



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO.970 OF 2016**

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

**VERSES**

**PETER NJUGUNA NGUGI**

**LINCOLN NGUGI NJUGUNA**

**T/A LINPET AGENCIES.....DEFENDANTS**

**GULF ENERGY LIMITED.....INTERESTED PARTY**

**RULING**

The plaintiff brought this suit against the defendants on 10<sup>th</sup> August, 2016 seeking the following reliefs:

- a) A permanent injunction restraining the defendants 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 defendants' titles.
- d) General damages.

In its plaint dated 10<sup>th</sup> August, 2016, the plaintiff averred that it is the registered owner of all that parcel of land known as L.R No. 209/14758(IR 175501) situated in Nairobi(hereinafter referred to as "the suit property"). The plaintiff averred that on or about 8<sup>th</sup> August, 2016, the defendants by themselves and their agents invaded the suit property and started subdividing the same into small portions. The plaintiff averred that through the intervention of the Officer Commanding Langata Police Station, the defendants were chased away from the suit property. The plaintiff averred that on 9<sup>th</sup> August, 2016, the defendants made attempts to go back to the suit property but were repulse by the plaintiff's security guards and police officers. The plaintiff averred that the defendants' actions aforesaid are criminal in nature and are unwarranted since the defendants are not the registered owners of the suit property and have no known interest in the same.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 10<sup>th</sup> August, 2016 seeking the following orders:

- a. A temporary injunction restraining the defendants by themselves, their servants, legal representatives, agents or howsoever from entering into, chasing away workers, blocking or in any other manner interfering with or wasting the suit property pending the hearing and determination of this suit.
- b. The O.C.S Langata Police Station and the officer in charge of Langata Administration Police Camp do ensure compliance with the order.
- c. The costs of the application to be in the cause.

The Notice of Motion application was supported by the affidavit of the plaintiff's Managing Director, Mohammed Birre sworn on 10<sup>th</sup> August, 2016 in which he reiterated the contents of the plaint which I have highlighted above. The plaintiff's said director averred that the defendants are not known to the plaintiff and that it is not clear what their interest in the suit property is. He averred that the plaintiff is apprehensive that unless the orders sought are granted, the defendants are likely to continue with their acts of interference with the suit

property. The plaintiff's said director averred that the defendants' continued interference with the suit property is unlawful and constitutes trespass and a violation of the plaintiff's constitutional right to peaceful and quiet enjoyment of its property.

The plaintiff's application was brought under certificate of urgency. The same was heard *ex parte* on 10<sup>th</sup> August, 2016 and the injunctive orders sought were granted on an interim basis pending the hearing of the application *inter partes*.

On 18<sup>th</sup> October, 2016, the interested party filed an application of the same date seeking orders that:

- a. Gulf Energy be joined in the suit as interested party.
- b. A duly licensed surveyor from the Survey of Kenya be directed to conduct a site visit of the properties described as L.R No. 209/14758(IR 175501)("the suit property"), L.R No. 9306, Nairobi (hereinafter referred to as "Plot No. 9306") and L.R No. 9804, Nairobi (hereinafter referred to as "Plot No. 9804") to establish the boundaries and demarcations thereof and to report to the court within such time as the court may deem fit.
- c. Upon the establishment of the location and boundaries of the said parcels of land, the plaintiff be compelled to remove the fence that it has put up around L.R No. 9306, Nairobi ("Plot No. 9306") and L.R No. 9804, Nairobi ("Plot No. 9804") forthwith and be restrained from interfering in any way whatsoever with the two parcels of land.
- d. The Officer Commanding Langata Police Station be directed to ensure compliance with the order.
- e. The costs of the application to be borne by the plaintiff.

The interested party's application that was supported by the affidavit of its retail manager, Sammy Ndolo Maundu sworn on 18<sup>th</sup> October, 2016 was brought on the grounds that the interested party is the registered owner of Plot No. 9306 and Plot No. 9804 and that sometimes in August, 2016, it came to the interested party's attention that Plot No. 9306 and Plot No. 9804(hereinafter together referred to as "the interested party's properties") had been fenced by unknown people who claimed to have an order issued by the court on 10<sup>th</sup> August, 2016 prohibiting all forms of interference with the parcel of land known as L.R No. 209/14758(IR 175501) ("the suit property"). The interested party averred that the interested party's properties do not form part of the suit property. The interested party averred that the plaintiff had applied the orders that were issued by the court on 10<sup>th</sup> August, 2016 in respect of the suit property on Plot No. 9306 and Plot No. 9804 by fencing the same on the presumption that the same formed part of the suit property. The interested party contended that survey maps obtained from the Survey of Kenya are explicit that the interested party's properties are not located within the suit property. The interested party contended that the plaintiff's wrongful application of the orders of 10<sup>th</sup> August, 2016 in respect of the suit property upon the interested party's properties has continued to impede the interested party from enjoying its rights over the interested party's properties.

