



GA Insurance Limited v St. Elizabeth Academy- Karen Ltd (Environment & Land Case 61 of 2020) [2022] KEELC 15624 (KLR) (9 June 2022) (Judgment)

Neutral citation: [2022] KEELC 15624 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 61 OF 2020**

LN MBUGUA, J

JUNE 9, 2022

BETWEEN

GA INSURANCE LIMITED PLAINTIFF

AND

ST. ELIZABETH ACADEMY- KAREN LTD DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit vide a Plaint dated April 2, 2020 claiming that they are the registered owners of property LR No 1159/140 (Original No 1159/96/5) situated at Dagoretti Road, Karen but sometime in March 2020 the Defendant encroached unto the suit property and started carrying out excavation works and dumping debris which amounted to acts of trespass. The Plaintiff therefore seeks the following orders;
 - i. A mandatory injunctive order directing the Defendant by itself, its officers, agents, servants, assigns, representative and or any person claiming under them to forthwith remove the waste, debris, refuse and or excess soil or any material dumped thereon by the Defendant or on its order and or vacate all that property known as LR No 1159/140 (Original No 1159/96/5) situated at Dagoretti Road Karen;
 - ii. In the alternative to prayer (1) above, the Plaintiff be at liberty to immediately remove the waste, debris, refuse and or excess soil or any material dumped thereon by the Defendant or on its order and or vacate all that property known as 1159/140 (Original No 1159/96/5) situated at Dagoretti Road Karen at the Defendant's cost;
 - iii. A permanent injunction restraining the Defendant whether by itself, its officers, employees, servants, agents and or anyone claiming under their names



from howsoever entering, trespassing, remaining thereon, dumping debris or refuse or any material, trespassing, wasting away, damaging, threatening, attacking or restraining the Plaintiff or its servants access, entry use, enjoyment, interrupting, hindering and or in any way howsoever interfering with the Plaintiff's quiet and peaceful enjoyment, physical occupation, use and or lawful possession thereof;

- iv. The Honourable court do award general damages in the nature of aggravated damages for the Defendant's act(s) of trespass;
 - v. The Honourable court do award special damages in the nature of mesne profits for the Defendant's continued unlawful user of the Plaintiff's property; and,
 - vi. Costs of this suit.
2. When this matter came up for hearing on July 1, 2021, the Court noted that the Defendant had not complied with earlier orders issued on February 18, 2021 and July 1, 2020 to file and serve a trial bundle containing their pleadings, witness statements and documentary evidence. In particular, the order of February 18, 2021 contained a penalty clause where the suit was to proceed as an undefended claim in the event of none compliance. Come the date of July 1, 2021 and the court noted that the Defendant seemed not keen on resolving the dispute. Nevertheless, the defendant was again indulged by the court, whereby, they were to abide by the conditions given by the court including filing their trial bundle within 30 days, failure to which the defence belatedly filed would stand as struck out and the suit would proceed as an undefended claim.
 3. When this matter came up for hearing before me on November 2, 2021, the Defendant once again had not complied with the set conditions. The case was rescheduled for hearing to April 25, 2022 noting that Plaintiff too was absent. This case therefore proceeded as a formal proof on April 24, 2022 due to none compliance with court orders on the part of the Defendant who had legal representation all through.
 4. The Plaintiff called one witness (herein referred to as PW1) Sharon Mukania, its Legal Officer who adopted her witness statement dated April 2, 2020 as their evidence. She also produced the 4 documents in their bundle as Plaintiff exhibits 1 to 4. Her evidence is a replica of the averments set out in the plaint.
 5. The Plaintiff was directed to file their submissions by May 9, 2022 but this was not done.

Determination

6. The issue falling for determination is: Whether the Plaintiff is entitled to the prayers sought in the plaint.
7. The plaintiff's case is premised on the grounds that it is the owner of LR No 1159/140 (Original No 1159/96/5) Dagoretti Road, Karen and that the Defendant has encroached and trespassed on the said property and excavated/ dumped debris and waste materials on the said land thus rendering it unusable by the Plaintiff. I find that amongst plaintiff's exhibits is a Certificate of Title for the suit property LR No 1159/140.(original 1159/96/5) where the second entry shows that the property was transferred to the Defendant- St. Elizabeth Academy- Karen Limited on February 6, 2006. It was charged to National Bank as per entry number five and six in 2010, partially discharged in 2014 as per entry number seven, while entry number 8 shows that the land was transferred to GA Insurance Limited on April 14, 2014. Thus the registration records indicate that Plaintiff is the current registered owner of the suit property.



8. The provisions of Section 25 of the [Land Registration Act](#) provides that:
- “(1) (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”
9. Plaintiffs evidence has not in any way been challenged hence, they are entitled to the rights and privileges that come with ownership of the land as stipulated in the aforementioned statute.
10. The Plaintiff has also sought general damages for trespass and special damages in the nature of mesne profits. The Plaintiff Exhibit 4 is a valuation report dated December 31, 2019 where the value of the subject property is pegged at Kshs 625,000,000 market value. The Plaintiff Exhibit 2 are photos of the suit property undergoing excavation works allegedly by the Defendant. It is quite difficult from the valuation report and photographs to discern the nature and extent of the activities going on. Nevertheless, one can see lorries and dumped substances in the photograph on pages 16, 20 and 25 of the bundle.
11. Is the Plaintiff thus entitled to the general damages for trespass? The Court of Appeal in [Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited](#) [2017] eKLR held:
- “It is trite law and as correctly submitted by counsel for the respondent that trespass to land is an actionable tort per se and proof of damage is not necessary or required. In other words, where trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damage or loss as a result so as to be awarded damages. The court is under the circumstances bound to award damages, of course depending on the facts of each case.”
12. I find that the Plaintiff is entitled to general damages for trespass which I peg at the sum of Kshs 1,000 000.
13. On the claim of special damages, I make reference to the Court of Appeal case of [Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited](#) [2016] eKLR where it was stated that:
- “... it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit... The appellant apart from listing the alleged loss and damage, it did not, according to the respondent lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed there was not credible documentary evidence in support of the alleged special damage.”
14. Further, in the Court of Appeal case of [PME & another v PNE](#) [2019] eKLR, the court made reference to the case of [David Bagine v Martin Bundi](#), Civil Appeal 283 of 1996, where the same court expressed that:
- “Special damages in addition to being pleaded must be proved; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, this is what I have lost. I ask you to give me these damages...”



15. In the current case, no evidence was led to support the claim for special damages. The same is disallowed.
16. The final orders are;
- i. An order is hereby issued for the defendants to vacate the suit land LR No 1159/140 (original No 1159/96/5) and to forthwith remove the waste, debris and any other materials on the aforementioned suit property within 45 days failure to which, the Plaintiff is at liberty to remove the waste, debris, refuse and excess soil.
 - ii. A permanent injunction is hereby issued restraining the defendants their servants or agents from interfering with the suit Land LR No 1159/140 (Original No 1159/96/5) Dagoretti Road Karen.
 - iii. The Plaintiff is awarded general damages for trespass to the tune of Kshs 1000,000.
 - iv. The plaintiff is awarded Costs of the suit, plus interest which shall be calculated at court's rate from the date of delivery of this judgment

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Lusi for the Plaintiff

Court Assistant: Eddel Barasa

