



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL CASE NO. 216 OF 2010**

**REDEEMED GOSPEL CHURCH INC**

**REGISTERED TRUSTEES .....APPLICANT**

**VERSUS**

**ALBERT MBITHI MUTINDA.....1<sup>ST</sup> RESPONDENT**

**MUTINDI MBITHI.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The applicant , by way of Notice of Motion dated 27<sup>th</sup> February, 2014, seeks orders that :-
  - i. The stay order issued on the 4<sup>th</sup> October 2013 be lifted;
  - ii. The matter be transferred to the Chief Magistrate’s Court for urgent disposal;
  - iii. The respondents by themselves, their servants and/or agents and any person claiming under them be restrained from alienating, disposing, entering into, wasting, developing, constructing or in any other way interfering with the applicant/plaintiff’s quiet use or dealing with the plaintiff’s parcel number **Emali Township Block 1/126 (subject land)**;
  - iv. The OCS Emali to enforce orders made;
  - v. The OCS Emali to provide 24 hour security to the plaintiff’s premises against the defendants, their servants and/or agents and any persons claiming under them;
  - vi. The defendants to bear costs of the application.
  
2. The application is based on grounds that the applicant/plaintiff is the sole registered and lawful proprietor of the subject land being a lease from **Makueni County Council**. On the subject land stands a church, a place of worship; the plaintiff filed an application dated 25/10/2010 seeking injunctive orders against the defendant which were granted on the 16/11/2010 on interim orders; the defendant raised a Preliminary Objection dated 12/11/2010 stating that there is a pending suit before the Lower Court, CMCC No. 380 of 2010. Consequently, these proceedings were stayed pending hearing and determination of CMCC No. 380 of 2010; the defendants in the aggrandizement that interim orders of injunction granted on the 16/11/2010 were no longer binding on them; resumed their injurious and prejudicial acts against the plaintiff and their properties from the 4/10/2013 . The defendants applied to the Lower Court to have their application withdrawn, the court granted the order of withdrawal therefore CMCC No. 380 of

- 2010 is no longer subsisting, and that the plaintiff's interest in the suit is being undermined by the defendant's unlawful acts.
3. In response thereto by a replying affidavit sworn by **Mbithi Mutinda** having been authorized by the 2<sup>nd</sup> respondent averred that the 1<sup>st</sup> respondent/defendant was the registered proprietor of **Plot No. UNS BCR Emali Township** having been allocated the same through the allotment letter dated 7/12/1999 and which allotment letter has never been revoked to-date and which the applicants allege to be part of the land leased to them by the **County Council of Makueni**; the order of injunction the applicant is seeking was denied by the court in its ruling dated 4<sup>th</sup> October, 2013 and therefore seeking the orders again would be an abuse of the court.
  4. That among the reasons why the court failed to grant such injunction orders was because the appellants failed to prove that the 1<sup>st</sup> defendant did not have an interest in the suit land and that his allotment letter had been revoked. The 1<sup>st</sup> defendant has been the lawful occupant of the suit premises since 1968. At the time the applicant claims the land was leased to them he was still on the ground; the applicants are employing delaying tactics since the withdrawal of CMCC No. 380 of 2010 on 3/8/2010; the place is already developed therefore an injunction cannot issue. In the interest of justice the order staying the suit should be lifted for the matter to proceed to full conclusion. The applicant has instituted suits in the same subject matter and does not prosecute them to their logical conclusion and the police should not be involved in the matter.
  5. The application was canvassed by way of written submissions which have been considered. An order staying this suit was granted on the 4/10/2013 in order for Machakos CMCC No. 380 of 2010 to be heard and determined. Both parties herein are in agreement that the stated suit was withdrawn and is not subsisting. Further, in paragraph 10 of the replying affidavit it is stated that it will be in the interest of justice that the order staying the hearing be lifted so that the matter proceeds in order for litigation to come to an end. That being the case justice demands that the stay order be lifted and it should be so.
  6. With regard to the prayer to transfer the matter to the **Chief Magistrate's Court**, it is submitted that the prayer was made since there was no **Environmental and Land Court** in **Machakos**. The prayer was therefore abandoned on the ground that the suit premises is valued at over **Kshs, 7 million** which surpasses the pecuniary jurisdiction of the Subordinate Court, a fact that was however refuted by the respondent who argued that it is speculative.
  7. This therefore brings in the issue whether injunctive orders sought should be granted? Principles for granting an injunction were laid down in the case of *Giella versus Cassman Brown & Co. Ltd [1973] E.A. 358* at page 360 where *Spry, J* held that:-

*“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on a balance of convenience.”*

8. It is important to interrogate what a *prima facie* case is. In the *Case of Mrao -versus -First American Bank of Kenya Limited & 2 Others [2003] KLR 125*, a *prima facie* case was described as follows:-

*“A prima facie case in a Civil Application includes but is not confirmed to be a “genuine and arguable case.” It is a case 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.”*

9. Both the respondents and applicants claim ownership of the suit premises. The applicant in claiming to be the sole registered owner of the subject land has adduced in evidence a Certificate of Lease issued to them in 1994 to run for a period of 99 years. The respondents on the other hand have a letter of allotment issued in 1999, although they claim to have been in possession of the land since 1968. The issue as to who indeed owns the disputed portion of land will have to be

determined at the hearing of the case. Both parties having undertaken development of the land following issuance of documents by the **County Government**, it will be in the interest of justice that *status quo* as ordered on the 4/7/2014 be maintained pending further orders.

10. In the premises I order as follows:-

- i. The stay order issued on the 4<sup>th</sup> October 2012 be and is hereby lifted;
- ii. Status quo as at the 4<sup>th</sup> July, 2014 be maintained;
- iii. The case shall be mentioned before the **Environment** and **Land Court** for directions.
- iv. Costs of the application shall be in the cause.

**DATED, SIGNED and DELIVERED** at **MACHAKOS** this 27<sup>TH</sup>

day of **JANUARY, 2015.**

**L.N. MUTENDE**

**JUDGE**