



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Environmental & Land Case 649 of 2010

SEVENTH DAY ADVENTIST CHURCH (E.A.) LTD.....PLAINTIFF/APPLICANT

VERSUS

EVANGELICAL LUTHERAN CHURCH

IN KENYA REGISTERED TRUSTEESDEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed an application dated 21/12/2010 seeking the following orders:
 - i) An order of temporary mandatory injunction ordering the Respondent to open the access road known as L.R. No. Nairobi/Block 61/709 and remove all structures and buildings being thereon pending the hearing and determination of this application.
 - ii) An order of temporary injunction to restrain the Respondent from blocking the access road known as L.R. No. Nairobi/Block 61/709 and erecting any structures or buildings thereon pending hearing and determination of this application.
 - iii) An order of temporary mandatory injunction ordering the Respondent to open the access road known as L.R. No. Nairobi/Block 61/709 and remove all structures and buildings being thereon pending the hearing and determination of the suit.
 - iv) An order of temporary injunction to restrain the Respondent from blocking the access road known as L.R. No. Nairobi/Block 61/709 and erecting any structures or buildings thereon pending hearing and determination of the suit.

The application is premised on the grounds that the Respondent has subjected the Applicant's worshippers, pupils, visitors and other people from going to the Plaintiff's compound to hardship and inconvenience by blocking the access road known as L.R. No. Nairobi/Block 61/709. Further that unless the Court orders that the Respondent do open the access road and be restrained, they shall continue to block the access road.

2. The application is supported by an affidavit sworn on 20/12/2010 by Pastor Musyoka Paul Muasya who deponed that he is the Executive Director of the Applicant. He deponed that the Applicant owns land parcel no. Nairobi/Block 61/722 which is contiguous to the Respondent's land parcel no. Nairobi/Block 61/710, on which the Applicant has constructed a church and a school and that the Defendant has also constructed a church on its parcel. That the Commissioner of Lands has

provided a public access road to access the Plaintiff's parcel of land which access is referenced as L.R. No. Nairobi/Block 61/709 which the Respondent has illegally and unlawfully blocked and erected temporary structures on the said access road. The Applicant's further disposition is that due to the Respondent's illegal and unlawful actions, the Applicant's members, worshippers, visitors, pupils and other members of the public going to the compound have been forced to access the same through the residential estate which has no designated access road through it out of the good will of the residents of the estate. Consequently, they have been subjected to hardship and inconvenience. The Pastor also deponed that the Applicant has obtained from the City Council of Nairobi an approval to build, construct and grade the access road but is unable to do so because of the Respondent's unlawful and illegal actions, adding that, it is in the interest of justice that the said road be opened to facilitate easier access to the Applicant's compound.

3. The application is opposed. The Respondent filed a Notice of Preliminary Objection, Grounds of Opposition and a Replying Affidavit all dated 29/3/2011. The Preliminary Objection is that the suit is statutorily barred, it is incompetent, bad in law and non-starter as the Plaintiff's verified by a false affidavit which has concealed a material fact, and that the Applicant has no locus standi to institute and/or maintain this suit.

The Grounds of Opposition raised are that the Applicant has not demonstrated sufficient grounds to meet the threshold required for the orders of injunction sought and that the application does not warrant the remedy of injunction as the Applicant can be adequately compensated by an award of damages. Further that the application seeks temporary orders of injunction which have the potential of operating like final orders. The Respondent averred that the Applicant is guilty of laches and has come to Court with unclean hands, the suit is frivolous, vexatious and an abuse of court process.

4. Bishop Walter Obare Obare swore the Replying Affidavit on behalf of the Respondent and stated that he is one of the trustees of the Respondent. He deponed that the Respondent's parcel L.R. No. Nairobi/Block 61/705 is a merger of Nairobi/Block 61/436 and Nairobi/Block 61/634 and the purported access road referred to by the Applicant does not exist. Further that, certain documents purporting to have originated from the office of Commissioner of Lands in respect of what is claimed to be the access road, show that it passes through the Respondent's parcel of land.

