



**REPUBLIC OF KENYA**

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

**CIVIL CASE 12 OF 2011**

**MARION WAKANYI KAMAU.....PLAINTIFF**

**VERSUS**

**DELIVERANCE CHURCH REGISTERED TRUSTEES.....1<sup>ST</sup> DEFENDANT**

**GEOFFREY KAMAU .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. There are two applications before me for determination, one is a Notice of Motion dated 6<sup>th</sup> January 2011 supported by the Affidavit of Marion Wakanyi Kamau sworn on 6<sup>th</sup> January 2011 and the other is a Notice of Motion dated 15<sup>th</sup> December 2011 supported by the affidavit of Rev. Geoffrey Kamau Njuguna.

I will first deal with the Notice of Motion dated 6<sup>th</sup> January 2011 in which the applicant is seeking for orders that:-

1. The Defendant be ordered to vacate all that property known as LR No. 209/9938/2 to the plaintiff.
2. In the alternative orders do issue for the eviction of the Defendants from all that property known as LR No. 209/9938/2.
3. The Defendants/Respondents be ordered to pay the costs of demolishing the unauthorized structure erected on all that property known as L No. 209/9938/2
4. The applicant be awarded costs of this application.

The ground as are set out by the applicant/Plaintiff summarise her case. The application was opposed by the Respondents/Defendants.

2. I have set out issues between the parties in the application dated 15/12/11

Having considered their affidavits and submissions, I find that the orders sought are mandatory and cannot be granted at this stage. The orders can only be granted after the full hearing of this suit and I therefore dismiss the application. Costs shall be in the cause.

The application dated 15<sup>th</sup> December 2011 is by the Defendants.

They are seeking for:

a. That a temporary Injunction do issue restraining the plaintiff either by herself, or through her agents ,servants and /or employees or any Auctioneer(s) duly appointed by the Plaintiff from levying Distress against the Defendants properties, possessions, belongings, goods and or assets on Land Reference Number 209/9938/2 or elsewhere, evicting and or interfering with the defendants quiet enjoyment of the suit premises or occupation of the said premises and or place of worship on Land Reference Number 209/9938/2 until the final determination of this suit.

b. That costs for this application be provided for.

Their grounds are that:-

i. There is no tenancy agreement/Relationship between the plaintiff and defendants at all

ii. The plaintiff filed this suit for mesne profits which is a clear indication that there is no tenancy relationship between the parties.

iii. The premise the plaintiff wants to levy distress was put up by the defendants and not the plaintiff under a deed of understanding of exchange of the understanding that the plaintiff takes the defendants property known as LR NO. 209/9743

3. In the supporting Affidavit of Rev. Geoffrey Kamau Njuguna he stated that in 1997 the applicants and the Respondent entered into a deed of agreement to exchange their parcels of land and pursuant to the signing of the deed agreement and approval by the commissioner of lands to exchange the parcels of land, the applicants entered the land. He also stated that the on the strength of the deed of agreement the applicants went ahead and constructed a church sanctuary, a multipurpose hall and offices on the Respondent's part of land and have been in occupation for the last 20 years. He further stated that the Respondent filed suit in January 2011 seeking for mesne profits and eviction of the applicants from her piece of land or eviction. His view is that because the Respondents claim is for mesne profits then there existed no tenancy relationship between the two parties herein. The deponent explains that there was a suit filed at the chief Magistrates court, Milimani Commercial court Misc No. 608 of 2011 and obtained orders for distress of rent but the applicants later filed Judicial Review proceedings at the High Court JR NO. ELC No.94 of 2011 and obtained orders of stay of proceedings at the Chief Magistrates court. He concludes by saying that he believes that the Respondent has no legal right to ask for rent as they did not enter into a tenancy agreement

4. The Respondent opposed application by a Replying Affidavit she swore on 16<sup>th</sup> January 2012 in which she stated that the applicants requested her to allow the applicants pitch tent in her portion of land in which she told them that they had to pay for their stay .This was done in writing and rent was paid at a monthly fee of Kshs. 2000 and rent would increase as the church grew. She says that the applicants used to make payments through cheques then changed to standing orders and she says the standing orders stopped in 2008. She states that the applicants mooted the idea that they could exchange their parcel of lands Plot No. 209/9743 belonging to the applicants and LR No. 209/9938/2 belonging to the respondent. She further says that the applicants continued paying rent despite her protests that the amount was little. She disputed the Deed of exchange and stated that the deed of agreement was fraudulent as at the time of signing the deed of exchange she had put them on notice that the she would terminate the agreement. She insists that the applicant got into a verbal tenancy agreement due to the temporary nature of their need. That the applicant entered the land under verbal tenancy agreement rather than pursuant to the alleged Deed of Exchange and said says that the applicants constructed on her land without her consent. She concludes by stating that since she was the bonafide owner of the land and no valid exchange agreement offered to purchase the land this application should not be allowed and asks this court to dismiss this application with costs.

