



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL SUIT NO. 969 OF 2013**

**CHARLES ODERO OBURU.....1<sup>ST</sup> PLAINTIFF**

**JACOB OMBOKO ALURU .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....DEFENDANT**

**RULING**

The plaintiff by a Notice of Motion dated 5<sup>th</sup> August 2013 and subsequently amended on 26<sup>th</sup> August 2013 seeks the following substantive orders:-

1. THAT pending the hearing and final determination of this suit, an injunction do issue restraining the Defendant, his servants, agents or anybody or authority from entering trespassing onto the plaintiffs land being plot **NO. KLS/D88** at **Kibera Laini Saba** or disrupting the plaintiff's church services or in any manner whatsoever interfering with plaintiffs possession of the said plot and premises.
2. That pending hearing and final determination of this application and this suit, a mandatory injunction do issue reinstating the plaintiffs and their congregation back into the premises being plot **NO. KSL/D88**.

In support of the application the plaintiffs state they are the owners of the suit land having purchased the same from one **Karanja Njoroge** under an agreement of sale dated 18<sup>th</sup> July 2008. The plaintiffs further state that they hold church services in a church building that stands on this property. The plaintiffs aver that the Defendant authorized them to use the name **Hossana Community Church** where he serves as the Bishop and the church is registered. The plaintiffs state the Defendant moved from the plaintiff's church congregation to another church and that the plaintiffs have operated independently since 2008 until recently when the Defendant returned and started laying claim to the church and has generally started interfering with the plaintiffs activities at the church and has in that regard been using the local administration to deny the plaintiffs members access to the church. The plaintiffs are apprehensive that unless the Defendant is restrained he will persist in causing disruption of the plaintiffs and their congregations' church activities and the plaintiffs stand the risk of losing their church premises. The plaintiffs further rely on the annexed affidavit of **Charles Odero Oburu** sworn in support of the application on 5<sup>th</sup> August 2013 and a further affidavit sworn on 13<sup>th</sup> November 2013.

The Defendant has in opposition to the plaintiffs application sworn a replying affidavit dated 26<sup>th</sup> September 2013 and interalia states that he is one of the founders of **Hassana Community Church**. The Defendant asserts that the suit plot **NO.KLS/D88** was bought using funds from the congregants and not funds from the plaintiffs pockets. The Defendant avers that he is the one who authorized the plaintiffs to sign the agreement for the purchase of the plot on behalf of **Hossana Community Church**. The Defendant alleges that the plaintiffs in October 2012 or thereabouts changed the name of the church without the Defendant's authority from **Hossana Community church** to Universal Pentecostal Evangelism Church and instead of moving out of the Hossana Community Church Plot they adamantly refused to move out and that is when the Defendant sought the intervention of the Chief who ordered the plaintiffs to close the church and that the church was closed with effect from February 2013 or thereabouts. The Defendant avers that the plaintiffs moved out of **Hossana Community Church** and are now running a different church from a different location and having left the **Hossana Community Church** plot they cannot be entitled to an order of injunction. At any rate the plaintiffs prayer for an order of injunction has been overtaken by events as they have already left the premises.

The parties have filed written submissions which they highlighted before the court on 19<sup>th</sup> March 2014. **Mrs Wanjohi** counsel for the plaintiff reiterated the contents of the plaintiff supporting affidavit and submitted that the plaintiffs were the purchasers of the suit property and that the Defendant was only a witness to the purchase agreement. It was submitted on behalf of the plaintiff that the plaintiffs merely used the name of **Hossana Community Church** with the approval of the Defendant since it had a registration. The plaintiffs submitted that the Defendant moved out the plaintiffs Kibera Church premises and went to start his own church at Kawangware but later came back and disrupted the plaintiff's conduct of services at the disputed premises and caused the plaintiffs to be ejected from the church premises which were then locked.

The plaintiffs seek to be restored to the premises arguing that owing to the Defendant's unwarranted action they have been forced to conduct their church services in unpalatable and deplorable conditions in a makeshift rented premises which they claim to be on top of a sewer. The plaintiffs have referred the court to a ruling in the case of **Meshack Mbogo Wambugu –vs- Rev. Samuel Kariuki Gathuma t/a Faith Gospel Church (2005) eKLR** to support their proposition that a court can grant a mandatory injunction at an interlocutory stage to meet out justice to the parties under the court's inherent powers under section 3A of the Civil Procedure Act. The plaintiffs submitted that they have demonstrated a prima facie case and that this would not be case where damages would be an adequate remedy.

