



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO 715 OF 2017

GA LIFE ASSURANCE LIMITED..... PLAINTIFF

=VERSUS=

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

RULING

1. Until 19/6/2015, Land Reference Number 1169/377 (the “**suit property**”) was registered in the name of St Elizabeth Academy Karen Limited (the defendant). On 25/5/2010, the defendant charged the suit property to National Bank of Kenya (the **chargee**). On 25/11/2010, a further charge was registered against the title in favour of the same chargee. Subsequently, on 19/6/2015, the suit property was transferred to GA Life Assurance Limited (the **plaintiff/respondent**) after the chargee sold the suit property to them in exercise of the chargee’s statutory power of sale.

2. Prior to the sale of the suit property to the plaintiff, the defendant filed Nairobi **High Court Civil Case Number 333 of 2013; St Elizabeth Academy Karen Limited v National Bank of Kenya Limited**, in which it sought to restrain the chargee against exercising the chargee’s statutory power of sale. The application was rejected by Kamau J on 16/12/2014. The defendant’s application for a review of the orders of Kamau J was similarly rejected by Ochieng J on 18/8/2016. An appeal to the Court of Appeal against the decision of Ochieng J was declined by the Court of Appeal on 16/2/2018. Consequently, the suit property is registered in the name of the plaintiff herein.

3. Although the applicant caused the plaintiff to be joined as a second defendant in **Nairobi High Court (Commercial & Admiralty Division) Civil Case Number 333 of 2013**, the suit has not been determined. It is not clear why six years down the road the suit has not been disposed.

4. On 20/11/2017, the respondent brought the present suit seeking the following orders:

i. A mandatory order directing the defendant by itself, its agents, servants, representative and or any person claiming under them to forthwith remove waste, debris, refuse and or excess soil or any material dumped thereon by the defendant or on its order and or vacate all the property known as Land Reference No 1159/377 (Original No 1159/375/2) situated at Dagoretti Road Karen;

ii. A permanent injunction restraining he defendant whether by themselves, employees, servants, agents and or anyone claiming under their names from howsoever entering, 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 interfering with the plaintiff’s quiet and peaceful enjoyment, physical occupation, use and or lawful possession thereof.

iii. Mesne profits for trespass from 19th June 2015 until full compliance in (i) and (ii) above.

iv. Costs of this suit.

5. The respondent contends that since 2015 when it purchased the suit property, the applicant has refused/declined and/or failed to permit or allow it to enjoy quiet possession and use of the suit property. This is what prompted the respondent to seek the above orders.

6. On 21/12/2017, the applicant filed a statement of defence in which it contends that the material charge was illegal, defective and incapable of creating any proprietary rights over the suit property. It further contends that it is still holding the suit property rightfully.

7. On 28/2/2018, the applicant brought a notice of motion dated 28/2/2018 in which it seeks an order staying this suit, pending the hearing and determination of Nairobi HCCC No 333 of 2013. Alternatively, the applicant seeks an order striking out or dismissing this suit on the ground that it is an abuse of the process of the court. That application is the subject of this ruling.

8. The case of the applicant is that this suit offends Section 6 of the Civil Procedure Act, in that it is res *judicata* by dint of the fact that Nairobi High Court Civil Case No 333 of 2013 subsists between the applicant and two defendants, one of whom is the respondent herein.

9. The respondent opposes the application. The case of the respondent is that the cause of action in the present suit is distinct and separate from the cause of action in Nairobi HCCC No 333 of 2013 because the suit herein is based on the plaintiff's right to vacant possession of the suit property and the applicant's refusal to allow the respondent access, use and quiet possession of the suit property while in Nairobi HCCC No 333 of 2013, the applicant challenged the chargee's exercise of statutory power of sale. Secondly, the plaintiff contends that the orders of eviction and permanent injunction which are sought in the present suit are not available in Nairobi HCCC No 333 of 2013 by dint of the Constitutional and statutory framework on jurisdiction of the three tier superior courts of equal status. Thirdly, the respondent contends that by dint of Section 99 of the Land Act, the only remedy available to the defendant in Nairobi HCCC No 333 of 2013 is damages.

