



**REPUBLIC OF KENYA**

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

**ELC NO. 898 OF 2015**

**GOSPEL EVANGELISTIC CHURCH OF KENYA (suing through**

**the National Overseer, General Secretary**

**and National Treasurer) .....PLAINTIFF**

**VERSUS**

**BURUBURU RIVERSIDE S.H.G. COMMITTEE.....1<sup>ST</sup> DEFENDANT**

**NAIROBI CITY COUNTY.....2<sup>ND</sup> DEFENDANT**

**NATIONAL LAND COMMISSION.....3<sup>RD</sup> DEFENDANT**

**RULING**

I have before me three (3) applications; two by the plaintiff and one by the 1<sup>st</sup> defendant. The first application is the Notice of Motion dated 21<sup>st</sup> September 2015 brought by the plaintiff seeking a temporary injunction to restrain the 1<sup>st</sup> defendant, its officials, members, servants or agents from encroaching, trespassing, alienating, interfering in any way with all that parcel of land known as LR. No. 166667 IR. No. 57417 measuring 3.001ha. (hereinafter referred to as “the suit property”) pending the hearing and determination of this suit. The application is supported by the affidavit of Bishop Shem Nzioki, the plaintiffs’ General Secretary sworn on 21<sup>st</sup> September 2015.

The plaintiff’s case as set out in the plaint and the said affidavit is that; the plaintiff is the registered proprietor of the suit property. It has put up on the suit property a church for use by its members. The suit property is adjacent to a river. The plaintiff is concerned about environmental conservation. There is riparian land between the suit property and the river. With a view to conserve the said riparian land, the plaintiff planted several trees thereon. On 9<sup>th</sup> September 2015, the plaintiff started erecting a perimeter wall to protect the suit property. Without any lawful excuse, the 1<sup>st</sup> defendant’s members invaded the suit property on 10<sup>th</sup> September 2015 armed with crude weapons and stopped the plaintiff from putting up the said wall. During the commotion, the 1<sup>st</sup> defendant’s members not only destroyed the wall that was being put up but also the trees that the plaintiff had planted for the protection of the riparian land. The loss caused by the 1<sup>st</sup> defendant’s members during the said invasion was estimated at Kshs. 400,000/-. After the said invasion, the 2<sup>nd</sup> defendant wrote to the plaintiff on 16<sup>th</sup> September 2015 about an alleged boundary dispute between the plaintiff and the 1<sup>st</sup> defendant and without any lawful basis or authority, the 2<sup>nd</sup> defendant purported to appoint a surveyor to resolve the dispute. On 21<sup>st</sup> September 2015, members of the 1<sup>st</sup> defendant accompanied by officers and a surveyor appointed by the 2<sup>nd</sup> defendant encroached

on the suit property and began demarcating the same. The plaintiff has contended that it had enjoyed quiet possession of the suit property over the years until its possession was unlawfully disrupted by the defendants as aforesaid. The plaintiff urged the court to grant the orders sought in the application since the suit property and the building thereon risk being destroyed and alienated by the 1<sup>st</sup> defendant. The plaintiff's application was opposed by the 1<sup>st</sup> defendant through a replying affidavit sworn by Alexander Waweru Mwangi on 16<sup>th</sup> October 2015.

The second application was brought by the 1<sup>st</sup> defendant by way of Notice of Motion dated 12<sup>th</sup> February 2016. The application is seeking the discharge of the ex parte interim injunction which was granted in favour of the plaintiff on 24<sup>th</sup> September 2015 on the ground that the same was being used by the plaintiff oppressively to restrain the 1<sup>st</sup> defendant's members from accessing their parcels of land which are situated next to the suit property owned by the plaintiff. The application is supported by the affidavit sworn on 12<sup>th</sup> February 2016 by the 1<sup>st</sup> defendant's chairman, Alexander Waweru Mwangi. This affidavit is a replica of the affidavit which was sworn by the said Alexander Waweru Mwangi on 16<sup>th</sup> October 2015 in opposition to the plaintiff's application dated 21<sup>st</sup> September 2015. The 1<sup>st</sup> defendant has contended that the plaintiff obtained the ex parte interim injunction sought to be set aside by misleading the court and failing to disclose material facts. The 1<sup>st</sup> defendant has contended that the plaintiff failed to disclose to the court the fact that the 1<sup>st</sup> defendant's members' parcels of land are separate and distinct from the suit property owned by the plaintiff and that the 1<sup>st</sup> defendant's members had not trespassed on the suit property. The 1<sup>st</sup> defendant has contended that, it is composed of more than 800 households living in Buruburu, adjacent to Nairobi River at a place popularly known as Carton City. The 1<sup>st</sup> defendant has contended that, the parcel of land under their occupation was initially owned by the 2<sup>nd</sup> defendant and that in the years 2011-2012, the 2<sup>nd</sup> defendant passed a resolution to settle the residents of Carton City on the said parcel of land so as to protect the rights of the residents of the informal settlement to decent housing. Following this resolution, a part development plan was prepared and adopted by the 2<sup>nd</sup> defendant which resulted in the subdivision, allocation and issuance of allotment letters to the residents of Carton City which is now known as Buruburu Riverside Estate. The titles for the plots which were allocated to the 1<sup>st</sup> defendant's members by the 2<sup>nd</sup> defendant are now being processed. The 1<sup>st</sup> defendant has contended that the parcel of land in dispute between its members and the plaintiff lies between the suit property (LR. No. 16667) and the Nairobi River. The 1<sup>st</sup> defendant has refuted the plaintiff's claim that the disputed parcel of land is situated in a riparian reserve. The 1<sup>st</sup> defendant has contended that the 2<sup>nd</sup> defendant had subdivided the disputed parcel of land into 145 plots and allocated the same to the members of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant has denied having any interest in the suit property. It has contended that its members have been resisting the plaintiff's attempt to grab the alleged riparian land which was allocated to its members by the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant has urged the court to discharge the ex parte injunction which was issued herein in favour of the plaintiff because the plaintiff misled the court into believing that the defendants had trespassed onto the suit property which was not the case.