**Mr. Munoko Advocate** counsel for the Defendant submitted that by the time the plaintiffs came to court they had already left the premises and yet they were seeking restraining orders. There was nothing to restrain since they had already vacated/left the premises and thus their application was overtaken by events. The Defendant further in the submissions reiterated that the plaintiffs were merely entrusted by the Defendant with running of the church. The Defendant in further submissions contended that the plaintiffs cannot be entitled to a mandatory injunction as there are no special circumstances to warrant the grant of a mandatory injunction. The Defendant further submitted that the plaintiffs have not satisfied the standard of proof necessary for the grant of mandatory injunction which is higher than in ordinary cases of injunctions.

The Defendant further submitted that the plaintiffs amended Notice of Motion was fatally defective as the same was not supported by an affidavit as the law demands.

The Defendant referred the court to the case of **Kyalo –vs- Bayusufu Brothers Ltd (1982) eKLR** to support the proposition that an application not supported by affidavit is defective. The defendant argues the effect of the amended Notice of Motion was to introduce a totally different prayer seeking a mandatory order which if granted would entail the virtual eviction of the Defendant from the premises. Thus the amendment altered the nature of the application and the defendant contends the amendment ought to have supported by an affidavit.

I am in agreement with the Defendants submission that the plaintiff's amended Notice of Motion was defective it having not been supported by any affidavit contrary to order 51 Rule 4 of the Civil Procedure

Rules. The amended Notice of Motion dated 27<sup>th</sup> August 2013 was unsupported and was therefore defective to the extent that it sought to rely on an affidavit sworn in support of an application that had been superseded by the amended Notice of Motion. The application that is before the court for consideration is the Amended Notice of Motion and there is no affidavit supporting the same.

The plaintiffs application even if the affidavit supporting the initial application before the amendment was effected is considered it would not in my view establish that the plaintiff has a prima facie case that is plain and clear to entitle the court to grant a mandatory injunction. In the present matter the question of the acquisition of the suit property is highly contested. While the plaintiffs contend that they are the ones who purchased the property the Defendant insists that the property was purchased by **Hossana Community Church** for their members and that the plaintiffs were merely authorized by the Defendant to represent the church. There is evidence that the premises were initially used by members of the **Hossana Community Church** but later the plaintiffs changed to another denomination namely Universal Pentecostal Evangelism Church and continued using the suit premises under the new name which the Defendant objected to leading to the plaintiffs being ordered to move from the premises. The issue of who between the two groups should be entitled to the use of the church premises is one which I do not think can be determined at this interlocutory stage as evidence will need to be led to establish who between the two should be entitled to the premises.

Thus although a mandatory injunction can be granted at an interlocutory stage that can only be in instances where the case is clear plain and obvious. If a court entertains a doubt as to whether an applicant for a mandatory interlocutory is entitled to the order, the court will not grant it unless there are compelling special circumstances.

In the case of **Syrup Distributors Limited –vs- Loki Developers Ltd (2008) eKLR Hon. Justice H.M. Okwengu** (as she then was) held that an interlocutory order of mandatory injunction can only be granted in very clear and exceptional circumstances and made reference to the case of **Kenya Breweries Ltd –vs- Okeyo (2002) IEA 109** where the court of Appeal cited with approval the following passage in **Vol.24 Halbury’s Laws of England 4<sup>th</sup> Ed para 948** as providing the test on the principles on which mandatory injunction may be granted.

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied or if the defendant attempted to steal a march on the plaintiff mandatory injunction will be granted on an interlocutory application”.**

As I have held that on the material placed before me I am not persuaded the plaintiff has established a prima facie with a probability of success it follows that the plaintiff has not satisfied the threshold for the grant of a mandatory injunction which would invite a higher standard of proof than the usual injunctions seeking mere prohibition. There are no special circumstances that render the grant of a mandatory injunction an imperative in the present case. The plaintiffs by their own admission are still conducting church services albeit at a location they consider to be inferior to the suit premises.

The upshot is that I am not persuaded the plaintiff/applicants have satisfied the conditions for grant of an interlocutory mandatory injunction and accordingly the plaintiffs application fails and the same is ordered dismissed. However having regard to the circumstances of this matter I will make no order as to costs and I direct that each party meets its own costs for the application.

Ruling dated, signed and delivered at Nairobi this...**30TH**.....day of.....**MAY**.....2014.

**J.M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... For the Plaintiffs

..... For the Defendant