



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 114 OF 2010

LINK PROPERTIES LIMITED.....PLAINTIFF

VERSUS

KENYA POWER COMPANY..... DEFENDANT
& LIGHTING COMPANY

SIMON CHEGE1ST INTERESTED PARTY

GEORGE MUHORO.....2ND INTERESTED PARTY

SIMON MATHENGE.....3RD INTERESTED PARTY

JULIA KAMUIRU..... 4TH INTERESTED PARTY

RICHARD AYUSA ONDIEKI.....5TH INTERESTED PARTY

JACKSON MWELWA.....6TH INTERESTED PARTY

PETER NJOROGE.....7TH INTERESTED PARTY

STANLEY KAMAU.....8TH INTERESTED PARTY

RULING

The interested parties application dated 21st February 2011 is the subject of this ruling. The application seeks the following substantive orders:-

1. That the orders of injunction obtained by the plaintiff and issued by this Honourable court on 28th July 2010 and all consequential orders and proceedings be discharged varied and/or set aside forthwith.
2. That the suit instituted by the plaintiff herein be struck off with costs as it is an abuse of the due process of the law.
3. That in the alternative the plaintiff its servants and/or agents be restrained by an order of this

- Honourable court from interfering with the power installation and supply project by the plaintiff to the residents of all that estate known as **Chokaa, Ruai** Nairobi situated on **L.R.NO.11531/8**.
4. That the plaintiffs be condemned to pay the costs of this application.

The interested party's application is based on the grounds set out on the face of the application and the affidavit sworn in support by the representatives of the interested parties. The said grounds are as follows:-

- i. The interested parties represent a group of over 2,500 residents of the residential estate known as "**Chokaa**" at **Ruai**, Nairobi who have been directly and adversely affected by the orders of this Honourable court.
- ii. The interested parties were not informed of the court proceedings herein despite the fact that the orders sought affected them directly. They have thus been condemned without being heard.
- iii. The court order issued herein was obtained by persons with no valid or legitimate claim to the suit parcel of land.
- iv. The court orders herein were obtained by the counsels and the plaintiff behind the interested parties backs through deceit, wrongful connivance, non disclosure and deliberate misrepresentation of some relevant facts.
- v. The Applicant has no recognized or legitimate interest or claim to title and/or ownership to the suit parcel of land **11531/8**.
- vi. The court order issued herein was maliciously intended and has actually been utilized to unlawfully blackmail and forcefully coerce the interested parties into some wrongful demands by the Applicants.
- vii. The suit has been brought and sustained in court by the plaintiffs with ulterior motives.
- viii. The court order has been manipulated to stop supply of power to more than 900 out of 2500 residents of "**Chokaa**" **Ruai Estate L.R. NO.11531/8** who have rightfully applied for and paid to KPLC for connection, installation and supply of power.
- ix. The entire suit by the plaintiff is bad in fact and in law and ought to be struck out with costs.

The named interested parties have sworn a joint affidavit in support of the application dated 29th February 2011. The deponents state they have the authority of the persons who have signed the letter of authority annexed and marked "**CRR1**". The interested parties depone that the suit parcel of land **L.R. NO. 11531/8** was at all material times registered in the name of the late **Ranbir Krishen Kecharhand Kent** who passed away on 9th December 1997 leaving his daughters Nish Kent alias **Nidhi Kent** and **Upsana Kent** as the **Executrixes** of his will which together with the grant and certificate of confirmation of grant is annexed and marked "**CRR2**". The deponents depone under paragraphs 4 to 11 both inclusive as follows:-

4. **That the deceased had employed our respective parents who continued for all their natural lives to reside and work on the suit parcel of land since the early nineteen sixties (1960s) and we were all born and bred by our respective parents and have continued through out our lives to exclusively occupy the said parcel of land with our respective 2nd and 3rd generation families.**
5. **THAT the occupants currently residing on the suit parcel of land are over 2,500 in total and we have received their mandate to institute the current proceedings as their representatives.**
6. **That for all the period that our parents worked for the late Ranbir Krishen Kecharhand Kent as farm workers in his horticultural farms he constructed for them some workers quarters on the parcel of land known as L.R NO.11531/8 where they resided with their families.**
7. **That we are aware that over the years the residents of L.R. NO.11531/8 Chokaa Ruai, Nairobi have subdivided the land into more than 1,500 residential sub-plots and constructed their residential houses where they now live with their respective families.(copy of recent photographs attached and marked "CRR-3")**

