



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
Civil Suit 549 of 1999

**GARAATA INVESTMENTS LIMITED..... PLAINTIFF**

**VERSUS**

**WILLIAM K. GITHINJI..... DEFENDANT**

**JUDGMENT**

The Plaintiff Company Garaata Investments Limited is the registered proprietor of the parcel of land known as Title Number Dagoretti/Riruta/S.468 which is adjacent to the Defendant's parcel of land registered as Title Number Dagoretti/Riruta/S467. Both parcels are developed and the Plaintiff has residential units on its plot. The Plaintiff has sued the Defendant in respect of an alleged trespass into its parcel of land and seeks the following prayers.

- a) **A permanent injunction to restrain the Defendant by himself, his servants or agents from entering, trespassing upon, pulling down and/or removing structures (either permanent or temporary) or digging up part of the Plaintiff's suit land and boundaries or interfering with the Plaintiff's ownership of and quiet possession of its plot either by itself servants or tenants.**
- b) **Special damages**
- c) **General damages**
- d) **any other appropriate relief at the discretion of the Court.**

The Plaintiff alleges in its Plaint filed herein on 18th March 1999 that the Defendant, on or about the 9th of January 1999 trespassed upon the Plaintiff's parcel of land and demolished a 100 feet long perimeter wall on the eastern part of its property thereby exposing the Plaintiff's tenants to health and security risks. According to the Plaint, the Defendant also threatened to dig up and grade a road on the Plaintiff's property and also pull down the Plaintiff's latrine which at the time was for use by its caretaker.

At the time of filing the Plaint the Plaintiff feared that the Defendant's actions and threats if not stopped by an order for injunction, would result in its tenants vacating the property leading to a loss of revenue in the form of rent, which the Plaintiff contends to be an irreparable loss. The Plaintiff has stated and particularized the said risk and loss in paragraph 6 of the Plaint as follows:

**“6. Should the Defendant execute to completion his wrongful intentions as set out hereinabove, the Plaintiff is likely to suffer irreparable loss including loss of rent as the sitting tenants may be forced to vacate the premises among other things.**

**Particulars of Loss and Damage to the premises**

- 1) **Destroyed slabs and cedar posts**

**2) The piled rubbles are a health hazard**

**3) The said rubbles are heaped against the residential units**

**4) Loss of amenities to the sitting tenants as they cannot now use their back yards for their own private uses e.g. drying clothes.”**

At the hearing of the suit the Plaintiff abandoned its claim for special damages and proceeded to testify in the matter in a manner suggesting that all the threats recounted above were actually carried out. This was done notwithstanding that the Plaintiff was never amended. The Plaintiff called only one witness Mr. Charles Thiong'o Githuka a senior member of the Kenyan bar and the Plaintiff's Company secretary. The said witness did witness the events of 9th January 1999 but testified on information he claims to have been supplied by the Plaintiff's caretaker who was never called as a witness. The witness testified in his evidence that his only reason to believe that the Defendant did actually demolish the fence either by himself or using "a gang of hired men" was that he was seen driving his car along the extended foot path created by the demolition of the perimeter wall. According to the witness

**"...the Defendant damaged the perimeter fence in his attempt to broaden the footpath."**

Without providing any further evidence to back his words, the witness told the Court that tenants vacated the premises as a result of the exposure after which the Plaintiff was forced to erect a new fence nearer to its residential units.

The Defendant has denied having ever demolished the fence complained about but does admit using the affected portion as a driveway to his plot. He also confirms having complained, alongside other neighbours, to the local chief that the Plaintiff's original fence and latrine had encroached and obstructed the access road or footpath leading to their plots. The issue of the affected boundary was heard before the Land Registrar pursuant to an order of this Court and the Registrar's findings filed herein and adopted as part of the record on 24th September 2003.

At the close of the proceedings before me it was clear that both parties had no problem with the finding by the Land Registrar that the Plaintiff's boundary and therefore the correct position for its perimeter fence should be 4 feet from the developments of residential units on its plot No. Dagoretti/Riruta/S468 of importance is the Registrar's finding No. 6 which reads as follows:

**"After demolition of the complaints (Plaintiff's) initial fence it was relocated to the right place. As I have stated earlier, their fence should be approximately four feet from the house."**

The registrar concluded her Ruling thus:

**"Each party was shown the position of their boundaries and advised to maintain the same."**

In his evidence during cross examination, PW1 clearly stated as follows:

**"We are happy with the (Registrar's) finding in so far as the same placed the boundaries at 4 feet from the house."**

It is not clear to me this Court the Plaintiff has not proceeded to return the fence to its proper location as designated by the surveyor and the Registrar, or why this Court should be involved in the exercise since the Plaintiff does not allege that the Defendant has in any way hindered or interfered with an attempt to do so. The relocation of the fence to its proper place is not an issue in these proceedings and will not be considered in this judgment.

Despite the fact that the Plaintiff herein was never amended as earlier stated, it is clear from the evidence that the threats alleged therein have already been carried out. I am unable to see, in the circumstances, what breach the injunctive orders sought herein are intended to prevent. Even if, as alleged by the

Plaintiff the Defendant and others (as admitted by the Plaintiff) do continue to drive along the access road which the Plaintiff claims to be intended for use as a footpath, I find that by not taking advantage of the Registrar's award to return the fence to its proper place the Plaintiff has acquiesced to such user.

The mere fact that the Defendant complained to the Chief about the Plaintiffs wall and latrine and later started driving along the newly created driveway does not in my considered finding amount to proof, albeit on a balance of probabilities that he demolished or caused to be demolished, the Plaintiff's perimeter wall as alleged herein as lead this Court to find him liable to the Defendant in damages. The registrar's award did not state anywhere that the Plaintiffs' original fence was in the correct position as to lead the Court to conclude that such driving by the Defendant and others amounts to trespass on the Plaintiff's plot.

Taking all the above into consideration, it is clear that the Plaintiff has not fulfilled any of the legal essentials for the granting of an injunction in that it has failed to establish a prima facie case against the Defendant, has not demonstrated any irreparable loss or placed before the Court any submission and/or evidence as to suggest that on the balance of convenience the Plaintiff would suffer prejudice if the injunction sought is not granted. For these reasons the Plaintiffs claim for an injunction against the Defendant fails.

Secondly, as no liability can attach in the absence of proof, I find that the Plaintiff having failed to prove, on the balance of probabilities that the Defendant was in any way responsible for the pulling down of the Plaintiff's fence on the 9th January 1999, the claim for general damages cannot succeed. Consequently, this suit fails in its entirety and is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 30th day of September 2005.

**M.G. Mugo**

**Judge**

*In the presence of*

*Mr. Oluoch for the Plaintiff*

*Mr. Muhindi for the Defendant*