



**GA Life Assurance Limited v St. Elizabeth Academy Karen Ltd (Environment & Land Case 715 of 2017) [2022] KEELC 15633 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 15633 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 715 OF 2017**

**LN MBUGUA, J  
JUNE 9, 2022**

**BETWEEN**

**GA LIFE ASSURANCE LIMITED ..... PLAINTIFF**

**AND**

**ST. ELIZABETH ACADEMY KAREN LTD ..... DEFENDANT**

**JUDGMENT**

**Background and Pleadings**

1. The Background of the dispute herein is well captured in a ruling delivered by this court (Judge Eboso sitting) on 11.2.2019 in the following terms;

“Until 19/6/2015, Land Reference Number 1169/377 (the “suit property”) (it should be 1159/377) was registered in the name of St Elizabeth Academy Karen Limited (the defendant). On 25/5/2010, the defendant charged the suit property to National Bank of Kenya (the chargee). On 25/11/2010, a further charge was registered against the title in favour of the same chargee. Subsequently, on 19/6/2015, the suit property was transferred to GA Life Assurance Limited (the plaintiff/respondent) after the chargee sold the suit property to them in exercise of the chargee’s statutory power of sale.

Prior to the sale of the suit property to the plaintiff, the defendant filed Nairobi High Court Civil Case Number 333 of 2013; *St Elizabeth Academy Karen Limited v National Bank of Kenya Limited*, in which it sought to restrain the chargee against exercising the chargee’s statutory power of sale. The application was rejected by Kamau J on December 16, 2014. The defendant’s application for a review of the orders of Kamau J was similarly rejected by Ochieng J on 18/8/2016. An appeal to the Court of Appeal against the decision of Ochieng J was declined by the Court of Appeal on 16/2/2018. Consequently, the suit property is registered in the name of the plaintiff herein.”



2. The current suit was filed *vide* a Plaint dated 9<sup>th</sup> November 2017 where the following orders were sought:
  - i. A mandatory order directing the Defendant by itself, its agents, servants, 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. 1159/377 (Original No. 1159/375/2) situated at Dagoretti Road Karen;
  - ii. A permanent injunction restraining the Defendant whether by themselves, employees, servants, agents and or anyone claiming under their names from howsoever entering, remaining thereon, dumping debris or refuse or any material, trespassing, wasting away, damaging, threatening, attacking or restraining the Plaintiffs 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;
  - iii. Mesne profits for trespass from 19<sup>th</sup> June 2015 until full compliance in (i) and (ii) above.
  - iv. Costs if this suit.
3. The Plaintiff claims that they are the owners of the suit property LR No. 1159/377 (Original No. 1159/375/2) situated at Dagoretti Road- Karen having purchased it through a private treaty on 20<sup>th</sup> May 2015 from the National Bank of Kenya who were exercising their statutory power of sale against the Defendant. The transfer was effected on 19<sup>th</sup> June 2015 and a discharge of the charge was registered. Earlier on, the Defendant had charged the suit property to the National Bank of Kenya on 25<sup>th</sup> November 2010 for a loan facility.
4. The Plaintiff claimed that having legally purchased the property, the Defendant had declined to allow them quiet possession and use of the suit property adding that the Defendant had trespassed unto the aforementioned land and dumped debris on it without the Plaintiff's consent. Thus the plaintiffs have suffered loss and damage.
5. The Defendant did enter appearance and filed a statement of defence dated December 21, 2017 averring that the registration of the suit land in the name of the plaintiff has been challenged in High Court Civil Suit No. 333 of 2013. The defendant contends that National Bank of Kenya colluded with the Plaintiff to illegally/ fraudulently register the property adding that the current suit is *subjudice* to the aforementioned High Court matter.
6. For the better part of the lifespan of this suit, applications and counter applications took center stage. Of particular importance is the application lodged by the defendant dated 28.2.2018 in which they sought orders for stay of this suit pending the hearing and determination of the case HCCC NO. 333 of 2013. In the ruling dated February 11, 2019 (Judge Ebozo sitting), the court observed that;

“In my view, a stay of either of the two suits may not be a proper move in the circumstances of the two suits. I say so because Nairobi HCCC Number 333 of 2013 is now 6 years old. The applicant who is the plaintiff in that suit has not told the court what it is that has prevented it from prosecuting that suit. It wants to stay the present suit without prosecuting the other suit and continue occupying land that is now registered in the name of the respondent (emphasize added). A stay order will therefore unduly perpetuate that state of affairs. In my view, a holistic approach will be to give the parties to the two suits the opportunity to elect to consolidate the two suits and have them disposed by the same court (empahesize added).”



