



JOHN NGARURO MUGO PLAINTIFF

VERSUS

FESTUS MUNYAO1ST DEFENDANT

OSHAM OMINDE2ND DEFENDANT

GEORGE MUSATSILI AMISI3RD DEFENDANT

SUED AS THE TRUSTEES OF PENTECOSTAL REVIVAL CHURCH

CITY COUNCIL OF NAIROBIINTERESTED PARTY

RULING

1. This ruling relates to two notices of motion: The plaintiff's amended notice of motion dated 10th June 2012; and a notice of motion dated 6th June 2012 by Samson Oigo and Oshan Ominde as trustees for Pentecostal Revival Church. The latter motion seeks injunctive relief against the plaintiff from trespassing or interfering with the property known as plot 209/4361/R. The plaintiff's motion is a cross action to restrain the church and the City Council of Nairobi, the interested party, from denying the plaintiff access to his properties known as LR Nos 209/4361/4, 5, 6 and 8 situated at Shauri Moyo, Ambira road Nairobi. The applications relate to a similar property and were thus consolidated for hearing.

2. In a synopsis, the plaintiff's case is that he is the registered proprietor of LR Nos 209/4361/4, 5, 6 and 8 which he purchased for Kshs 75, 000, 000 from one Isaac Kamunya. His case is that the Church, without any colour of right, has encroached upon an open public space and carved out a plot known as **R 8** or plot 4361/R which has blocked the plaintiff's access to his properties. The plaintiff contends that the alienation of the open space is unlawful. As the church intends to construct a school or church on it, the plaintiff's rights to enjoyment of his properties will be compromised.

3. The 1st to 3rd defendants' case on the other hand is that the church was allocated plot **R 8** on 8th November 1999 by the City Council of Nairobi. They were issued with a letter of allotment and beacon certificate. They have paid the rates to the council and got approval to construct a church and school. A change of user was approved and paid for. Construction has commenced. The church's case is that on 21st January 2010, and on other dates, the plaintiff and his hirelings, policemen and the City Council *askaris* demolished the structures and a fence. The church's position is that the plaintiff is acting illegally and he has alternative parking or access to his properties.

4. I have heard the rival arguments. I take the following view of the matter. The parameters for grant of interlocutory prohibitive injunction are now well settled. When a litigant approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly in Giella Vs Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR 80. See also The Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012] e KLR, George Munge Vs Sanjeev Sharma & 3 others HCCC ELC 677 of 2011 [2012] e KLR.

5. Applying those principles to the evidence before me, I find as follows. It is not disputed that the plaintiff, John Ngaruro Mugo is the proprietor of all those properties known as LR Nos 209/4361/4, 5, 6 and 8 situated along Ambira Road in Shauri Moyo Nairobi. They were formally Unga Limited's staff houses. The plaintiff bought them for consideration of Kshs 75, 000, 000. I have looked at the deed plans of the properties. They start with LR 209/4361/4 at the junction of two roads; the other properties of the plaintiff follow in a sequence along one of the roads forming a *cul de sac* and extending to the opposite side of the road. They are in a circular layout around the end of the open space or road. The plaintiff has erected buildings on the property with approval of the interested party, the City Council of Nairobi.

6. I have then seen a deed plan annexed to the further supporting affidavit dated 13th June 2012 of Osham Ominde marked "**001 A**". In the middle of the open space surrounded by the plaintiff's properties, a new plot known as LR 4361/29 has been carved out. There is now a circular road around it joining the T-junction. That plot, according to the church, was known as **R 8**. The new reference of LR 4361/29 according to the 1st to 3rd defendants resulted from "a major survey in the region in 1992". The church has approved development plans for a church and school as per the exhibit marked "**001 b**". The letter of allotment dated 8th November 1999 issued to the church is for a plot known as **R 8**.

7. I am disturbed that the Nairobi City Council, as a custodian of public land, could allot property in such a manner. And I am also alive to the fact that a letter of allotment is a transient right and not title to property. See Wreck Motor Enterprises Vs Commissioner of Lands and others Nairobi, Civil Appeal 71 of 1997 (unreported), Jaj Super Power cash & carry Limited Vs Nairobi City Council and others Nairobi Civil Appeal 111 of 2002, Court of Appeal (unreported).