The third application was brought by the plaintiff. The same was brought by way of Notice of Motion dated 24<sup>th</sup> February 2016. In the application, the plaintiff sought leave to institute contempt proceedings against the 1<sup>st</sup> defendant's chairman and for him to be committed to civil jail and condemned to pay a fine of Kshs. 500,000/- for disobeying the order which was issued herein on 25<sup>th</sup> September 2015 which the 1<sup>st</sup> defendant has sought to discharge above. The application was supported by the affidavit sworn by Reverend Philip Njuguna Njoroge on 25<sup>th</sup> February 2016. The grounds upon which the application was premised are that, on 28<sup>th</sup> September 2016, the 1<sup>st</sup> defendant's associates and members led by its chairman invaded the suit property and injured the plaintiff's employee. The plaintiff claimed that the said group visited the suit property again on 13<sup>th</sup> January 2016 claiming to have a right to be on the property since the orders issued herein had lapsed. The plaintiff contended that the 1<sup>st</sup> defendant's activities complained of were in breach of the order that was issued herein on 25<sup>th</sup> September 2015 for which breach the 1<sup>st</sup> defendant should be punished.

On 10<sup>th</sup> March 2016, the court gave directions that the three applications be heard together by way of written submissions. The plaintiff filed two sets of submissions on 17<sup>th</sup> May 2016 in support of its two applications and in opposition to the 1<sup>st</sup> defendant's application. In support of its contempt application, the plaintiff submitted that despite the injunctive orders that were issued herein in its favour on 25<sup>th</sup> September 2015, the 1<sup>st</sup> defendant had violently invaded the suit property on two occasions. The plaintiff submitted that the 1<sup>st</sup> defendant's actions were deliberate and intended to belittle the authority of the court. The court was referred to the case of **Football Kenya Federation vs. Kenya Premier League Ltd (2015) eKLR**. The plaintiff submitted that judicial authority which is derived from the people of Kenya must be jealously guarded.

On its injunction application and the 1<sup>st</sup> defendant's application to discharge the interim orders, the plaintiff submitted that the suit property risks being totally destroyed if the injunction orders in force are vacated. The plaintiff submitted that the lifting of the said orders would give the 1<sup>st</sup> defendant a license to commit wanton destruction on the suit property. The plaintiff submitted that in such eventuality, its members would be deprived of their freedom of conscience, religion, belief and opinion as provided for in Article 32 of the Constitution since their church would be no more. The plaintiff referred the court to the case of Benedict Karitu Rukwaru vs. Naftaly Mungathia (2013) eKLR and Giella vs. Cassman Brown (1973) EA 358 and submitted that it had established a prima facie case with a high probability of success against the defendants and that it would suffer irreparable injury if left unprotected by the court.

The 1<sup>st</sup> defendant filed one set of submissions on 21<sup>st</sup> July 2016 in respect of the plaintiff's application for injunction and its application to set aside the interim injunction which was issued herein on 25<sup>th</sup> September 2015 in favour of the plaintiff. The 1<sup>st</sup> defendant submitted that it had no interest in the suit property. The 1<sup>st</sup> defendant submitted that it had demonstrated in its replying affidavit that the parcel of land which the 1<sup>st</sup> and 2<sup>nd</sup> defendants are alleged to have entered and subdivided was not owned by the plaintiff. The 1<sup>st</sup> defendant submitted that the parcel of land in question is situated between the suit property and the riparian reserve along Nairobi River. The 1<sup>st</sup> defendant submitted that none of the defendants had entered the suit property or attempted to do so and that there was no danger posed by the defendants to justify the issuance of the injunction sought in this case.