8. That in the year 2004 we registered an organization by the name of Ruai Chokaa Settlement Self-help Group with a view of improving the welfare of our members who are primarily residents of L.R.NO.11531/8. (Copy attached and marked as “CRR-4”).
9. That we have openly occupied, lived on the said parcel of land continuously with our respective families since we were born and over the years we have built and developed our residential homes, occupied the land and we have not known any other home.
10. That we wish the Honourable court to note that the City Council of Nairobi connected water supply to the entire residential estate and the residents have got properly installed water pipes with City Council meters in place. (copies of water bill attached and marked as “CRR-5”).
11. That the self-group has assisted the residents to develop community projects intended to improve the welfare and social amenities catering for the occupants of L.R. NO.11531/8 Chokaa Ruai, Nairobi being;
 - i. Three Schools catering for pre-primary Education,
 - ii. One health clinic
 - iii. An electrification project
 - iv. A church and a mosque

(Enclosed herewith are photographs in a bundle marked as “CRR-6”)

The Deponents further claim the Executrixes of the Estate of the late **Ranbir Krishen Keharchard Kent** in the year 2002 filed **HCCCC NO. 1502** of 2000 (now referred to as **HC.ELC NO. 795** of 2007 directed against the occupants of the adjacent **PLOT L.R.NO.11531/9** against the persons named as **John Oyawo Neko, Stephen Ongoro Adika, Ezbon Ongoto Adika** and **John Kamande** which persons the interested parties state are unknown to them and have never been residents of **Chokaa, Ruai Nairobi L.R.NO.11531/8**. As per the pleadings in the referred to suit the plaintiffs claim against the Defendants was that the Defendants were stone masons and were quarrying in the suit premises and sought an order of mandatory injunction and eviction against the Defendants in addition to general damages for trespass and wastage.

The interested parties claim there is no quarry in **L.R.NO.11531/8** and further that the plaintiffs obtained amendment of the plaint to seek the orders of injunction against the residents and occupants of **L.R.NO.11531/8** and **11531/14** (instead of **L.R.NO.11531/9** and **L.R.NO.11531/10** and proceeded to get orders of injunction and eviction. The interested parties state they are the occupants and residents of **L.R.NO.11531/8** and they were not enjoined to the suit as parties and that the injunctive orders and eviction orders were obtained without their knowledge and without them being made parties to the suit and were thus being condemned unheard against the rules of natural justice. The interested parties aver that they were not parties in the proceedings where the orders were made and were never served with the court proceedings before the issuance of the orders. The interested parties claim they came to learn of the proceedings when the plaintiffs attempted to evict their members from **L.R.NO.11531/8** using Auctioneers which they resisted as they laid claim to the parcel of land on account of being adverse possessors for a period in excess of the statutory period of 12 years.

The interested parties have filed a representative suit for the 2500 residents of **Chokaa Ruai** claiming title to **L.R.NO.11531/8** by virtue of adverse possession against the Administrixes of the Estate of the late **Rabir Krishen Kencharhand Kent** vide **HCCCC NO. 615** of 2010 (OS) and contend that the suit has high chances of success. The interested parties further depone that following discussions and consultations with **Rajesh Kent** who claimed to be entitled to the portion occupied by the interested party and had paid a sum of Kshs.8,560,721/50 to have the property transferred to him, the interested parties agreed to refund the said deposit paid to the Executrixes on the condition that the said **Rajesh Kent** would abandon any further claim to the parcel of land. Pursuant to this agreement/arrangement the residents mobilized and raised a sum of Kshs.7,500,000/- which they paid to **Rajesh Kent’s Advocates** who duly acknowledged the amount and issued a receipt for the same.

The interested parties further depone that the residents of **Chokaa, Ruai** Estate applied for and paid for installation of power to their respective residential houses to Kenya Power & Lighting Co. Ltd who have completed installation of Power cables and the majority of the residents have entered into power supply agreements with Kenya Power & Lighting company. The interested parties however state that they have learnt that the plaintiff company, **Link Properties Ltd** in which **Rajesh Kent** and his lawyer are directors and shareholders have filed the instant suit against KPLC and obtained an order barring KPLC from connecting, supplying electricity power through the power lines erected and being on **L.R.NO.11531/8** Nairobi and that further KPLC was ordered to remove the power lines and poles erected upon **L.R.NO.11531/8** Nairobi pending hearing and determination of the suit. The interested parties contend that these orders were obtained through collusion of the parties in that **Otieno OKeyo Advocate** who represented the Defendant was a shareholder and director of the plaintiff company and hence could not properly represent the interests of the Defendant he himself being an interested party through the plaintiff. The interested parties contend that having agreed with Rajesh Kent in the presence of his lawyer and having made the refund to Rajesh Kent through his lawyers in the sum of Kshs.7,500,000/- the said Rajesh Kent and his lawyers could not lawfully renege from the agreement in the manner they sought to do by manipulating the court to issue orders without making full disclosure of all the facts. The orders of injunction herein were in the premises issued in abuse of the court process and the same are for setting aside.