The interested party contended that in view of what has transpired following the issuance of the said order of 10<sup>th</sup> August, 2016, the interested party is a necessary party in these proceedings whose presence would be required for the effectual determination of all controversies and issues arising in this suit and as such it should be joined in the suit. The interested party contended that this court had power for expeditious disposal of cases to make an order for a site visit of the suit property and the interested party's properties by a licensed surveyor for the purposes of establishing the location of the same and submitting a report to the court.

On 16<sup>th</sup> December, 2016, the interested party filed another application by way of Notice of Motion of the same date seeking a temporary injunction to restrain the plaintiff from dealing or interfering in any manner with the suit property and the interested party's properties pending the hearing and determination of the earlier application dated 18<sup>th</sup> October, 2016. This application was brought on the grounds that despite the existence of a dispute over the location of the suit property and the interested party's properties, the plaintiff had commenced construction on the parcel of land that included the interested party's properties.

When the interested party's second application dated 16<sup>th</sup> December, 2016 came up for hearing *inter partes* on 22<sup>nd</sup> December, 2016, the court ordered the Director of Surveys to nominate a licensed surveyor from his office to survey and mark out the boundaries of the suit property and the interested party's properties and to submit a report to court on or before 15<sup>th</sup> March, 2017. The court made a further order stopping all forms of development or construction on the suit property and the interested party's properties pending the hearing of the interested party's two applications aforesaid and the plaintiff's application for injunction dated 10<sup>th</sup> August, 2016.

Following the said order of 22<sup>nd</sup> December, 2016, the Director of Surveys, appointed one, Pricilla N. Wango who visited the suit property and the interested party's properties and submitted a report in court on 8<sup>th</sup> March, 2017.

The plaintiff's application dated 10<sup>th</sup> August, 2016 was opposed by the defendants through a replying affidavit sworn by the 1<sup>st</sup> defendant, Peter Njuguna Ngugi on 4<sup>th</sup> January, 2017. The 1<sup>st</sup> defendant contended that the plaintiff's application was brought in bad faith. The 1<sup>st</sup> defendant denied that the 2<sup>nd</sup> defendant and he invaded the suit property and started subdividing it into small portions as claimed by the plaintiff. The 1<sup>st</sup> defendant averred that he had no interest in the suit property. The 1<sup>st</sup> defendant averred that contrary to the plaintiff's claim that the suit property had been encroached, it is the plaintiff who had encroached on and fenced off the parcels of land adjacent to the suit property including the interested party's properties. The 1<sup>st</sup> defendant averred that he owned Plot No. 9306 which, he sold to the person who subsequently sold the same to the interested party. The 1<sup>st</sup> defendant contended that the suit property lies on a flight path and that explains why the plaintiff had encroached on the neighbouring properties. The 1<sup>st</sup> defendant contended that the defendants had no interest in the suit property and as such had no business invading the same. The defendants averred that they had no objection to the interested party being joined in this suit.

The plaintiff did not file any response to the interested party's application dated 18<sup>th</sup> October, 2016. The plaintiff however filed a further affidavit sworn on 19<sup>th</sup> June, 2017 in opposition to the report that was filed in court by the surveyor appointed by the Director of Surveys on 8<sup>th</sup> March, 2016. In this affidavit, the plaintiff took issue with the manner in which the report was prepared. The plaintiff contended that the surveyor who prepared the report was biased in favour of the interested party. The plaintiff also filed another affidavit on 21<sup>st</sup> July, 2017 in opposition to the interested party's application dated 16<sup>th</sup> December, 2016. In this affidavit, the plaintiff contended that since the interested party had not been joined in the suit, the orders sought in its application dated 16<sup>th</sup> December, 2016 were not available to it. The plaintiff contended that its title to the suit property had not been challenged. The plaintiff annexed to this affidavit a report prepared by Midland Surveys & Estates dated 10<sup>th</sup> July, 2017 on the status of the suit property and the interested party's properties.