The 1<sup>st</sup> defendant submitted that in the absence of a survey report on the boundaries of the parcel of land which was allocated to the 1<sup>st</sup> defendant's members and the suit property, the plaintiff's trespass claim was unsustainable. The 1<sup>st</sup> defendant referred to the case of Giella vs. Cassman Brown (supra) and submitted that the plaintiff had not satisfied the conditions set out in the said case.

On its application to set aside the ex parte interim injunction which was granted by the court on 25<sup>th</sup> September 2015, the 1<sup>st</sup> defendant submitted that the same was obtained by the plaintiff through non-disclosure of material facts since the 1<sup>st</sup> defendant had no interest in the suit property. The 1<sup>st</sup> defendant reiterated that its members own a parcel of land adjoining the suit property which is not a riparian reserve as claimed by the plaintiff. The 1<sup>st</sup> defendant submitted that it had tendered ample evidence to demonstrate that the exparte injunction had been issued through non-disclosure of material facts and that it would be patently unjust to extend the injunction until hearing and determination of the suit since the 1<sup>st</sup> defendant's members have no interest in the suit property.

I have considered the applications before me and the affidavits filed in support thereof and in opposition thereto. I have also considered the submissions by the parties and the case law cited. The applications for injunction and setting a side of the interim orders which were issued on 25<sup>th</sup> September 2015 are related and can be determined together. The contempt application is a standalone application and must be dealt with separately. Due to its nature, I will consider it first before I go to the other two applications. In the case of Hadkison –vs- Hadkinson(1952) ALLER 567, the court stated that;-

*“It was plain and unqualified obligation of every person against or in respect of whom an order was*

*made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment...”.*

For one to be punished for contempt of a court order, it must be shown that the court had issued an order requiring the person to do or refrain from doing an act and that the order was served upon the person or the person was aware of the order but defied the same by doing what he was restrained from doing or refusing to do what he was ordered to do. The onus of proof of disobedience of a court order rests with the party seeking the punishment of the alleged contemnor.

Contempt of court proceedings are quasi criminal in nature. Due to that fact, the standard of proof is higher than a balance of probabilities. See, the Court of Appeal case of, Mutitika-vs-Baharini Farm Ltd. (1985) KLR 227, where the court stated that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly, beyond reasonable doubt. It follows therefore that for the plaintiff to succeed in the present application, he has to satisfy the court to a degree beyond a balance of probabilities that the unnamed 1<sup>st</sup> defendant’s chairman was served or was aware of the court order which was issued herein on 25<sup>th</sup> September 2015 and proceeded to disobey the same.

It is not in dispute that the court made an ex parte interim order herein on 24<sup>th</sup> September 2015 restraining the 1<sup>st</sup> defendant and its officials, members, servants or agents from encroaching, trespassing, alienating or interfering in any way with the suit property. The order was extracted and issued on 25<sup>th</sup> September 2015. The plaintiff has claimed that during the pendency of that order, members of the 1<sup>st</sup> defendant and their associates invaded the suit property on 28<sup>th</sup> September 2015 and again on 12<sup>th</sup> January 2016 during which they caused mayhem and damage. The plaintiff has not stated in its affidavit in support of the contempt application whether the 1<sup>st</sup> defendant’s chairman sought to be punished was served with the order or whether he had knowledge of the same. The acts complained of by the plaintiff are criminal in nature. There is no evidence that any report was made to the police regarding the alleged invasion of the suit property by the 1<sup>st</sup> defendant. Looking at the material before me in totality, I am not satisfied that the plaintiff has established the allegations of contempt made against the 1<sup>st</sup> defendant’s chairman to the required standard. I therefore find no merit in the application dated 24<sup>th</sup> February 2016.

The disposal of that application paves the way for the two applications one of which is seeking a temporary injunction pending the hearing of the suit while the other is seeking the discharge of the interim injunction which was granted pending the hearing of the application for injunction inter partes. I am of the view that the determination of the Plaintiff’s application dated 21<sup>st</sup> September 2015 would dispose of the 1<sup>st</sup> defendant’s application dated 12<sup>th</sup> February 2016. The 1<sup>st</sup> defendant’s application is opposing to the plaintiff’s said application and I would consider the same as such.

The principles upon which this court exercises its discretion in applications for interlocutory injunction are now well settled. In the case of Giella vs. Cassman Brown and Co. Ltd. (supra) which was cited by the parties in support of their submissions, it was held that an applicant for a temporary injunction must establish:-

- i. A prima facie case with a probability of success.
- ii. That if the injunction is not granted, he will suffer irreparable injury that cannot be compensated by an award of damages and;
- iii. If in doubt, the court shall determine the application on a balance of convenience.

