



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.223 OF 2002

THOMAS SHIRURI

JOSEPH AMBANI NDOLI

ZABLON AMADANGU SIMINYWI (as Trustees for

PENTECOSTAL ASSEMBLIES OF GOD (ELBURGON)...PLAINTIFFS

VERSUS

BERNARD MUNGAI WANJEMA.....1ST DEFENDANT

PETER KARIUKI MUNGE.....2ND DEFENDANT

PHILIP WANJIKU MBUGUA.....3RD DEFENDANT

MARY MUGURE.....4TH DEFENDANT

JUDGMENT

The plaintiffs, THOMAS SHIRURI, JOSEPH AMBANI NDOLI, ZABLON AMADAGU SIMINYWI have brought this suit (in their capacity as Trustees for Pentecostal Assemblies of God - Elburgon) against BERNARD MUNGAI WANJEMA, PETER KARIUKI MUNGE, PHILIP WANJIKU MBUGUA and MARY MUGURE (referred to as the 1st, 2nd, 3rd and 4th defendants respectively).

They seek orders of vacant possession or eviction from property **Title No.Elburgon/Township/349** measuring approximately 0.8708 hectares (about 2 acres) to which the plaintiffs hold a certificate of lease.

It is their case that on 14th May 1977, the defendants jointly instituted **Nakuru CMCC No.1268 of 1997** against the themover the same suit property. The matter was heard and the defendant's claim was dismissed on 25/01/2002. However the defendants have refused to vacate the suit property and continue in their wrongful occupation despite demand and notice to vacate.

In a joint statement of defence, the defendants state that decision in CMCC No.1268 of 1997 was made in error and is therefore a *nullity ab initio*. They insist on being the original allottees of Elburgon Township/349 from Nakuru County Council and to date, each one of them pays the rates to the Council for the contested parcel which they have developed and even reside thereon.

They state that the claim herein is bad in law and has no merit, since they are merely victims of double allocation of land and having been the original allottees then their right should prevail over those of the plaintiffs. It is on this basis that they urge the court to dismiss the suit.

The matter has been at different stages heard partly by Justices Lesiit, Musinga, Kimaru and Emukule.

PW1 (ZABLON AMATANGU) testified as a member of the Pentecostal Assemblies of God Church situated in Elburgon, who also serves as the treasurer. The property is situated in parcel No.349 and measures about 2 acres. It was his evidence that the land was allocated to him by the Commissioner of Land and they were issued with a title document in 1994 (produced as exhibit 1). They subsequently built a temporary church thereon. Later on several people entered the land and constructed thereon. These people are the defendants who then filed a suit against the church seeking for their eviction, but the suit was dismissed. However the defendants remained on the land, and their activities have prevented the church from developing the plot. The defendants have also interfered with the children's playground.

Under what circumstances did the church acquire the land?

According to PW1, they applied for the plot from the Commissioner of Lands. Previously they had a temporary allocation issued by the County Council of Nakuru. They were issued with the lease. PW1 denies claims that by the time of being allocated the land the defendants were already in occupation and urges the court to order the defendants out of the land.

None of the defendants testified, and the court ordered that the counsel do file written submissions. However as at the time of writing this judgment, I had only received written submissions from the plaintiff's counsel i.e. Miss Omwenyo.

Although the defendants fault the magistrate's findings in **CMCC No.1268 of 1997 Bernard Mungai Wangare and 3 Others V Pentecostal Assemblies of God (Elburgon)** - I note that no appeal was filed against that decision, and it is not in the defendant's power to declare the decision a nullity *ab initio*. The suit in the magistrate's court had sought orders of injunction restraining the church by itself, agents and/or servants from interfering with the present defendant's quiet and peaceful enjoyment of the parcel in question, and also sought general damages for trespass. The defendants had claimed in that suit that they were allotted the parcel herein and the plaintiffs were alleged to be trespassers. This is the same line of argument they have adopted as their defence in the present case. However they tendered no documents in this court to support their claims of ownership to the parcel.

Apart from the Title document, PW1 produced a plan of the land. The Title document is the certificate of lease dated 26th November 1996 issued in the names of the plaintiffs as Trustees for the church.

Miss Omwenyo has referred this court to **section 24(b)** of the **Land Registration Act 2012** which provides:-

"...The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease."

I agree with counsel that from the evidence presented, it is the defendants who invaded the land long after the church had been allocated the same, taken possession and occupied it. Their actions amount to trespass and I need not say more - the defendants occupation of the land is unjust and I order that each defendant shall vacate the property within **60 (sixty) days** from today in default then eviction orders to take effect as prayed.

Costs of this suit shall be borne by the defendants jointly and severally.

Delivered and dated this 24th day of September, 2014 at Nakuru.

H. A. OMONDI

JUDGE