



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC CASE NO.218 OF 2014

JEMIMAH WAKINI KIARIE..... PLAINTIFF

VERSUS

**CHINA ROAD AND BRIDGE CONSTRUCTION COMPANY LTD
DEFENDANT**

RULING

1. In a **Plaint** dated **16.12.2014** and filed on 16.12.2014 the Plaintiff/Applicant filed the instant suit seeking injunctive relief, declaratory orders, damages and costs of the suit. Contemporaneously, with the filing of the **Plaint**, the Applicant filed application dated 16.12.2014 seeking temporary injunctions against the Defendant/Respondent. It is worth noting that despite service with the pleadings that Respondent has not filed any replying affidavit to date of hearing the same application.
2. On 16.12.2014 the court was moved under certificate of urgency to issue temporary injunction against the Respondent, but the court directed the Applicant to serve the application for direction on 19.12.2014. On 19.2.2015 the parties' advocates appeared before the court and the Respondent undertook to compute damages of the applicant structures including on-going damages as they were negotiating and agreed to mention matter on 23.1.2015 to record settlement. By this time the Respondent had filed grounds of opposition.
3. Come on 23.1.2015 there was no settlement and the Respondent sought leave to file a replying affidavit which was granted. The advocates agreed to proceed with the hearing of the application on 23.2.2015. When the matter came for hearing of the application on 23.2.2015 the Respondent had not filed a replying affidavit and opted to rely on the grounds filed. The advocates made oral submissions. The Applicant's case is that she is a registered owner of land parcel **No. Ngong/Ngong/15681** comprising a house constructed of concrete and tile. There are other concrete buildings mainly the dog kennels and servant quarters. The land is also fenced with concrete wall.
4. Sometimes in 2012 the Defendant started blasting activities near the Applicant aforesaid residence and it is still on-going occasioning a lot of inconveniences and damage to the suit premises. The blasts are so strong that Plaintiff likens their impact to earth tremors. Initially the Applicant and area residents, joined hands and complained of damage caused to their houses prompting the Defendant to visit the residents premises to confirm the damages which it confirmed. The Applicant residence was visited at least 4 times by Mr. Li of the Respondent and the visit made

Respondent confirm the following damages:-

- Cracked walls
 - Damaged structural works
 - Cracked corridors
 - Damaged garage walls
5. All above had been repaired to salvage premises from collapsing. The Defendant promised compensation but to date same is not forthcoming. Before repairs were undertaken, the Defendant frustrated all efforts to have a meeting with Applicant's Quantity Surveyor. The Defendant is still continuing with the blasting activities which is aggravating the damage to the Applicant, thus claim for orders sought to mitigate the damage.
 6. The Applicant has annexed bundle of documents showing the Quantity Surveyor costing of initial repairs as at 4.11.2014 amounting to KShs.1,476,275/-. The Applicant had also issued a notice dated 26.7.2012 before instituting the instant suit. The Applicant opposes the application and has mounted 7 grounds vide grounds of opposition dated 19.12.2014 filed on the same date. The Respondent states that there is no *prima facie* case and the application is an abuse of the court process.
 7. The Respondent also states that the Applicant is guilty of the delay and equity does not aid indolent as the acts complained of commenced in 2012. The Respondent also impugns the affidavit specifically paragraph 9 to 11 and 13 as they allege admission contrary to order 19 rule 3 Civil Procedure Rule. The Respondent also contends that the alleged acts complained of are not being undertaken on the plaintiff property. The Respondent argues that damages would be adequate remedy for the Applicant. The Respondent concludes that there is no evidence to support case and in any event balance of convenience is against the grant of an injunction.
 8. After going through the material placed before the court and the parties' advocates submissions, I find the following issues emerging:
 1. Whether the threshold of grant of interim injunction in line with the principles set in the case of **GIELLA –VS- CASSMAN BROWN LTD** have been established?
 2. If yes what is the appropriate order to make in the circumstances of the case?
 3. What is the order as to costs?

The grant of interlocutory injunction is now trite law that the conditions set by the authority of **GIELLA –VS- CASSMAN BROWN CO. LTD.(1973) EA 358** have to be established. These are captured by the judgement read by SPRY, VP to wit:

“The grant of an interim injunction is an exercise of judicial discretion and an appellate cannot interfere unless it be shown that the discretion has not been exercised judicially... The conditions for grant of an interlocutory injunctions are now settled in East Africa. First, an applicant must show prima facie case with probability of success. Secondly, an interlocutory injunction will not normally grant unless the Applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

9. The averments by the Applicant in the affidavit and the Plaint have not been rebutted by the Respondent by way of a replying affidavit nor has Respondent filed a defence. The grounds of opposition do not constitute rebuttal of sworn evidence contained in the affidavit. The Respondent failed to take the opportunity given to file a replying affidavit and opted to rely on the grounds of opposition. The aforesaid circumstances leave court to largely rely on the sworn statement of the Applicant in the affidavit.
10. The Respondent attacks the content of paragraphs 9-11 and 13 of the supporting affidavit as being hearsay and offending order 19 rule 3 Civil Procedure Rules 2010. The provisions are to the effect that:

The affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove:

“Provided that at interlocutory proceedings (like the instant one) or by leave of court an affidavit may contain statement of information and belief showing the sources and grounds thereof”.

