with costs.

Cockar JA. This application under rules 5 (2) (b) and 42 of the Court of Appeal Rules, filed under a certificate of urgency, seeks a stay of execution of the ruling given by Mwera J in HCCC 4522/92 pending hearing and determination of the appeal filed by the applicant challenging the said ruling.

Briefly the facts are that the respondent (plaintiff in the suit) is a sub-tenant of the applicant (defendant in the suit) of shop number one situated on the ground floor of Rumwe House, Mfangano Street, Nairobi, on LR No 209/4985 (hereinafter referred to as the suit premises) by virtue of a sub-lease agreement dated 1st February, 1988, made between the respondent and the applicant (the head lessor) for a term of five (5) years and five (5) months from the said date at a monthly rent of Shs 10,000/= payable monthly in advance. Pertinent to the matters in issue are the clauses prescribing an elaborate procedure to be followed for increase in rent after the expiry of 2 years and 6 months from the commencement of the lease and for an extension of the period of lease at the option of the tenant that is the respondent. On 17th July, 1992, the applicant sent a notice demanding payment of Shs 97,920/= by way of arrears of rent and interest. The respondent claims that no rent at all was due. On 28th July, 1992, the applicant caused M/S Parkview Auctioneers to levy distress against the goods and stock-in-trade of the respondent in the suit premises. The respondent was simultaneously also evicted from the suit premises. The respondent

claimed that the levy of distress was unlawful because no rent at all was due and the eviction was illegal, null and void and of no effect.

The respondent. immediately sought redress by filing a suit in the Principal, Magistrate's Court as Sheria House. This suit was, however, withdrawn and on 21st August, 1992, the respondent filed a plaint in the High Court of Kenya at Nairobi and sought judgment for *inter alia* the following prayers:

(a) A declaration that the eviction was i1legal, null and void and of no effect and for unconditional repossession.

(b) An order to restrain the applicant from alienating and demising the suit premises pending the hearing and determination of the suit.

(c) A mandatory injunction for reinstatement in and unconditional re-possession of the suit premises and for the return of the respondent's stock-in-trade, goods and effects.

(d) Aggravated and special damages.

Simulteneously with the plaint the respondent also took out a chamber summons seeking against the applicant an injunction to restrain and also a mandatory injunction in terms of the above prayers, (b) and (c) of the plaint. The Managing Director of the respondent company, Riaz Jivan, swore and filed an affidavit together with relevant documentary annextures in support of the chamber summons. On the same day that is on 21st August, 1992, an interim injunction to restrain the applicant from alienating the suit premises was granted by the Court.

In his replying affidavit the applicant deponed to *inter alia* the following facts:-

1. The respondent's previous director had verbally agreed with the applicant to the monthly rent being increased to Shs 13,000/= with effect from 1st July, 1990. But as that particular director had gone overseas the respondent's present director had adamantly refused to pay the increased rent.

2. After the respondent's eviction the suit premises were sublet to M/s Uni-Trade Printers Ltd who converted the entire suit a premises into a printing press.

3. After the withdrawal of the applicant's suit in the Principal Magistrate's Court at Sheria House, the applicant gave his consent to the new tenant to proceed with the re-construction of the suit premises and that a reconversion of it into a hotel now would involve a considerable expense and that the respondent could be adequately compensated by an award of damages.

An affidavit in reply dated 4th September, 1990, by Riaz Jivan, the Managing Director of the respondent company was filed denying any mutual agreement to increase the rent to Shs 13,000/- per month as from 1st July, 1990, and reiterating the elaborate procedure that had been prescribed in the sub-lease which provided for an agreed increase in the monthly rent. It is to be noted that in his supporting affidavit of 21st August, 1982, Riaz Jivan, of the respondent company, deponed that after the attachment of goods an employee of the respondent company, Sadrudin Punjani, offered to pay Mr Kamonde, the then advocate for the applicant, the alleged outstanding arrears for the attached goods to be released but Mr Kamonde informed him that his intructions, apart from levying distress, were to evict the respondent from the suit premises. He also deponed that the vehicle of a neighbour, one Charles Munge, who occupied premises next to the suit premises was used to transport the attached goods. The said Charles Munge is also the director of Uni-Trade Printers Ltd the new tenants of the suit premises as can be seen from the annexture (KMI) to the replying affidavit of the applicant sworn on 1st September, 1992. Neither of these two claims made in Riaz Jivan's supporting affidavit was denied by the applicant in his replying affidavit.

With the above facts and the submissions from the advocates of both the parties before him during the *inter partes* hearing of the application the learned judge, who now had also to deal with the prayer for a manadatory injunction, found himself satisfied that the respondent had established a *prima facie* case

against the applicant, that there was a need for a status quo to be maintained through a prohibitory injunction, and that the applicant's action was such as to attract a mandatory injunction in order to restore the status quo. He therefore in his ruling dated 17th September, 1992, granted the orders in favour of the respondent in terms of prayers (b) and (c) summarized above.

