REPUBLIC OF KENYA

IN THE HIGH COURT OF KINYA AT NAIROBI

Environmental & Land Case 52 of 2010

WANJIKU WANYEE ……PLAINTIFF
V E R S U S
ATHI WATER SERVICES BOARD ……DEFENDANT
R U L I N G

The Plaintiff has annexed a Certificate of Freehold Title ("WW1") to demonstrate that she is the registered owner of land parcel No. Dagoretti/Riruta/71 since 14th April, 1965. The Defendant has constructed a sewer line through this parcel. It is part of Lavington – Riruta North Tunk Sewer. From the report ("CKM – 2") by the consultant and which is annexed to the replying affidavit, it was his (the consultant's) business to put together a team including a surveyor to survey the route for the sewer line as per the design and to identify the plot owners affected by the line and ensure that any crops and property that were likely to be damaged during construction are assessed for compensation purposes. This was to happen before construction. On 15th January, 2010 the consultant's team went to the parcel in question and found it was going to be affected by the sewer line. They found people here, some of whom told them that the land belonged to the Government but that it was being used by Children's Garden Home School and Rescue Centre whose Director was Moses Ndungu. Others said the land belonged to one Mama Wanjiku who was not there. They decided to treat the land as belonging to the Centre. They assessed the value of the property to be affected and the Director consented to the report. This is the report ("WW2") that is annexed to the Plaintiff's supporting affidavit. Construction then commenced. There is no dispute that by the time the Plaintiff came to court and obtained an *ex parte* injunction order the line was already in place.

The suit was brought alleging trespass and construction of the sewer line and sought a permanent injunction to restrain the Defendant and/or his servants and/or agents from encroaching into, trespassing, constructing and/or in any other way interfering with the Plaintiff's land **"**pending hearing of this suit *inter partes***."** With the suit was filed an application under **Order 39 rules 1, 2, 3** and **9** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act** for:-

a) temporary injunction pending the hearing of the application *inter partes*, and
b) permanent injunction pending the hearing and determination of the suit.

The Plaintiff, as registered owner of the suit property, is entitled to absolute, exclusive and indefeasible claim to it. She has the right to possession, occupation, use and quiet enjoyment. The Defendant had the duty to establish the owner of the suit land and seek permission and authority to pass the sewer line through it. It did not do this. Under the principles established in **Giella –Vs- Cassman Brown & Co. Ltd. [1973] EA 358** the Plaintiff has a *prima facie* case. However, she came to court when the line was already constructed. It is only a mandatory injunction that can reverse the situation. It was not sought. One may say that the continued being of the sewer line is a continuing trespass. However, the line certainly serves public good and to order its blockade or removal would present a serious inconvenience . The balance of convenience should tilt towards preserving the *status quo*. I am also mindful that the Defendant is a public body that should be able to pay whatever damages that the situation may warrant.

I dismiss the application but, in the circumstances of the case, order that costs be borne by the Defendant.

DATED AND DELIVERED AT NAIROBI
THIS 13TH DAY OF OCTOBER 2010

A. O. MUCHELULE
J U D G E