



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 311 OF 2011**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19,20,21,3,4,27,28,31,3,33,35,36,40 AND 47**

**AND**

**IN THE MATTER OF THE LOCAL GOVERNMENT ACT**

**AND**

**IN THE MATTER OF THE CRIMINAL PROCEDURE CODE**

**BETWEEN**

**NENO EVANGELISM CENTRE THRO' ITS REGISTERED TRUSTEE.....  
PETITIONER**

**AND**

**DIRECTOR OF CITY PLANNING.....1<sup>ST</sup>  
RESPONDENT**

**THE TOWN CLERK OF NAIROBI .....2<sup>ND</sup>  
RESPONDENT**

**THE CITY COUNCIL OF NAIROBI .....3<sup>RD</sup>  
RESPONDENT**

**MINISTER OF LOCAL GOVERNMENT .....4<sup>TH</sup>  
RESPONDENT**

**RULING**

The applicant, **NENO EVANGELISM CENTRE**, has come to this court seeking the following substantive reliefs against the Respondents;

**“4. An order to issue for the Arrest of:-**

- (i) The Town Clerk, Mr. Philip Kisia;**
  - (ii) The Mayor of Nairobi George Aladwa Omwera;**
  - (iii) The Director of City Planning Mr. Patrick Tom Odongo**
  - (iv) The Minister in charge of Local Government, Mr. Musalia Mudadavi.**
- (5) THAT the aforementioned accused persons be brought before Chief Magistrates Nairobi law Courts, and that the officer Commanding Police Station Central, be directed to ensure full strict compliance with this order.**
- (6) AN ORDER TO ISSUE by way of a permanent injunction against the Respondents herein against DEMOLISHING, removing, tearing away, interfering with the free enjoyment of the suit properties of the Petitioner, in part or in whole of the suit property located and situated at L.R. No. 209/9640 and to include any and all of the branches of the Petitioner, by the Respondents, their servants and/or agents.**
- (7) Or that such other Order (s) as this Honourable Court shall deem just.”**

Why have the applicants deemed it necessary to seek those reliefs?

Mr.Ngugi, the learned advocate for the applicant, said that it is because the applicant was the registered proprietor of the suit property L.R. No. 209/9640.

Being the lawful owners of the said suit property, the applicant had developed it by putting up structures for use by its members.

It is the Applicant’s case that on 2<sup>nd</sup> June 2011, the City Council of Nairobi caused one of its bulldozers to descend on the suit property, whereupon it proceeded to demolish a section of the structures which the Applicant had erected.

It is only when the church-goers, who are members of the Applicant intervened, that the demolition stopped.

The applicant submitted that the Council Askaris carried out the demolition as agents of the Respondents.

And the main reason why the Applicant is aggrieved is that the Respondents had not served any proper notice on it, relaying information about its intention to demolish the church for any reason whatsoever.

Even though the Applicant had become aware of some notices, the awareness is said to have come about after the demolition.

It is the applicant’s case that the Respondents ought to have proved that they had served Notices upon the Applicant. And the Applicant contends that no such proof was forthcoming.

To the extent that the Respondent did lodge some complaints with the Applicant, the same are said to be anything but Notices as envisaged under sections 38 and 39 of the Physical Planning Act.

Furthermore, any letters which the 3<sup>rd</sup> Respondent may have written to the Applicant were said to have been in relation to **L.R. No. 209/12223**. In other words, the applicant contends that the said letters were not in relation to **L.R. No. 209/9640, (the suit property)**.

Thereafter, the 3<sup>rd</sup> Respondent also issued a Notice to the owners or occupiers of kiosks that had been constructed around the Applicant's church.

As such Notices did not mention the church; the Applicant insists that it was never given any appropriate notice about the 3<sup>rd</sup> Respondent's intention to pull down the church or any part thereof.

But even it were to be held that the Applicant had been served with Notices prior to the demolition, the Applicant submitted that the 2 Notices, numbered 8398 and 9736, respectively, were spent when the parties recorded a consent in **ELC Case No. 271/2010**.

After the recording of the said consent, if the 3<sup>rd</sup> Respondent wished to undertake any action with regard to the church property, the Applicant believes that the 3<sup>rd</sup> Respondent should have served a fresh Notice.

In conclusion, the Applicant submitted that the demolition of a portion of the church was carried out without due process. Therefore, I was asked to grant the reliefs sought.

In answer to the Petition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the application was fatally flawed because it was in the nature of an omnibus. It was seeking both criminal and civil reliefs; which was not permissible in law.

Secondly, the Director of City Planning and the Town Clerk of the City of Nairobi contend that there had been material non-disclosure by the applicant.

In particular, they accuse the applicant of failing to disclose that Notices were duly served on them.

As the notices are said to have not only been received by the applicant, but also acknowledged by their advocates, the applicants are said to have told untruths to this court.

On the basis of material non-disclosure, this court was invited to strike-out the case herein.

