REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

ENVIRONMENTAL & LAND CASE 455 OF 2011

BISHOP ISAIH CHALLO

REVEREND SYLVESTER KIEMA &

REVEREND JACKSON MUTUNE ……....PLAINTIFFS/APPLICANTS

- VERSUS –

THE TRUSTEES REDEEMED CHURCH ..….. DEFENDANTS/RESPONDENTS

RULING

1. On 24th October 2011, the plaintiffs' notice of motion dated 30th August 2011 was dismissed with costs. The plaintiffs then filed the present notice of motion dated 30th November 2011 seeking to review or vary the order of dismissal. The plaintiffs had also sought a temporary injunction pending the determination of the new application.

2. The application is expressed to be brought under section 80 of the Civil Procedure Act and orders 45 and 51 of the Civil Procedure Rules 2010. The principal grounds are that the plaintiffs' former advocates failed to present crucial evidence to the court which evidence the plaintiff has discovered after the ruling. It is the plaintiffs' case that had the court been seized of the evidence, it may well have arrived at a different decision. It was further submitted that the order of court has caused great prejudice to the plaintiffs as the defendant will interfere or alienate the suit property. No appeal has been preferred. The plaintiffs thus implored the court that there are sufficient grounds upon which to review the impugned order. Those matters are elaborated upon in the averments by Isaiah Challo in two affidavits sworn on 30th November 2011 and a supplementary affidavit dated 10th January 2012. The plaintiffs have also filed written submissions in support of the motion. On the date of the hearing on 9th May 2012, the plaintiffs attempted to introduce a third deposition by the same deponent sworn on 9th May 2012. It was filed without leave and on the date of the hearing. The court, for reasons on the record, declined to grant further leave to re-open evidence at the 11th hour as it would prejudice the respondents. The court ordered that the matter proceed on the basis of the two earlier affidavits and the written submissions of the applicants filed on 18th April 2012.

3. The motion is contested. There is a replying affidavit sworn on 14th December 2011 by Arthur

Kitonga. Reliance was placed on paragraphs 6, 7, 10, 11 and 14 of that affidavit. It is deponed that the impugned ruling had considered the fact that the plaintiff had no title to the suit land; and, that failure to enjoin the city council of Nairobi was fatal. It was submitted that there was no evidence that the defendants were about to alienate the suit land. The respondents aver that there are a multiplicity of certificates of registration of the plaintiff church and correspondence that does not establish title to the plaintiff. It was also submitted that the plaintiffs, as members of an alleged society, cannot maintain the suit.

4. The respondents' case is that the plaintiffs cannot found a claim of title based on a letter of allotment. The plaintiffs, it is submitted, have brought proceedings in the name of "Living Water Christian church" or "centre" or "international". The respective certificates are attached. The one for "Living Water Christian centre" **(exhibit BIC 4)** was issued on 4th May 1999; the one for "Living Water Family church international" was issued on 21st February 2007; and, the one for "Living Water church international" was issued after filing of the suit on 2nd September 2011. The respondents submit that there are no sufficient grounds for review and the present motion should be dismissed.

5. I have heard the rival arguments. I take the following view of the matter. The gist of the application is that the ruling of 24th October 2011 was erroneous. The honourable judge had concluded that there was no evidence the plaintiffs' church was registered. In particular, the plaintiffs take up cudgels on the following passage in the ruling;

"Perhaps this dispute is linked to the defection of the 1st plaintiff from the 1st Defendant. He is now making moves to acquire the property where his church stands. He did not deny the defection and, besides the court was not favoured with a copy of registration of the 1st plaintiff's church. Or indeed the same was not readily available in the file. In sum this application is dismissed with costs".

The plaintiffs say their advocates failed to present to court crucial evidence. That evidence had been given to the advocates. The plaintiffs just say they were surprised after the ruling to discover it was not presented. This is clear at paragraphs 7 and 8 of the affidavit of Isaiah Challo sworn on 30th November 2011. He depones as follows;

*7. **THAT** I was alarmed when I read the foregoing paragraph in the Ruling and the reasons for dismissing our application since I had provided to our former advocates all the proper and relevant documents regarding this dispute. It therefore came as a complete shock and utter surprise these documents were not presented to the court for consideration.*

*8. **THAT** I only discovered that important material facts and crucial evidence which I had availed to our former advocates in time were not presented before the court for consideration, after delivery of the Ruling of this Honourable Court. I verily believe that this Honourable court would have reached a different decision if all the evidence was presented before it.*

6. The plaintiffs have then attempted to bring in that evidence of registration of the church for example and to rebut the findings of Hon. Justice Mwera of 24th October 2011. The plaintiffs had sworn two affidavits before that ruling: one on 30th August 2011 and another on 23rd September 2011 by the 1st plaintiff. Why did the 1st plaintiff execute the affidavits? I find it odd that the 1st plaintiff is now trying to introduce evidence, which was in his possession then, to counter the findings by the court. I thus find that the plaintiffs are not presenting new evidence that was not available to them at the time of the action or that could not be obtained earlier with due diligence. To that extent the application does not meet one of the primary conditions in order 45 of the Civil Procedure Rules 2010 or section 80 of the Civil Procedure Act.

