



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 44 OF 2021

THE REGISTERED TRUSTEES OF

CHRIST'S CO-WORKERS FELLOWSHIP

CHURCH (CHRISCO).....-PLAINTIFF

VERSUS

GREY HARTS LIMITED.....1ST DEFENDANT

GRACE ALIVIDZA CHIMWANI.....-2ND DEFENDANT

LAND REGISTRAR

KITLAE LANDS OFFICE.....-3RD DEFENDANT

COUNTY SURVEYOR

KITALE COUNTY OFFICE.....4TH DEFENDANT

COUNTY PHYSICAL PLANNER

KITALE COUNTY.....5TH DEFENDANT

RULING

(On grant of Mandatory Injunction and eviction and cancellation of title deeds at interim stage, and locus standi of an entity)

THE APPLICATION

1. The Applicant filed a Plaint simultaneously with the instant Application - a Notice of Motion. Both were dated **18/8/2021** and filed on **20/8/2021**. It brought the Application under Sections **1A, 1B** and **3A** of the Civil Procedure Act and **Order 40 Rules 1, 2** and **3, Order 51 Rule 1** of the **Civil Procedure Rules, 2010** and 'all other relevant provisions of the Laws of Kenya.'

2. The specific prayers the Plaintiff/ Applicant sought were *inter alia*:

1. ...spent

2. ...spent

3. **THAT the Honorable court do issue mandatory injunction stopping (*sic*) the defendants/respondents from trespassing, fencing, transferring, entering, selling all that unsurveyed parcel of land ALLOTMENT REF. NO. 20089 cited as PDP REF. NO. K.T.L 10:95:42 and APPROVED DEVELOPMENT PLAN No. 320 the property of the plaintiff/applicant.**

4. **THAT the Honourable Court do issue eviction orders directing the plaintiff/applicant to evict the 1st and 2nd defendants from al that piece of land situated at KITALE IN TRANS-NZOIA County being allotment Ref No. 20089 cited as PDP REF NO. K.T.L 10:95: 42 and Approved Development Plan No. 320 the property of the plaintiff/applicant.**

5. THAT, the honourable court do issue an order directing the 3rd defendant/Respondent to revoke any title deeds existing in the name of the 1st defendant and all that piece of land situated at Kitale situated being KITALE IN TRANS-NZOIA County being Allotment Ref No. 20089 cited as PDP REF NO. K.T.L. 10: 95: 42 and Approved Development Plan No. 320 the property of the plaintiff/applicant.

6. THAT costs of this suit be provided for.

3. The grounds on which the Application was premised were that the Applicant was the legal licensee by way of allotment of all that parcel of unsurveyed land situate in Kitale within Trans-Nzoia County, specified in the Allotment letter Ref. No. 20089 and Part Development Plan Ref No. K.T.L.10:95:42 and identified as Plan No. 320, having fulfilled the conditions of allotment thereto. The other one was that by a Letter dated 3/4/1997 the Commissioner of Lands requested the Director of Surveys to conduct survey on the suit land which he did not do and the Applicants engaged a private surveyor who inspected the parcel, together with the relevant documents thereto and opined that there was serious encroachment and use of vague documents which had given rise to fraudulent entry of FR. NO. 296/12 and FR. NO. 628/8 also known as Plot No. 509. Also, that the Director of Physical Planning disowned the drawing which gave rise to letter of allotment to the 2nd Defendant since it was non-existent and a forgery. Again, that on carrying out an official search on Land Parcel No. Block 4/470 which was processed following Allotment Letter, ref: 20089/XXV it revealed that the 1st Defendant was registered as proprietor. Additionally, a further search showed that the parcel of land had been transferred to the 1st Defendants on 19/5/2015. Then it stated that it had a prima facie case with high chances of success and the Respondents would suffer no prejudice if the orders sought were granted.

