



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO.970 OF 2016

R.J.F. KENYA LIMITED.....PLAINTIFF

VERSUS

GULF ENERGY LIMITED.....DEFENDANT

JUDGMENT

The plaintiff brought this suit on 10th August, 2016 against Peter Njuguna Ngigi and Lincoln Ngugi Njuguna t/a Linpet Agencies. These defendants were removed from the suit through an amendment of the plaint that was made on 16th May, 2018 pursuant to the orders given on 5th April, 2018 that joined the current defendant to the suit. In the amended plaint dated 27th April, 2018, the plaintiff sought the following reliefs against the defendant;

- a) A permanent injunction restraining the defendant from entering into, blocking the plaintiff's agents, erecting structures or in any other manner interfering with the plaintiff's peaceful and quiet enjoyment of its property known as L.R No. 209/14758(IR 175501) situated in Nairobi.
- b) A declaration that the plaintiff is the lawful registered owner of L.R No. 209/14758(IR 175501) situated in Nairobi.
- c) An order for the cancellation of the defendant's title.
- d) General damages.
- e) Costs of the suit and interest.
- f) Any other relief that the court may deem fit and just to grant.

In its amended plaint, the plaintiff averred that it was the registered owner of all that parcel of land known as L.R No. 209/14758(IR175501) situated in Nairobi (hereinafter referred to as "the suit property"). The plaintiff averred that on or about 8th August, 2016, the defendant by itself and its agents invaded the suit property and started subdividing the same into small portions claiming to be the owner thereof. The plaintiff averred that through the intervention of the Officer Commanding Langata Police Station, the defendant was chased away from the suit property. The plaintiff averred that on 9th August, 2016, the defendant made attempts to go back to the suit property but was repulsed by the plaintiff's security guards and police officers. The plaintiff averred that the defendant's actions aforesaid were criminal in nature and were unwarranted since the defendant was not the registered owner of the suit property and had no known interest in the same.

The defendant filed a defence and counter-claim on 16th July, 2018. The defendant denied that the plaintiff was the registered proprietor of the suit property and that it had invaded the said property on 8th August, 2016 and started subdividing the same. The defendant admitted that it was the registered proprietor of all those parcels of land known as L.R No. 9306 and L.R No. 9804(hereinafter referred to as "the defendant's properties"). The defendant averred that the plaintiff had fenced a parcel of land that included the defendant's properties on the presumption that the said parcels of land were part of the suit property allegedly registered in the name of the plaintiff.

The defendant denied that it entered the suit property as claimed by the plaintiff. The defendant averred that it was the plaintiff through its agents who had invaded and fenced the defendant's properties and had continued to keep off anyone claiming interest thereon. The defendant averred that since the defendant's properties were part of the parcel of land that had been fenced by the plaintiff, the plaintiff's representatives had continued to deny the defendant's representatives access to the defendant's properties. The defendant averred that the plaintiff was not entitled to the reliefs sought in the amended plaint.

In its counter-claim, the defendant averred that in August, 2016, the plaintiff claiming to be acting under a court order dated 10th August, 2016 fenced a parcel of land that included the defendant's properties and thereafter erected structures thereon including a makeshift gate, a water tank, tents and a container and posted a guard to keep off anyone claiming interest therein. The defendants averred that the plaintiff was aware that the defendant's properties were not part of the suit property in respect of which the said order was issued. The defendant averred that the plaintiff applied the said order on the defendant's properties which were not part of the suit property.

The defendant averred that in a report prepared by the Director of Surveys pursuant to an order that was made herein on 23rd December, 2016, the Director of Surveys found that the plaintiff's claim that the suit property encompassed the defendant's properties was wrong because part of the suit property was located within Wilson Airport while the other part fell on a flight path. The defendant averred that the plaintiff's claim that the defendant's properties were located within the suit property was wrong and unfounded.