Thirdly, it was submitted that if the applicant had a genuine complaint about the manner in which the Respondents had acted they should have appealed against the Enforcement Notices.

It was the Respondents submission that the applicant should not be allowed to circumvent the delay in lodging any appeal, by invoking the provisions of the Constitution.

Finally, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Applicant had come to court with dirty hands, and should therefore not be granted the remedies sought.

Why are the applicant's hands said to be dirty?

According to the Respondents, it is because the structures that had been erected by the applicant had not been authorized. They were thus deemed to be illegal structures, which ought not to be protected by law.

On its part, the City Council of Nairobi submitted that the Applicant failed to demonstrate any *prima facie* case with a probability of success. Therefore, it was submitted by the 3<sup>rd</sup> Respondent that the applicant ought not to have been granted any conservatory orders.

Mr. Ataka, learned advocate for the 3<sup>rd</sup> Respondent, fully associated himself with the submissions made by Miss Kabage, the learned advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

He added that the petition herein was a non-starter, as the alleged infringements of the Constitution

had not been particularized.

The City Council of Nairobi said that they demolished structures which were illegal. The said illegality was said to seem from the fact that none of the demolished structures had been authorized or approved by the Council.

Finally, the 3<sup>rd</sup> Respondent said that if a permanent injunction were issued, it would inhibit the City Council of Nairobi from carrying out its statutory mandate to control development in the city. Therefore, I was asked to reject the application.

Miss Kamaiyo, the learned advocate for the Minister for Local Government, submitted that he had been wrongly enjoined to the petition.

She pointed out that the City Council of Nairobi was a legal entity with capacity to sue or be sued. Therefore, the 4<sup>th</sup> Respondent is said to be incapable of being held legally responsible for the actions of any of the other respondents.

When called upon to reply to the submissions made by the Respondents, the applicants' advocate, Mr. Ngugi submitted it was the responsibility of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to demonstrate that they had served Notices on the applicant.

In the absence of such notices, the applicant reiterated that it was wrong for the City Council of Nairobi to demolish the church, even if the structures had been constructed without authority. Therefore, the applicant believes that they have made out a prima facie case with a probability of success.

However, in relation to the 4<sup>th</sup> Respondent, it was conceded by the Applicant that he ought not to have been enjoined.

Having given due consideration to the application, I find that it is premised on **Articles 21, 22, 23 and 24 of the Constitution of Kenya.**

In invoking those provisions of the Constitution, the Applicant asserts that they are entitled to the protection of their rights, freedoms, guarantees, privileges and immunities as enshrined in the Bill of Rights.

As the Respondents went about demolishing the church when worshippers were allegedly inside it, the Applicant asserted that the Respondents had no regard for the welfare, lives and safety of the worshippers.

**Article 21 (1) of the Constitution** stipulates as follows;

***“It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.”***

Article 22 empowers every person to institute court proceedings if he believes that his right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

Therefore, in so far as the Petitioner has reason to believe that their Constitutional rights had been violated, they were entitled to institute court proceedings.

By dint of the provisions of **Article 23 of the Constitution**, the High Court was clothed with the requisite jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or a fundamental freedom in the Bill of Rights.

The Applicant is thus before the right court.

**Pursuant to Article 24 of the Constitution**, a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

So, how have the rights and fundamental freedoms of the Applicant been infringed in this case?

As I understand it, it is through the process in which the City Council of Nairobi demolished a portion of the structures constructed on the suit property. The Applicant says that the said demolition was carried out without any Notice.

That conduct was deemed, by the Applicant, to be contrary to section 96 of the Penal Code.

Furthermore, because the structure that was demolished was a house of prayer, the Applicant says that the Respondents' actions constituted an Insult to Religion contrary **to section 134 of the Penal Code**; as well as an act of disturbing religious assemblies contrary to **section 135 of the Penal Code**.

Finally, the applicant stated that the actions of the Respondents constituted an attempt to murder contrary to **section 220 of the Penal Code**; and also a conspiracy to murder contrary to **section 224 of the Penal Code**.

Although those assertions were set out in the body of the application, the Applicant failed to make any submissions to that end.

Of course, it may still be open to the Applicant to lead evidence, at the hearing of the substantive Petition, to prove their assertions. But because no submissions were made at this stage, the Applicant did not establish a *prima facie* case with a probability of success, in that respect.

Secondly, there is a letter from the City Council of Nairobi, dated 24<sup>th</sup> May 2010, which told the Applicant as follows, amongst other things;

***“This letter, therefore, serves as instructions to you to remove, within 48 hours, the illegal encroaching structures into Plot L.R. no. 209/12223. Further, ensure that the Church’s development activities, which should in any case get approvals by the City Council of Nairobi, are confined within Plot L.R. No. 209/9640. Failure to comply shall invite enforcement action as per our earlier enforcement notices.*”**

***(Signed)  
P.T. ODONGO  
FOR: TOWN CLERK”***

There is no doubt at all that that letter was received by the Applicant, because the applicant's advocates, Messrs Wachira Nderitu Ngugi & Co. Advocates wrote to the Town Clerk on 28<sup>th</sup> May 2010 acknowledging receipt thereof.

