



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 61 OF 2020

(COVID 59/2020)

GA INSURANCE LIMITED.....PLAINTIFF

=VERSUS=

ST. ELIZABETH ACADEMY – KAREN LIMITED.....DEFENDANT

RULING

1. The plaintiff, GA Insurance Limited, initiated this suit through a plaint dated 2/4/2020. Its case was that it was the registered proprietor of **Land Reference Number 1159/140 (Original Number 1159/96/5)** situated along Dagoretti Road, Karen, Nairobi. The plaintiff contended that on diverse dates, including Saturday 20/3/2020, the defendant through its officers, servants, agents and employees, encroached onto the suit property and started wasting it by undertaking excavation works and dumping debris/soil thereon. The plaintiff added that despite demand and notice of intention to sue, the defendant had continued with the trespass.

2. Consequently, the plaintiff sought the following orders against the defendant:

a) A mandatory injunctive order directing the defendant by itself, its officers, agents, servants, assigns, representatives and or any person claiming under them to forthwith remove the waste, debris, refuse and or excess soil or any material dumped thereon by the defendant or on its order and or vacate all that property known as Land Reference No 1159/140 (Original No 1159/96/5) situated at Dagoretti Road, Karen;

b) In the alternative to prayer (1) above, the plaintiff be at liberty to immediately remove the waste, debris, refuse and or excess soil or any material dumped thereon by the defendant or on its order and or vacate all that property known as Land Reference No 1159/140 (Original No 1159/95/5) situated at Dagoretti Road, Karen, at the defendant's cost;

c) A permanent injunction restraining the defendant whether by itself, its officers, employees, servants, agents and or anyone claiming under their names from howsoever entering, trespassing, remaining thereon, dumping debris or refuse or any material, trespassing, wasting away, damaging, threatening, attacking or restraining the plaintiff or its servants access, entry, use, enjoyment, interrupting, hindering and or in any way howsoever interfering with the plaintiff's quiet and peaceful enjoyments, physical occupation, use and or lawful possession thereof;

d) The honourable court do award general damages in the nature of aggravated damages from the defendant's act(s) of trespass;

e) The honourable court do award special damages in the nature of mesne profits for the defendant's continued unlawful user of the plaintiff's property; and

f) Costs of this suit

3. Together with the plaint, the plaintiff brought a notice of motion dated 2/4/2020 seeking a temporary injunctive order restraining the defendant against engaging in the impugned activities. Further, the plaintiff sought an order directing the Officer Commanding Karen Police Station to supervise the enforcement of the injunctive order. The said application is one of the two applications which are the subject of this ruling.

4. The second application is the defendant's notice of motion dated 27/4/2020 filed in this suit but bearing "GA Life Assurance Limited" as the respondent. Through it, the defendant sought the following verbatim orders:

1) That this application be and is hereby certified urgent and that service be dispensed with in the first instance and the same be placed down for hearing on a priority basis.

2) That the execution of the ex-parte orders of this honourable court granted on 7/4/2020, be and is hereby stayed.

3) That the ex-parte orders of this honourable court granted on 7/4/2020, be and is hereby set aside.

4) That in the alternative, this honourable court be pleased to review its orders of 7/4/2020 as follows;

a. Honourable court be pleased to issue a stay of execution against the orders issued on 7/4/2020 in favour of the plaintiff/ respondent pending the hearing and determination of this application.

b. Orders are hereby issued barring the plaintiff/respondent from destroying in any manner the vegetable garden projects on the suit property pending hearing and determination of this application.

c. The defendant/ applicant and all persons claiming under them be allowed unhindered access to the property, for educational purposes, pending the hearing and determination of the present application.

5) That this honourable court be and is hereby pleased to issue the earliest possible date(s) for inter partes hearing as a matter of urgency on such terms as to date and time as this honourable court may direct.

6) That this honourable court extends the orders sought hereinabove until the hearing and determination of the present suit.

7) That this honourable court be and is hereby pleased to make any other order(s) as it may deem fit in the circumstances and interest of justice.