It was the Bishop's disposition that the Respondent learnt that the Applicant's agents operating with officers from the office of Commissioner of Lands brewed a confusion that led to the production of the said documents including a Part Development Plan No. 42/32/98/01 purporting to be an access road which PDP is no longer valid as the same was cancelled vide a letter from the Commissioner of Lands dated 31/3/2004 and which cancellation had been confirmed in the Kenya Gazette dated 30/5/2003 and by two other notices which the Director of Physical Planning published in the Daily Nation and Taifa Leo both dated 9/5/2003. Further that in the said letter dated 31/3/2004 the Commissioner of Lands confirmed having reverted PDP No. 42/32/95/35 and that is now the valid PDP number to which the applicant raised no objections.

5. Pastor Musyoka Paul Muasya swore a Supplementary Affidavit dated 6/4/2011. He deponed that the Respondent owns parcel Nairobi/Block 61/710 and not Nairobi/Block 61/705 as the later was done away with by the Commissioner of Lands when Nairobi/Block 61/709 (public access road) and Nairobi/Block 61/710 were created. That the public access road was created by the Commissioner of Lands when it became clear that the Applicants' parcel and that of the neighboring parcels did not have a proper access road as the road currently in use was meant to be used by the residents to access their houses. The said road is also very narrow. Further that Nairobi/Block 61/709 passes at the edge of the Respondent's parcel and not through it. With respect to the PDP, the Pastor deponed that PDP No. 42/32/98/01 has never been cancelled. He added that Nairobi/Block 61/709 is a public access road and the Applicant being a juridical member of public has a right to use it and the right to bring a suit against any person denying that right. Further that the parcels of land belonging to both parties herein is Government Land which was allocated to the parties by way of grants and the Government retained the right to re-draw the boundaries to create access road and it could result in reduction of the size of the parcels. As such if the Respondent is aggrieved by the action of the Government to reduce the size of its parcel, then

it should take up the issue with the Government and not the Applicant.

6. Bishop Walter Obare Obare swore a Further Affidavit dated 13/9/2011 in which he reiterated that the Respondent is the owner of Nairobi/Block 61/705 and that the purported Nairobi/Block 61/710 is a strange and mischievous creation of the Commissioner of Lands as its title has never been placed in the possession of the Respondents, and consequently it is not interested in taking possession as it is not a proper title. Further that the Applicant's allegations that the Respondent is the owner of Nairobi/Block 61/710 are baseless as the Applicant cannot claim to have better knowledge of the details of its property. Moreover, the Applicant has not exhibited the title for the said parcel for the Court to establish ownership. The Applicant has also not exhibited a copy of the beacon certificate in respect of Nairobi/Block 61/709 and as such the exact boundaries and measurements the same are uncertain.

7. Parties made written submissions which together with the application I have given full consideration. As regards the Preliminary Objection taken by the Respondent that the Applicant lacks locus standi, the suit is bad because its verifying affidavit is false and that the suit, in any event, statute barred, one needs to consider what amounts to a Preliminary Objection. To this end I can do no better than cite the celebrated case of **MUKISA BISCUIT MANUFACTURING CO. LTD -VS- WEST END DISTRIBUTORS LTD (1969) EA 696**, where it was held:-

Law, J.A "So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Sir Charles Newbold, P. "The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

Placing the preliminary objection raised herein against this backdrop, the question is whether it raises pure points of law. Limitation is no doubt a point of law. It is noteworthy to point out that there is a dispute as to the existence of Nairobi/Block 61/709 the subject matter herein and whether the same is public land. In my opinion, the Court can only arrive at a finding on this issue upon hearing the evidence and expert evidence for that matter from the Survey of Kenya and Registrar of Lands. If the Court then eventually finds that it is public land, then the provisions of S.7 of the Limitation of Actions Act is inapplicable in this circumstance by virtue of S. 42 (1)(k) which provides that -

"This Act does not apply to actions, including actions claiming equitable relief, in which recovery or compensation in respect of the loss of or damage to any public property is sought."

and S. 42(2) which provides that -

"Subsection (1) (k) shall apply retroactively"

See **Kenya Anti-Corruption Commission v J.S.K. (Cargo) Limited & another [2009] eKLR**. What then is clear is that Limitation as raised here is not available to the Respondent as the same is no certain and requires the calling of evidence to determine the same.

