



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 420 of 2005

CANUTE D'SOUZAPLAINTIFF

VERSUS

THEOTONIO DOMINIC D'SOUZADEFENDANT

RULING

On 13th April 2005 the Plaintiff/Applicant filed a suit in the High Court to seek an order of injunction to restrain the Defendant/Respondent, his agents, servants and/or employees from committing acts of obstruction, trespass, nuisance and committing injury to the proprietary rights of the Plaintiff in respect to ***L.R. No. 209/2535/1.***

There was also a prayer for a mandatory injunction compelling the defendant, his agents, servants and/or employees to give vacant possession of Garage No. 2 and removing the old unserviceable cars, structural frame gate on the staircase landing in front of flat No. 5 and Garage No. 2, wooden gate, tyres, metal tank and all properties in Garage No. 2 and any other part of the premises erected or lying within L.R. No. 209/2531/1 and to repair the roof of flats No. 6, 7 and 8 namely the roof of the third floor of the said premises.

A third prayer in the suit related to general damages for trespass and mesne profits for loss of user for rent of Garage No. 2 from 1st January 1980 to 31st March 1997 at the rate of Kshs.300/= per month; 1st April 1997 to 13th May 2003 at the rate of Kshs.1,200/= per month and 14th May 2003 to 14th April 2005 at the rate of Kshs.5,000/= per month.

The last prayer was for costs of the suit.

Together with the filing of the suit was an application by Chamber Summons where the two main prayers in the suit formed core prayers in the application together with costs thereof.

The application was supported by the grounds on the face thereof and the supporting affidavit.

These grounds were that the Defendant was illegally and unlawfully occupying the Plaintiff's Garage lot No. 2 on L.R. No. 2553/1 erecting a structural frame gate on the said garage and locking it with his own properties inside, that the Defendant had illegally and unlawfully erected structural frame gates on the Plaintiff's property on the staircase landing in front of flat No. 5 on L.R. No. 209/2535/1; that the Defendants his agents, servants and/or employees had continually obstructed the Garages No. 2, 3 and 4 on L.R. No. 209/2531/ by parking their old vehicles at the gates of the said garages with the intention not to allow the Plaintiff access to the said garages; That the Defendant had continually caused nuisance to

the plaintiff and his tenants by depositing a wooden gate, old unserviceable car, tyres and metal tank carelessly in other parts of L.R. No. 209/2535/1; that the Defendant had refused, neglected and/or failed to repair the roof of flats number 6, 7 and 8, namely the roof of the third floor of the premises erected on L.R. No. 209/2535/1 which were leaking and were in a pathetic state, and that the Plaintiff is bound to suffer irreparable loss should the defendant continue occupying Garage No. 2 and with his acts of obstruction, trespass, nuisance and committing injury to the property rights of the Plaintiff in respect to L.R. No. 209/2535/1

The supporting affidavit was deponed to by the Plaintiff/Applicant in which he gives the history of the estate of one **Alexio Baptista D'Souza**, all of which was bequeathed to his wife with only a life rent interest (use) and enjoyment in flat numbers 6, 7 and 8 on L.R. No. 209/2535 being bequeathed to the Defendant/Respondent. **Alexio's** wife was **Deudita Piedade D'Souza**

Deudita died in 1979 having bequeathed the estate to the Plaintiff/Applicant and one **Louis Francis D'Souza**; subject of cause to the life rent interest in the three (3) flats by the Defendant/Respondent.

According to the Plaintiff's averment in the supporting affidavit, the Defendant had no other interest in this estate apart from the life rent use and enjoyment in the three flats.

That in 1980 the Defendant had unlawfully and without any colour of right taken possession of L.R. No. 209/2535/1 without the Plaintiff's permission and had parked his cars, put old engines and other items in the garage despite the existence of an overt Will that he was not entitled to any other user rights or any part of the premises erected on or lying within L.R. No. 209/2535/1.

That in an Originating Summons Case **HCCC No. 1772 of 1996** the parties herein entered into a consent order wherein it was declared that the Defendant had no other or further interest in L.R. No. 209/2535/1 except a life interest in flat numbers 6, 7 and 8 and specifically that the Defendant was not entitled to any use of right, save with consent of the Plaintiff, in respect of the garage, or any part of the premises now erected on or lying within the premises L.R. No. 209/2535/1.

That there was a further consent in the suit above that the Defendant is under an obligation to repair the roof of flats numbers 6, 7 and 8 namely the roof of the third floor of the said premises now erected on L.R. No. 209/2535/1.

That the roofs of the flats 6, 7 and 8 are now leaking and are in pathetic state but that the Defendant had ignored to carry out the repairs.

According to the Plaintiff's averments there was further consent in **HCCC No. 1772 of 1996** allowing the Defendant to have a life interest and the use of garage No. 1 situate on L.R. No. 209/2535/1 and no other garage; and that the above Civil Case was for the determination of the rights of the parties in respect of the Will of **Baptista D'Souza** and **Deudita Piedade D'Souza** but that the Plaintiff's claim against the Defendant was not dealt with to-date.

