



**REPUBLIC OF KENYA**

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

**ELC NO 215 OF 2015**

**BOARD OF TRUSTEES OF MAENDELEO YA WANAWAKE  
ORGANIZATION.....PLAINTIFF/RESPONDENT**

**VERSUS**

**FLORENCE ACHISA SHIVACHI ALIAS**

**FLORENCE GOME.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ABIGAEI MAKOTSI MUSIMBI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ELIZABETH S. M. MUTENDE..... 3<sup>RD</sup>DEFENDANT/RESPONDENT**

**MARTHA W. LUMBASI ..... 4<sup>TH</sup> DEFENDANT/RESPONDENT**

**ATANAS MANYALA KEYA ..... 5<sup>TH</sup> DEFENDANT/RESPONDENT**

**AND**

**GULF ENERGY LIMITED.....INTENDED INTERESTED PARTY/APPLICANT**

**RULING**

This application is dated 3<sup>rd</sup> May 2016 and is brought under Article 22 of the Constitution 2010, Section 3A of the Civil Procedure Act, Order 1 Rule 10 (2) of the Civil Procedure Rules and seeks the following orders;

1. THAT this matter be certified as urgent and service be dispensed with in the first instance.
2. THAT this honourable court do issue orders to have Gulf energy Limited enjoined as an interested party in these proceedings.
3. THAT the interim orders issued by this honourable court on the 11<sup>th</sup> February, 2016 and 4<sup>th</sup> March, 2016 be discharged pending the interparties hearing of this application.
4. THAT this honourable court does issue orders restraining the plaintiff or defendants, their agents and or servants from interfering with the interested party's peaceful occupation of the premises known as KAKAMEGA/MUNICIPALITY/BLOCK 1/557 pending the inter parties hearing of this application.

5. THAT the interim orders issued by this honourable court on the 11<sup>th</sup> February, 2016 and 4<sup>th</sup> March, 2016 be discharged pending the inter partes hearing of this suit.

6. THAT this honourable court does issue orders restraining the plaintiff or defendants, their agents and/or servants from interfering with the interested party's peaceful occupation of the premises known as KAKAMEGA/MUNICIPALITY/BLOCK 1/557 pending the hearing and determination of this suit.

7. THAT costs of this application be provided for.

The application is based on the annexed affidavit of Gulf Energy Limited, sworn and deposed by Stephen Tonuion behalf of the interested party applicant and which is based on the following grounds; the interested party's claims are genuine and there is a lease and a charge registered on the 19<sup>th</sup> August, 2015 between the 5<sup>th</sup> Defendant/respondent and the intended interested party. That the interested party did due diligence and had the property leased to it by the 5<sup>th</sup> defendant/respondent as the lessor and a charge created thereafter between the 5<sup>th</sup> defendant/respondent as the charger and the interested party as the chargee. That being a lessee and a chargee of the property in issue the interested party is directly affected by the claims in this suit and its presence is necessary in order for the court to effectively and completely adjudicate over the matter. That the interested party has engaged and paid a contractor who has mobilized machinery and equipment and is ready commenced works on the site which is the suit property. That the ends of justice will be better served by joining the interested party in the suit to enable it defend its interests in the suit property as the outcome of the suit has a direct effect on the interested party. That if the application is not allowed, the interested party will be economically prejudiced.

The applicant submitted that, the applicant company has its operations in Kenya and is involved in the business of selling and supplying fuel to its clients. That interested party applicant and the 5<sup>th</sup> defendant/respondent herein agreed to enter into a lease agreement over the property known as KAKAMEGA/MUNICIPALITY/BLOCK 1/557 where the 5<sup>th</sup> defendant would be the lessor and the interested party applicant as the lessee. That the interested party applicant conducted due diligence at the land registry located in Kakamega and established that the 5<sup>th</sup> defendant/respondent herein was the registered proprietor of the leasehold interest in the land known as KAKAMEGA/MUNICIPALITY/BLOCK 1/557. Annexed hereto and marked "GE-1" is a true copy of the certificate of lease. That the interested party applicant together with the 5<sup>th</sup> defendant/respondent executed the lease agreement and had it registered on the 19<sup>th</sup> August, 2015. The lessor agreement to lease to the lessee the suit property for a term of twenty five (25) years.) Annexed hereto and marked "GE-2" is a copy of the said lease agreement. That the said suit property was further charged with the 5<sup>th</sup> defendant as the charger and the interested party applicant as the chargee securing a principal amount of Kenya shilling Seven Million Two Hundred Thousand (Ksh. 7,200,000/=). That the above said charge was executed by both parties and was registered on the 19<sup>th</sup> August, 2015 (Annexed hereto and marked "GE-3" is a copy of the said registered charge). That both the lease and the charge over the property known as KAKAMEGA/MUNICIPALITY/BLOCK 1/557 were registered and recorded at the Land Registry (Annexed and marked "GE-4" is a copy of the certificate of lease Encumbrance Section showing registration of the lease and the charge respectively). That the interested party applicant has already engaged and paid the contractor on the said property who has mobilized machinery and equipment to begin the construction of a service station, shop and offices (Annexed hereto and marked "GE-5" is a copy of letter awarding the contract to the contractor). That the said contract is worth 26,303,890/= which is a substantial amount and for each day the works are stopped, the interested party is being charged and will continue to be charged and therefore stands to suffer substantial loss and damage. That by engaging the contractor and mobilization of the equipment the interested party applicant has used a substantial amount of money and to this moment it has so far been costly taking note that this is a venture that requires substantial amounts of resources. That if the orders issued by this court are not discharged and construction of the suit property allowed to continue, the interested party applicant will stand to suffer loss irreparably as it has put a substantial amount of money in development of the suit property. That the interested party being a genuine lessee and chargee of the suit property is directly affected by the claim