On 23rd September, 1992, the applicant filed this notice of motion seeking a stay of the execution of the aforesaid ruling of Mwera J. While conceding that a levy of distress by itself did not terminate tenancy nor did it entitle an eviction, Mrs Ochanda, for the applicant, however, strongly contended that she had an arguable appeal. The suit premises had after eviction been completely transformed to suit the needs of a printing press. A great amount of expense had been incurred in bringing about the alterations. Even a re-instatement of the respondent in the suit premises would not, in her view, prove of any benefit to it because the same were no longer suitable for the respondent's purpose. Finally Mrs Ochanda also reminded us that as the sub lease for 5 years and 5 months had commenced from 1st February, 1988, a very short unexpired period of the sub-lease was now left. There was also a lack of promptitude on the part of the respondent in seeking its remedy. Eviction had taken place on 29th July, 1992, and the suit was filed on 21st August, 1992. Mrs Ochanda vigorously contended that the above factors had disclosed such special circumstances as to render the intended appeal against the ruling and order of the learned judge arguable.

As regards Mrs Ochanda's contentions in respect of the very short unexpired period of lease that is now left it was submitted by Mr Regeru, that the period of the sub-1ease ceased to run from the date of eviction. Further clause 4 of the sub-lease has provided for its extension for another period of 2 years and 6 months at the option of the respondent. With regard to lack of promptitude of which the respondent was accused Mrs Ochanda was not quite fair in her accusation because after the eviction the respondent had immediately sought the same reliefs in a suit filed in Principal Magistrate's Court at Sheria House. This suit was subsequently withdrawn and thereafter the present High Court suit was filed.

Mrs Ochanda was extremely critical of the grant of both prohibitory and the mandatory injunctions and particularly of the latter which she claimed was, in the absence of speial circumstances, not normally granted. She cited the cases of *Locabail Internatinal Finance Ltd vs Agro – export & Others* [1986] 1 All ER, *Shepherd Homes Ltd vs Sandham* [1970] 3 WLR & *Wrotham Park Estate Co vs Parkside Homes Ltd & Others* [1974] 2 All ER on the issue of mandatory injunction. I entirely agree with Mrs Ochanda on the factors that were particularly stressed in these authorities, and referred to us by her, that a Court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction, that 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 that this is a higher standard than is required for a prohibitory injunction. After referring to the prayers of aggravated and general damages that the respondent had also claimed in its plaint Mrs Ochanda submitted that the learned judge had erred in not finding that damages would have been the most appropriate remedy for the respondent because he was aware that the suit premises had after the eviction, been let to a third party who was not a party to the proceedings. In her view although the learned judge had considered the principles set down in the authorities that she had cited he had not applied them stringently before granting the mandatory injunction.

As regards Mrs Ochanda's submission that the learned judge had not strictly applied the principles governing the grant of a mandatory injunction, I quote below a passage from the ruling of the learned judge on this issue:

"In all the treatises, precedents and court arguments etc whenever an issue of a mandatory injunction arises it is clearly understood and accepted that such an injunction should issue in the clearest and special cases only. It should issue with utmost care and even reluctance. This Court appreciates this stance well. The rationale of this stance should be that the effect of an order for a mandatory injunction is that the party against whom the order is made should do or undo something. Many side effects may follow such an act. So it is well understood as to why Courts issue such orders with care and even reluctance."

This is not the stage where I can deal with this issue any further and I therefore say no more.

Mr Regeru who was understandably indignant that no attempt had been made by the applicant to serve the order of the learned judge on the 3rd party submitted that the applicant instead had the temerity by this application to seek a position which would result in a continuing benefit to the 3rd party which was obtained through such a blatantly unlawful eviction of the respondent. Not even the unlawful attached goods of a va1ue of over Shs 1.5 million had so far been returned to the respondent. The act of *mala fides* on the part of the respondent (and the 3rd party) was further aggravated by the fact that the 3rd party had filed a suit in the High Court being HCCC No 5028/92 at Nairobi and therein he had, though unsuccessfully, attempted to obtain an order for a stay of execution of Mwera J's said order thereby attempting to circumvent the said order and to have it stayed through the back-door.

Apart from the *mala fides* so displayed by the applicant and referred to by Mr Regeru, the thrust of the rest of Mr Regeru's submissions centered around his contention that having obtained an advantage by such wantonly unlawful acts the applicant ought not to be allowed by Court to retain' maintain that benefit and the position must revert to a status quo as it existed before the unlawful eviction took place. That is what Mwera J had in fact granted by his said order. He drew the Court's attention to the passage from 24 *Halisbury's Laws of England* (4th Edition) para 948 and quoted in *Locabail's case* which I give below:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing ……, if the defendant attempted to steal a march on the plaintiff …… a mandatory injunction will be granted on an interlocutory application."

A party, as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act and, without in any way attempting to pre-decide the intended appeal or to influence a decision thereon, I am of the view that the order of the learned judge, granting the prohibitory and mandatory injunctions ought not to be disturbed at this stage. I would, therefore, in full agreement with Hancox, CJ and Kwach JA, whose able drafts I have had the advantage of perusing, propose that this application be dismissed with costs.

Dated and Delivered at Nairobi this 10th day of March, 1993

A.R.W. HANCOX

…….

CHIEF JUSTICE

R.O. KWACH

…….

JUDGE OF APPEAL

A.M COCKAR

…….

JUDGE OF APPEAL