



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO.172 OF 2014**

REGISTERED TRUSTEES

INTERNATIONAL GLORIOUS VICTORY CHURCH ..... PLAINTIFF

**VERSUS**

THE COUNTY ENGINEER, KISII COUNTY GOVERNMENT ..... 1<sup>ST</sup> DEFENDANT

KISII COUNTY GOVERNMENT ..... 2<sup>ND</sup> DEFENDANT

**RULING**

1. What I have before me is the plaintiff's application by way of Notice of Motion dated 5<sup>th</sup> May 2014 seeking a temporary injunction to restrain the defendants from entering, re-entering, trespassing onto, depositing building materials, digging foundation, building structures, interfering with and/or in any other manner whatsoever dealing with all that parcel of land known as **LR No. Kisii Municipality/Block III/597** (hereinafter referred to as "**the suit property**") or any portion thereof pending the hearing the determination of this suit. The plaintiff has sought a further order that the O.C.S Kisii Police Station be directed to ensure compliance with the order sought if granted. The plaintiff's application was supported by the affidavit of one, Pastor Mike Ronald Nyarunda Omwenga. It was also based on the grounds set out on the face of the application.
2. The application was brought on the grounds that the plaintiff is the registered proprietor of the suit property which is leasehold from Gusii County Council for a period of 99 years with effect from 1<sup>st</sup> December 1997 at a revisable annual rent of kshs. 2,000/= . The suit property was transferred to the plaintiff by Mike Ronald Nyarunda Omwenga as a gift on 15<sup>th</sup> December 2011. Upon the transfer and registration of the suit property in the name of the plaintiff, the plaintiff fenced the same with barbed wire and constructed thereon a church house for its members. The plaintiff also dug and constructed a pit latrine for use by the church members and other worshippers. The plaintiff's complaint against the defendants is that on 30<sup>th</sup> April 2014 the defendants through their agents, servants and/or employees led by the 1<sup>st</sup> defendant moved into the suit property without the plaintiff's permission or consent and started destroying the barbed wire fence that the plaintiff had put up around the suit property and the pit latrine that the plaintiff had constructed thereon. The defendants also started clearing a portion of the suit property by cutting down the trees that were growing thereon. After damaging the barbed wire fence and clearing a portion of the suit property as aforesaid, the defendants started leveling the ground and digging trenches with a view to commence putting up structures on the suit property.
3. If that was not enough, the defendants barred and/or restrained the members of the plaintiff's church from accessing the church house. The plaintiff's members failed to conduct church

services on Sunday 4<sup>th</sup> May 2014 as a result of this blockade by the defendant. It is on account of the foregoing that the plaintiff was constrained to file this suit and the present application to seek protection of the court from the defendants' onslaught. The plaintiff has contended that as the registered owner of the suit property, it has the exclusive and absolute right to possess, develop and occupy the suit property and as such the actions of the defendants aforesaid are illegal and should be restrained. The plaintiff annexed to the affidavit of Pastor Mike Ronald Nyarunda Omwenga among others; a copy of the register for the suit property, a copy of the certificate of lease for the suit property dated 15<sup>th</sup> December 2011, a copy of a certificate of official search on the title of the suit property dated 22<sup>nd</sup> November 2013 and copies of photographs said to have been taken on the suit property between 30<sup>th</sup> April 2014 and 2<sup>nd</sup> May 2014.