The defendant averred that the plaintiff had through the actions complained of continued to impede the defendant from accessing its properties or exercising its rights as the rightful owner of said properties. The defendant averred that it was entitled to the orders sought in the amended plaint. The defendant averred that it incurred costs of Kshs. 374,910/- for the survey that was conducted on 21st March, 2017 in respect of which it was claiming a refund from the plaintiff.

The defendant sought judgment against the plaintiff by way of counter-claim for;

1. A declaration that the suit property did not encompass the defendant's properties.
2. An order compelling the plaintiff to remove the fence set up around the defendant's properties and all the structures erected thereon.
3. A permanent injunction restraining the plaintiff from interfering in any way whatsoever with the defendant's properties.
4. Reimbursement of Kshs. 324,910/- being survey costs incurred by the defendant together with interest from the date of filing suit until payment in full.
5. Costs.
6. Any other or further relief that the court may deem just and necessary to grant.

The plaintiff filed a reply to defence and defence to counter-claim on 23rd July, 2018. The plaintiff reiterated that it was the sole proprietor of the suit property and that the defendant had invaded the property and started subdividing it. The plaintiff averred that the defendant's claim over a portion of the suit property had no basis. The plaintiff denied the defendant's counter-claim in its entirety. The plaintiff denied that the suit property was situated at Wilson Airport and on a flight path. The plaintiff denied having interfered with the defendant's properties. The plaintiff urged the court to strike out the defendant's counter-claim as a non-starter.

When the suit came up for hearing on 17th November, 2020, the plaintiff's advocate informed the court that the plaintiff did not wish to tender evidence in proof of its case. The plaintiff's case was therefore closed without the plaintiff calling any evidence. The defendant called one witness in support of its counter-claim. The defendant's witness, Paul Kiprotich Limo(DW1) was the defendant's Chief Executive Officer. DW1 adopted his witness statement dated 12th July, 2018 as part of his evidence in chief. He also produced the defendant's bundle of documents dated 12th July, 2018 and a letter dated 26th February, 2020 attached to the list of documents dated 27th February, 2020 as exhibits. DW1 told the court that the defendants were the owners of the defendant's properties. He stated that the defendant's properties were situated behind Wilson Airport. He stated that in August, 2016 when they wanted to develop the defendant's properties, they realized that the said properties had been fenced by unknown persons. On investigations, the defendant learnt that the fencing was done by some people who claimed to have a court order declaring them to be the owners of the defendant's properties.

DW1 stated that when they perused the said court order, they noted that the order referred to a parcel of land different from the defendant's properties. He stated that it was the plaintiff that had fenced the defendant's properties. He stated that a search at the companies registry on the plaintiff revealed that the plaintiff did not exist as a legal entity. DW1 stated that it was not clear how a non-existent company obtained a court order. He stated that a search on the suit property revealed that it was registered in the name of a company known as R.T.F Kenya Limited which was different from the plaintiff which calls itself, R.J.F Kenya Limited. DW1 stated that the suit property which was owned by R.T.F Kenya Limited was separate and distinct from the defendant's properties. He stated that this fact was confirmed through a survey that was carried out pursuant to a court order a report in respect of which was filed in court on 8th March, 2017.

DW1 stated that the defendant wanted to develop its properties. He stated that the defendant had lost revenue by not using the suit property. He stated that the defendant wanted the plaintiff's fence and guards removed from the defendant's properties. He stated that the defendant incurred a sum of Kshs. 324,910/- in survey fees which it was supposed to share with the plaintiff but the defendant ended up paying the whole amount when the plaintiff failed to pay its share. DW1 denied that the defendant wanted to subdivide the suit property and that a complaint was made by the plaintiff against the defendant to the Police. He stated that it was the plaintiff which had encroached on the defendant's properties. He stated that no basis had been laid for the cancellation of the defendant's titles to its properties. He stated that the defendant acquired its properties lawfully and that the properties had nothing to do with the suit property claimed by the plaintiff.

