

**SEVENTH DAY ADVENTIST
CHURCH.....PLAINTIFF**

**-VERSUS-
NOAH K. SIMI**

BERNARD ORANGO

BEN ONGANGA OSORO.....DEFENDANTS

RULING

The plaintiff filed suit against the defendant seeking several orders regarding the ownership of a parcel of land known as **West Mugirango/Bonyamutu/755**. The plaintiff claims that it is the lawful owner of the suit parcel of land. Contemporaneously with filing suit, the plaintiff filed an application pursuant to provisions of **Order 40 Rule 1** of the **Civil Procedure Rules** seeking orders of injunction to restrain the defendants by themselves or through their agents from entering or interfering with the running of a health facility erected on the suit parcel of land which the plaintiff refers to as Kenya SDA Health Centre. The plaintiff has sought this order as a temporary relief pending the hearing and determination of the suit.

The grounds of the application are stated on the face of the application. It is supported by the annexed affidavit of **Pastor Charles Kerosi Mangoere**. In the supporting affidavit, the applicant alleges that the respondents have committed acts of contempt by locking up the main gate to the premises and taking away some equipment. It is averred that the said actions were committed after the court order and a penal notice thereto were served upon the respondents.

The application is opposed. Noah Kamau Simi, the Chair of Kenya Community Centre swore a replying affidavit in opposition to the application. In the said affidavit, the 1st defendant depones that the suit parcel of land is actually the property of members of the Kenya Community. He annexed documents in the replying affidavit which points to the fact that the suit parcel of land was actually reserved by Nyamira County Council for the purposes of the establishment of a Community Health Centre. It is the defendants' case that the plaintiffs have no valid claim over this suit parcel of land.

During the hearing of the application, this court heard oral rival submissions made by **Mr. Soire** for the plaintiff and **Mr. Motanya** for the defendant. This court has carefully considered the said submissions. The issue for determination of this court is whether applicant/plaintiff established a case for this court to cite the defendants for being in contempt of an order of this court issued on 18th October 2010. This court has perused the record of the court. It is clear that on that date, counsel for the plaintiff appeared before **Makhandia J.** and informed him that he had served the defendant with the pleadings and on the basis of the presentation, **Makhandia J.** granted the order of injunction in the absence of the defendants. This court has noted that the issue in dispute between the plaintiff and the defendant is in respect of who is entitled to be declared the owner of the suit parcel of land or to operate the Community Health Centre.

Contempt proceedings are quasi-criminal in nature. As such the standard of proof is higher than a balance of probability. Looking at the rival affidavits and submissions, I am of the view that the applicant has not discharged that burden. Also having carefully evaluated the conflicting facts of this application, it is clear to this court that the only way the dispute between the plaintiff and the defendant can be resolved once and for all is for the court to determine the dispute on its merits. The filing of many applications will not do. In the circumstances of the present application, this court is of the opinion that the parties should conclude all preliminary issues including discovery to enable this suit be set down for full hearing.

In the premises therefore this court finds no merit with the application and dismisses it with costs.

Ruling dated, signed and delivered at Kisii this 23rd day of August, 2012.

R. LAGAT-KORIR

JUDGE

In the presence of :

Edwin Mongare Court clerk

.....Counsel for the plaintiffs/Appellant

.....Counsel for the defendants/respondent

R. LAGAT-KORIR

JUDGE