



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 303 OF 2011

SEVENTH DAY ADVENTIST CHURCH (E.A) LTD ...

(NAIROBI EAST S.D.A. CHURCH).....PLAINTIFF

=VERSUS=

STRATHMORE EDUCATIONAL TRUST

REGISTERED TRUSTEES.....1ST DEFENDANT

KENYA RAILWAYS CORPORATION.....2ND DEFENDANT

STELLA MBAI T/A ST. MARY'S SCHOOL.....3RD DEFENDANT

RULING

The full facts of this case are set out in the judgment that was delivered herein on 30th September, 2019. In the said judgment, the court made the following orders:

- 1. The plaintiff's suit is dismissed as against all the defendants.**
- 2. Judgment is entered for the 1st defendant against the plaintiff for:**
 - (i) eviction from L.R No. 209/19707 and a permanent injunction restraining the plaintiff from interfering with the said parcel of land.**
 - (ii) Kshs. 72,940/= as special damages.**
 - (iii) Kshs. 2,000,000/= as general damages for trespass and mesne profits.**
 - (iv) interest on (ii) and (iii) above at court rates from the date of the judgment until payment in full.**
- 3. Judgment is entered for the 3rd defendant against the plaintiff for Kshs. 250,000/-being general damages for trespass together with interest at court rates from the date of the judgment until payment in full.**
- 4. The plaintiff to pay the costs of the suit and the two counter-claims.**

The plaintiff was dissatisfied with the said judgment and filed a notice of intention to appeal against the same to the Court of Appeal on 1st October, 2019. The plaintiff also wrote to the Deputy Registrar requesting for copies of the proceedings and a certified copy of the decree for the purposes of the intended appeal. On 9th October, 2019, the plaintiff filed an application seeking a stay of execution of the said judgment of 30th September, 2019. In a ruling delivered on 5th December, 2019, the court allowed the plaintiff's application for stay on the following terms:

- 1. A partial and conditional stay of execution is issued in respect of the limb of this court's judgment delivered on 30th September, 2019 that ordered the eviction of the plaintiff from L.R No. 209/19707 to the extent that pending the hearing and determination of the plaintiff's intended appeal to the Court of Appeal, the plaintiff shall not be evicted from that portion of L.R No. 209/19707 that it uses to access the church building and for parking during normal church services.**

2. The plaintiff shall deposit in court as a condition for the stay order, a sum of Kshs. 1,000,000/= within 30 days from the date hereof in default of which the stay shall lapse automatically without any reference to the court.

3. For the avoidance of doubt, the 1st defendant shall be entitled to possession of the portion of L.R No. 209/19707 that was hitherto occupied by the plaintiff save for the parking area in respect of which the stay order shall apply.

4. The application is dismissed in respect of the monetary portion of the decree in favour of the 1st defendant.

5. The application is dismissed wholly as against the 2nd and 3rd defendants.

6. Each party shall bear its own costs of the application.

What is now before me is another application brought by the plaintiff by way of Notice of Motion dated 14th January, 2020. In the application, the plaintiff has sought the following orders;

1. A mandatory injunction compelling the 1st defendant to remove and/or pull down the iron sheet fence and further be compelled to refill the trenches dug and restore back the parking area previously used by the plaintiff on all that parcel of land known as L.R No. 209/19707.

2. In the alternative and without prejudice the 1st defendant be compelled to comply with the terms of the stay order issued on 5th December, 2019 by restoring back all the parking areas previously used by the plaintiff.

3. The costs of the application.

The plaintiff's application that was supported by the affidavit of Philip Meli sworn on 14th January, 2020 was brought on the ground that the 1st defendant had violated the orders of stay that were granted in favour of the plaintiff on 5th December, 2019. The plaintiff contended that in breach of the said order, the 1st defendant fenced the area earmarked for the plaintiff's parking on 24th December, 2019 thereby blocking the members of the plaintiff from accessing the same. In its supporting affidavit, the plaintiff annexed photographs taken on the suit property showing the iron sheet fence that the 1st defendant was accused of erecting to prevent the plaintiff's members from accessing the parking area and the trenches dug on the said parking.

The plaintiff's application was opposed by the 1st defendant through a replying affidavit of Andrew Olea sworn on 3rd March, 2020. In the affidavit, the 1st defendant admitted that on 5th December, 2019 the court granted an order of stay of execution of the judgment delivered on 30th September, 2019 on terms. The 1st defendant averred that the stay that was granted to the plaintiff was in respect only of the portion of L.R No. 209/19707 (the suit property) that was being used by the plaintiff to access the church building and for parking during normal church services. The 1st defendant averred that it had a right to take possession of the other areas of the suit property that was hitherto occupied by the plaintiff that was not being used for either accessing the church building or parking. The 1st defendant averred that in accordance with the judgment of the court in its favour, it took possession of the portion of the suit property that the plaintiff had leased to a third party and ceded to the plaintiff the portion thereof that was being used by the plaintiff for parking. The 1st defendant averred that the portion of the suit property that it ceded to the plaintiff was more than enough for the plaintiff's parking needs. The 1st defendant averred that the plaintiff's application had no merit.

The plaintiff's application was argued by way of written submissions. The plaintiff filed its submissions dated 2nd October, 2020 on 3rd October, 2020 while the 1st defendant filed its submissions on 20th July, 2020. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the affidavit filed by the 1st defendant in opposition to the application. Finally, I have considered the submissions filed by the advocates for the parties. It is not in dispute that the stay order granted by the court in favour of the plaintiff on 5th December, 2019 was limited to the portion of the suit property that was being used by the plaintiff to access the church building and for parking during normal church services. To succeed in the present application, the plaintiff had a duty to satisfy the court that the 1st defendant had blocked it from accessing the church building or the parking area. The material placed before the court by the plaintiff has fallen short of establishing that fact. The plaintiff has not placed before the court evidence showing the measurement of the portion of the suit property that it was using for parking during its normal church services before the judgment of the court and the extent to which it had been interfered with by the 1st defendant's activities complained of. The 1st defendant has contended that the plaintiff has ample parking space and has placed evidence before the court showing the portion of the suit property that it has ceded to the plaintiff for parking pending the hearing of the plaintiff's intended appeal to the Court of Appeal. The plaintiff did not controvert the averments in the 1st defendant's replying affidavit. In the circumstances, I find no basis for the orders sought by plaintiff.

For the foregoing reasons, the plaintiff's application dated 14th January, 2020 is without merit. The application is dismissed with costs to the 1st defendant.

Delivered and Dated at Nairobi this 18th day of February 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Nyakundi for the Plaintiff

Mr. Nyiha for the 1st Defendant

N/A for the 2nd Defendant

N/A for the 3rd Defendant

Ms. C. Nyokabi - Court Assistant