DW1 was not cross-examined on his evidence after the plaintiff's advocate told the court that he had no instructions to do so. The plaintiff did not also tender any evidence in its defence to the counter-claim. After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiff did not file submissions while the defendant filed its submissions on 9th December, 2020.

In its submissions, the defendant framed four issues for determination namely;

- a. Who is the owner of the subject properties?
- b. Are the properties registered as L.R No. 9306, Nairobi, L.R No. 9804 Nairobi (the defendant's properties) and L.R No. 209/14758(the suit property) located on separate and distinct areas?
- c. Is the plaintiff's presence on the defendant's properties illegal?
- d. Has the defendant suffered any loss on account of the plaintiff's actions?

On the first issue, the defendant submitted that the plaintiff claimed to be the owner of the suit property while the defendant was the owner of the defendant's properties. The defendant submitted that the only conclusive proof of ownership of a property is a title document as provided under Section 26 (1) of the Land Registration Act, 2012. The defendant submitted that it was the registered owner of the defendant's properties as evidenced by the certificates of title at pages 1 - 5 and 6 - 9 of Defence Exhibit 1. The defendant further submitted that the plaintiff had not placed before the court any evidence that disputes the ownership of the defendant's properties nor had the plaintiff adduced any evidence that diminished or discredited the defendant's certificates of title. With regard to the ownership of the suit property, the defendant submitted that its title showed that the same was registered in the name of a company known as "R.T.F. Kenya Limited". The defendant referred the court to the title for the property at pages 10 – 12 of Defence Exhibit 1. The defendant submitted that this suit was instituted not by R.T.F Kenya Limited, the company registered as the owner of the suit property but by "R.J.F. Kenya Limited". The defendant submitted that the absolute owner of the suit property claimed by the plaintiff was not a party to this suit and had not adduced any evidence to explain its interest if any in the suit property.

The defendant submitted that it made efforts to establish the identity of the plaintiff company by conducting a search with the Companies Registry and that a search on the plaintiff company revealed through a letter dated 26th February 2020 issued by the Registrar of Companies that the plaintiff company did not appear in the Companies Registry. The said letter dated 26th February 2020 was produced in evidence as Defence Exhibit 2. The defendant submitted that unknown entity, namely R.J.F. Kenya Limited had brought this suit against the defendant without producing an iota of proof as to its right to bring an action as a registered owner of the suit property.

The defendant submitted that the uncertainty surrounding the existence of the plaintiff in this suit and the plaintiff's failure to establish its interest in the suit property and the defendant's properties is sufficient for the court to dismiss the plaintiff's suit.

On the second issue, the defendant submitted that the primary dispute in this suit is the location of the suit property and the defendant's properties. The defendant submitted that the issue must be determined on the strength of each party's evidence. The defendant invited the court when determining the issue to consider the Survey Maps issued by the Director of Survey (See Pages 23 – 26 of Defence Exhibit 1.). The defendant submitted that the survey map on page 25 of Defence Exhibit 1 shows the location of the suit property as having a trapezoid shape appearing on the right of the beacons marked M31 and M32. The defendant submitted that the suit property had also been highlighted in yellow on page 32 of Defence Exhibit 1. The defendant submitted that the survey map on page 26 of Defence Exhibit 1 shows the defendant's properties appearing on the lower section of the map. It was submitted that, the defendant's properties are the two rectangular-shaped properties (9306 and 9804) appearing on the left of the beacons marked M31 and M32 (the V shaped dip on the road). The defendant submitted that for ease of reference, the defendant's properties had been highlighted in yellow on page 32 of the Defence Exhibit 1.

The defendant submitted that the plaintiff erroneously fenced off the properties appearing on the right of the beacons marked M31 and M32 at page 26 of Defence Exhibit 1, alleging that the same were the suit property (Land Reference Number 209/14758). The defendant further submitted that even a cursory look at the maps supplied by the Survey of Kenya showed that the defendant's properties and the suit property are different and that the parcel of land that was fenced off by the plaintiff could not be the property registered as Land Reference Number 209/14758(the suit property).