Mr. Rajesh Kent Managing Director of the plaintiff Company swore a replying affidavit dated 26th May 2011 in opposition to the interested parties application dated 21st February 2011. The plaintiff denies that the Applicants are in occupation of the suit premises and further states that the deceased who was his father, his uncle and himself were the persons who occupied the parcel of land and avers that the workers never lived in the farm and that they (worked came and left as their work schedules required of them). The deponent states that any purported subdivisions and/or any developments undertaken by any person on the suit property are illegal and unlawful as they have been effected without any lawful authority and/or colour of right.

The plaintiff assert that the suit **HCCC NO.1502 of 2002** was filed against the four named persons who were trespassing on **L.R.NOS.11531/8** and 14 Nairobi insinuating the interested parties were then not in trespass. The plaintiff claims that they have never been served with any suit papers by the interested parties but at any rate aver that such a suit for adverse possession by the Applicants has no chance of succeeding as the Applicants are mere trespassers. The deponent admits that he held about three meetings with certain representatives of the unlawful squatters on the subject properties upon their request. The squatters indicated that they had organized themselves into a group and that they wished to purchase the said parcel of land from **Link Properties Limited**. The plaintiff denies that they agreed to abandon their claim to the parcel of land upon being paid a sum of Kshs.8,560,721/50 and states that the applicants were to pay a much higher sum of Kshs.85,500,000/- as per letter annexed and marked "**RK2**" dated 2nd October 2009. The plaintiff admits the interested parties paid a sum of Kshs.7,500,000/- but contends that this was only a part payment and that the interested parties were to pay the balance to enable the plaintiff company to execute the sale agreement and the transfer.

The plaintiff claims it has beneficial ownership in regard to the suit property by virtue of an executed transfer and sale agreement dated 19th June 2006 between the administrators of the estate of the late **Ranbir Krishen Keharchand Kent** and the plaintiff and asserts that the beneficial ownership confers the same rights and obligations as those conferred on a registered interest.

The interested parties filed a supplementary affidavit with leave of the court on 31st January 2014 further to the replying affidavit by the plaintiff. The interested parties depone that **Hon. Lady Justice Nyamweya** on 31st October 2013 set aside the injunction and order of eviction issued in **ELC NO. 795 of 2007** where the interested parties herein had been enjoined as interested parties. **Hon Lady Justice Nyamweya** further in her ruling ordered that "interested parties" possession and occupation of the suit properties was not to be interfered with and that there should be no demolition and/or interference with any structures and facilities on the said properties belonging to the interested parties. The interested parties further depone that the suit property is still registered in the name of the deceased **Ranbir Krishen**

Kecharhand and Kent and aver that the plaintiff had no capacity or authority to deal with the property they not being the owners of the suit property and/or administrators of the deceased estate. The interested parties reiterate the injunctive orders were fraudulently obtained through concealment and/or misrepresentation of material facts. The injunctive orders obtained directly affected the interested parties and both Rajesh Kent and his lawyer **Otieno Okeyo** were aware that the interested parties were in possession and occupation and had developed residential homes/houses in the suit property and that the project by the Defendant of supplying electricity was intended for the benefit of the interested parties and yet the plaintiff omitted to enjoin the interested parties to the suit from inception. The interested parties aver that the injunctive orders to the extent that they affect them and they were not party to the suit at the time they were obtained ought to be set aside as they were made without them being afforded a chance to be heard and the same were obtained through concealment and/or misrepresentation of material facts.