and its presence is necessary in order for the court to effectively and completely adjudicate over the matter. That the only way for the increased party's interest to be secured, is through being enjoined as a party to the suit

The plaintiff/respondent submitted that the 5<sup>th</sup> defendant herein does not hold a good title to the property known as KAKAMEGA/MUNICIPALITY/BLOCK 1/557 and the lease certificate he holds was unlawfully acquired and he cannot pass any title to the interested party. The interested party has also not shown any company resolution authorizing the interested party to enter into contracts with third parties for construction of the said property and this application should therefore be dismissed.

This court has considered the interested party/applicant's and the plaintiff/respondent's submissions and the supporting affidavits therein. The application being one that seeks injunctions, has to be considered within the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** and which are:-

- 1. The applicant must show a prima facie case with a probability of success at the trial***
- 2. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,***
- 3. If in doubt, the Court will decide the application on a balance of convenience.***

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity.

The applicant submitted that, the applicant company has its operations in Kenya and is involved in the business of selling and supplying fuel to its clients. The interested party applicant and the 5<sup>th</sup> defendant/respondent herein agreed to enter into a lease agreement over the property known as KAKAMEGA/MUNICIPALITY/BLOCK 1/557 where the 5<sup>th</sup> defendant would be the lessor and the interested party applicant as the lessee. That the interested party applicant conducted due diligence at the land registry located in Kakamega and established that the 5<sup>th</sup> defendant/respondent herein was the registered proprietor of the leasehold interest in the land known as KAKAMEGA/MUNICIPALITY/BLOCK 1/557. That the interested party applicant together with the 5<sup>th</sup> defendant/respondent executed the lease agreement and had it registered on the 19<sup>th</sup> August, 2015. The lessor agreement to lease to the lessee the suit property for a term of twenty five (25) years.) That the said suit property was further charged with the 5<sup>th</sup> defendant as the charger and the interested party applicant as the charge securing a principal amount of Kenya shilling Seven Million Two Hundred Thousand (Ksh. 7,200,000/=). That the above said charge was executed by both parties and was registered on the 19<sup>th</sup> August, 2015. That both the lease and the charge over the property known as KAKAMEGA/MUNICIPALITY/BLOCK 1/557 were registered and recorded at the Land Registry. That the interested party applicant has already engaged and paid the contractor on the said property who has mobilized machinery and equipment to begin the construction of a service station, shop and offices. That as can be seen from the contract terms, the said contract is worth 26,303,890/= which is a substantial amount and for each day the works are stopped, the interested party is being charged and will continue to be charged and therefore stands to suffer substantial loss and damage. That by engaging the contractor and mobilization of the equipment the interested party applicant has used a substantial amount of money and to this moment it has so far been costly taking note that this is a venture that requires substantial amounts of resources. That if the orders issued by this honourable court are not discharged and construction of the suit property allowed to continue, the interested party applicant will stand to suffer loss irreparably as it has put a substantial amount of money in development of the suit property.

The plaintiff/respondent submitted that the 5<sup>th</sup> defendant herein does not hold a good title to the property known as KAKAMEGA/MUNICIPALITY/BLOCK 1/557 and the lease certificate he holds was unlawfully acquired and he cannot pass any title to the interested party. The interested party has also not

shown any company resolution authorizing the interested party to enter into contracts with third parties for construction of the said property and this application should therefore be dismissed.

I find on perusal of the court file that the plaintiff/respondent alleges fraud in this matter and states that the 5<sup>th</sup> Defendant had no title to pass on to the applicant. I find that the applicant has not shown a prima facie case with a probability of success at the trial and dismiss this application. On the prayer to issue orders to have Gulf energy Limited enjoined as an interested party in these proceedings, I find that the same were granted on the 3<sup>rd</sup> March 2017 by the court and the same will remain so granted as the applicant has establish interest in this matter. Cost of this application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2017.**

**N.A. MATHEKA**

**JUDGE**