The defendant submitted further that in the Survey Report dated 6th March, 2017 (Pages 27 – 33 of Defence Exhibit 1.) that was prepared and filed in court pursuant to the orders of this Honourable Court issued on 23rd December, 2016, Ms Priscilla Njeri Wango on behalf of the Director of Surveys surveyed and marked out the boundaries of the suit property and the defendant's properties. The defendant submitted that the findings in the said Survey Report were quite clear as to the location of the suit property and the defendant's properties. The defendant submitted that it was the finding of the surveyor that a section of the suit property was located within Wilson Airport while the rest of the suit property was located on a flight path.

The defendant submitted that this was the reason why the plaintiff had illegally alienated/fenced off the defendant's properties that clearly did not belong to it. The defendant submitted that the plaintiff had failed to adduce any evidence that the location of the suit property is as claimed by it. The defendant submitted that even the material placed before the court by the plaintiff showed that the plaintiff was occupying the defendant's properties. The defendant submitted that it was clear that the plaintiff had incorrectly fenced off the defendant's properties and had continuously deprived the defendant of its right to property.

On the third issue, the defendant submitted that it had already established that the property that had been fenced by the plaintiff belonged to the defendant. The defendant submitted that as registered owner of the defendant's properties it was entitled to quiet enjoyment thereof. The defendant submitted that the plaintiff had denied it access to the defendant's properties and had placed armed men to stop any efforts by the defendant to access its own properties. The defendant submitted that it had not nor had it ever given the plaintiff any authority or consent to enter, occupy or interfere in any way with the defendant's properties and as such any possession or dispossession of its properties by the plaintiff was an infringement of the its right to property.

On whether it had suffered any loss, the defendant submitted that the plaintiff fenced the defendant's properties in 2016 thereby denying the defendant access and use of its properties since then. The defendant submitted that it was in the energy business and the properties it has been

denied access to, were prime properties that would have allowed substantial gain and benefit to the defendant if the defendant had established a petrol station thereon. The defendant submitted that with each passing day since 2016 to date, the plaintiff's actions in illegally preventing the defendant from developing its properties had caused the defendant to suffer insurmountable financial loss. The defendant urged the court to find it just and equitable to award damages against the plaintiff. The defendant submitted that in assessing the amount to award the defendant as general damages, the court should be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered. In support of this submission, the defendant cited Ugandan case of *Ewadra v Spencon Services Limited (Civil Suit No. 0022 OF 2015) [2017] UGHCCD 136* (See Page 27 of the Defendant's Bundle of Authorities), where the court stated that:

“In the assessment of general damages, the court should be mainly guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered”

The defendant submitted that taking into account the value of the defendant's properties which was Kshs. 28,000,000/- in the year 2012 for L.R No. 9306 (refer to page 22 of the Defence Exhibit 1) and Kshs. 46,000,000/- in the year 2015 for L.R No. 9304 (refer to page 17 of the Defence Exhibit 1), the location of the properties, the cost of inflation and time value of money, an award of Kshs. 15,000,000/- for general damages would be reasonable and urged the court to so grant. The defendant submitted further, that due to the unwarranted actions of the plaintiff, the defendant incurred the cost of Ksh. 374,910/- for the survey conducted on 21st March 2017. The defendant submitted that it is entitled to a full refund of the said amount.

In conclusion, the defendant urged the court to dismiss the plaintiff's suit and allow the orders sought by the defendant in the counter-claim and in the submissions.