The interested Parties/Applicants and the plaintiff filed written submissions to ventilate their respective positions. Counsel for the Applicants and the plaintiff/Respondent made oral submissions before me on 7th October 2014 to highlight their filed written submissions. Having considered the Applicants application and the affidavits filed in support and opposition and the parties submissions the issues for determination are firstly whether the Applicants have made out a case for the plaintiff's suit to be struck out for being frivolous, vexatious and/or otherwise an abuse of the process of the court. Secondly, whether the injunctive order made on 28th July 2010 in favour of the plaintiff ought to be set aside and/or lifted.

Order 2 rule (1) of the Civil Procedure Rules 2010 provides for the striking out of pleadings and replaced the previous order V1 Rule 13 under which the Applicants application is made.

Order 2 rule 15 (1) provides:-

15.(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:-

- (a) it discloses no reasonable cause of action or defence in law or**
- (b) it is scandalous, frivolous or vexatious, or**
- (c) it may prejudice, embarrass or delay the fair trial of the action, or**
- (d) it is otherwise an abuse of the process of the court.**

and may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be.

Hon Justice Mboghli Msagah on 25th January 2011 made an order enjoining the interested parties to the instant suit in the following terms pursuant to an application dated 9th December 2010.

- 1. That the interested parties named herein are hereby granted leave to be enjoined.**
- 2. That the said interested parties be and are hereby granted leave of this court to act as representatives for the 2,500 residents of Chokaa, Ruai, occupants of L.R. NO.11531/8 Nairobi.**
- 3. That the costs of the application be in the cause.**

The interested parties filed a defence dated 14th February 2011 but by consent of the parties made on 20th January 2014 the said defence of the interested party was withdrawn and expunged from the record with the result that the interested party now does not have a pleading on record in the present suit. The court notes that the plaintiff sought the leave of the court to amend its plaint which leave was granted by the court on 29th November 2011 and even though the interested party/Defendant was granted the opportunity to file an amended defence they did not avail themselves of the opportunity. The interested

parties application having been made in February 2011 cannot as it were be said to have been directed at the plaint as amended. Without a defence on record it is difficult to appreciate what the interested parties case is vis –a vis the plaintiffs claim. I have perused the amended plaint filed in court on 19th December 2011 and note that even though the amendment was made after the interested parties had been ordered to be enjoined in the suit as Defendants the plaintiff makes no claim against the interested parties and no relief is sought against them. The plaintiff was aware that the interested parties were in occupation and possession of the suit property as the plaintiff admits that its director and shareholder Rajesh Kent had held discussions with a view of reaching some amicable resolution and that some money had even changed hands.

The interested parties through **HC ELC NO. 615 of 2010 (OS)**, brought against the Executrices of the Estate of **Ranbir Kirshen Kencharhand Kent** are staking claim to the suit property herein by virtue of what they claim to be adverse possession. The interested parties in the application seeking to be enjoined to this suit set out facts to illustrate they occupied and possessed the suit property over a long period and disclosed that they had filed **HC ELC NO.615 of 2010) (OS)** where they claim to be entitled to the suit land by virtue of adverse possession and thus there is no doubt the plaintiff's are aware that the interested parties claim ownership of the suit property. The plaintiff's claim beneficial ownerships to the suit property and therefore clearly there is a triable issue as to who between the plaintiff and the interested party is entitled to ownership of the suit property. Whereas the interested parties withdrew their defence in the instant suit, the suit has not been certified ready for trial in terms of order 11 of the Civil Procedure Rules. The interested parties/Defendant/Applicants having withdrawn their filed defence meant that it was open for them to file a defence and/or defence and counter claim even if it entailed seeking the leave of the court to do so. In other words it meant that the pleadings were not closed following the withdrawal of the defence.

I am in agreement with the submission by the plaintiff that the interested parties/Defendants not having a pleading on record in response to the plaintiff's claim cannot properly seek to have the plaintiff's plaint and suit struck out. The interested parties have, as it were, not filed any answer to the plaintiff's claim to enable the court to evaluate the parties respective pleadings to determine whether the plaintiff's suit would in the light of any defence put forth by the Defendants be sustainable as against the Defendants. In the premises it is the court's view that the interested parties/Defendants have not in the absence of any defence on their part on record demonstrated that the plaintiffs suit is frivolous, vexatious and/or an abuse of the court process and that the same deserves to be struck out. I decline to order the suit to be struck out.

On the second issue whether or not the injunctive order issued in favour of the plaintiff should be set aside and/or lifted the court is of the view that the interested party having been enjoined to these proceedings as a party is entitled to seek a review variation and/or setting aside of the order provided that they can show that the order affects them. The Notice of Motion by the applicants having been made under the previous order xxxix rule 4 and 9 the applicable law presently is Order 40 Rule 7 of the Civil Procedure Rules 2010 which provides thus:-

40.(7) Any order for an injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied with such order.