7. Section 80 of the Civil Procedure Act reads as follows;

Any person who considers himself aggrieved –

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 rule 1(1) is *pari materia* with section 80 and provides;

1. (1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important mater or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

From a plain and natural meaning of the words of the law, an application for review is open to a person aggrieved by a decree of this court and who is entitled to an appeal to the Court of Appeal but has not preferred such appeal or who holds a decree or order from which no appeal is allowed by the Act. It is thus a unique and special power of this court. For an application for review to succeed, it must be brought without delay, it must be on the basis of either new and important evidence not available at the time of trial, or on account of mistake or error on the face of the record, or for other sufficient cause. Those are the parameters set by the authorities. And the authorities abound including *Origo & another Vs Mungala* [2005] 2 KLR 307, *Kisya Investments Ltd Vs Attorney General and another* Civil Appeal No 31 of 1995 (unreported), *Refrigeration Contractors Ltd Vs Lieta* [2005] KLR 506, *Kuria Vs Shah* [1990] KLR 316 and *M'Anthaka M'Mwoga Vs M'Boore* [2006] e KLR.

8. I am reminded that this is not an appeal against the decision of a judge of concurrent jurisdiction. I got the clear impression that the plaintiff is seeking to relitigate and regurgitate the arguments that were made before the Hon. Justice Mwera. I do not see an error on the face of the record. The plaintiffs failed to put the evidence they now cite before the judge. The plaintiffs are climbing on a new platform informed by that ruling and trying to answer it with fresh evidence. It is evidence that was in possession of the 1st plaintiff. It could have also been procured with due diligence. The plaintiffs are clearly seeking a second bite at the cherry. Their remedy would lie in an appeal if they strongly feel that the honourable judge arrived at an erroneous finding or misapprehended the law.

9. I am also guided by the decision in *National Bank of Kenya Ltd Vs Njau* [1995 – 1998] 2 E A 249 at 253.

"*A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect proposition of the law. Misconstruing a statute or another provision of law cannot be a ground for review".*

10. In *James Kingaru & others Vs J.M. Kangari and others* it was stated of sub rule 2 of order 44 [the predecessor to the present order 45].

"It *appears that the applicants, having lost their case, wanted a second bite of the cherry …… applications on this ground must be treated with great caution. Review cannot be sought to supplement*

the evidence or to introduce new evidence. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of the trial".

See also *Business Partners International Kenya SME Fund L.P Vs Zingo Investments Limited and another* HCCC 797 OF 2009 (Nairobi, High Court, unreported).

11. I also note that the primary foundation of the plaintiffs claim on title is built on a letter of allotment. The respondents in turn have a lease registered in favour of the 1st defendant. On that score, I agree with the impugned ruling that the plaintiffs' claim on title did not establish a strong *prima facie* case. The learned Judge had held;

"The position is that as of now the council lease dated 7th July 2011 reads that NAIROBI/UMOJA/BLOCK 107/384 (formerly PLOT No. 384 II) is in the name of the 1st defendant – the Redeemed Gospel church…."

That would seem to accord with the legal position that a registered interest in land is superior to a letter of allotment. A letter of allotment constitutes a temporary right. See *Wreck Motor Enterprises Vs Commissioner of Lands and others* Nairobi, Civil Appeal 71 of 1997, Court of Appeal (unreported), *Jaj Super Power cash & carry Limited Vs Nairobi city council and others* Nairobi, Civil Appeal 111 of 2002, Court of Appeal (unreported).

12. I thus find that the plaintiffs have not established sufficient cause for review. Lastly, I note that the impugned ruling was delivered on 24th October 2011. The present motion was not presented to court until 2nd December 2011. An application for review must be brought with expedition. See *Panistar Company Limited Vs Catherine Wanjiku Mwangi & others* Nairobi, HCCC No 1154 of 1999 [2002] e KLR.

13. For all of the above reasons I find that the plaintiffs' notice of motion dated 30th November 2011 is without merit. I order that the same be and is hereby dismissed with costs to the defendants.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 28th day of June2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Arithi for Mr. Mbaluka for the Plaintiffs Applicants.

Mrs. Baraza for the Defendants/Respondents.
Mr. Collins Odhiambo Court clerk.