IN THE COURT OF APPEAL

AT NAIROBI

GITAU v SAVAGE & 4 OTHERS

(TUNOI, O'KUBASU & KEIWUA JJ A)

CIVIL APPEAL NO. 244 OF 1999

GITAU …….....…….....…….APPELLANTS

VERSUS

SAVAGE & 4 OTHERS….....…….……RESPONDENT

Land – *land use - application to restrain development on land designated as residential user for commercial purposes - the development alleged to be contrary to physical planning law - matters the court will consider in an application for injunction.*

The respondents filed a suit in the superior court against the appellant and the City Council of Nairobi, and simultaneously lodged an application for an injunction to restrain the defendant from carrying out a development of a commercial nature, namely a petrol station, in Mukoma, Kisembe and Kikeni Estates of Magadi Road as it was a residential area. The superior court granted the orders to preserve the status quo pending the outcome of the hearing of the suit.

The appellant felt aggrieved by the decision and filed an appeal arguing that the order injunction was draconian. It was contented for the respondents that it had not been shown that the judge had misdirected himself in the exercise of his discretion.

Held:

1. The principles which guide the court in dealing with an application for an injunction are well settled and clearly spelt out in the case of *Giella v Cassman Brown & co. Ltd*. The applicant must show that:

a) He has a prima facie case with the probability of success upon trial;

b) In the event that he is refused an injunction and he were eventually to succeed, that damages would not adequately compensate him for any loss which he would have suffered; and

c) If the court is in doubt on either of the two principles above then it should consider the application on the balance of convenience.

2. The High Court judge could not be faulted in the manner in which he exercised his discretion in granting temporary injunction. A temporary injunction was properly granted in order to maintain the

status quo until the final determination of the suit.

Appeal dismissed.

Cases

Giella v Cassman Brown & Co Ltd [1973] EA 358

Statutes

Civil Procedure Rules (cap 21 Sub Leg) order XXXIX rules 1, 2, 3, 7

Advocates

Mr Ojiambo and Miss Kenyenje for the Applicants

Mr Mwenesi for the Respondents

Mr Mugi for the Interested Party

February 15, 2002, the following Judgment of the Court was delivered. This is an interlocutory appeal from the decision of the superior court (Mitey J) delivered on 8th March, 1999 in which injunctive orders were granted against the appellant.

The plaintiffs who are the respondents in this appeal filed a suit against the appellant (Michael Gitau Waweru), and City Council of Nairobi.

According to the plaint filed in the superior court, all the plaintiffs (Nos 1-5) and the appellant (1st defendant) "are residents of or inhabitants of or proprietors of land or residential property within the Mukoma, Kisembe and Kikeni Estates, off Magadi Road Nairobi Area". The pertinent paragraphs of the plaint state as follows:-

"8. The Plaintiffs aver that the Mukoma, Kisembe and Kikeni Estates are designated as residential areas and are planned and developed and zoned as such for land planning and land use purposes.

9. At all material times the Plaintiffs and the 1st Defendants were and are all subject to the Land Planning Act, Chapter 303 of the Laws of Kenya and the Development and use of Land (Planning) Regulations 1961 made thereunder or by virtue thereof.

10. The Land Planning Act Chapter 303 of the Laws of Kenya provides for control of development of land and requires that persons wanting to undertake development of land in a planned or zoned area should do so with the consent of or in consultation with the planning authority.

11. In or about March 1998 the Plaintiffs noticed that a development of a commercial nature, namely a petrol station was taking place on the parcel of land known to the Plaintiffs as LR. No 7413/5 on Mukoma Road within the Plaintiff's residential area.

12. The Plaintiffs after investigation established that the property belonged to the 1st Defendant and they objected to the 2nd Defendant, the City Council of Nairobi and its Director of City Planning in particular, about the development in March 1998 and again in August 1998.

13. The Director of City Planning and Architecture by a letter Reference No Cp & APCH/PIS/04672/LR 7413/ 5 dated 14th August 1998 informed the Plaintiffs that the development complained of was not authorised. The 2nd Defendant's letter was copied to the 1st Defendant.

14. The 1st Defendant in addition has gone ahead and purported to carry out subdivision of LR 7413/5

without planning permission and purports to be carrying on development on a parcel No LR 7413/26.

15. Despite demand made the 1st Defendant has refused to or neglected and ignored to stop the unauthorized development and to return the property LR 7413/5 to its planned residential premises status.

16. Further the Plaintiffs aver that the unauthorized development of a petrol station will

(a) greatly increase traffic flow, noise and disturbance which will be a nuisance

(b) devalue their residential properties in which they have heavily invested for the zoned residential purposes

(c) adversely affect the already poor security in the area

18. The Plaintiffs claim against the 1st Defendant is that he stops the unauthorised development of LR No 7413/5 and reverts it to its original zoned user of a residential property.

19. The Plaintiffs claim against the 2nd Defendant is that the 2nd Defendant do not permit or authorise the development by the 1st Defendant and do take steps to stop and prevent the existing unauthorised development or any development adverse to the Plaintiffs' enjoyment of their properties as quiet residential homes in a residential area."

Simultaneously with the filing of the plaint the respondents in their Chamber Summons application dated 8th October 1998 and brought under order XXXIX rules 1, 2, 3 and 7 of the Civil Procedure Rules sought the following orders:-

"1.

2.

3. That a temporary injunction do issue to prevent the 1st Defendant, his agents, workers, servants, or otherwise from alienating, selling, damaging, removing or disposing of the property comprised in LR. No. 7413/5 or 7413/26 or any portion or part thereof until final determination of this suit.