That despite the consent order the Defendant had failed, neglected and/or refused to deliver and/or give up vacant possession of Garage number 2 to the Plaintiff.

The Plaintiff complains in the affidavit that on several occasions the Defendant had obstructed, interfered, trespassed and/or committed injury to the Plaintiff's propriety rights in respect of the Garage No. 2 on L.R. No. 209/2535/1 by parking all their serviceable cars in front of Garages 2, 3 and 4 with the intention of blocking the Plaintiff's access to the said garages.

That the said Defendant had unlawfully and illegally erected structural gates on the staircase landing in front of flat No. 5 and Garage No. 2 on the Plaintiff's L.R. No. 209/2535/1.

That despite the several letters that Plaintiff had written either by himself or through his counsel directing the Defendant to stop the obstruction, interference, trespass and/or committing injury to the propriety

rights in respect of garage No. 2 and on staircase landing in front of flat No. 5, no action had been taken.

That instead the Defendant had fully occupied garage No. 2 with old engines and other items and had refused to remove and/or vacate the said garage No. 2 thereby causing acts of obstruction, trespass, nuisance and committing acts of injury to the Proprietary rights of the Plaintiff in respect to L.R. No. 2535/1.

That the Defendant's intents to continue to maintain the obstruction, trespass, nuisance and committing injury to the proprietary rights of the Plaintiff in respect to L.R. No. 209/2535/1.

That the Plaintiff had been greatly disturbed in the enjoyment of his right of usage of the said garage No. 2 and other parts of the premises now erected on or lying within L.R. No. 209/2535/1 and has suffered loss and damage.

In the grounds of opposition to the application the Defendant took a preliminary objection to the Chamber Summons application saying it was misconceived untenable and incompetent and that it cannot lie under Section 3(A) Civil Procedure Act or Order **XXXIX** rules 1, 2 and 5 of the Civil Procedure Rules.

That prayer 4 under the guise of a mandatory injunction amounts to a final/summary judgment in terms of the Plaintiff which the Court cannot grant summarily under the rules.

That the Plaintiff has on his own no locus standi in the matter and that his affidavit is incompetent.

According to the Defendant, there is no jurisdiction to grant multiple interlocutory injunctions against obstruction, trespass, nuisance and injury to the Plaintiff's proprietary rights, which are manifestly vague, amorphous and imprecise, failing to state precisely what overt acts of torts or wrongs are to be restrained.

That no specific performance, nor eviction order or recovery of land (Garage No. 2) nor any declarations of the consent orders have been claimed or sought as the plaintiff must.

The grounds sought the dismissal of the Chamber Summons application.

In the meantime an interlocutory judgment had been entered against the Defendant in the matter for failure to file Memorandum of Appearance or defence within the requisite period and an application had to be made to set this order aside, and this took quite some time before this application was fixed for hearing herein before this Court on 23rd March 2007.

Counsel for both parties appeared before me on that day and submitted on the application. Counsel for the applicant referred the Court to the application and the prayers sought; the grounds upon which the application is based on the face of the application and the averments in the supporting affidavit.

Counsel repeated how the suit property was bequeathed to the parties to the suit through the father's *Will* and how the Defendant was given life rent use in flat numbers 6, 7 and 8.

That in respect to the Plaintiff, the *Will* devolved to the mother, upon whose demise it devolved to the Plaintiff including the reversionary interest.

That after the mother died in 1979 the Defendant, apart from only enjoying the life rent use in flat numbers 6, 7 and 8 he in 1980 took possession of garage No. 2 and parked everything in that compound as its legal owner.

Counsel referred the Court to the consent order entered into by and between the parties in **High Court Originating Summons Case No. 1772 of 1996** and a further consent attached to the further affidavit which the Defendant did not adhere to necessitating that this suit and application be resorted to.

That despite the Plaintiff writing to the Defendant to tell him to comply with the Court order he failed to

comply.

That the conduct of the Defendant had caused prejudice to the Plaintiff who cannot use the garages, nor can his visitors park their cars in his compound.

Counsel for Defendant opposed the application and relied on the replying affidavit dated 21st September 2005 which unfortunately I do not find in the file.

According to counsel there was nothing urgent in this matter for an order of temporary injunction to be sought.

That it has been admitted by the Plaintiff that the Defendant occupied the garage No. 2 in or about 1980 and that he got his rights in the property from the father's *Will* before 1979 but that he had occupied garage No. 2 in 1968 – before the father passed on. That he has occupied it after the mother passed away to-date.

That the rights of the parties in the suit property can be determined at the hearing of the suit.

According to counsel, granting the prayers sought in the application will dispossess the Defendant from possession of premises which they are still in possession as at the time of submission before the Court for over thirty (30) years since taking possession in 1980 with consent of the Plaintiff – where he resides to-date.

That the matter cannot be decided at an injunction stage since there is issue of adverse possession involved.

According to counsel, the Defendant built an iron gate in front of the gate to the garage for the purpose of the security of the property therein and this does not cause obstruction and/or cannot amount to trespass.

That the allegations of a wooden structure, unserviceable car, tyres and tanks are not true, and that if these items are on the suit premises, they do not belong to the Defendant.