The plaintiff's application dated 10<sup>th</sup> August, 2016 and the interested party's application dated 18<sup>th</sup> October, 2016 were heard together before me on 27<sup>th</sup> July, 2017. The interested party's application dated 16<sup>th</sup> December, 2016 was overtaken by events following the orders which were made by the court on 22<sup>nd</sup> December, 2016 pursuant to which the court stopped any development on the suit property and the interested party's properties pending the hearing of the plaintiff's application dated 10<sup>th</sup> August, 2016 and the interested party's application dated 18<sup>th</sup> October, 2016.

I have considered the two applications before me; one by the plaintiff and the other by the interested party together with the affidavits in support of and in opposition thereto. I have also considered the submissions by the parties' respective advocates. I will consider the two applications, one after the other starting with the plaintiff's application dated 10<sup>th</sup> August, 2016.

What the plaintiff has sought in its application is a temporary injunction pending the hearing and determination of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in the case of Giella vs. Cassman Brown & Co. Ltd (1973) EA 358, an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. In that case, it was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR the Court of Appeal stated as follows:-

*“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”*

From the material before the court, I am not satisfied that the plaintiff has satisfied the conditions for granting the injunction sought. What has come out from the pleadings and other material before the court is that the dispute before the court has nothing to do with the defendants. The dispute is between the plaintiff who owns L.R No. 209/14758 (IR175501) (the suit property) and the interested parties who own L.R No. 9306, Nairobi and L.R No. 9804, Nairobi (the interested party's properties). The dispute does not revolve around the ownership of these parcels of land but the location and the boundaries of the same on the ground. The defendants have averred that they have no interest in either the suit property or the interested party's properties.

The documents of title placed before the court by the plaintiff and the interested party support that position. The defendants have denied that they were involved in the invasion of the suit property. A part from the plaintiff's assertion in the affidavit of Mohamed Birre which is in general terms, there is no direct evidence before the court showing that the defendants were among the people in the photographs attached to the plaintiff's supporting affidavit who are said to have invaded the suit property. A copy of the Grant I.R 89832 in respect of L.R No. 9306 annexed to the affidavit of Sammy Ndolo Maundu sworn on 18<sup>th</sup> October, 2016 shows that the parcel of land was alienated to the defendants herein by the Commissioner of Lands on 30<sup>th</sup> August, 2002. On 15<sup>th</sup> September, 2006, the defendants transferred the property to a company known as Ex Potential Value Limited. Ex Potential Value Limited transferred the property to yet another company known as Bryane & Gene Investments Limited on 19<sup>th</sup> December, 2012. It is this company that transferred L.R No. 9306 to the interested party on 19<sup>th</sup> December, 2012. It is clear from the foregoing chronology that the defendants ceased to be the owners of L.R No. 9306 10 years before the dispute herein broke out. A copy of the Grant I.R 140887 in respect to L.R No. 9804 which is also attached to the said affidavit shows that the defendants have never owned the property.

I am in agreement with the defendants that they have no interest in the properties in dispute and would have had no reason to invade the suit property. I am of the view that the plaintiff's suit should have been brought against the interested party and not the defendants. I am not satisfied that a case has been established against the defendants to warrant the grant of a temporary injunction sought against them. Even if the plaintiff had established that the defendants still have an interest in L.R No. 9306, I would still not have granted the injunction sought. I have noted from the material on record that whereas the Grant for L.R No. 9306 and Grant for L.R No. 9804 were issued on 30<sup>th</sup> August, 2002 and 15<sup>th</sup> November, 2012 respectively, the certificate of title for the suit property was issued on 12<sup>th</sup> May, 2016 a few months before the dispute herein broke out. It follows therefore that if there is any overlap in relation to the location of the three properties, the title which is first in time will have to prevail. For the foregoing reasons, I find no merit in the plaintiff's Notice of Motion dated 10<sup>th</sup> August, 2016.

The disposal of that application takes me to the interested party's application dated 18<sup>th</sup> October, 2016. The interested party's application has three (3) main limbs. The first limb seeks the joinder of the interested party in the suit. The second limb seeks an order for a surveyor to visit the suit property and the interested party's properties for the purposes of locating the same and fixing their boundaries. The third limb seeks an order compelling the plaintiff to remove the fence that he has put up around the interested party's properties and to forthwith cease from interfering with the interested party's properties. With regard to the first limb of the application, I am in agreement with the interested party

that it is a necessary party to these proceedings and that it should have been joined in the suit when it was filed. As I have mentioned earlier, the dispute herein is between the plaintiff and the interested party over the location of their respective parcels of land.

