



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT 452 OF 2010**  
**REGISTERED TRUSTEES OF THE CHRISTIAN CHURCHES EDUCATIONAL**  
**ASSOCIATION.....PLAINTIFFS/APPLICANTS**  
**-VERSUS-**  
**TUDOR WATER SPORTS**  
**LIMITED.....DEFENDANT/**  
**RESPONDENT**

**RULING**

The main suit relates to possessory rights over L.R. No. Mombasa/Block IX/162 and was lodged by plaintiff of **15<sup>th</sup> December, 2010**; and the plaintiffs now move the Court by Notice of Motion dated **22<sup>nd</sup> March, 2011** brought under Order 51 [Rules 1, 15] of the Civil Procedure Rules, and ss.3 and 3A of the Civil Procedure Act (Cap.21, Laws of Kenya). The application carries the following prayers:

- (i) that the Orders made herein on **17<sup>th</sup> March, 2011** dismissing the plaintiff's application dated **10<sup>th</sup> December, 2010** be set aside;
- (ii) that the plaintiff's application dated **10<sup>th</sup> December, 2010** be reinstated, and the plaintiff be allowed to prosecute the said application on its merits;
- (iii) that the interim Orders granted on **16<sup>th</sup> December, 2010** restraining the defendant by themselves, their servants, representatives and/or agents from encroaching and/or trespassing on and interfering in any manner whatsoever with all that piece or parcel of land known as Title No. Mombasa/Block IX/4, be reinstated and confirmed as being in force pending the hearing *inter partes* of the application dated **10<sup>th</sup> December, 2010**.

The supporting grounds are stated as follows:

- (a) the plaintiff is ready and willing and has always been ready and willing to prosecute the application dated **10<sup>th</sup> December, 2010**;
- (b) on **17<sup>th</sup> March, 2011** when the matter came up for hearing of the plaintiff's application, the plaintiff's counsel was ready to proceed with the hearing of the said application;

(c) the plaintiff has a meritorious application and was ready to prosecute the same, save for counsel's mistake which should not be visited upon the plaintiff who stands to suffer substantial and irreparable loss;

(d) no prejudice will be suffered by the defendant if the instant application is allowed, whereas the plaintiff will suffer irreparable loss and damage, should the said application be not reinstated.

The supporting affidavit is sworn by **Ms. Elizabeth Wanjeri**, an Advocate with the firm of *M/s. Lumatete Muchai & Co. Advocates*, which has the conduct of this matter on behalf of the plaintiffs; and the defendants filed a replying affidavit sworn on **4<sup>th</sup> April, 2011**.

In the submissions, learned counsel, **Mr. Lumatete** urged that the plaintiff be not punished for the mistakes of counsel: for which point he invoked past decisions of the High Court – **Mutungu, J** in **Julie Migare v. Co-operative Bank of Kenya**, Nairobi HCCC No.699 of 2005; and **Kasango, J** in **Laxcon Hardware & Spares Limited v. Plantation Fertilizers Limited & Mugama Farmers Co-operative Union Limited**, Nairobi MCC Civ. Suit No. 1199 of 2001.

Counsel urged that no prejudice would be suffered by the defendant if this application and the Orders sought are allowed: *“By virtue of the dismissal of the application dated 10<sup>th</sup> December, 2010 and the subsequent discharge of the interim Orders granted on 16<sup>th</sup> December, 2011, the plaintiff has [suffered] and continues to suffer irreparable loss in that the defendant who has forcefully encroached upon the plaintiff's land is interfering with the plaintiff's use of the same...”*

Counsel asked that the application of **10<sup>th</sup> December, 2010** be heard on the merits.

Learned counsel, **Mr. Oloo** for the respondent submitted that *“there are no reasonable grounds warranting the granting of the Orders sought.”*

But counsel justified his client's position on the basis of pleading-matter that cannot be established at the interlocutory stage, and must go to *trial*; in his words: *“the respondent has stated in para. 12 of the replying affidavit...that the plaintiff has never been in occupation and/or possession of the subject property...”*

It is well known that the primary contentions in the pleadings can only be tested by the *orderly delivery and examination of evidence at the trial*, and so ought not to be made the subject of *final orders*, or appearances of *ultimate fact-finding*, at the *interlocutory stage*. However, the appearances touching on the primary claims, such as these emerge through interlocutory, affidavit-evidence, are a proper basis for the Court to grant *interim*, or *preservatory*, or *status quo* orders in the *short term*.

Being guided by the foregoing principles, I will make Orders as follows:

- (1) The Orders of 17<sup>th</sup> March, 2011 dismissing the plaintiff's application of 10<sup>th</sup> December, 2010 are hereby vacated.**
- (2) The plaintiff's application dated 10<sup>th</sup> December, 2010 is hereby reinstated.**
- (3) The interim Orders of 16<sup>th</sup> December, 2010 placing certain restraints on the defendant and/or its servants, representatives and/or agents are reinstated pending the hearing and determination of the plaintiff's application by Chamber Summons of 10<sup>th</sup> December, 2010.**
- (4) The said Chamber Summons of 10<sup>th</sup> December, 2010 shall be listed for inter partes hearing within 21 days of the date hereof.**
- (5) The costs of this application shall abide the hearing and disposal of the main cause.**

**SIGNED at NAIROBI .....**

**J.B. OJWANG  
JUDGE**

**DATED and DELIVERED at MOMBASA this 12<sup>th</sup> day of March, 2012.**

**.....  
M.A. ODERO  
JUDGE**