- 11.Paragraph 9 talks of the complaint made by the Applicant and the neighbour. Paragraph 10 talks of the visits by the Defendant’s team led by one Li. Paragraph 11 talks of the noted damage caused by the acts complained of and the repairs done and so is paragraph 12. Paragraph 13 also mentions the promise to compensate the Plaintiff by the Defendant which was never fulfilled. All these are facts within Applicant’s knowledge.
- 12.The Applicant letter annexed as part of annexed bundle of documents addressed to the Respondent dated 26.7.2012 was never replied to and nor has the Respondent denied the content or rebut the same on the face of the court. The Defendant was conceding that they were willing to compensate the Applicant and were negotiating to settle the claim. The annexed documents which are attached disclose at least KShs.1,476,275 damage incurred and renovated as by 4.11.2014 or thereabout. The Respondent has not questioned or denied the same.
- 13.The Respondent who visited the suit premises has not tendered any assessment to the damage done to the suit premises undertaken by its agents. The continuing damage is not denied but the Respondent answer to the same is that the same can be compensated.
- 14.The court finds that the first limb of the **GIELLA Authority** is established that a *prima facie* case is disclosed with probability of success. On the limb on harm, the damage has been demonstrated to the house and the structures of the premises which damage is on-going. Perhaps the issue is as to whether same can be compensated to stave off the issuance of the interim injunction sought. Despite the negotiations undertaken by the parties, the settlement was not forthcoming for reasons known to the parties. The Respondent has not disclosed its ability to pay the damage already disclosed and the future in event interim injunction is not granted. The acts complained of continue unabated. In the **PRINCIPLES OF INJUNCTION 2001**, by RICHARD KULOBA page 54-55, it states: interim injunction would be granted where:

“Although damages are assessable or might be adequate, the chances of getting them from the Defendant are remote...” or The Applicant might be obliged to enforce his rights under lengthy and expensive procedures or depend on remedies which are uncertain or which otherwise will not sufficiently safeguard his position.

- 15.Whereas the Applicant has averred the damage caused and continuation of aggravation of the same by the Defendant acts, the Respondent does not furnish any evidence of ability to pay any amount of damages should same be assessed in a successful claim in future. Under Article 70 of the Constitution of Kenya where the right to clean and healthy environment, under Article 42 is denied, violated, impugned or threatened a person can apply to court for redress in addition to any other legal remedies that are available in respect to the same.
 - 16.The remedies set in the same Article 70(2) are to the effect that court can order to stop or discontinue the acts complained of inter alia. The court can also order compensation. The applicant does not have to demonstrate that any person has incurred loss etc. In absence of Respondent demonstrating ability to pay damages, the court is prepared to hold that the second limb of the **GIELLA Authority** is established.
 - 17.On the issue of balance of convenience, the Applicant shows how the tremors are not only inflicting damage to the house but also to the family members. The Respondent has not demonstrated the magnitude of inconveniences it is likely to suffer if orders sought are granted. There are two allegations made from the bar by both sides especially when the parties attempted to have their case settled out of court;
1. The applicant advocates alleged that the house being damaged has costed about KShs.10 million to construct.
 2. The Respondent advocate alleged that the Respondent work and activities are for extracting materials being used to construct the Southern By-pass in Nairobi and any injunction will have

grave consequences.

18. The court is alive and takes judicial notice of the facts that Southern By-pass being constructed by the Respondent, and stopping extraction of materials might occasion delay in building it. However, the damage inflicted upon the Applicant has to be safeguarded. It is in the exercise of powers vested in this court under Section 13(7) ELC Act and other provisions of the law including Article 10(2) (b) of the Constitution I endeavour to do justice by making the following orders:

1. The parties will open joint interest earning account in parties advocate names for the Respondent to deposit KShs.5 million within 14 days to be held therein until suit is heard and determined.
2. In default of (1) above, the injunction sought in paragraph 3 of the Notice of Motion dated 16.12.2014 to issue and remain in force until suit is heard and determined.
3. The matter herein be heard on priority basis.
4. Parties to comply within 21 days and fix a hearing date.
5. Costs to the Applicant.

Dated and Delivered at Machakos, this 16th day of March, 2015.

CHARLES KARIUKI

JUDGE