7. Thereafter, the defendant filed an application dated 19.11.2019 before this court seeking to transfer the case HCCC NO. 333 OF 2013 to this court for the two suits to be consolidated. On December 2, 2019, this court observed and gave directions that the application for transfer of a suit ought to be made in the cause which is sought to be transferred. The indecision of the defendant on the issue of transfer and consolidation persisted for a while and on July 1, 2020, their advocate addressed the court as follows; “ we may not pursue consolidation”.
8. Eventually, the defendant’s aforementioned application for transfer of the high court matter to this court was withdrawn by consent on December 17, 2020, paving way for the hearing of this suit. The defendants were granted 21 days to file and serve their trial bundle. It is paramount to note that the defendants did not revisit the issue of transfer and consolidation of the two suits again, nor did they update this court on the status of the High court matter.
9. Despite the vibrant presence of the defendants in the prosecution of various applications, the said party went missing in action during the actual trial under circumstances which I term as outlandish. The said circumstances are that the suit was scheduled for hearing before me on November 9, 2021 when the plaintiff’s case proceeded to conclusion. The defence counsel even conducted cross examination upon plaintiff’s witness. At the close of the Plaintiff’s case, the defence counsel sought adjournment on the basis that their witness was attending to a patient. The court indulged them, putting off the defence case to April 25, 2022.
10. Come the date of April 25, 2022 during the virtual platform session and M/S Nguu holding brief for Mr. Mathenge for the defendant stated that “we are ready”. Thus the court proceeded give time allocation for defence hearing at 12pm in open court. The matter was called out in open court at the appointed time, when the counsel appearing for the defendant (M/S Nguu) addressed the court as follows;

“ Our witness, director of St Elizabeth was present this morning and we prepared for trial. However, when I called her and her advocate to meet in court, the witness met me with different news giving a number of reasons why she will not come to court. As counsel holding brief, I feel frustrated. I don’t understand why she has failed to turn up in court despite preparation. If court is lenient and we are indulged by Plaintiff’s advocate, we pray for another date.”
11. This court made a finding that no reasons (let alone good reasons) had been advanced as to why the witnesses for the defendants were not in court. In that regard the court proceeded to mark the defence case as closed.
12. In light of the above analysis, I can only conclude that the defendant’s deliberately elected to shun these proceedings, thus denying themselves an opportunity to tender evidence in support of their pleadings.

### **Plaintiff’s Case**

13. At the hearing on 9<sup>th</sup> November 2021, the Plaintiff called one witness (herein referred to as PW1) Sharon Mukania, their legal officer who adopted her witness statement dated 9<sup>th</sup> November 2017 as her evidence. She also produced the 3 documents in their list dated November 9, 2017 as exhibits 1-3, which are; Copy of certificate of title, sale agreement and the copy of the transfer and discharge of charge.
14. The plaintiff’s case is that the defendant, being the registered owner of the suit land had on November 25, 2010 charged the said land to National Bank of Kenya as security for a loan facility advanced by the said bank. On or about 20<sup>th</sup> May 2015, the bank as a chargor in exercise of its statutory power



of sale under the terms of the private treaty/Agreement sold the suit land to the plaintiff. Thus on 19th June 2015, a transfer of the suit property to the Plaintiff and a discharge of all the existing encumbrances thereon were registered thereby conferring the Plaintiff absolute and indefeasible title to the suit property.

15. The plaintiff avers that the defendant has since refused, declined and or failed to permit or allow the Plaintiff to enjoy quiet possession and use of the suit property without any justifiable cause and the Plaintiff has suffered loss of user and damages. PW1 further stated that the defendant hired goons who trespassed on the suit property dumping debris and soil.
16. During her testimony in court, PW1 stated that the case HCCC 333 of 2013 has since been dismissed.
17. On cross examination PW1 affirmed that the property was sold through a private treaty noting that they also undertook due diligence and found out that the property was up for sale.
18. On re-examination, PW1 stated that she was not consulted before the Bank exercised its statutory power of sale adding that they were not aware that there was an order barring the Bank from exercising the said power of sale.