In the of Mrao Limited vs. First American Bank Limited & 2 Others (2003) KLR 125, the court defined a prima facie case as;

*“a case in which on the material presented to the court a tribunal properly directing itself will conclude*

*that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”*

In the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others*[2014]eKLR, the court stated that;-

*“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.”*

The court went further to state that;

*“.....in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. 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 or is threatened with violation.”*

I have set out at the beginning of this ruling the plaintiff's case against the defendants and the defendants' response to the same. The plaintiff's claim against the defendants is based on trespass. The onus was upon the plaintiff to establish on a prima facie basis that the defendants had trespassed on the suit property. The defendants' response to the plaintiff's trespass claim is that the parcel of land in dispute is not the suit property but land adjacent to the suit property which the 1<sup>st</sup> defendant claims to have been allocated to its members by the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant has placed before the court sufficient evidence that they were allocated land adjacent to the suit property by the 2<sup>nd</sup> defendant. What I can gather from the material before me is that the dispute between the parties is over the boundary between the parcel of land said to have been allocated to the members of the 1<sup>st</sup> defendant and the suit property. By the time the plaintiff came to court, the 1<sup>st</sup> defendant had sought the assistance of the 2<sup>nd</sup> defendant's surveyors to determine the boundaries between the two parcels of land and the plaintiff had contested this move. The defendants have placed maps before the court showing that the parcels of land which were allocated to them by the 2<sup>nd</sup> defendant which are adjacent to the suit property are separate and distinct from the suit property.

The plaintiff did not file a supplementary affidavit to respond to these claims by the 1<sup>st</sup> defendant. The plaintiff has not come out clearly in its plaint and the affidavit in support of the application herein whether the contest between it and the 1<sup>st</sup> defendant is over the alleged riparian land on which it had planted trees for conservation or the suit property itself. The defendants have stated that they have no claim over the suit property and have not trespassed on the same. This court has no jurisdiction to determine boundary disputes. Section 18(1) of the Land Registration Act 2012 provides that unless it is noted in the register that the boundaries of a particular parcel of land have been fixed, any cadastral map or plan which may be filed in relation to such parcel of land are deemed to indicate only approximate boundaries. Section 18(2) of the Land Registration Act 2012 bars this court from entertaining any proceedings relating to a dispute over a boundary which has not been fixed. Without deciding the issue with finality, I must say that this court has no jurisdiction to determine the dispute brought before it by the plaintiff which to me is over a boundary. See, the case of, Wamutu vs. Kiarie [1982]KLR 480. I am of the view that the dispute should have been taken before the Land Registrar in the first instance under section 19 of the Land Registration Act 2012.

The onus was upon the plaintiff to establish a prima facie case against the defendants. In view of what I have stated above, I am not persuaded that the plaintiff has a prima facie case with a probability of success against the defendants. That being my view on the matter, it is not necessary for me to consider whether or not the plaintiffs stand to suffer irreparable harm unless the orders sought are granted.

The upshot of the foregoing is that the plaintiff's Notice of Motion application dated 21<sup>st</sup> September 2015 is not for granting. In view of my findings in that application, it is not necessary for me to consider the 1<sup>st</sup>

defendant's application dated 12<sup>th</sup> February 2016. However, if I was to determine the application, I would have allowed the same. I am satisfied from the material placed before the court that the plaintiff concealed material facts to the court and that the court was misled into granting the ex parte order complained of by the 1<sup>st</sup> defendant.

In conclusion, I hereby dismiss the Plaintiff's two applications dated 21<sup>st</sup> September 2015 and 24<sup>th</sup> February 2016 with costs to the 1<sup>st</sup> defendant. With a view to bringing the dispute between the parties to an end, I hereby direct that the Chief Land Registrar and the Director of Survey to visit Riverside Settlement Scheme (Buruburu City Carton Resettlement Scheme) and the Plaintiff's parcel of land, L.R. No. 16667, IR No. 57417 and establish the beacons and mark the boundaries of the plaintiff's said parcel of land and the said Scheme. This exercise shall be carried out and a report filed in court within a period of sixty (60) days from the date of service of this order upon the said officers. If there are any expenses involved in the exercise, the same shall be met by the plaintiff since the plaintiff had prevented the surveyors brought by the 2<sup>nd</sup> defendant from determining the boundaries of the disputed parcels of land.

**Delivered and Signed at Nairobi this 24<sup>th</sup> day of February, 2017.**

**S. OKONG'O**

**JUDGE**

In the presence of:-

N/A for the plaintiff

N/A for the 1<sup>st</sup> defendant

Ms. Masinde for the 2<sup>nd</sup> and 3<sup>rd</sup> defendant

Kajuju Court Assistant