

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1627 OF 2001

OLD COMRADES ASSOCIATION REGISTERED TRUSTEES
.....**PLAINTIFF**

VERSUS

THE ATTORNEY GENERAL1ST DEFENDANT

NAIROBI CITY COUNCIL2ND DEFENDANT

R U L I N G

This application, dated and filed in court on 26th September, 2001 is seeking a court order of injunction to restrain the Nairobi City Council from interfering with the plaintiff's possession and enjoyment of, or trespassing into the whole or any part of, its said land parcel in any manner whatsoever until this suit is heard and determined.

The application is based on the grounds stated thereon and the supporting affidavit. The grounds are that the plaintiff is the registered proprietor of the suit premises L.R. No. 209/11911 Madaraka Estate Nairobi, that the defendants have threatened and intend to wrongfully deprive the plaintiff of a portion of its land and interfere with its lawful possession and enjoyment of a part of its said premises and that the defendants act is unlawful and shall persist unless restrained by an order of this Honourable Court.

In the support affidavit, the applicant named a third party Agape Fellowship Centre as the party instigating the second defendant to interfere with the suit land by requiring a resurvey of the same to give it access road through the applicant's land though there was no such road on the approved deed plan hence this application. Counsel for the parties appeared before the court on 30th October, 2001 to submit on it with counsel for the applicant urging the court to grant the order of injunction while that for the second respondent opposed the application.

The application had been filed against the Attorney General and the second defendant but on counsel for the applicant being reminded that an order of injunction cannot be issued against the Government, decided to withdraw the said application against the said Attorney General and to proceed against the Nairobi City Council.

Counsel for the applicant complained that the second respondent intends to interfere with the applicant's land by resurveying it and lawfully giving the third party an access road through the said applicant's land. That the second defendant refused a 10m' strip free of charge to offer a curving road to the third party and that there is no public use for the intended road of access.

Counsel for the respondent said the applicant had not established a prima facie case with the probability of success to warrant an order of injunction.

One of the conditions set down in the case of *Giella v Cassman Brown & Co. Ltd.* [1973] E.A. 358 is irreparable injury which cannot be compensated by an award of damages. But where in the case subject to such an application general damages are prayed for then the probability is if an order of injunction is not granted, an award of damages at the end of it all would constitute an adequate remedy.

Moreover, in my view the applicant is becoming fussy for no apparent reason.

In the first place, though the applicant's counsel submitted that the applicant had offered a 10mx10m free of charge to the second respondent for a curving road to the third party – which the latter rejected, the

truth of the matter is that the 2nd defendant requested for this but the D.O.D. opposed the request because the site plan had already been designed.

(See a letter from the Deputy Secretary D.O.D. dated 2nd November, 1999 to this effect).

Moreover, a letter from the Commissioner of Lands dated 8th September 2000 to the applicant and the third party to surrender allocation documents and title deed for amendment to reflect the road of access to the third party as “Initially planned” does not seem to have elicited any response from the applicant. I am not surprised counsel for the applicant did not mention this during his submissions.

When the court considers all these submissions and circumstances then there is no reason to disagree with counsel for the second respondent that the applicant has not established a prima facie case with the probability of success to warrant the issue of an interlocutory injunction in this case; and that even a balance of convenience tilts favour of the second respondent and that this application has no merit. It should be dismissed with costs.

Delivered and dated this 8th day of November, 2001.

D.K.S. AGANYANYA

JUDGE