



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 413 OF 2012**

**AFRICAN BROTHERHOOD CHURCH**

**the registered trustees.....PLAINTIFF**

**VERSUS**

**THE HEAD TEACHER**

**MAKIVENZI PRIMARY SCHOOL.....1<sup>ST</sup> DEFENDANT**

**THE MANAGEMENT COMMITTEE**

**MAKIVENZI PRIMARY SCHOOL.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

By a Plaint dated the 22<sup>nd</sup> October, 2012, the Plaintiff prays for judgement against the Defendants for:

- a) A declaration that Land Parcel No. Machakos/ Matuu/1263 is jointly owned by Makivenzi ABC Church, Makivenzi Secondary School and Makivenzi Primary School and thus the Defendant has no exclusive rights over the whole land.
- b) A permanent order of injunction restraining the Defendants, their agents or servants from entering, interfering, cutting down trees, cultivating, putting up any structures or in any way dealing with the Plaintiff's portion of Land Parcel No. Machakos/ Matuu/ 1263.
- c) Any other order this court may deem fit and just to grant.
- d) Costs and interests of this suit.

The Defendants in their Defence dated 9<sup>th</sup> November, 2012, denied that land parcel number Machakos/ Matuu/ 1263 is public land, reserved, used and occupied jointly with Makivenzi Primary School and Makivenzi ABC Secondary school as alleged by the Plaintiff. They insist the subject area in dispute is occupied by the Defendants', primary school which has been in control of the school for more than 25 years. Further, they deny that the Plaintiff has been in exclusive possession and have utilized the portion in dispute for more than 25 years at the exclusion of the Plaintiff. The Defendants stated that they shall rely on the doctrine of laches. They deny being served with a notice of intention to sue and insist the Plaintiff has come to court with unclean hands.

The matter proceeded for hearing where it is only the Plaintiff who called one witness to testify. The Defendants failed to attend court to testify.

**Evidence of the Plaintiff:**

PW1 Lawrence Muange, who was the Pastor with the Plaintiff testified that the Plaintiff is the sponsor of the Defendants. He claimed the Plaintiff and Defendants jointly own land parcel number Machakos/ Matuu/ 1263 hereinafter referred to as the 'suit land'. Further, that each is at a reasonable distance and controls defined distinct portions. It was his testimony that on 11<sup>th</sup> October, 2012, their office received a report from the Deacon of the Church Mr. Joseph Maingi that the Defendants through their agents and servants had cut down trees, on the land which belonged to the Plaintiff in readiness for cultivation. Further, the said agents were stopped but they arrogantly stated that they will continue with the process of encroaching and destroying church property. It was his further testimony that the Plaintiff is the owner of the property being wasted away and stand to suffer injustices. The Plaintiff produced the following documents as exhibits: Authority dated 4<sup>th</sup> April, 2012; Copy of Official Search dated 27<sup>th</sup> June, 2012; Copy of Letter from the Plaintiffs dated 8<sup>th</sup> October, 2012; Photographs of suit land; Demand Letter and Defendant's letter dated 16<sup>th</sup> October, 2012.

## Submissions

### Plaintiff's Submission:

The Plaintiff in its submissions explains that the suit land is jointly owned by Makivenzi ABC Church, Makivenzi Secondary School and Makivenzi Primary School. It contends that each institution is distinctly placed and the Plaintiff had preserved and taken care of the natural vegetation on its portion of the suit land. It claims the Defendant has trespassed on its land and gives an example that in October, 2012, the Defendant commenced felling trees and purportedly started cultivating the said land without considering the Plaintiff's interest. It referred to section 3(1) of the Trespass Act and reiterated that it had proved the Defendants have trespassed on its land. It hence sought for orders of injunction.

### Analysis and Determination:

Upon consideration of the Plaintiff's Defence, Plaintiff's witness testimony including exhibits as well as submissions, the only issue for determination is whether the Plaintiff is entitled to the orders sought in the Plaintiff. In the Plaintiff, the Plaintiff has sought for a declaration that they jointly own the suit land together with the Defendants and Makivenzi Secondary School; injunctive orders and costs of the suit.