4. That a temporary injunction do issue to restrain the 1st Defendant by himself, his agents, workers, servants or otherwise from continuing with unauthorized development on land parcel No LR No 7413/5 or unauthorised subdivision thereof whether known as 7413/26 or otherwise at Mukoma Road, Nairobi Area.

5. That a temporary injunction do issue restraining the 2nd Defendant from authorising or permitting development of a petrol station or other commercial development of LR No 7413/5 or on any portion or resultant subdivision thereof.

6. That there be such other order as the court deems would be just in the circumstances of this case.

7. Costs.". The application was brought under certificate of urgency and argued exparte before Ang'awa J who granted prayers 3, 4 and 5 on 8th October, 1998 and ordered that the matter be heard inter partes on 21st October, 1998. These interim orders were extended from time to time due to one reason or another until 9th February, 1999 when the inter partes hearing of the application commenced before Mitey J. who considered the arguments advanced before him and came to the conclusion that the orders sought should be granted. In his ruling the learned judge stated:-

"I find that the plaintiffs have established a prima facie case. The proposed construction is of a permanent nature and the suit will be of no consequence if the plaintiffs are denied the orders at this stage. I do not see any prejudice to the first defendant by the granting of the order. Furthermore damages cannot be adequate remedy to the plaintiffs in a case of this nature. What they seek to prevent transcends monetary

valuation. The balance of convenience tilts in favour of granting the order.

I therefore grant orders in terms of paragraph 3, 4 and 5 of the Chamber Summons dated 8th October, 1998. The costs of this application will be in the cause.".

It is that ruling that provoked this appeal. There were, in all, 13 grounds of appeal drawn up by the appellant's counsel.

When the appeal came up for hearing on 30th January, 2002 Mr Ojiambo appearing with Miss. Kinyenje for the appellant informed us that the first ground of appeal had been overtaken by events and so he did not wish to argue that ground. Mr Ojiambo then opened his address by complaining that the injunction as granted by the superior court was draconian as it has far reaching effect. We have considered that point but we see nothing draconian in the injunction which merely stopped any further development pending the final determination of the suit in the superior court. Mr Ojiambo then sought to show that permission to build the petrol station and subdivision had been granted. But this, in our view, will be a matter for the trial court when the suit comes up for hearing. The same can be said in respect of the complaint that the Commissioner of Lands should have been made a party to the suit.

The other grounds of appeal relate to issues of letters exchanged between the parties and how the learned judge of the superior court failed to take them into account and how his evaluation of the facts was clouded when he took extraneous and irrelevant matters and juxtaposing them with the proceedings before him. In short, it was Mr Ojiambo's submission that the respondents were not entitled to an injunction.

To counter Mr Ojiambo's arguments Mr Mwenesi, for the respondents, stated that it had not been shown that the learned judge of the superior court had misdirected himself in the exercise of his discretionary jurisdiction. It was Mr Mwenesi's contention that as the land in dispute was residential property then all matters were to be held in check until the matter was finally determined and hence status quo had to be maintained until a full trial had been held.

Mr Mugi for City Council of Nairobi associated himself with the submissions of Mr Ojiambo especially on the issue of joining the Commissioner of Lands as a party to the proceedings in the superior court.

At the commencement of this judgment we set out in extenso the pertinent paragraphs of the plaint which in themselves show the nature of the dispute.

As we are dealing with an interlocutory appeal we have to be careful in dealing with the issues raised lest we prejudice the trial in the superior court. Indeed, we had to remind Mr Ojiambo that he was dealing with interlocutory appeal when he appeared as if he was arguing the main suit before us.

According to the plaint filed in the superior court all the parties except City Council of Nairobi are residents of or inhabitants of or proprietors of the land within that area of Mukoma, Kisembe and Kikeni Estates off Magadi Road, Nairobi Area. This is a residential area. Then in March

1998 the respondents herein noticed that a development of a commercial nature, namely, a petrol station was taking place on the appellant's land.

It was also discovered that the appellant was not only putting up a petrol station but had effected subdivision of his land and he was in the process of developing a commercial centre on one of his subdivided portions. It was this development of a petrol station that triggered this litigation. As we have already stated when the plaint was filed in superior court the respondents took out a chamber summons application seeking a temporary injunction so that the construction of the petrol station and the intended commercial centre could be held in check until the suit was finally determined. It was then upon the learned judge of the superior court to consider respective positions of the parties and decide whether those facts were in favour of an injunction being issued. The learned judge was satisfied that injunction was appropriate.

What must be emphasized here is that what was before the learned Judge was an application for a temporary injunction. The principles which guide the court in dealing with such an application are well settled and are clearly spelt out in the often cited case of *Giella v. Cassman Brown & Co Ltd* [1973] EA 358.The applicant must first show he has a prima facie case with the probability of success upon trial. Secondly, he must show that in the event that he is refused an injunction and he were eventually to succeed that damages would not adequately compensate him for any loss which he would have suffered. Thirdly, that if the court is in doubt on either of the two principles above then it should consider the application on the balance of convenience.

The learned Judge appears to have had these principles in mind since in his ruling he clearly stated that the plaintiffs (the respondents in this appeal) had established a prima facie case, and that the appellant stood to suffer no prejudice by the grant of an injunction. The learned Judge went on to state that damages would not be adequate remedy to the respondents in a case of this nature. We have carefully considered the nature of this suit, the material before the learned Judge and what has been canvassed before us during the hearing of the appeal and we are of the view that the learned Judge of the superior court cannot be faulted in the manner in which he exercised his discretion in granting temporary injunction. We are satisfied that a temporary injunction was properly granted in order to maintain status quo until the final determination of the suit. We find no merit in this appeal and we order that the same be and is hereby dismissed with costs to the respondents. City Council of Nairobi will bear its own costs.

Those shall be our orders.