



**Dikus Transporters Limited v Ga Insurance Limited (Environment & Land
Case E075 of 2023) [2023] KEELC 18366 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18366 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E075 OF 2023
EK WABWOTO, J
JUNE 22, 2023**

BETWEEN

DIKUS TRANSPORTERS LIMITED PLAINTIFF

AND

GA INSURANCE LIMITED DEFENDANT

RULING

1. This ruling is in respect to two applications filed by the plaintiff on February 24, 2023 and March 18, 2023. The applications were accompanied by a supporting affidavit sworn by Diba Boru Jaldessa. The Application dated February 24, 2023 was later amended on March 1, 2023 seeking the following orders:
 - i. Spent.
 - ii. That the defendant/respondent be restrained by itself, its agents, servants, employees and by any other person whatsoever from trespassing, excavating and or continuing with excavation works, constructing or continuing to construct a perimeter wall round the plaintiff's LR No 209/22464 and 209/22465 ,or disposing off, selling, sub-dividing or dealing with the said parcels of land in any other way detrimental to the plaintiff's interest pending the hearing and determination of this application inter-partes.
 - iii. That the defendant/respondent be restrained by itself, its agents, servants, employees and by any other person whatsoever from trespassing, excavating and or continuing with excavation works, constructing or continuing to construct a perimeter wall round the plaintiff's LR No 209/22464 and 209/22465 or disposing off, selling, sub-dividing or dealing with the said



parcels of land in any other way detrimental to the plaintiff's interest pending the hearing and determination of this suit.

- iv. That an order of mandatory injunction be issued requiring the defendant/respondent to immediately demolish and remove the portion of the perimeter wall it has been erected round the plaintiff's LR No 209/22464 and 209/2246, clear the site and remove all material deposited or erected around the said properties.
- v. That the officer commanding Police Division OCDP Embakasi or his officers to ensure compliance with these orders.
- vi. That the costs of this application be paid by the defendant.

2. The Application was premised on the grounds that:

- i. The plaintiff is the registered proprietor in possession of LR No 209/22464 and 209/22465 which was the subject in ELC E114 of 2021 which the defendant was allowed to withdraw on February 23, 2023.
- ii. The court had issued orders of maintenance of status quo.
- iii. Shortly after withdrawal from the suit, the defendant's agents forcibly invaded and trespassed on the subject parcels of land and commenced massive excavation works.
- iv. That the unlawful and wrongful trespass and excavation are ongoing.
- v. The defendant has embarked on construction of a perimeter wall round the suit properties and deposited construction material on the said land.

3. The Notice of Motion application dated March 18, 2023 sought the following orders:

- a. That Mr Sachit Suresh Shah and other directors of GA Insurance Ltd be summoned to attend court to show cause why he or they should not be committed to jail for disobeying the court order issued against the defendant on February 28, 2023.
- b. That Mr Sachit Suresh Shah and other directors of GA Insurance Ltd be committed to jail for such terms as this court may determine for contempt of court disobeying and breaching the terms of the court orders of injunction issued on February 28, 2023,
- c. That the defendant be denied audience until it purges its contempt
- d. That costs of this application be paid by the defendant.

4. Pursuant to the direction issued by the court on March 23, 2023 it was directed that the both applications would be disposed of simultaneously and by way of written submissions.

5. In the plaintiff's submissions dated April 6, 2023, it was submitted that the plaintiff bought the two parcels of land in vacant possession and took possession in 2020. It was further argued that the root of the plaintiff's title stemmed from David Mutinda who was a registered rate payer in LR 209/10601/12 (prior to subdivision). The title was traceable from David Mutinda to Stephen Juma Ndeda to Dikus



Transporters Ltd. The plaintiff urged the court to grant the orders sought as against the defendant. Reliance was placed on the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358.