I note as per the Certificate of Official Search, dated 27<sup>th</sup> June, 2012, which was produced as an exhibit, the suit land is owned by Masaku County Council (Now County Government of Machakos) and reserved for Makivenzi Secondary School, Makivenzi African Brotherhood Church and Makivenzi Primary School. PW1 Lawrence Muange, who was the Pastor with the Plaintiff claimed the Plaintiff is the sponsor of the Defendants. Further, that they jointly own the suit land with each institution having a reasonable distance and controls defined distinct portions. He testified that on 11<sup>th</sup> October, 2012, the Defendants through their agents and servants had cut down trees, on the portion of suit land which belonged to the Plaintiff in readiness for cultivation. Further, the said agents despite being stopped, failed to heed.

The Defendants only filed a Defence but never appeared in court to tender evidence despite the Counsel having been duly served. Section 107 of the Evidence Act provides that: "**Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**"

In the case of **Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002**, Lesiit, J. cited the case of **Autar Singh Bahra and Another vs. Raju Govindji, HCCC No.548 of 1998** where it was held that:

***"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."***

In associating myself with the legal provisions I have cited above as well as the quoted authority, I find that since the Defendants failed to controvert the Plaintiff's averments, the Plaintiff's claim remains unchallenged.

On the issue of trespass, Clerk & Lindsell on Torts 18<sup>th</sup> Edition at paragraph 18-01 defines the same as follows:

***"Any unjustifiable intrusion by one person upon land in possession of another." ....Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession"***

Section 3 of the Trespass Act further provides that, "**(1)Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.**"

In this instance, the Plaintiff confirmed it owned a distinct portion of the suit land with boundaries demarcated. I note in the Certificate of Official Search, it confirmed that from 4<sup>th</sup> March, 1993, the Masaku County Council had reserved the suit land for Makivenzi Secondary School, Makivenzi African Brotherhood Church and Makivenzi Primary School. Further, from a letter written by a representative of the Defendants dated the 16<sup>th</sup> October, 2012, addressed to the Town Clerk Matuu Town Council, they had sought for subdivision of the suit land as well as issuance of a Letter of Allotment to them. They even admitted that the suit land was shared by the aforementioned three parties. From the exhibits produced, I find that the Defendants are indeed encroaching and interfering with the Plaintiff's portion of land within the suit land. It is my considered view that the County Government of Machakos, although not a party to the dispute herein but as the registered proprietor of the suit land should clearly demarcate the respective boundaries of the institutions herein and issue them with letters of allotment.

In line with the decision of **Giella V Cassman Brown (1973) EA 358**, I find that the Plaintiff has indeed established a prima facie case and will make an order that the Defendants should cease interfering with its portion of the suit land.

On the issue of costs, since the Defendants are public entities, I will direct that each party does bear its own costs.

It is against the foregoing that I find the Plaintiff has proved its case on a balance of probability and will proceed to make the following final orders:

- i. A declaration be and is hereby issued that Land Parcel No. Machakos/ Matuu/1263 is jointly owned by Makivenzi ABC Church, Makivenzi Secondary School and Makivenzi Primary School and thus the Defendants have no exclusive rights over the whole land.

ii. A permanent order of injunction be and is hereby issued restraining the Defendants, their agents or servants from entering, interfering, cutting down trees, cultivating, putting up any structures or in any way dealing with the Plaintiff's portion of Land Parcel No. Machakos/ Matuu/ 1263.

iii. The Land Registrar and Surveyor of the County Government of Machakos be and are hereby ordered to clearly demarcate the respective boundaries of Makivenzi ABC Church, Makivenzi Secondary School and Makivenzi Primary School within Land Parcel No. Machakos/ Matuu/ 1263 and issue them with respective letters of allotment to that effect; the three institutions will be responsible for the costs of the exercise.

e) Each Party to bear its own costs.

**DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23<sup>RD</sup> FEBRUARY, 2022.**

**CHRISTINE OCHIENG**

**JUDGE**