4. The Application was supported by the Affidavit of one Pastor GIDEON BIRECH sworn on 18/8/2021, having been authorized to swear it on his own behalf and that of the registered trustees. He annexed to it copies of the letter of authority and certificate of incorporation the Church and marked them as RT1 and RT2 respectively. The Certificate of Incorporation shows that the Trustees of the church who brought this Suit were incorporated as such on 15/09/2002. He deponed, giving the history on how the suit land was allocated to the Church. He stated that the Plaintiff applied for a piece of land and by a letter dated 15/12/1992 Ref No. I.ND10/13 the Town Clerk of Kitale Municipality wrote a letter, Ref: PDP/KTL/10/5/VOL. IV/169, to the Commissioner of Lands advancing its cause, and later the Physical Planning Officer from Kitale wrote to the Commissioner of Lands through the Director of Physical Planning Department and copied to the Permanent Secretary Lands and Settlement, the District Commissioner, District Land Officer and Town Clerk all of Kitale forwarding Part Development Plan (PDP) for the suit land for their action. He deponed further that both the proposed site and approved Plan were completed on 13/7/1995 and forwarded to the relevant authorities for further action. Thereafter, the Church was issued with an allotment letter and an approved Plan whose copies he annexed and marked as RT 6 and 7. He also annexed and marked as RT 8 a copy of a receipt for Kshs. 5,980/= for it. He deponed further that by a letter dated 3/4/2019 which he annexed to his Affidavit and marked as RT 9, the Commissioner of Lands directed the Survey office to carry out a survey exercise on the suit land. He stated that despite the Director of Survey giving permission by a letter reference no. 17771204 for the survey to be done, it was not because it was realized that there was an encroachment which "showed the illegal alienation as plot 470 and 509" had been surveyed and given to other persons, and he termed the transactions as forgeries and fraudulent.

5. He insisted that the Applicant's efforts to obtain a title deed had been rendered futile despite its Plot number and P.D.P. being authentic as evidenced by a letter dated 7/4/2021. He repeated the fact of carrying out searches on both the suit land and that of the Company and their outcome was that GREY HARTS LIMITED came into existence on 23/11/2006. In addition, he deponed that the green card of the suit land shows that it was registered in the name of one Grace Alividza Chimwani and later transferred to Grey Harts Limited. He accused Ms. Chimwani for illegal and irregular acquisition of the land and its registration in her name while depriving the actual owners of their rightful acquisition. To justify that, he annexed a Copy of Standard Newspaper of 17/7/2018 which mentioned the 2nd Respondent as having acquired another parcel of land illegally.

6. He summed it up that the 2nd Respondent was a trespasser on the suit land, having denied any involvement in it and that her actions forced them to seek justice and a prayer for an order stopping the 2nd Respondent from trespassing further on the suit land. He also stated that the Applicant would suffer loss and damage if the orders sought are not granted.

THE RESPONSE

7. The Application was opposed. The 1st Respondent filed a Replying affidavit on 16/9/2021. It was sworn on 15/9/2021. The 2nd Respondent opposed it through grounds of opposition dated 31/8/2021 and filed on 4/9/2021 as well as a replying affidavit sworn on 1/9/2021 and filed on 2/9/2021. I analyze them under the following heads.

a) The 1st Respondent's Replying Affidavit

8. The 1st Respondent is said to be a Limited Liability Company. One Vipul Ratilal Dodhia who described himself as a director responded on its behalf. He swore that the Company, jointly with one Dipakben Vipul Dodhia, purchased the suit land in good faith and for value on 5/12/2011 from the 2nd defendant. He annexed thereto a copy of sale agreement dated 05/12/2021 and marked it as VD 1. He stated that the 2nd defendant had been allotted the land on 26/7/1995 and a 99-year lease on 28/7/1997 w.e.f. from 1/8/1995, upon payment of the requisite fees. Consequently, a certificate was issued to her on 5/8/1997. He annexed to his Affidavit and marked as VD 2, VD-3, VD-4 and VD-5 copies of receipts for payment. He deponed that after the purchase the land was transferred to the company and a fresh certificate of lease issued to it. He attached a copy of the certificate and marked it as VD 6.

9. His further deposition was that the 1st Respondent was the registered proprietor of the land to date and has been paying rent and rates thereon to the relevant authorities. He annexed receipts of payment and demands for it. His further response was that there was no land available for allotment to the Plaintiff as at 5/12/1995 since it had been allocated to the 2nd defendant on 26/7/1995. He stated that the instant application did not meet the requirements for the grant of an interlocutory injunction. Lastly, he attacked the orders sought in prayers 3, 4 and 5 as being final nature hence not capable of being granted at the interim stage. He prayed that the application be dismissed with costs.