With respect to the Preliminary Objection on the verifying affidavit sworn by Pastor Muasya, the Court would have to interrogate whether the pending suit HCCC 194/2007 is with respect to the same subject matter and cause of action as in the present suit, notwithstanding that the parties are the same. Again for the same reason as above, this cannot be described as a proper Preliminary Objection and the same fails.

On the aspect of *locus standi*, the Court would have to interrogate whether or not the Applicant had suffered any prejudice over and above injury, loss or prejudice suffered by the rest of the public, since the subject matter of the dispute was public land. This in my opinion is a matter of evidence which must be articulated at the hearing. Consequently this so called Preliminary Objection suffers the same fate as the two above.

8. The Applicant seeks a temporary mandatory injunction restraining the Respondents from blocking Nairobi/Block 61/709 which the Applicant claims is a public access road and to remove structures erected and/or constructed thereon, pending the hearing and determination of this application and the suit. No doubt the orders sought herein are final in nature, the effect of which compromise the suit and prejudices the trial in the absence of tested and full evidence on cross-examination. The test of granting a mandatory injunction was enunciated in the case of **Locabail International Finance Limited Vs Agro Export et al [1986] 1 ALL E.R. 901**, where their lordships held,

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thought that the matter ought to be decided at once, or where the injunction was directed at simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

Guided by the aforesaid decision, Can the Court grant a mandatory injunction at this interlocutory stage? I think not, for reasons that;

1. The Court cannot ascertain the authenticity of the documents/exhibits provided by the parties, as there are allegations of fraud, collusion and illegality.
2. The Court cannot at this stage ascertain the existence of Nairobi/Block 61/709 which the Applicant claims to be the access road and whether the same passes on the edge of the Respondent's parcel or forms part of the Respondent's parcel.
3. There is also resistance by the Respondent over the Applicant's claim that its parcel no. Nairobi/Block 61/705 was done away with and a new parcel no. Nairobi/Block 61/710 came up and a section of it parcel no. Nairobi/Block 61/709 being the access road was hived off.
4. As correctly pointed out by the Respondents, if the Court were to grant the prayer as sought at this stage, the Respondents will be forced to demolish the structures erected on the suit parcel and it stands to suffer irreparable loss if the Court eventually finds in favour of the Respondents.
5. The date when the cause of action arose is uncertain.

It is my conclusion that the Applicants have not presented a case that is of special circumstances to warrant the grant of mandatory injunction at this interlocutory stage. There are just too many uncertainties to allow for the grant of a mandatory injunction, this is most certainly not a clear case.

9. With respect to prayers (ii) and (iv) seeking temporary injunctions, the Applicant has to satisfy the principles set out in the case of **GIELLA -VS- CASSMAN BROWN CO. LTD (1973) EA 358** that the Applicant must show a prima facie case with a probability of success, that the the applicant would suffer irreparable injury not capable of being compensated by an award of damages and where the court be in doubt then the principle applicable is the balance of convenience. The analysis of the entire application and the response thereto, in the court's considered view, does not meet the criteria set out in the GIELLA (supra) case. A prima facie case cannot be said to be established in the circumstances of this case where the dispute whether or not indeed there is an access road at the place it is said to be could go either way at the hearing depending on the documentary evidence to be availed. It is not lost to the court that a prima facie case is not one that must succeed at trial. Nevertheless this application under

consideration must fail for the further reason that loss as cannot be adequately compensated by an award of damages if the order sought is not granted, was not shown by the applicant. It is not necessary to discuss balance of convenience in these circumstances. In the end this application fails and it is hereby dismissed with costs.

DATED AND SIGNED AT NAIROBI THIS **30TH** DAY OF **JANUARY, 2013**.

P.M. MWILU

JUDGE

DELIVERED ON **30TH JANUARY, 2013** BY P. NYAMWEYA, JUDGE.

In the presence of:-

..... Advocate for Plaintiff/Applicant
..... Advocate for Defendant
..... Court Clerk

P. NYAMWEYA

JUDGE