I have considered the pleadings and the evidence on record. I have also considered the submissions filed by the defendant. As I mentioned earlier in this judgment, the plaintiff did not tender any evidence at the trial in support of its case. In the circumstances, it is my finding that the plaintiff's case has not been proved and is for dismissal. The court will make appropriate orders at the end of the judgment. That leaves the defendant's counter-claim against the plaintiff for determination. The issues arising for determination in the counter-claim in my view are the following;

1. Whether the plaintiff trespassed on the defendant's properties and prevented the defendant from accessing and using the same.
2. Whether the defendant is entitled to the reliefs sought in the counter-claim.
3. Who is liable for the costs of the suit and the counter-claim?

Whether the plaintiff trespassed on the defendant's properties and prevented the defendant from accessing and using the same.

Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. *See, Clerk & Lindsell on Torts, 18th Edition, page 923.* In *Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR*, it was held that title to land carries with it legal possession. The defendant's properties were registered under the Registration of Tiles Act, Chapter 281 Laws of Kenya (now repealed). Section 23(1) of the Registration of Tiles Act provides as follows:

The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

Section 24 and 25 of the Land Registration Act, 2012 provides as follows:

24. Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

It is clear from the foregoing that under the current land registration system and the land registration regime under which the defendant's titles were registered, the defendant's titles to the defendant's properties are indefeasible unless any illegality, procedural impropriety or fraud in the acquisition thereof is established. In the present case, the plaintiff did not tender any evidence to challenge the defendant's titles to the defendant's properties. From the evidence on record, I am satisfied that the defendant is the absolute owner of the defendant's properties. As the lawful proprietor of the defendant's properties, the defendant was entitled to enjoy all the rights accruing to a proprietor of land including that of possession and use.

The defendant did not only establish its title to the defendant's properties. The defendant proved further that the plaintiff had entered into and occupied the said properties without its consent. After the defendant had established its title to the defendant's properties and the plaintiff's unauthorized entry and occupation of the same, the onus was upon the plaintiff to justify its occupation of the properties. The plaintiff tendered no evidence at the trial. In its plaint, the plaintiff had contended that it was the defendant which had entered into its property. The evidence placed before the court puts it clear without a doubt that the suit property claimed to be owned by the plaintiff is separate and distinct from the defendant's properties and that they are far apart. This is clear from the survey report dated 6th March, 2017 that was prepared and filed in court on 8th March, 2017 pursuant to the orders of the court.

In the absence of any justification put forward by the plaintiff for its occupation of the defendant's properties, the only conclusion that this court can make is that such occupation is without any lawful cause and as such is trespass.

Whether the defendant is entitled to the reliefs sought in the counter-claim.

I have set out at the beginning of this judgment, the reliefs sought by the defendant in its counter-claim. From my findings above, I am satisfied that the defendant has proved its case against the plaintiff and as such it is entitled to the reliefs sought in its counter-claim. In its submissions, the defendant had urged the court to grant it damages for trespass. The defendant having proved trespass, it is entitled to damages. The defendant is however bound by its pleadings. The defendant neither pleaded general damages nor sought the same in its counter-claim. The court cannot grant a substantive relief like general damages when it is not pleaded and prayed for. The claim for special damages in the sum of Kshs. 324,910/- was pleaded and proved. The defendant is therefore entitled to the same together with the other orders sought in the counter-claim.

Conclusion:

In conclusion, I hereby make the following orders;

1. The plaintiff's suit is dismissed.
2. Judgment is entered for the defendant against the plaintiff in terms of prayers i, ii, iii, iv and v of the counter-claim dated 12th July, 2018.
3. The defendant shall have the costs of the suit and the counter-claim.
4. In the event that the plaintiff does not exist as a legal entity, the costs of the suit and the special damages shall be paid by one, Mohamed Birre who swore the affidavit verifying the plaint.

DELIVERED AND DATED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2021

S. OKONG'O

JUDGE

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

MR. WANDATI FOR THE PLAINTIFF

MR. GATUGUTI FOR THE DEFENDANT

MS. C.NYOKABI-COURT ASSISTANT