4. The plaintiff's application was opposed by the defendants through a replying affidavit sworn on 28<sup>th</sup> October 2014 by one, Patrick Achoki and a Notice of Preliminary Objection dated 15<sup>th</sup> May 2014. In their preliminary objection, the defendants contended that the plaintiff's suit is incompetent and incurably defective because the plaintiff has no legal capacity to hold property in its name. The defendants contended further that the title of the suit property is held in the name of a non-existent legal entity and as such the suit herein which is based on the said title is null and void. The defendants contended also that the 1<sup>st</sup> defendant is a non-existent legal entity and as such no suit can lie against it. Finally, the defendants contended that no notice was served upon them before the institution of this suit. In their replying affidavit, the defendants contended that the suit property was curved out of land that was reserved for a fire station in the Kisii Town Development Plan of the year 1971. The defendants contended that the user of the said parcel of land was never changed from fire station to church. The defendants contended further that there are no minutes of the defunct Municipal Council of Kisii to show how the suit property was allocated to the plaintiff. The defendants have contended that it is very likely that the suit property was acquired by the plaintiff fraudulently, unprocedurally and illegally. The defendants denied that the plaintiff has put a church house and a latrine on the suit property. The defendants annexed to the affidavit of Patrick Achoki, copies of what are said to be Kisii Town Development Plan for 1971 and registry index map for Mwabundusi area.
5. When the plaintiff's application came up for hearing on 19<sup>th</sup> May 2014, I directed that the same be argued by way of written submissions. The plaintiff filed its submissions on 24<sup>th</sup> September 2014 while the defendants did not file their submissions as directed by the court even after time was extended for them to do so on 28<sup>th</sup> October 2014. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the notice of preliminary objection and the replying affidavit that were filed by the defendant in opposition to the application. Finally, I have considered the written submissions by the plaintiff together with the authorities cited in support thereof. The law on temporary injunction is now well settled. In the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, the Court of Appeal set out the principles for granting interlocutory injunction as follows;
  - a. **The applicant must show a prima facie case with a probability of success.**
  - b. **An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages.**
  - c. **If the court is in doubt, it will decide the application on a balance of convenience.**
6. It is not in dispute that the plaintiff is the registered proprietor of the suit property. The plaintiff has also demonstrated by the photographs annexed to the affidavit in support of the application that it has put up a church house and a pit latrine on the suit property. The defendants have not denied that they entered into the suit property on 30<sup>th</sup> April 2014, destroyed the fence that the plaintiff had put up around the suit property together with the pit latrine and started clearing the area for their own use. The photographs annexed to the affidavit in support of the application herein which are said to have captured the defendants' activities on the suit property have not been contested. The defendants have also not denied that they prevented the members of the plaintiff from accessing the suit property and completely blocked them from the church house on the property on Sunday 4<sup>th</sup> May 2014. The defendants' response to the plaintiff's application is that

- the plaintiff acquired the suit property irregularly because the suit property was created from land that was reserved for a fire station. I have no evidence from the material before me that the suit property was curved from land that was reserved for a fire station. I have seen from the plaintiff's bundle of documents (page 19) a copy of a letter written by the town clerk, Municipal Council of Kisii to the Director of Surveys on 16<sup>th</sup> July 2010 that the council had no objection to a title being issued to Mike Ronald Nyarunda Omwenga with respect to the land now comprised in the suit property.
7. I wonder how the Municipal Council of Kisii would have approved the issuance of a title for the suit property to the said Mike Ronald Nyarunda Omwenga for private use while the said parcel of land was reserved for a fire station. The less said with regard to that contention the better because it is an issue that cannot be determined on affidavit evidence before me. The question that I wish to pause is that, even assuming that the plaintiff acquired the suit property irregularly, were the defendants entitled to repossess the same from the plaintiff by force. I don't think so. Equity frowns at people who take the law into their own hands. A court of equity would not allow them to keep what they have obtained unlawfully. In the case of **Aikman –vs- Muchoki [1984] KLR 353**, it was stated that a wrong doer cannot keep what he has unlawfully taken because he can pay for it. In the same case, the court observed that equity does not assist lawbreakers. To deny the plaintiff the orders sought would be tantamount to sanctioning the forceful repossession of the suit property by the defendants. In the case of, **Kamau Mucuha vs. The Ripples Ltd., Civil Application No. Nai.186 of 1992(unreported)**, Cockar JA, stated that “ **A party as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act.....**”.
  8. Due to the foregoing, I am satisfied that the plaintiff has established a prima facie case against the defendants. The plaintiff has proved that it is the registered proprietor of the suit property and that the defendants had without following the due process purported to forcefully evict it from the property. I am also satisfied that the plaintiff would suffer irreparable loss if the orders sought are not granted. The members of the plaintiff's church have been worshiping in the church house on the suit property; if the defendants are not restrained and they proceed to demolish the said church house as they have done with the pit latrine, the members of the plaintiff would not have a place of worship. The plaintiff would therefore suffer irreparable harm.
  9. I am persuaded therefore that the plaintiff has satisfied the conditions for granting interlocutory injunction. The plaintiff's Notice of Motion application dated 5<sup>th</sup> May 2014 is well merited. The same is hereby allowed in terms of prayer 3 thereof. The plaintiff shall have the costs of the application.

**Delivered, signed and dated at KISII this 13<sup>th</sup> day of February, 2015.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Bigogo h/b for Oguttu for the plaintiff

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**