By the said letter, the Applicant's advocate communicated the following message to the Town Clerk;

***“Attention: Mr. P.T. Odongo***

***Dear Sirs,***

***RE: PLOT L.R.NO.209/9640 – NENO CHURCH***

***The above matter refers.***

***Your letter to the Pastor-In-Charge – Neno Church dated 24<sup>th</sup> May, 2010 has been placed in our***

*hands with instructions to reply thereto as hereunder:-*

*That the Church Organization kindly requests that you allow them at least seven (7) days from today to enable them comply with the notice in your letter and therefore request that you put this matter on hold.*

*Kindly acknowledge receipt of this letter by signing on a copy of this letter.*

*Yours faithfully,*

**FOR: WACHIRA NDERITU, NGUGI & CO. ADVOCATES**

*(Signed)*  
**NGUGI C.M.**

*c.c. Client”*

There is clear evidence that the Applicant knew that the subject matter of the letter dated 24<sup>th</sup> May 2010 was not limited to L.R. No. 209/12223, as alleged in the submissions before me.

The subject reference is clearly **PLOT NO. 209/9640 – NENO CHURCH.”**

And the contents of the letter also made it explicitly clear that apart from removing the structures encroaching onto Plot No. L.R. 209/12223; the Applicant should ensure that its developments, which were confined to Plot No. 209/9640, were approved by the City Council of Nairobi.

In any event, the applicant filed a case before the Environmental and Land Division of the High Court, Nairobi. The case was **NENO EVANGELISM CENTRE REGISTERED TRUSTEES & JAMAGA INTERNATIONAL LIMITED Vs THE CITY COUNCIL OF NAIROBI, ELC NO. 271 of 2010.**

The case was filed on 2<sup>nd</sup> of June 2010.

The first relief sought in the Plaintiff was a permanent injunction against the Defendant, from demolishing or pulling down the church structure on L.R. No. 209/12223.

The said relief was being asked for after the City Council of Nairobi issued a Notice in March 2010, as well as the letter dated 24<sup>th</sup> May 2010.

On 2<sup>nd</sup> of February 2011, the parties entered consent in the following terms;

***“1. THAT leave be and is hereby granted to the***

***Defendant/Applicant to forcibly evict the plaintiffs from L.R. no. 209/12223 Nairobi.***

***2. THAT there shall be no eviction until the expiration of thirty (30) days from the date hereof”***

Of course, that consent order made no reference to L.R. No. 209/9640.

But I hold the considered view that the failure to cite that property in the consent order, did not, prima facie, undo the effect of the Notice dated 24<sup>th</sup> May, 2010.

That Notice had, inter alia, made it clear that any developments on the suit land should be authorized.

In any event, even if the notice did not remind the applicant about the need for Development permission, **Section 30 of the Physical Planning Act** stipulates that;

***“(1) No person shall carry out development within the area of a local authority without a development permission granted by the local authority under section 33.***

***(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousand shillings or to an imprisonment not exceeding five years or to both.***

***(3) Any dealing in connection with any development in respect of which an offence is committed under this section shall be null and void and such development shall be discontinued.”***

In the Notices issued to the applicant, the City Council of Nairobi made it clear that the developments carried out by the Applicant on L.R. No. 209/9640

***“.....has been carried out without the grant of permission and/or the following conditions required on that behalf under Part V of the Physical Planning Act/ building Code. . . .***

***Physical Planning Act Cap 286, Section 30 (1) and (5) and the Nairobi City Council By-laws.”***

The notices further made it clear that the developments had been carried out without the requisite development permission and occupation certificate from the City Council.

As a consequence, the Applicant was required to stop the illegal development and occupation. They were also required to remove the said structures.

As the Applicant has failed to demonstrate that the structures in issue had Development Permission or Occupation Certificates, I find that the said structures were, on a *prima facie* basis, unlawfully constructed and occupied.

In the circumstances, the Applicant appears to have come to court with dirty hands.

As an injunction is a discretionary remedy, I find that the Applicant is not deserving of the same.

If the court were to protect persons who had flouted the law or regulations, that would enhance impunity.

And although the City Council could have been more humane in the manner in which they brought down a portion of the church building, I find that that alone cannot entitle the applicant to the reliefs sought.

Secondly, no attempt was made to explain why the court should order that the named persons be arrested.

Thirdly, and in any event, the Applicant conceded that the Minister for Local Government ought not to have been enjoined to this suit.

In any event, the issuance of a Permanent Injunction against the Respondents may curtail the exercise of their lawful mandate: It would thus be imprudent to issue such order.

For all those reasons, the application lacks merit. It is therefore dismissed, with costs to the Respondents.

**Dated, Signed and Delivered at Nairobi this 26<sup>th</sup> day of January, 2012**

.....

**FRED A. OCHIENG**

**JUDGE**