



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 39 of 2012

BAPTIST CONVENTION OF KENYA/WATAMU BAPTIST BRANCH

TRUSTEES

1. FRANCIS JOMO
2. DAVID KIATU
3. MICHAEL HAMSINI
4. GILBERT KABAGE.....PLAINTIFFS

VERSUS

1. ATHUMAN SHAIBU
2. IDI MAULIDI
3. AMIN MADI
4. MUNICIPAL COUNCIL OF MALINDI.....DEFENDANTS

RULING

1. What is before the court is the Plaintiff's Notice of Motion dated 19th October 2012 seeking for the following orders:

(a) In the first instance, this application be certified as urgent;

(b) The Defendants/Respondents their servants, agents, employees or any other person acting on their behalf be temporarily restrained from constructing, erecting any structures and interfering in any manner with the suit premises until inter parties hearing.

2. Prayer number (c) is a repetition of prayer number (b) which I have reproduced above.

3. The Application is based on the ground that the 1st , 2nd and 3rd Defendants have encroached on the Plaintiff's property and have erected and still continue to erect illegal structures without any colour of right; that the said structures will restrict the worshipers of Watamu Baptist Church

from accessing and attending to church activities and finally that the Defendants have threatened the Plaintiffs' members of the Watamu Baptist church with violence and have threatened to burn the church if the Plaintiffs continue to assert their rights to the suit premises.

4. The Application is supported by the affidavit of Francis Juma whose main deposition is that he is a registered Trustee of Baptist Convention of Kenya and that the Plaintiffs are the beneficial owners of plot No. **33650/89A**.

5. Francis Juma has further deponed that the 1st, 2nd and 3rd Defendant have encroached on the Plaintiff's land and erected illegal structures. According to the Plaintiff, the 1st Defendant is erecting a house on the suit premises; that the 2nd Defendant has brought building materials on the suit premises with the intention of commencing construction and that the 3rd Defendant has already constructed a structure which he is using as a shop.

6. Francis Jomo, on behalf of the Baptist Convention of Kenya has finally deponed that the 1st to 3rd Defendants have caused the Plaintiff's church to suffer loss and damage and they are about to block the Plaintiff's members access to the church causing worshipers a lot of pain and anguish.

7. The 1st Respondent filed his Replying Affidavit on 15th November 2012. The 1st Respondent denied that the 1st to 4th Plaintiffs are the registered trustees of the Plaintiff 's church as claimed and that Baptist Convention of Kenya/Watamu Baptist Branch has any beneficial interest in the unsurveyed plot as designated in the letter of allotment.

8. In any event, the 1st Respondent deponed, the letter of allotment number 33650/89A being relied upon by the Plaintiff is in favour of the Registered Trustees of Baptist Mission of East Africa and not the Plaintiff thus rendering the whole suit null and *void ab initio* for lack of *locus standi*.

9. The 1st Respondent finally deponed that he has for a very long period of time operated and ran his business of Tours and Travel and that he has the licenses necessary to operate the said business. According to the 1st Respondent, his business premises are off the church whose land is fenced and that the church is in its fenced area.

10. The 1st Respondent annexed photographs showing the site which his business premises are situated viz-a-viz the church and the church's gate.

11. The 2nd Respondent filed his Replying Affidavit on 31st October 2012 in which he deponed that the Plaintiffs have no propriety interest in the suit property and that he has not encroached on the said land.

12. According to the 2nd Respondent, he has already completed the construction of his premises which is on his plot. The 1st Respondent has annexed the photographs showing the complete building which borders the suit property.

13. The 2nd Respondent finally deponed that the Plaintiffs have not categorically specified their claim and that it would be futile for the court to try and determine whether or not the 2nd Defendant has encroached or blocked access to the church. The 3rd and 4th Respondents did not file any responses.