5. I have gone through the pleadings filed by both parties. I have also considered their submissions both filed and argued in court. The issue before this court is whether the applicants deserve the orders of

injunction pending the hearing and determination of this suit. The principles of granting injunction were elaborated in the case of **Giella –vs- Cassman brown & Co. Ltd (1973) EA.** which are clearly stated as follows;

- a. An applicant must show a prima facie case with a probability of success
- b. The applicant might suffer irreparable injury if the injunction is not granted.
- c. Where the balance of convenience lies.

6. In this case the applicant claims that they did not have any tenancy relationship with the Respondent since the Respondent in her claim vide a plaint filed on 6<sup>th</sup> January 2011, asked for among other prayers mesne profits from the Respondent and by virtue of that the applicants are of the view that they cannot be termed as the tenants of the Respondent. The applicants state that they put up structures on on the strength of a Deed of Exchange in which parties were to exchange their parcels of land which the Respondent disputes and states that the applicants put up structures on her piece of land without consent. To support her case the Respondent has annexed. annexure **MWK2** is a letter dated 12<sup>th</sup> February 1993 addressed to the Respondent by the Applicant forwarding Kshs 6000/= “being the first rent as agreed” a further letter dated 30<sup>th</sup> April 1993 forwarding a cheque of Kshs 6,000/= “being the rent of the month of May, June and July 1993” There is also a letter marked as annexure **MWK9** where the applicants acknowledge that they paid rent to the Applicant and I will quote that section where they have stated that :...we had a small agreement to be paying her a monthly token of Kshs. Two Thousand five hundred (Kshs 2,500/=) and eventually increased from the year 2000-2006 to Kenya shillings three thousand (Kshs 3000)” this “token “is indeed paid to the applicant as rent.

7. From there foregoing, there appears to be a tenancy relationship between the parties herein and the Respondent is entitled to collect rent from the applicant but the issue herein is how much the Respondent is to distress from the applicant Since she has not shown any evidence of when the Applicant stopped remitting rent, how much rent was collected per month this court cannot therefore ascertain the exact amount to be distressed unless this matter is set down for full hearing. I also note there are issues to be considered at the hearing on the “tenancy relationship”, the alleged exchange of parcels of land between the parties which can only be determined at a full hearing. To be just to both parties I make the following orders:-

8. That a temporary injunction do issue restraining the plaintiff either by herself ,or though her agents, servants and /or employees or any Auctioneers duly appointed by the plaintiff from levying distress against the defendants properties ,possession, belongings ,goods and or assets on Land Reference No. 209/9938/2 or elsewhere, evicting and or interfering with the defendants quiet enjoyment of the suit premises or occupation of the said premises and or place of worship on LR No. 209/9938/2 on condition that the Applicants deposit a sum of Kenya Shillings three Million (Kshs. 3,000,000/=) within seven (7) days from the date of this ruling.

Parties in this suit shall comply with provisions of Order 11 of the Civil Procedure Rules and fix the matter for the main hearing within the six months. Costs shall be in the cause.

**Dated, Signed and Delivered on 24<sup>th</sup> Day of July, 2012**

**R. OUGO**

**JUDGE**

In the Presence of:-

.....For the Applicant

.....For the Respondent

..... Court Clerk

24/7/12

Before Ougo J.  
Kabiru Court Clerk  
Mr. Odawa for the plaintiff  
Mr. Mugo for the defendant  
Court: ruling read on the 24/7/12

**R. Ougo**

**Judge**

Court By Consent:

1. The defendants to file their defence and counter claim within the next 30 days
2. The plaintiff to file a reply to defence and defence to counter claim within 15 days hereinafter.
3. Parties to exchange documents and finalize the interrogatives within 30 days.
4. Mention on the 11/10/12 for directions on the hearing.

**R. Ougo**

**Judge**

**Mr. Mugo:** Could the Kshs 3million deposited in Court in Misc Application No.608/11 since it has been released to us could the same be deposited in ELC No. 12/11 as the Kshs.3 Million that the Court has ordered to be the deposited.

**R. Ougo**

**Judge**

**Court:** I further order that the Ksh.3million deposited in Misc Application No. 608/11 be transferred to be a deposit in ELC 12/11. The same shall be held in Court until the Court gives a final order on its disposal.

**R. Ougo**

**Judge**

24/7/12