b) The 2nd Defendant's/Respondent's Grounds of Opposition

10. The 2nd defendant challenged the suit as being incompetent and misconceived for the reason that the Plaintiff lacked *locus standi* to institute it hence it could not stand the test of the law and because the plaintiff did not own a title to the suit land. To her, what the Plaintiff had was a mere allotment letter issued to it 25 years ago. She contended that since the Plaintiff Church's trustees were registered in the year 2002, it was non-existent at the time of the alleged allotment thus incapable of owning the land. She then stated that the suit was unjustified, unripe and in a wrong forum because it would have been handled by the National Land Commission and the Chief Registrar of Lands and not the Honourable Court. Lastly, she contended that the orders sought were already overtaken by events as they could not be made in regard to a non-existent land which had not been identified and which the Plaintiff failed to describe its identity.

c) The 2nd Defendant's Replying Affidavit

11. The 2nd Defendant opposed the Application also by way of Affidavit. She swore it on 1/9/2021. Her response was that sometimes in April, 1995 she applied to the Commissioner of Lands for allocation of land in Kitale. She annexed to her affidavit a copy of the application letter and marked it as GAC 1. She deponed that her request was accepted and in July of that year and she was allocated land through an allotment letter dated 26/7/1995. The land that was allocated to her was an unsurveyed residential plot in Kitale Municipality measuring 0.15 Hectares on Plan No. KTL/10/95/97. She annexed a copy of the allotment letter and marked it as GAC 2. She deponed further that after the allocation, she paid the sum of Ksh. 19,500/= according to the conditions contained in the letter of allotment. She annexed a copy of a Bankers Cheque and payment receipts to evidence payment marked them as GAC 3 (a) and (b).

12. She swore further that later the un-surveyed plot was surveyed and registered as Kitale Municipality Block 4/470. Thereafter, she was registered as the owner and issued with a Certificate of Title. She annexed to her affidavit a copy of the Lease and a Certificate of Lease marked as GAC 4 (a) and (b).

13. The deponent explained further that she later sold the said land and transferred it to GREY HARTS LTD, the current registered owners. She expressed surprise upon being served with Court papers filed by the Plaintiff accusing her of land grabbing. She denied the allegation and stated that she acquired the land legally and by extension through following the right procedure of acquisition.

14. She denied the allegation that the suit land was the same as the one she was allocated. She stated that she had found out from the Plaintiff's papers presented in court that the Plot the Plaintiff claimed was an unsurveyed plot measuring 0.651 Ha while the one she was allocated measured 0.37 acres. She was emphatic that the plots were distinct and different even in size.

15. She too repeated the 1st Defendant's contention that the Plaintiff's case was defective because as at the time the alleged Plot was allocated, the Plaintiff was non-existent since it was registered in 2002, thus not capable of being allocated land. She referred the Court to the Plaintiff's Certificate Incorporation which she annexed to her Affidavit and it marked as GAC 6.

16. She challenged the issuance of the allotment to the Plaintiff stating that she was the first to be allocated her Plot in July, 1995. She asserted that the Plot was not available for allocation in December, 1995. She emphasized by repeating that she acquired her Plot lawfully, rightfully and regularly after following the due procedure and paying the requisite fee before it was surveyed and registered in her name. She annexed correspondences to justify her claim for procedural acquisition of her land. She advised the Plaintiff to look for its alleged plot elsewhere but not from hers.

SUBMISSIONS

17. Parties were directed to dispose the Application by way of written submissions which they did, and I have considered them deeply and systematically.

ANALYSIS, ISSUES, DETERMINATION

18. I have anxiously but carefully considered the application, the grounds contained thereon, the rival affidavits both in support and opposition, the grounds of opposition as well as the submissions of the parties. I have also analyzed the law and case law cited. In my view the issues that commend to me for determination are:-

- (1) Whether an order for mandatory injunction can and should issue in the interim period;***
- (2) Whether the Court has jurisdiction to determine this suit;***
- (3) Whether the Plaintiff has locus standi to bring this suit;***
- (4) What orders to issue and who to bear the costs of the Application?***

19. Before I delve into determining the issues, let me clarify a few concerns. First, is in respect to the prayers contained in the Application. The Applicants made prayers 4 and 5. These were in summary to the effect that eviction orders do issue, directing the plaintiff/applicant to evict the 1st and 2nd defendants from suit land, and an order directing the 3rd defendant/Respondent to revoke any title deeds existing in the name of the 1st defendant, respectively. Had it been that the 1st and 2nd Defendants moved recently onto the suit land, prayer 4 would have fallen under one of a mandatory nature that could have been considered at this stage together with prayers 2 and 3. It is this Court's humble view that the prayers 4 and 5 as sought are of a final nature which and can only be granted at the end of the trial, in a judgment if the Plaintiff succeeds. They cannot be issued at the interim stage. For that reason, they will not form part of the matters for consideration in this

application. I refuse to determine them because it would be **premature** for me to do so when the parties have not been heard in full (*Emphasis mine*). I leave it at that.