The interested party has sought to be joined in the suit as interested party. I am of the view that since the interested party seems to have a claim against the plaintiff which it has accused of encroaching on the interested party's properties, it should be joined in the suit as a substantive party which in this case should be a defendant. With regard to the second limb of the application, I am of the view that the same has been overtaken by events. The court made an order on 22<sup>nd</sup> December, 2016 for the Director of Surveys to nominate a surveyor to visit the site of the suit property and the interested party's properties and to survey and mark the boundaries of the said parcels of land. The order was duly complied with and a report was filed in court on 8<sup>th</sup> March, 2017. It is not necessary in the circumstances to make another order for a site visit.

The last limb of the application seeks temporary injunction both prohibitory and mandatory. I am not satisfied that the interested party is entitled to the injunction sought. As rightly argued by the plaintiff, the interested party is yet to be joined in the suit so that it can raise whatever claim it may have against the plaintiff. The injunction sought is in the circumstances not based on any pleading. The court is unable to say in the circumstances whether the interested party has a prima facie case against the plaintiff to justify the grant of the temporary injunction sought. I am in agreement that the report dated 6<sup>th</sup> March, 2017 filed herein by the Director of Surveys supports the interested party's contention that its properties and the suit property are far apart and that part of the suit property is inside Wilson Airport while the other portion is on a flight path. This report is nothing more than evidence. It can only be used to support a claim or defence. The report *per se* cannot form a basis for an injunction. The interested party's prayer for injunction cannot be granted for the forgoing reasons.

From my findings above, I would deny both parties injunction. I have however noted from the material before me that the situation on the ground is volatile and as such there may be a breakdown of law and order if this court does not make a suitable order to preserve the subject matter of the suit pending the hearing of the parties' respective claims. I would in the interest of justice and with a view to avoid further interlocutory applications in the matter make appropriate orders that will ensure that all the properties in dispute are preserved pending the hearing and determination of the suit. The interested party had also asked the court to direct the plaintiff to pay its share of the survey fees. The order that was made on 22<sup>nd</sup> December, 2016 speaks for itself. The parties were to share the fees for the site visit and the fixing of the boundaries. The interested party should furnish the plaintiff with the invoice and receipt for the payment that was made to the Director of Survey. Upon receipt of the same, the plaintiff shall make arrangement to pay its share of the said fees. In the event that it fails to do so, the interested party shall be at liberty to move the court for appropriate relief.

In conclusion, I hereby make the following orders on the two applications before me:

1. Gulf Energy Limited is joined in this suit as the 3<sup>rd</sup> Defendant.
2. The plaintiff shall amend the plaint within twenty one (21) days from the date hereof to effect the joinder.
3. Gulf Energy Limited shall file its response to the amended plaint together with its bundle of documents and witness statements within twenty one (21) days from the date of service of the amended plaint.
4. Pending the hearing and determination of this suit or further orders by the court, neither the plaintiff nor the interested party, Gulf Energy Limited shall sell, lease, charge, mortgage, fence, develop or put up structures of any nature on L.R No. 209/14758 (IR175501) and L.R No. 9306, Nairobi and L.R No. 9804, Nairobi.
5. Pending the hearing and determination of this suit or further orders by the court, neither the plaintiff nor the interested party, Gulf Energy Limited shall interfere with or tamper with the survey beacons marking the boundaries of L.R No. 9306, Nairobi and L.R No. 9804, Nairobi which were re-established and replaced by Pricilla N. Wango in accordance with her report dated 6<sup>th</sup> March, 2017 filed in court on 8<sup>th</sup> March, 2017.
6. The plaintiff's Notice of Motion dated 10<sup>th</sup> August, 2016 is dismissed.
7. The interested party's application dated 18<sup>th</sup> October, 2016 is allowed to the extent set out in orders 1, 2 and 3 above.
8. The costs of the two applications shall be in the cause.

**Dated and Delivered at Nairobi this 5<sup>th</sup> day of April 2018**

**S. OKONG'O**

**JUDGE**

Ruling read in open court in the presence of:

Mr. Ondabu for the Plaintiff

Mr. Mwangi for the Defendants

Mrs. Omwenga for the Interested Party

