



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KISUMU

ELC CASE NO.11 OF 2015

EVANGELICAL LUTHERAN CHURCH OF KENYA.....APPLICANT

VERSUS

YONA ODHIAMBO NYAWIR.....RESPONDENT

RULING

1. **Evangelical Lutheran Church Of Kenya**, the Applicant, filed the notice of motion dated 21st January 2015 praying for restraining orders against **Yona Odhiambo Nyawir**, the Respondent, from dealing adversely with **L.R. 21513 and 21514 Mamboleo**, pending the hearing and determination of this suit. The notice of motion is based on ten grounds on its face and the supporting affidavit of **Reverend Henry Kabasa** sworn on 21st January 2015. He depones that plots number **258 and 259**, which after survey became **L.R. 21513 and 21514** respectively, were allotted to the Applicant by the defunct **Municipal Council of Kisumu** on or about 16th April 1998. That the Respondent has commenced construction on **L.R. 21513** claiming that the land was his ancestral land and should be restrained. The court granted the Applicant interim orders in terms of prayer 2 on 22nd January 2015 pending the hearing and determination of this application.

2. The application is opposed by the Respondent through the replying affidavit sworn on 28th January 2015. The Respondent depones that the allotment of the plots to the Applicant by the Municipal Council of Kisumu was irregular, illegal and unlawful. That the plots are part of his ancestral land which were unlawfully taken over by the Municipal Council of Kisumu and that he and others with beneficial interests over it had challenged the acquisition through High Court Civil Case No.65 of 2008 headed **Samuel Ayoki & Others -V- Kisumu Municipal Council & Commissioner of Land** which is still pending in court. That the court issued orders on 15th July 2008 and 11th February 2009 to maintain status quo and stopping the evictions. That the matter is being investigated by the National Land Commission.

3. The Applicant responded to the issues raised in the replying affidavit through the supplementary affidavit of **Reverend Henry Kabasa** sworn on 15th May 2015 disputing that the allotment of the plots was irregular and deponed that due procedure of the law was followed. The deponent denied that the parties in this suit are the same parties in **Kisumu HCC No.65 of 2008 Samuel Ayugi & Others -V- Kisumu Municipal Council & Another**. That the suit land falls on the land compulsorily acquired by the **Government in 1976 under Gazette Notice No.3400 of 6th November 1976** and that due compensation had been paid to the occupants. That the suit land was therefore not part of the Respondent's ancestral land as claimed. The Respondent filed reply to the supplementary affidavit which he swore on 10th June 2015 reiterating his earlier stated position.

4. That on 12th November 2015, counsel for the parties agreed to file written submissions. The Respondent's counsel filed their submissions dated 16th November 2015 on the 20th November 2015, while Applicant's counsel filed theirs dated 8th December 2015 on the 9th December 2015.

5. The court has considered the grounds on the notice of motion, the affidavit evidence by both parties, the rival submissions by both counsel and come to the following findings;

a) That under letters of allotment dated 16th April 1998 under reference 30973/LXVIII signed by E.M. Kambogo for the Commissioner of Lands, the Applicant was offered unsurveyed plots measuring 3.0 hectares and 0.77 hectares for a Primary School and Church respectively. The Applicant has attached copies of the two letters of allotment and a letter dated 13th March 2006 from the Director of Town Planning, with the then Municipal Council of Kisumu, indicating that the Applicant owns plots **L.R. 21513 and 21514 Mamboleo**. It is the Applicant's case that the plots allotted to them through the letters of allotment are the ones now known as **L.R. 21513 and 21514** after subdivision and are the ones they seek to have the Respondent restrained from interfering with.

b) That though the Respondent claims that the Applicant obtained allocation of the said plots irregularly, illegally and unlawfully, the claim is denied by the Applicant who has indicated that their allocation was regularly done as the plots came from a portion of land that had been compulsorily acquired by the Government in 1976. The Respondent has not given particulars upon which he has deduced that the Applicant obtained the allocation irregularly, illegally and unlawful or that the two plots are part of his ancestral lands.

c) That the suit properties subject matter of **Kisumu HCC No.65 of 2008** are described as **L.R. 15345 and 24414** in the order dated 15th July 2008 and marked "YON - O1." The suit properties in the current suit are described as L.R. 21513 and 21514. There is nothing in the descriptions of the suit properties in this suit and the earlier one that could be constructed to mean that they refer to the same properties. The parties in this suit are also different from the parties in that earlier suit. There is therefore nothing presented by the Respondent to show that the issues raised in this suit is *judicata* or are substantially and directly similar to the issues in that other suit. This suit do not therefore, on the facts so far availed, offend **Sections 6 and 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

d) That though the Respondent claim to be entitled to the properties allotted to the Applicant, he has not availed any documentary evidence in support of his beneficial entitlement. The court has an obligation to protect the rights of a person registered with a property against all others, until such registration has been successfully challenged under **Section 26 of Land Registration Act No.3 of 2012**. There has been no challenge mounted on the Applicant's titles.

e) That the Respondent has been interfering with the Applicant's use of the suit properties and is therefore entitled to the orders sought.

6. That the Applicant's application dated 21st January 2015 has merit and is allowed in terms of prayer 3 with costs pending hearing and determination of this suit.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 27TH DAY OF APRIL 2016

In presence of;

Applicant Absent

Respondent Absent

Counsel Mr Abande for Omondi for Applicant

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/4/2016

27/4/2016

S.M. Kibunja J

Oyugi court assistant

Mr Abande for Omondi for Applicant

Counsel absent

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/4/2016

Court: Ruling delivered in open court in presence of Mr Abande for Omondi for Applicant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/4/2016