10. I have deeply reflected on the tenor and import of the present application. The key issue presented by this application is yet another of the many questions that keep emerging in relation to what is popularly described as "mixed grill" or "hybrid" causes of action. The applicant's position is that the plaintiff should have ventilated its grievances in Nairobi HCCC No 333 of 2013 which subsists to date. The position taken by the respondent is that it seeks an order of eviction and the court with jurisdiction to grant that order is the Environment and Land Court, hence it could not ventilate its grievances in Nairobi HCCC No 333/2013.

11. I have looked at the pleadings in Nairobi HCCC No 333 of 2013. The applicant who is the plaintiff in that suit challenged the chargee's right to sell the suit property in exercise of the chargee's statutory power of sale. The court considered the applicant's plea at the interlocutory stage and declined to grant an interlocutory injunction. Consequently, the suit property was sold and is now registered in the name of the respondent. The key issue in Nairobi HCCC Number 333 of 2013 is whether the plaintiff in that suit owed the defendant the debt which led to the sale of the suit property. The key issue in the present suit is whether or not the applicant is entitled to continue being in possession of the suit property after the same was sold to the respondent by the chargee in exercise of the chargee's statutory power of sale.

12. There is therefore no doubt that if the two suits are left to be determined by the two different courts of equal status, there is the real danger of the two courts making pronouncements and findings that contradict each other. This may adversely affect the proper administration of justice. For this reason, there is merit in seeking to avoid parallel proceedings.

13. The question that arises in the circumstances is whether a stay order would be an appropriate measure in the circumstances of the two suits? In my view, a stay of either of the two suits may not be a proper move in the circumstances of the two suits. I say so because Nairobi HCCC Number 333 of 2013 is now 6 years old. The applicant who is the plaintiff in that suit has not told the court what it is that has prevented it from prosecuting that suit. It wants to stay the present suit without prosecuting the other suit and continue occupying land that is now registered in the name of the respondent. A stay order will therefore unduly perpetuate that state of affairs. In my view, a holistic approach will be to give the parties to the two suits the opportunity to elect to consolidate the two suits and have them disposed by the same court.

14. Instructively, the litigants in the two suits will be confronted with the question as to whether one of the two courts of equal status can properly handle the two related disputes in light of their jurisdictional limits. Confronted with a similar question on the jurisdictional limits of the courts of equal status, the Court of Appeal in **Prof Daniel N Mugendi v Kenyatta University & 3 others (2013) eKLR** held thus:

“ in the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour court relations matters alongside claims of fundamental rights ancillary and incidental to those matters, the same should go for Environment and Land Court, when dealing with any claims of breaches of fundamental rights associated with the two subjects”

15. Guided by the above approach by the Court of Appeal, I am of the view that the two suits can properly be disposed by one court. This will eliminate the possibility of having contradicting findings by two different courts of equal status. Any of the litigants is therefore at liberty to move the court for appropriate orders. In so doing, they will have to consider the question as to which of the causes of action is principal and which one is ancillary or incidental.

16. Lastly, the applicant made an alternative plea for an order striking out the respondent's suit. That plea, in my view, is misplaced. The respondent purchased the suit property and is the registered proprietor thereof. The applicant has refused to vacate the land. In my view, the respondent was entitled to bring an action for an eviction order. To therefore strike out the respondent's suit without granting it the benefit of a full hearing would be draconian and inappropriate.

17. In light of the foregoing, I decline to stay the proceedings in this suit. I similarly decline to strike out the suit. The parties in this suit and in High Court Civil Case Number 333 of 2013 are at liberty to initiate appropriate proceedings for transfer and consolidation orders in any of the related suits, guided by the relevant jurisdictional criteria of principal issue and ancillary or incidental issues.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF FEBRUARY 2019

B M EBOSO

JUDGE

In the presence of:-

Ms Mwangi holding brief for Mr Maina for the plaintiff