6. The defendant filed submissions (undated) in respect to the amended application on March 1, 2023 in which they contended that based on their belief that the sub division of the suit properties was fraudulent and the subsequent cancellation of the sub division and transfer was justification on which they made steps to enter the premises. It was argued that at this point in time, they would suffer a great harm should they court grant an order to demolish the perimeter wall. They also argued that they had exercised their right to withdraw ELC No E114 of 2021 under Order 25 of the [Civil Procedure Act](#) and therefore could not be accused of unlawfully withdrawing the said suit.
7. The defendant also filed submissions dated May 23, 2023 in respect to the application seeking to cite the directors of the plaintiff company for contempt. It was argued that the orders in respect to which the plaintiff seeks to cite the defendant for contempt were issued on February 28, 2023 and served upon them on the same day by email at around 16:53 Hours at a time when the construction of the perimeter wall had been concluded and as such the defendant could not be held guilty for contempt. Reliance was made to the cases of *Mbugua vs Mbugua* [1992] KLR 448, [Indian Airports Employees Union vs Ranjan Catterjee & another](#) [AIR 1999 SC 880:1999(2) SCC:537 and [Mahinderjit Singh Bitta vs Union of India & others](#) 1 A No. 10 of 2010.
8. I have considered the applications, rival affidavits and the respective submissions filed. In my view, the issue that arises for determination by this court are as follows;
 - i. Whether the plaintiff has made out a case for the grant of the injunctive orders sought.
 - ii) Whether this court should proceed to cite the defendant for contempt of its orders issued on February 28, 2023.
9. In the amended motion application dated February 28, 2023 the plaintiff sought a temporary injunction restraining the defendant from engaging in certain activities in respect to L.R No. 209/22464 and L.R No. 209/22465 pending the hearing and determination of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now settled. In *Giella v Cassman Brown & Co Ltd* [1973] EA 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer an irreparable injury that cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. This court is guided by section 63 of the [Civil Procedure Act](#) and Order 40(1) of the [Civil Procedure Rules](#), where in any suit it is proved by affidavit or otherwise—
 - (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiffs will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or



disposition of the property as the court thinks fit until the disposal of the suit or until further orders. [Emphasis Mine]

10. In *Nguruman Limited vs Jan Bonde Nielsen & 2 others*, Ca No. 77 of 2012, the court outlined that:

“In an interlocutory injunction application, the applicant has to satisfy the three requirements to;

- (a) Establish his case only at a prima facie level,
- (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) Alleviate any doubts as to (b) by showing that the balance of convenience is in his favour”

11. As stated above, for an applicant for a temporary injunction to succeed, he must demonstrate that he has a prima facie case against the respondent and that he stands to suffer irreparable harm unless the injunction is granted. The existence or not of a prima facie case is a matter of fact and must be established through evidence. The same with whether or not one stands to suffer irreparable harm unless an injunction is granted. In interlocutory applications, evidence is adduced through affidavits unless the court orders otherwise. It is undeniable that the question of ownership of the suit premises is at the heart of this suit. When deciding interlocutory applications, the court’s foremost task is not to apply permanent solutions but to preserve the subject matter for future determination. From the material before me, I am satisfied that the plaintiff has established a prima facie case. In view of the foregoing, it is only prudent that the temporary injunctive orders sought be granted pending the determination of the suit.

12. With regards to the issue of contempt, contempt of court has been defined as conduct which interferes with the administration of justice or impedes or perverts the course of justice. In specific, civil contempt consists of a failure to comply with a judgment or order of a court or breach of an undertaking of court. (See *Osborne’s Concise Law Dictionary*).

13. In the case of *Sam Nyamweya & others vs. Kenya Premier League Ltd and others* [2015] eKLR it was stated as follows:

“Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

14. In *North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi* [2016] eKLR the court discussed the elements that would constitute contempt as follows:

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and



(d) the defendants conduct was deliberate.”

15. In this instance, the defendant argued that there was lack of personal service of the orders issued and thus the respective directors lacked full knowledge of the same. The defendant also argued that the orders were issued on February 28, 2023 but were served to the defendant’s company at around 16:53 Hours by email as indicated in the affidavit of service at which time the construction of the perimeter wall had been concluded.
16. In the instant case, having considered the affidavits filed herein and further the defendant’s contention that they were not personally served with the orders issued by the court, there is uncertainty as to whether or not the defendant was indeed made aware of the said orders immediately they were served by email on February 28, 2023 at 16.53 Hours. In the circumstances, I am not persuaded that the plaintiff has demonstrated that the defendant wilfully failed, refused and or neglected to obey the court order.
17. In conclusion, the plaintiff’s amended motion dated March 1, 2023 and the application dated March 18, 2023 are hereby determined as follows:
 - i. Pending hearing and determination of this suit the defendant is hereby restrained by itself, its agents, servants, employees and by any other person whatsoever from trespassing, undertaking any constructing on the plaintiff’s L.R No 209/22464 and 209/22465 or disposing off, selling, sub-dividing or dealing with the said parcels of land in any other way to the detriment of the plaintiff.
 - ii. The application dated March 18, 2023 is hereby dismissed.
 - iii. Each party to bear own costs of the applications.

12. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF JUNE 2023.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Kairaria for the plaintiff.

Mr. Paul Mwangi for the defendant.

court Assistant; Caroline Nafuna