20. Secondly, whereas the grounds of opposition before the Court were presented as such, two of them raise pure points of law which ought to have been presented by way of a Preliminary Objection. For instance, the first ground was that the plaintiff lacked *locus standi* to institute this suit and the third was that this suit was non-justiciable and unripe and in the wrong forum which point, in this Court's view, meant that the Court lacked jurisdiction to hear and determine the suit.

21. The two ground should have been clearly stipulated as preliminary objections. Nevertheless, since they were raised before me, I will determine them as they are although they were made during the stage hearing the interlocutory Application. I hold this view because, time without number, it has been held that points of law can be raised at any stage of the proceedings in a suit (see *Rajab Kosgei Magut v Nuru Jepleting Choge [2020] eKLR*, *Harambee Sacco Society Limited v Lawrence Njagi Mbungu & 2 others [2016] eKLR*, *Busia Sugar Company Limited v Wanga & Company Advocates [2005] eKLR*, and many more).

22. Again, in my view, preliminary points of law may be raised in any manner howsoever. Therefore, as long as it is pointed to the Court that a party wishes to raise or actually brings up a point of law, he/she will be permitted to do so and be heard on it. Once the point is raised, the Court actually leaves everything in order to listen to and determine it. This is what I will do even though I already set out a number of issues for determination above.

23. I now turn to determine first the third issue which is *whether or not this Court has Jurisdiction to hear and determine this matter*. I begin with this point because jurisdiction is everything when it comes to Court matters. Without it, all the business the Court engages in is void, null and baseless. Jurisdiction is the river bed rock upon which the flow of the river of justice is anchored. As was stated by Nyarangi J of the Court of Appeal (as he then was) in the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1*,

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

24. Similarly, in *Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011*, the Supreme Court of Kenya observed that:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

25. It is for these reasons that I must decide on whether or not I have the power to handle this matter. The 2nd Respondent stated in the 3rd ground of opposition that this suit was unjusticiable (*sic*) and unripe, and in the wrong forum. She sought to state that it should have been handled by the Chief Land Registrar and the National Land Commission before the Plaintiff would bring it. Although the 2nd Respondent was the one who raised this ground, she did not submit on. While the Applicant referred to the ground in its submissions, it did not also submit on its merits or otherwise. It only submitted that the 2nd Respondent did not point out the law upon which the grounds of opposition were based. That left the Court to analyze the ground in relation to the provisions cited and the existing law to which they would possibly relate.

26. I looked at the **Land Act, Act No. 6 of 2012** which establishes the functions of the Chief Land Registrar before whom the 2nd Respondent stated the Plaintiff should have taken the issue herein. I also looked at the Regulations (Subsidiary Legislation) made thereunder. He has none of those powers. I also analyzed the provisions of the **National Land Commission Act** which establishes the Commission which the 2nd Defendant also alluded to as one of the offices the Plaintiff should have presented its claim to. The only close provision in relevance to the proposition was **Section 14** of the latter **Act**. The Section provides for the review of all grants and dispositions of public land to establish their propriety or legality. That should be done either on the Commission's own motion or through a complaint by the national or county government or community or individual. Upon receiving the complaint, the Commission was to investigate and make a determination thereon. That was to be done within **five (5) years** of the commencement of the Act. The Act commenced on **2/05/2012** hence the period came to an end on **1/05/2017** except if it was extended. The Plaintiff's complaint as I understood it was that the 2nd Defendant forged documents which she used to acquire title to the suit land. That would not fall within the mandate of the Commission: I did not find any provision giving the office such powers as the 2nd Defendant wanted the Court to find. Therefore, the objection fails.

27. I now turn to the third issue, which manifested to me as a preliminary objection. That was whether or not the Plaintiff had *locus standi* to bring this suit. This is because, as the Court of Appeal rightly observed in *Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR*, having *locus standi* or lacking it has far reaching consequences in a matter. I begin its analysis by giving my understanding of the term itself. Often clean hands are referenced to when one approaches the Court for equitable reliefs. That which he/she uses to come to Court is a *locus standi*, akin to legs to use and stand on. They must be real in the eyes of the law. It is likened to a robe a party must wear in order to be heard once he has the basis for coming before a Court of law. *Black's Law Dictionary, 9th Edition at page 1026* defines *locus standi* as-

“The right to bring an action or to be heard in a given forum”.