8) That costs of this application be in the cause

5. The plaintiff's application dated 2/4/2020 was supported by an affidavit sworn on 2/4/2020 by Sharon Mukania, the plaintiff's Legal Officer. The deponent stated the plaintiff's case as summarized above. The defendant did not file any replying affidavit in response to the plaintiff's said application.

6. The defendant's notice of motion dated 27/4/2020 was supported by an affidavit sworn on 27/4/2020 by Ann Wanjiku Wado. She deposed that she was a director of the defendant company. She added that the school comprised of the property subject matter of the suit, on which the school grew vegetables in preparation for assessment in their Kenya Certificate of Secondary Education (KCSE) Agriculture Paper 3 Examination. She added that the interim orders issued on 7/4/2020 were irregularly sought because the school owned the suit property and had not at any point transferred the same to the plaintiff. She exhibited certificate of title number 42311 bearing three entries, namely: (i) entry number 1 relating to registration of the title; (ii) entry number 2 made on 6/2/2006 relating to transfer of the land to the defendant; and (iii) entry number 3 relating to a Charge registered in favour of Kenya Commercial Bank Limited. She urged the court to grant the orders sought in the application dated 27/4/2020.

7. The plaintiff opposed the defendant's application through a replying affidavit sworn on 4/5/2020 by Sharon Mukania and a supplementary affidavit sworn by the same deponent on 8/5/2020. She deposed that the respondent named in the defendant's application, **GA Life Assurance Limited**, was a different entity and was not the plaintiff herein. She added that the defendant's application was characterized by falsifications, deliberate misrepresentations, and active concealment of material facts, contending that the defendant had deliberately exhibited a past copy of the Title bearing only three entries while aware that there were subsequent entries namely: (i) entry no 4 relating to discharge of the charge in favour of Kenya Commercial Bank; (ii) entry number 5 relating to charge to National Bank of Kenya; (iii) entry number 6 relating to further charge to National Bank of Kenya Limited; entry number 7 relating to partial discharge of Charge Nos 5 and 6; (v) entry Number 8 relating to transfer of the suit property to the plaintiff; and (vi) entry number 9 relating to Charge to I & M Bank Limited.

8. Ms Mukania further deposed that the sale of the suit property to the plaintiff had never been challenged anywhere. She added that the transfer in favour of the plaintiff was executed by directors of the defendant company, Anne Wanjiku Wado and Ayub Kianja Munene. She exhibited a copy of the transfer instrument registered on 14/4/2014 as IR 42311/8 bearing signatures and pictures of the two directors.

9. The two applications were canvassed together through written submissions. The plaintiff filed written submissions dated 12/5/2020 through the firm of **CM Advocates LLP**. The plaintiff framed the following as the two issues falling for determination in the two applications: (i) whether the orders sought by the defendant against a party that is not privy to the proceedings are available; and (ii) whether the plaintiff's claim for protection of its constitutional right to property and to a clean and healthy environment were merited. On the first framed issue, counsel argued that **GA Life Assurance Limited** against whom the defendant had sought the orders in the notice of motion dated 27/4/2020 was not a party to this suit and therefore the orders would not lie.

10. On the second issue, counsel submitted that the plaintiff's constitutional right to property and to a clean and healthy environment should be safeguarded. Counsel added that the plaintiff had satisfied the criteria for grant of injunctive relief as set out in **Giella v Cassman Brown (1973) EA 358**. Lastly, counsel submitted that the balance of convenience favoured protection of the registered proprietor of the suit property.

11. The defendant filed written submissions dated 12/5/2020 through the firm of **Mathenge, Wambugu & Company Advocates**. Counsel framed the following as the five issues falling for determination in the two applications: (i) whether having **G A Insurance Limited or G A Life Assurance Limited** used simultaneously or in place of the other constitutes a fatally incurable error; (ii) whether National Bank should be joined in the suit; (iii) whether the orders issued on 7/4/2020 were valid; (iv) whether the defendant/applicant was entitled to challenge the defendant's ownership of the land; and (v) who should bear costs of the application.