### **Plaintiffs' Submissions**

19. The court gave directions on April 25, 2022 for parties to file and serve their submissions by 9<sup>th</sup> May 2022; none complied.

### **Determination**

20. This court finds that the issue falling for determination is:

### **Whether the Plaintiff is entitled to the prayers sought in their pleading.**

21. The Plaintiff's prayers against the Defendant are premised on the ground that the Plaintiff is the registered owner of the suit parcel LR No. 1159/377 (original No. 1159/375/2) Dagoretti Road, Karen which the Defendant has encroached and trespassed upon by excavating and dumping debris and waste materials on thus rendering it unusable. The defendant also declined to give vacant possession of the suit land to the plaintiff.
22. I have perused the document produced as Plaintiff's Exhibit 1, which is a Certificate of Title and the second entry thereof indicates that the property was transferred to the Defendant- St. Elizabeth Academy- Karen Limited on 4<sup>th</sup> April 2008. Entry number 5 of 25<sup>th</sup> May 2010 indicates that the land was charged to National Bank of Kenya Limited, while entry number 7 shows that the land was transferred to the Plaintiff- GA Life Assurance Insurance Limited on 19<sup>th</sup> June 2015. The agreement for sale of the suit land between the National Bank of Kenya and the plaintiff has been availed as Plaintiff exhibit 2 and is dated May 20, 2015. This far, I find that the plaintiff has proved that it is the registered owners of the suit property. They have also given a plausible account of how they came to be so registered.
23. The *Land Registration Act* under Section 26 (1) provides that a Certificate of Title shall be held as conclusive evidence of proprietorship unless acquired through fraud, misrepresentation, illegally, procedurally or through corrupt schemes.
24. This court notes that the Defendant has litigated widely on the issue of the sale of the suit property to the plaintiff and the net effect is that the Courts have not found any merit in the Defendant's claims.



The defendant did not even bother to clarify on the status of the High court matter no 333 of 2013, whereby the plaintiff has averred that the said case was dismissed.

25. In light of the foregoing analysis, I do find that the plaintiff is entitled to enjoy the rights and privileges that come with ownership of the land as stipulated under Section 25 of the Land Registration Act, which provides;

“(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...”

26. The Plaintiff is also seeking an award of mesne profits for trespass. On this issue the Court of Appeal in the case of Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR stated:

“... granted that trespass to land is actionable *per se*, and indeed no proof of damage is necessary for the court to award general damages. We note that the respondent did not claim any amount to guide the court in assessing general damages for trespass...

..... The appellant’s actions on the suit land were therefore unlawful and thereby altered the use of the suit property. The respondent is therefore entitled to compensation. No evidence was adduced as to the state of suit property after the trespass and it thus becomes difficult to assess general damages for trespass. The exact value of the land before trespass was Kshs. 3,000,000/- but the value after the trespass is not proved. However, as we have found that the appellant did trespass onto the respondent’s land and started construction thereof, we would award the respondent a nominal figure of Kshs. 500,000/- plus interest from the date of this judgment until payment in full as general damages for trespass...” (emphasis own)

27. The defendant has not countered the averments set forth by the plaintiff that the former had dumped debris and soil unto the suit premises and that they failed to give vacant possession of the said land. Considering the duration of the trespass as from year 2015, I award general damages for trespass to the tune of Ksh.3 500,000.

### **Disposal orders;**

28. In the end, I find that plaintiff’s claim is merited and is allowed in the following terms;
- i. An order is hereby issued for the defendant to vacate the suit land LR No. 1159/377 (original No. 1159/375/2) Dagoretti Road, Karen as well as to remove any debris, waste refuse and or materials dumped there on within 45 days.
  - ii. The Defendant is hereby restrained from hindering, interrupting or interfering with the Plaintiff’s peaceful and quiet physical occupation and enjoyment of parcel LR No. 1159/377 (original No. 1159/375/2) Dagoretti Road, Karen.
  - iii. The Plaintiff is granted an award of Ksh. 3,500 000 as general damages for trespass.
  - iv. The plaintiff is warded costs and interests of this suit (the interests to be calculated at court’s rates from the date of delivery of this judgment.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JUNE, 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Lusi for the Plaintiff

Court Assistant: Eddel Barasa

