



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI LAW COURTS)  
ENVIRONMENTAL & LAND CASE 248 OF 2011**

**BISHOP BYRAM MAKOKHA & 3 OTHERS.....PLAINTIFFS**

**VERSUS**

**MURIITHI MWENJE & ANOTHER.....DEFENDANTS**

**RULING**

The notice of motion dated 30<sup>th</sup> May, 2011, seeks for an interim order of injunction to restrain the defendants from entering, remaining or continuing in occupation, assembly or in any way from interfering with the plaintiffs' quiet occupation of **LR NO. 9042/R**. The plaintiffs are registered as trustees of the **Church of God, East Africa, Kenya**. They operate a Church or worship centre at Embakasi, Nairobi known as Embakasi Church of God.

The plaintiffs claim that they are the registered proprietors of **LR NO. 9042/R**, where they have been in occupation until the 22<sup>nd</sup> day of May, 2011, when the defendants with a group of people numbering about seventeen, wrongfully entered the premises, demolished the Church and destroyed the plaintiffs' property.

The application is supported by the affidavit of Maxwell Butembu Lohono sworn on 30<sup>th</sup> May, 2011. According to Maxwell, after the defendants invaded and trespassed upon the Church's property, the matter was reported to the police at Embakasi Police Station. The police took over the matter for investigation but the plaintiffs were advised to file a court action to seek for an injunctive relief.

The plaintiffs annexed a copy of a letter dated 27<sup>th</sup> January, 2011, by which the Commissioner of Lands, approved the plaintiffs' application for allocation of Plot number LR NO. 9042/R but cautioned the plaintiffs from fencing off **LR NO. 9042/600**, which was not part of their land. The plaintiffs were issued with a letter of allotment dated 27<sup>th</sup> May, 2011 over LR NO. 9042/R, Embakasi.

This application was opposed; the defendants relied on the replying affidavit of Muriithi Mwenje, which was sworn on 16<sup>th</sup> June, 2011. The defendants denied that they trespassed upon the plaintiffs' parcel of land. They challenged the letter of allotment which they claim was issued on 27<sup>th</sup> May, 2011 long after the alleged trespass which was said to be on 22<sup>nd</sup> May, 2011. Accordingly, the plaintiffs had no proprietary rights on 22<sup>nd</sup> May, 2011.

It is further contended that sometime in the year 2004, the defendants' father, Hon David Mwenje, permitted the plaintiffs temporarily the "*licence of use*" parcel of land on condition that they would relocate when requested. The defendants' father also provided the plaintiffs with building materials and labour to put up a temporary structure which was to be used for worship only on Sundays between 8 am and 2 pm.

The plaintiffs who were mere licensees have been working behind the backs of the defendants to get themselves allocated part of the defendants land after the death of their father. The defendants agreed to purchase for the church an alternative plot which the family of the late David Mwenje did, but due to internal wrangling, the church broke into two factions and could not agree to move to the new location. According to the defendants, plot number LR NO. 9042/600 is the property of the late Mwenje. The defendants deny having demolished the plaintiffs' property; they also claim that they have no knowledge of a gang of people who brought down the plaintiff's structures.

Both counsel for the plaintiffs and defendants filed lengthy written submissions in support of their respective propositions. They also quoted extensively from authorities and leading text books. I will refer to some of the citations in the course of the analysis of the issues raised herein.

This application as I understand it, seeks for a mandatory order of injunction. An order of eviction is final in nature. It is trite law that mandatory orders can be granted in cases where the evidence is clear due to its final nature. See the case of **KENYA BREWERIES LTD VS WASHINGTON OKEYO C.A. NO. 322 (NAIROBI)**.

The Judges cited with approval the **Text vol. 24 Halsbury's Laws of England 4<sup>th</sup> Edition paragraph 948** which provides:

*"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 a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ... A mandatory injunction will be granted on an interlocutory application.*

Also in **LOCABAIL INTERNATIONAL FINANCE LTD V AGROEXPORT & OTHERS [1986] 1 ALL ER 901** at page 901 it was stated:

*A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily 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 degree 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."*

The issue of determination is whether the plaintiffs' case meets the threshold of granting the orders sought. They claim to be the proprietors of the suit premises and annex a letter of allotment dated 27<sup>th</sup> May, 2011. It was submitted by Mr Wati, learned counsel for the plaintiffs, that the defendants were mere trespassers who have entered upon the plaintiffs' parcel of land without any color of right. Therefore, under the provisions of ***Trespass Act Cap 294***, the plaintiffs are entitled to the orders sought.

I have considered all the rival submissions, but am not satisfied that the plaintiffs' application meets the threshold of the laid down principles for granting of an order of injunction leave alone the mandatory order of eviction.

Firstly, the plaintiffs have withheld information on when or how they obtained possession of the suit property because the letter of allotment that they have exhibited was issued on 27<sup>th</sup> May, 2011, while the acts of trespass complained about allegedly occurred on 22<sup>nd</sup> May, 2011. Secondly, the plaintiffs were cautioned by the Commissioner of Lands not to interfere with LR NO. 9042/600 which they had fenced. Their letter of allotment does not show the boundaries of plot number LR NO. 9042/R. Moreover, the authenticity of the letter of allotment dated 27<sup>th</sup> May, 2011, is seriously challenged by the defendants. The issues raised by the defendants are triable issues regarding the plaintiffs' letter of allotment.

For the aforesaid reasons, the plaintiffs' application for injunction fails and it is hereby dismissed with costs to the defendants.

**Ruling read and signed this 30<sup>th</sup> day of March, 2012.**

**MARTHA KOOME**  
**JUDGE OF APPEAL**

**Note:**

*This application was heard and concluded on 7<sup>th</sup> **December, 2011**, when I was a Judge of the High Court. The matter was pending for ruling when I was appointed as a Judge of the Court of Appeal. I proceeded to write and append my signature thereto in my new capacity.*