8. The church in these proceedings refers to the plot number 209/4361/R. That is the prayer numbered 2 in the church's motion of 6th June 2012. There is then reference to plot **R 8** in the letter of allotment and beacon certificate. The payments by the church in the annexures marked **007** to the original affidavit of Osham Ominde dated 6th June 2012 are for plot **R 8**. I have thus formed the impression that the plot **R 8** may have originated or been carved out of LR 4361/29. The church has created doubt by its continued reference to a plot 4361/R. I have then looked at an older plan for the area annexed to the replying affidavit of the plaintiff sworn on 10th June 2012. It clearly shows that the new plot known as LR 4361/29 was created smack in the middle of an open space. So that even assuming that the council had a right to alienate it into private property, consideration for right of access by the neighbouring properties had to be considered. But my attention has been drawn to a letter dated 25th April 2012 by P.T. Odongo addressed to the plaintiff. The author is the Director of City Planning of the City Council of Nairobi. He is emphatic that "the purported allotment No **R 8** of the open space for Pentecostal Revival Church is a fraud" and that access roads remain as per survey plan 4361/R and not 4361/29. On the same date, he also wrote an internal memo in the same terms reference CPD/ADMIN/14343/SKN/MK to the Director, Legal Affairs, City Council of Nairobi.

9. From that evidence, the City Council corroborates the plaintiff's contention that the church has encroached on a public area and blocked the plaintiff's right of access. From a legal standpoint on planning and environmental regulations, I have serious doubts about the veracity of the church's claim. I have already stated that a letter of allotment is a transient right. To that I would add the decisions of the

court that frown upon encroachment of public open spaces that prejudice enjoyment of rights of neighbouring properties. See *Park View Shopping Arcade Limited Vs Charles M. Kangethe and others* [2006] 1 KLR (E & L) 591, *Gitau Vs Savage and 4 others* [2006] 1 KLR (E & L) 463, *Kamau Vs Gathuru and another* [2006] 1 KLR (E & L) 655. See also *Nelson Mwangi Vs Kikuyu Town Council and another* High Court, Nairobi ELC 323 of 2009 (unreported).

10. There is also another matter. The action was brought in the name of Pentecostal Revival Church by its named trustees. The further replying affidavit of Osham Ominde states that it used to be known as Pentecostal Revival Centre prior to its registration on 6th April 2005. I have looked at the earlier certificate marked "002" to the original affidavit of the deponent sworn on 6th June 2012. The Pentecostal Revival Centre was registered as a society on 13th July 2000. On 6th April 2005 it received another certificate, exhibit 001, in the name of Pentecostal Revival Church. Yet the letter of allotment to Pentecostal Revival Church is dated many years earlier on 8th November 1999 and even before the registration of the centre on 13th July 2000. I am not saying the church did not exist. But in a matter relating to allotment of a registrable interest in land, I am left in serious doubt about the capacity of the allottee.

11. For all the above reasons, I find that the church has not established a strong *prima facie* case. I order that the notice of motion by Samson Oigo and Osham Ominde as trustees of Pentecostal Revival Church dated 6th June 2012 be and is hereby dismissed. For the reasons given, I find that the plaintiff John Ngaruro Mugo has reached the threshold for grant of an interlocutory prohibitive injunction. I allow his amended notice of motion dated 10th June 2012. I order that an injunction do issue restraining the defendants in the amended motion, their servants, agents, employees or howsoever from denying the plaintiff access to his properties LR Nos 209/4361/4, 5, 6 and 8 Ambira Road, Shauri Moyo, Nairobi until the determination of the suit.

12. I also order that the defendants in the amended motion be and are hereby restrained by injunction from wasting, trespassing, entering, transferring or in any manner dealing with the open space or plot known as R 8 or 4361/R Ambira Road, Shauri Moyo, Nairobi until the determination of the suit.

13. The plaintiff shall file and serve a suitable undertaking as to damages. I further order that the suit be heard and determined within 1 year in default of which the orders of injunction shall lapse. The costs shall be in the suit.

It is so ordered.

DATED and DELIVERED at NAIROBI this 7th day of August 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff (John Ngaruro Mugo)

Mrs. Owino for the 1st to 3rd Defendants (Trustees of Pentecostal Revival Church)

No appearance for the Interested Party (Nairobi City Council)

Mr. Collins Odhiambo Court Clerk.