



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 380 of 2007

**REGISTERED TRUSTEES OF SIRI GURU SINGH OWNERS OF KHALSA
GIRLS & BOYS SOUTH C.....PLAINTIFF**

VERSUS

NAIROBI CITY COUNCIL.....1ST DEFENDANT

MRS GITONGA.....2ND DEFENDANT

CONSTITUENCY DEVELOPMENT FUND.....3RD DEFENDANT

RULING

The plaintiff, a body incorporated under the **Land (Perpetual Succession) Act, Cap 164 Laws of Kenya**, filed suit seeking *inter alia*, an order of permanent injunction to restrain the defendant from constructing a perimeter wall or interfering with the property in **Land Reference No. 209/5516 (hereinafter referred to as the suit property)**. The plaintiff averred in its plaint that it was the registered owner of the suit property upon which is erected a school known as Khalsa Boys & Girls Primary School. Contemporaneous with filing suit, the plaintiff filed an application under **Order XXXIX Rules 2 & 3 of the Civil Procedure Rules** seeking an order of temporary injunction to restrain the defendants, their servants or agents from trespassing, invading, interfering or utilizing the plaintiff’s property situate on the suit land by erecting a perimeter wall or at all pending the hearing and determination of the suit. The grounds in support of the application is that the plaintiff contends that the defendants had trespassed into the suit property and commenced construction of a perimeter wall without the plaintiff’s consent. As the registered owner, the plaintiff contends that no construction can be undertaken on the suit property without the plaintiff’s permission. The application is supported by the annexed affidavit of Manjit Dhadialla, the financial secretary of the plaintiff.

The application is opposed. Hassan Diddy Kombo, the Deputy Director of Education of the 1st defendant and Joseph Afuande Ochieng, the coordinator of Langata Constituency Development Fund, swore replying affidavits in opposition to the application. They both explained that the school erected on the suit property was a public school and therefore entitled to benefit from funds allocated to the Constituency Development Fund. The 1st defendant conceded that the plaintiff was the registered owner of the suit property. He however insisted that the plaintiff was so registered for the purposes of establishing a school on the suit property.

Hassan Diddy Kombo deponed that the school on the suit property was established with funds from the colonial government and from the members of the plaintiff’s community. He deponed that since the

school was established in 1960, it has been managed by the 1st defendant on behalf of the government. Further, the teachers of the school are provided by the Teachers Services Commission. In his view, for all intents and purposes, the school on the suit property was a public school and should therefore benefit from funds set aside for development of public schools within the jurisdiction of the 1st defendant. He deponed that the plaintiff, as trustees of the suit land, had no absolute say on how the school was to be managed.

At the hearing of the application, Mr. Midwa for the plaintiff reiterated the contents of the application and the supporting affidavit thereof. He submitted that the plaintiff is the registered owner of the suit property and no construction can be undertaken on the suit property without its consent. He submitted that the land on which the school is erected, together with the buildings that comprise the school is owned by the plaintiff. He explained that no development can be undertaken on the suit land without the plaintiff, as the *bonafide* owner, being consulted. It was the plaintiff's further submission that the defendants act in erecting a perimeter wall in the suit land was an act of trespass which should be prohibited by this court granting the interlocutory injunction sought. Mr. Midwa relied on several decided cases in support of his argument that the plaintiff would suffer irreparable damage that would not be likely be compensated by an award of damages if the defendants are allowed to continue with their acts of trespass. He submitted that the plaintiff had established a prima facie case with a likelihood of success. He urged the court to allow the application.

Mr. Kahaki for the 1st and 2nd defendants opposed the application. He relied on the replying affidavit filed in court by Hassan Kombo. He reiterated that the school on the suit property was a public institution and has been so since it was constructed in 1960. He submitted that since 1960, the school has been under the management of the 1st defendant on behalf of the government of Kenya. He explained that the role of the plaintiff in the management of the school was that of a trustee. Although recognizing that the plaintiff was the registered owner of the suit land, Mr. Kahaki submitted that the plaintiff's title was not absolute since there were conditions attached to the title when the same was issued by the government. He maintained that the defendants could not be stopped from erecting the perimeter fence because the said fence was meant to improve security of the children learning in the school. He reiterated that, as trustees, the plaintiff could not take an action which was contrary to the conditions by which the title was issued. He denied the plaintiff had established a prima facie case or that the plaintiff would suffer irreparable damage if the perimeter wall is erected. He insisted that the balance of convenience tilted in favour of the children who were learning in school. He urged the court to dismiss the application with costs.