It is the Applicants submission that it was not a party in the suit when the order was made and that it is directly affected by the order as it sought to stop and restrain the electrification project that was being carried out by KP&LC on the suit premises for the benefit of the interested parties the majority of whom had entered into electricity supply contracts as evidenced by the electricity supply bills for various members of the group annexed and marked "**CRR17**". It is not disputed that members of the residents group had developed structures on the suit premises to which electricity was connected as depicted in the photographs as per the annexures marked "**CRR3**". The plaintiff in my view knew that the interested parties were involved in the power connection to their structures in the suit premises and yet chose not to make the interested parties, party to the suit fully knowing the orders they sought against Kenya Power & Lighting company as the Defendant if granted would directly affect the interested parties. It is not lost to the court that the plaintiffs are not the registered owners of the suit property but claim to be entitled to be

registered as owners by virtue of some agreement with the Executerixes of the late **Ranbir K.K. Kent**. The Executerixes have not been made parties to this suit. The property is still registered in the name of the deceased and the interested parties in **HC ELC NO. 615 of 2010** claim as against the Executerixes to be entitled to be registered as owners of the suit property by virtue of being in adverse possession. In the premises it is clear both the plaintiff and the interested parties /Applicants both claim to be entitled to ownership of the disputed suit property. until that question of ownership is finally determined the plaintiff cannot claim to have any superior right over the suit property than the Applicants.

The order the plaintiffs obtained against KP&LC which was to effectively put a stop to the electrification project which was on going was obtained without the involvement of the Applicants who stood to be directly affected. The plaintiff was aware of the existence of the Applicants in the suit property and of their interest in power supply contract. The plaintiff at the time they approached the court in my view did not make full disclosure. It is settled law that where a party obtains an interlocutory injunction without making full disclosure or by concealing material facts, such injunction will be discharged on application by an aggrieved party. (see **Ragin –vs- Barclays Bank of Kenya Ltd (2002) 1 KLR 647**).

In **HC ELC 795 of 2007** (formerly **HCCCC NO. 1502 of 2002**) **Hon. Justice Nyamweya** held that the present Applicants who had not been made parties to the suit relating to the suit property (the same suit property as in the present suit) were entitled to have the order of injunction and eviction set aside as the same were obtained without the interested parties being heard. I am of the view that the same position obtains in the present case. The orders obtained by the plaintiff albeit against KP&LC relate to activities taking place in the suit property which the interested parties just like the plaintiff claim ownership. The activities relating to power connection were at the instance of the interested parties and my view is that no stoppage of the activities could be properly made without involving the interested parties. The orders of injunction in my opinion were obtained through material non disclosure and/or concealment of material facts and if full disclosure had been made the court may not have granted the orders of injunction. The interest of the Applicants was at the time the orders were granted not disclosed to the court and on that account the court is entitled to set aside the orders of injunction.

Considering the nature of this case it is doubtful there can be any resolution of the matter through interlocutory applications. In view of the orders made by Hon. Justice Nyamwenya on 31st October 2013 in **HC ELC NO. 795 of 2007** the parties may consider whether it would not be prudent to have the three suits viz- ELC 615 of 2010 (OS), HC. ELC NO. 795 of 2007 and the present suit consolidated to be heard together so that the issue of ownership of L.RNO.11531/8 (the suit property) is determined finally. I appreciate however it is upto the parties in these suits to determine how and in what manner they wish to conduct their suits and I thus leave it at that.

Counsel referred me to various authorities in their submissions for which I am grateful. However in regard to the issues that required my determination in this application I did not consider it was necessary to analyse all the authorities as the bulk of them fell outside the scope of the application.

The upshot is that I decline to strike out the plaintiff's suit for the reasons canvassed in the body of the ruling, however I have found merit in having the injunctive orders issued on 28th July 2010 set aside and I accordingly grant prayer (1) of the Applicants Notice of Motion dated 21st February 2011.

I order and direct that the costs of the application be in the cause.

Ruling dated, signed and delivered at Nairobi this...**6th**.....day of **February**.....2015.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Kongera for Nyiha .for the Plaintiff

MS Gathoni Kariuki for the Defendant

Mr. Gatheru Gathemia for the Interested parties