14. When the parties appeared before Hon. Lady Justice Meoli on 31st October 2012, they agreed to dispose the application by way of written submissions. The Plaintiffs filed their submissions on 4th December 2012 while the 1st and 2nd Respondents filed their written submissions on 18th February 2013 and 10th December 2012 respectively.

15. I have considered the Plaintiffs' and the Respondents' Affidavits and their rival

submissions. I would start by observing that the Notice of Motion dated 19th October 2012 is not properly drafted. I agree with the 1st Respondent's advocates submissions that the orders sought by the Applicants are only supposed to last until the inter-partes hearing, which would mean that the said injunctive orders should lapse after the hearing of the current application.

16. The intention of the application, in my view was to pray for injunctive orders pending the hearing and determination of the suit and I will proceed to analyse the issues as raised in this application on that basis.

17. The Plaintiffs application has raised two main issues, firstly that the 1st to 3rd Respondents have encroached on the suit premises and secondly that the Respondents have continued to erect structures at the entrance of the church.

18. The 1st Respondent has raised a preliminary issue on the legal standing of the Plaintiffs to institute this suit. The 1st Respondents advocate has submitted that there is no evidence of the registration of Baptist Convention of Kenya/Watamu Baptist Church and consequently the Plaintiffs cannot purport to bring this suit on behalf of the church claiming that the church is the beneficial owner of an unsurveyed plot vide a letter of allotment number **33650/89A**.

19. I agree with those submissions. It was upon the Plaintiffs to annex the certificate of registration to show that the church, on whose behalf the Plaintiffs were suing as trustees is either registered under the Societies Act or as "a Trust." In the absence of the instrument of registration coupled with the fact that the letter of allotment reference number 33650/89A is in the name of Registered Trustees, Baptist Mission of East African and not Baptist Convention of Kenya/Watamu Baptist Branch, it renders the suit and by extension the Application fatally defective. The Plaintiffs have not shown the nexus of the church as described in paragraph 1 of the Complaint and the Supporting Affidavit and the letter of allotment which purportedly confers the interest in the suit land to the Plaintiff.

20. I would have dismissed the current application on that ground alone, but I would like to express my views on whether the Respondents have indeed encroached on the suit property.

21. The suit property is unsurveyed and the same was allocated to the Registered Trustees, Baptist Mission of East Africa on 2nd July 1976. The letter of allotment was attached on the Plaintiff's Supporting Affidavit.

22. A letter of allotment is not in itself an interest in land which can be transferred. It is however true that letters of allotment have been institutionalized in this country as representing interests in land. Ordinarily, a letter of allotment is supposed to be accompanied with an approved Part Development Plan and an official receipt showing the payment of the stand premium. The Letter of Allotment together with the approved Part Development Part would be used by a licensed surveyor to prepare a survey plan which would be approved by the Director of Surveys.

23. It would appear that in the instant case, the Registered Trustees, Baptist Mission of East Africa never caused the suit property to be surveyed since they were allocated with the land in 1976.

24. However, photographs have been annexed on the 1st Respondents Replying Affidavit which shows that the suit property is fenced and that the suit property and it has a gate which is used to access the property. The Plaintiff have not shown how the 1st to 3rd Respondents have encroached on the suit land if indeed the fence to the unsurveyed property is still intact. The 1st and 2nd Respondents have deponed that they have constructed premises on their respective plots and have not encroached on the Plaintiff's suit property.

25. In the absence of any evidence by the Plaintiff showing the alleged encroachment or blockage of the access to the suit property, I find and hold that the Plaintiffs have not established a *prima facie* case with probability of success. The Plaintiff has not annexed any plans either from the Malindi

Municipal Council or the Physical Planning Department to show that the Defendants have encroached on what would be otherwise their access to the suit property or the other actual encroachments on the suit property.

26. In the circumstances, and for the reasons I have given above, I dismiss the Plaintiff's application dated 19th October, 2012 with costs.

Dated and Delivered at Malindi this 18th day of April 2013.

O.A. Angote
JUDGE