Mr. Ochieng for the 3rd defendant opposed the application. He submitted that the 3rd respondent had already commenced construction of the perimeter wall. For the plaintiff to be successful in its application, it was argued, it was required to apply for a mandatory injunction instead of an interlocutory injunction. He maintained that the 3rd defendant acted within the law when it funded the erection of the perimeter wall which was pursuant to a request made by the administration of school. He insisted that the school on the suit property was a public school and therefore entitled to benefit from public funds. He urged the court to dismiss the plaintiff's application with costs.

I have carefully considered the rival arguments made by Mr. Midwa for the plaintiff on the one hand, and by Mr. Kahaki and Mr. Ochieng for the defendants on the other. The issue for determination by this court is whether the plaintiff established a case to enable this court grant it the interlocutory injunction. The principles to be considered by this court in determining whether or not to grant the application for interlocutory injunction sought are well settled. In **Fina Bank Ltd vs. Spares and Industries Ltd [2001] 1EA 52**, the Court of Appeal held that the conditions for the grant of an interlocutory injunction were:

(i) that the applicant had to show a prima facie case with a probability of success,

(ii) the injunction would not normally be granted unless the Applicant stood to suffer irreparable injury or loss which could not be adequately compensated by an award of damages and

(iii) if the court was in doubt, the application would be decided on the balance of convenience; **Giella vs. Cassman Brown [1973] EA 358** followed.

In the present application, certain facts are not in dispute. It is not disputed that the plaintiff is the registered owner of the suit property. The plaintiff annexed a copy of a gazette notice issued under the **Registration Titles Act** which confirmed that the plaintiff is a registered owner of **LR No.209/5516**. (See annexure 'MSD1'). The said title which is a leasehold, was issued to the plaintiff for a period of 99 years with effect from 1st August, 1958. The said title is not absolute. Under special condition No.3, 4, 5 and 6 of the title, the plaintiff was required to use the said land for the purposes of erecting a school and two houses for the accommodation of teachers. The plaintiff was further required not to subdivide, transfer, sell, sublet, charge or part with possession of any part of the suit property. Condition 4 provided that if the plaintiff was to change the purpose on which the buildings in the suit land would be used i.e. as a school, then the land shall be deemed automatically to revert back to the government.

It is further not disputed that the 1st defendant has managed the school which was erected on the suit land from the time the construction of the school was completed in 1960. The teachers at the school are employed by the Teachers Service Commission, a government agency. The pupils attending the school do not pay any school fees and are in fact beneficiaries of the free primary education programme run by the government. It is therefore evident that the school, for all intents and purposes, is a public school. The role of the plaintiff in the management of the school is not clear. It appears that the children of the members of the plaintiff's community attend the school. However, children from the other communities who reside within the vicinity of the school are not prevented or barred from attending the said school. It is apparent that the 1st defendant, on behalf of the government, has managed the school from its inception.

Now, can the erection of a perimeter wall along the boundary of the school constitute an act that infringes on the plaintiff's proprietary right as a trustee? I do not think so. The perimeter wall is being erected using public funds. The erection of a perimeter wall cannot be interpreted to be an act hostile to the plaintiff's proprietary rights. It is not contrary to the conditions attached to the title of the land on which the school is erected. As trustees, the plaintiff can only enforce its rights in so far as it relates to the special conditions upon which it was issued the title. The erection of a perimeter wall does not infringe the mandate given to the plaintiff to erect a school within the suit land. I have carefully analysed the argument made on behalf of the plaintiff. I am unable to see what prejudice the plaintiff would suffer by the erection of the perimeter wall. I further fail to see what irreparable damage the plaintiff would suffer by the construction of the said perimeter wall. In fact, the benefit to the pupils at the said school, who would now be in a secure learning environment, far outweighs any rights that the plaintiff is purporting to seek enforcement of by the court.

The plaintiff has failed to establish that it has a prima facie case liable to be favourably considered by this court to enable this court grant it the interlocutory injunction sought. The application lacks merit and is hereby dismissed with costs.

DATED at **NAIROBI** this **21st** day of **MAY, 2008**.

L. KIMARU

JUDGE