12. On the first issue, it was submitted that the interchange of the names was a genuine mistake and the same should not be used against the defendant. Counsel submitted that misjoinder or non-joinder does not render a suit defective. Reliance was placed on the decisions in (i) **George Kimathi Mugenyu v China National Overseas Engineering Corporation [2014] eKLR** and (ii) **Jenipher Gumba Oyoo v Kenindia Assurance Company Limited [2011] eKLR**. Counsel submitted that Order 1 Rule 10 (2) provided for joinder of parties. It was argued that the inclusion of National Bank will help to determine how the suit property got transferred to the plaintiff. On the validity of the orders issued on 7/4/2020, counsel submitted that the plaintiff misled the court to get the orders issued. It was contended that the defendant obtained the suit property fraudulently, that the deed of sale annexed to the replying affidavit was altered. It was further submitted that the defendant was entitled to challenge the ownership of the suit property because the limitation period had not lapsed. On the issue of costs, it was submitted that costs follow the event and in this case, the defendant was entitled to costs.

13. I have considered the two applications together with the rival affidavits and submissions. I have similarly considered the relevant legal frameworks and jurisprudence on the key questions in the two applications. I will first dispose the defendant's application dated 27/4/2020. I have decided to dispose the defendant's application because most, if not, all the prayers in the application appear to be spent.

Defendant's Application dated 27/4/2020

14. Prayer 1 in the defendant's application dated 27/4/2020 sought certification of the application as urgent and disposal of the same urgently. That prayer is now spent because the application has been heard and is under determination. Prayer 2 sought stay of execution of the interim orders granted on 7/4/2020. That prayer is similarly spent because the interim orders lapse today upon delivery of this ruling. What would come into force are the disposal orders to be made in this ruling. Prayer 3 sought the setting aside of the interim order of 7/4/2020. It is similarly spent on account of the same reason. Prayer 4(a) sought stay of execution of the order of 7/4/2020 pending the hearing and determination of the application dated 27/4/2020. That prayer is similarly spent because the application has been heard and is under determination now. Prayer 4(b) sought an order barring the plaintiff against destroying the vegetable garden project on the suit property pending the hearing and determination of the application dated 27/4/2020. The said application has been heard and is now under determination. The prayer is therefore equally spent. Prayer 4(c) sought an order granting the defendant unhindered access to the suit property pending the hearing and determination of the application dated 27/4/2020. The said prayer is equally spent because the application has been heard and is under determination through this ruling. Prayer 5 sought an early date for *inter partes* hearing of the application. That prayer is equally spent. Prayer 6 sought extension of the orders sought in the preceding prayers until the hearing and determination of the suit. It is not clear what is there to be extended in the context of the above spent prayers. I will nonetheless make a brief pronouncement on this prayer after I dispose the plaintiff's application dated 2/4/2020. Prayer 7 was a general plea for any order which the court deems fit. No basis was laid for grant of the general order. Prayer 8 relates to costs of the application. I will make a pronouncement on prayer 8 in my disposal orders.

15. Lastly, the application dated 27/4/2020 bore **G A Life Assurance Limited** as the respondent. Despite the plaintiff, **G A Insurance Limited**, raising an objection, the applicant did not bother to move the court for leave to amend the motion. The net effect is that even if the defendant had a well merited case, no order would issue against **G A Life Assurance Limited** because the said entity is not a party to this suit. Secondly, no order would issue against the plaintiff in this suit on the platform of the application dated 27/4/2020 because the plaintiff is not the respondent named in the said application. Regrettably, counsel for the applicant elected to take a casual view of this critical legal issue.

Plaintiff's Notice of Motion dated 2/4/2020

16. Prayer 1 of the plaintiff's notice of motion dated 2/4/2020 sought certification of the application as urgent. It is therefore spent. Prayers 2, 3 and 4 are equally spent because the application has been heard and is under determination. Prayers 5 and 6 seek interlocutory injunctive order and enforcement of the order by the police, pending the hearing and determination of the suit. The two prayers properly fall for determination. The only other prayer falling for consideration is prayer 8 which relates to costs. Prayer 7 is a general plea for any order the court deems fit to grant.