That the staircase complained of leads to the three flats to which the Defendant has a life rent interest and a gate has been placed there strictly for security purposes and nothing else, that that gate does not obstruct the Plaintiff in any way or to his entry to the premises the Plaintiff is entitled to.

That the only part the gate blocks entry to is the premises belonging to the Defendant for life rent interest and enjoyment.

There is security problem in the area and this is why even the Plaintiff has placed grills in his own apartment for his own safety.

That as regards leaking roof the judgment in *HCCC 1772 of 1996* clearly stated that the duty of repairing top most roof in the building above flats 6, 7 and 8 is that of the Plaintiff because the premises are owned by him with only life rent interest to the Defendant.

But that the Defendant has always repaired the roof at his own expenses to avoid any leakages to his own flats.

That may be the Defendant has not done this to the satisfaction of the Plaintiff, hence this complaint.

That the cars complained of are used by the Defendant constantly and they cannot be termed unserviceable and they are parked at designated parking lots where the Defendant has a life interest.

That there is no blockage to garage No. 2 and that the compound is fenced off to the whims of the Plaintiff.

That if the orders prayed herein are granted it will mean the Defendant will not be given access even to this own flats because the orders being sought are geared towards giving control of the premises to the Plaintiff.

These are the submissions made in this application for consideration and decision by the Court.

The parties to this dispute are brothers and are disputing over an estate otherwise known as **land reference Number 209/2535/1** previously owned by their father **Alexio Baptista D'Souza**, who made a *Will* appointing his wife **Deudita Piedade D'Souza** the executrix of that *Will*.

In the same *Will* he bequeathed a life rent use and enjoyment of flats numbers 6, 7 and 8 to his son, Defendant herein **Theontonio D'Souza** erected and being on Plot number 209/2535/1 Nairobi:

“With the right to receive rent of the flats during his lifetime or to occupy the said flats or any of them at his discretion in appreciation of the services he rendered to me in erecting the said premises.”

Alexio further in his *Will* bequeathed the whole net residue and remainder of his estate both moveable and immoveable situated at the date of death onto his wife **DEUDITA PIEDADE D'SOUZA**

“for her own use and benefit absolutely subject only to the tenancy created by clause 3 hereof in favour of my said son but declaring that after the death of my said son, the said flats 6, 7 and 8 shall fall into and form part of my residuary estate and pass to my said wife accordingly or if she shall not be living at the death of my said son the flats shall pass to her personal representatives.”

The Respondent is still alive and still enjoys the fruits of the *Will* his father left.

But his mother died but before she died she had made a *Will* bequeathing

“all my right title and interest in all that piece of land known as Land reference No. 209/2535/1 Nairobi as well as my reversionary interest in the said property together with buildings and improvements erected and being thereon to my sons namely Canute Hermingild D'Souza and Louis Francis D'Souza in equal shares”.

Under these terms the parties have occupied the suit premises but during 1996 the Plaintiff filed a suit against the Defendant at High Court by Originating Summons seeking various declaratory orders amongst them whether the Defendant should not contribute towards payment of rates and rents in respect to the suit premises. It was **HCCC No. 1772 of 1996**.

In course of the hearing of the case parties discussed and came to some agreement on some of them; and recorded a consent in respect thereof

The recorded consent in that case are as follow:

1. The Respondent to have a life interest and to use garage number 1 situated on L.R. No. 209/2535/1, and no other.

2. The applicant Canute to have the right to use the roof and the exterior of flats 6, 7 and 8 erected on L.R. No. 209/2535. The applicant will also maintain the exterior of the roof, and be allowed to put

billboards and/or otherwise use it as he deems fit.

In light of the consent number 2 in that case, it is not correct for the Plaintiff/Applicant to complain that the Defendant/Respondent has refused, neglected and/or failed to repair the roof of flats No. 6, 7 and 8 or the roof of the third floor of the suit premises because under the said consent that is clearly his responsibility – (see ground (e) on the face of application and paragraph 11 and 12 of the supporting affidavit).

Paragraph (D) of the prayers in the Plaint and paragraph 4 of the Chamber Summons are worded in similar manner. If this court were to award prayer 4 of the application then it would have finalized that part of the claim and there would be nothing temporary about it. But this is not in the domain of Order **XXXIX** of the Civil Procedure Rules

As regards prayer 3 of the application, it is the ward of the applicant against that of the Respondent and unless the full case is heard which might entail a visit to the suit land to ascertain the actual position on the ground it is not easy to ascertain from on party or the other what the actual position is.

And given that the applicant has lived in this position, even say since 1996, there can be no substantial loss to him within, say, one more year when parties can take a hearing date and have the case finalized.

Given the documents perused on this file and arguments advanced on either side, I am not convinced the conditions required to be fulfilled in **Gieller K. Cassman Brown & Company Limited [1973] E.A. 358** before an interim injunction is issued have been satisfied.

I dismiss this application but since parties hereto are close relatives, I direct that each bears his own costs of the same.

Delivered and dated at Nairobi this 30th day of April, 2007.

D. K. S. AGANYANYA

JUDGE