28. The Court of Appeal in Alfred Njau & 5 others vs. City Council of Nairobi [1983] eKLR defined the concept in the following terms:-

“The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt’s Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”

29. The 2nd Defendant raised the issue (of *locus standi*) that to the extent that the Plaintiff “relied on a mere allotment letter made in **December, 1995**” and it (Plaintiff) became registered in the year **2002**, it was incapable of owning or being allocated land in **2002** and “there is in law (no) allotment in advance of and in anticipation of future existence.” From the pleadings, particularly, **paragraph 7** of the Plaintiff and **paragraph 3** of the Affidavit sworn by Pastor Gideon Birech on **18/08/2021** in support of the instant Application, it is clear that the allotment letter relied on by the Plaintiff to base its claim was issued or dated **05/12/1995** and the Certificate of Incorporation of the Plaintiff given on **18/07/2002**. That was about **six (6)** and **half years** later. I have also perused the defences and Affidavits filed. Thus, it is not in dispute that those are the material dates on the part of the Plaintiff regarding its existence and the alleged allocation of the suit land to it (emphasis mine).

30. I have carefully analyzed the law under which the Plaintiff was incorporated and therefore came into existence. **Section 3(3)** of the **Trustees (Perpetual Succession) Act**, Chapter **164** of the Laws of Kenya stipulates as follows:

“The trustees shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name and, subject to the conditions and directions contained in the certificate, to hold and acquire, and by instruments under the common seal to convey, transfer, assign, charge and demise any movable or immovable property or any interest therein now or hereafter belonging to, or held for the benefit of, the trust concerned in the same manner and subject to such restrictions and provisions as trustees might so do without incorporation.”

31. The subsection is preceded by **Subsection 1** which provides that trustees who have been appointed to act as such for a body or organization such as a religious one as the Plaintiff apply to the Minister for registration. **Subsection 3** cited above clearly provides for four things material to this suit. These are that, one, immediately upon being registered and given a certificate, two, the trustees become a body corporate, three, they can sue or be sued in that name, and four, they hold and acquire, convey or transfer property in that name.

32. Going by the pleadings and the provisions I have cited, it is clear that the property in question is said to be private property. It is claimed by the Plaintiff which came into existence more than six and half years from or after the time it alleges to have been allocated the Plot it claims that it applied for and was allocated it, which is practically, humanly and naturally impossible. Here is a situation where a cart is before a horse and both are moving in the direction of the cart! It is not possible. It is outside of the ordinary course of events and nature that a non-existent entity can apply for and be allocated property. Such occurrences are reminiscent of those where fraudsters create shams or shells and use them to fleece innocent individuals of their rightful properties. Of course, we hear of and it is understood by many that in religious circles and other life, miracles happen but certainly this is not one of them. If the Plaintiff could have claimed to have acquired the property from the original ‘allotee’ by way of purchase, gift or other assignment to it after it was incorporated, that would have made sense. However, its assertions were totally at variance with that hypothetical situation. The Applicant pleaded in its documents that it acquired the suit land by allocation, that it owned it, that it sued to claim it, yet it (Plaintiff) was ‘born’ many years after the land was allotted to ‘somebody’, a mere name.

33. What the situation above could imply was that the Plaintiff sued for and claimed the land for on behalf of a someone or an entity that has neither been disclosed or identified itself nor authorized the Plaintiffs to do so. But nowhere does the suit state as much. The suit is neither a public interest litigation nor is the suit land said to be public land. To be clear, I have carefully analyzed the pleadings herein. They do not import any iota of an idea that they could fall under **Article 22** of the **2010 Constitution**. To continue entertaining the suit would be tantamount to spending the precious time of the Court on a matter that should not be before it. To that extent, the Plaintiff lacks *locus standi* to bring the suit.

4) What Orders to issue and who to bear the costs of the Application?

34. Having found that the Plaintiff lacks *locus* to bring this suit, I find no basis to make findings in the other issues that I set to determine at the beginning of the analysis herein. For that reason, this suit and the Application dated **18/08/2021** are hereby dismissed with costs to the Defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 17TH DAY OF FEBRUARY, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.