17. The principle upon which trial courts exercise jurisdiction to grant interlocutory injunctive orders is well settled [see **Giella v Cassman Brown (1973) EA 358**]. The applicant is required to demonstrate a prima facie case with a probability of success. Secondly, the applicant is required to demonstrate that unless the injunctive order is granted, he would stand to suffer damage that may not be adequately indemnified through an award of damages. Thirdly, should there be doubts on the above two requirements, the court is required to determine the application based on a balance of convenience. Lastly, when determining an application of this nature, the court does not make definitive or conclusive findings or pronouncements on the key issues. What the court seeks to establish are the first two elements in **Giella v Cassman Brown (1973) EA 358**.

18. The plaintiff in this suit has placed before the court a copy of a certificate of title showing that it is the registered proprietor of the suit property, having acquired it through a sale by private treaty at a consideration of Kshs 381,000,000. At the time of sale, the property was charged to National Bank and the Bank allowed disposal of the property by the defendant to repay the loan. Exhibited by the plaintiff is an official search showing that the plaintiff is the registered proprietor of the suit property. Also exhibited is a transfer dated 3/3/2013 drawn by M/s Sichangi Partners Advocates, executed by the defendant through Anne Wanjiku Wado and Ayub Kianja Munene. The said transfer was registered on 14/4/2014 as entry number 42311/8. The plaintiff contends that it has been in possession of the suit property from the time it acquired it. Further, the plaintiff contends that the suit property is virgin land. The case of the plaintiff is that the defendant has trespassed onto the suit property and is now wasting it.

19. The defendant did not file any affidavit or grounds of opposition in response to the plaintiff's application. The defendant instead opted to bring a parallel application dated 27/4/2020. Ms Anne Wanjiku Wado who swore the affidavit in support of the parallel application asserted that the defendant was the registered proprietor of the suit property. To support that contention, she annexed a copy of a title bearing only three entries. She did not annex any official search from the Lands Registry. She, however, made reference in her affidavit to a charge registered in favour of National Bank. The entry relating to the charge is not reflected in the purported title document exhibited by the defendant.

20. Without making any definitive or conclusive pronouncements, what emerges from the totality of the evidential materials placed before court is that, the plaintiff is the registered proprietor of the suit property. The plaintiff became proprietor pursuant to a transfer executed by the defendant. The defendant's director, Anne Wanjiku Wado, appears to have deliberately elected to mislead the court. She elected to engage in what appears to be a criminal conduct (perjury), oblivious of the gravity of the conduct.

21. Based on the above evidence, I am satisfied that the plaintiff has demonstrated a prima facie case with a probability of success.

22. The next question is whether the second limb of the principle in **Giella v Cassman Brown (1973) EA 358** has been met. The right to own and enjoy land is protected by the Constitution and by Section 25 of the Land Registration Act. Blatant infringement of that right is a violation which no amount of damages can adequately indemnify. For this reason, I am satisfied the second limb of the criteria in **Giella v Cassman Brown (1973) EA 358** has been satisfied. I will, in the circumstances, not venture to consider the third limb in **Giella v Cassman Brown (1973) EA 358**.

23. My finding, therefore, is that the plaintiff's application dated 2/4/2020 has met the criteria upon which trial courts exercise jurisdiction to grant interlocutory injunctive orders. Consequently, I will allow the application dated 2/4/2020 in terms of prayers 5 and 6.

24. Having come to the above findings in the plaintiff's application dated 2/4/2020, I find the plea contained in prayer 6 of the defendant's application dated 27/4/2020 to be baseless and unmerited.

25. The defendant framed the question as to whether or not National Bank should be joined in the suit as one of the issues falling for determination in the two applications. I will not make any pronouncement on that question because there is no prayer for joinder in either of the two applications. The question is therefore not an issue for determination in the two applications.

Disposal Orders

26. In light of the above findings, I make the following disposal orders in relation to the plaintiff's application dated 2/4/2020 and the defendant's application dated 27/4/2020.

a) The defendant's application dated 27/4/2020 is dismissed for being defective, spent, baseless and unmerited.

b) The plaintiff's notice of motion dated 2/4/2020 is allowed in terms of prayers 5 and 6.

c) The defendant shall bear costs of the two applications.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF JULY 2020

B M EBOSO

JUDGE

In the presence of: -

Mr Mugo holding brief for Mr Mathenge for the defendant

Mrs Gichuru holding brief for Mr Lusi for the plaintiff

Court Clerk - June Nafula