



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

Civil Case 23 of 2011

**ELIAB OJOW**

**ODHIAMBO.....1<sup>ST</sup>**  
**PLAINTIFF/APPLICANT**

**WILLIAM WASONGA**

**ODERO.....2<sup>ND</sup>**  
**PLAINTIFF/APPLICANT**

**JOAB ODIWUOR**

**ODERO.....3<sup>RD</sup>**  
**PLAINTIFF/APPLICANT**

**BENSON NGALA**

**OSII.....4<sup>TH</sup>**  
**PLAINTIFF/APPLICANT**

**(Suing on own behalf and on behalf of 161 Members of EVANGELICAL CHRIST CHURCH OF AFRICA-MANYONGE CHURCH)**

**VERSUS**

**HABAKUK ONYAGO**

**ABONGNO.....D**  
**DEFENDANT**

**RULING**

1. The plaintiff came to court under a certificate of urgency accompanied by a notice of motion, affidavit and plaint on 15<sup>th</sup> February 2011 seeking:-
  - a) *Permanent injunction restraining the defendant by himself, servants, agents or otherwise howsoever from interfering with the plaintiffs' freedom of worship in church premises built on parcel of Land No. KANYAMKAGO/KAWERE I/489*
  - b) *Declaration that the defendant has no interest whatsoever on the church house and other related properties situated on parcel of Land No. KANYAMKAGO/KAWERE I/489.*
  - c) *Costs of the suit.*
  - d) *Interest.*

2. It is the plaintiffs' case that the 1<sup>st</sup> plaintiff is the registered owner of land parcel No. Kanyamkago/Kawere I/489 together with his deceased father one ELIASHAR ODHIAMBO.
3. That they donated a portion of the said property measuring 1.0 acres for construction of a church house where he and the other plaintiffs plus over 160 other worshippers worship. He claimed that he personally made donations towards the construction of the church.
4. That the defendant committed the acts of chasing away the plaintiffs and the said 161 members out of the church service locking up the church, took away 10 benches, 11 steel windows and defaced the church sign board and left two armed Maasai watchmen to guard the church premises to the exclusion of the plaintiffs and the other 161 members, hence the present suit.
5. As a result of the events in (4) above, the plaintiffs claimed to have no place of worship and complain of having suffered irreparable loss and damage as a result.
6. On the other hand it is the defendant's case that in 2005, some members of the church of Christ broke away from the said church to form a different church known as Evangelical Christ Church of Africa. Following interferences by the members of the latter church with the properties and activities of church of Christ Africa, the latter moved to court vide Kisumu HCCC No.121 of 2005 to restrain Evangelical Christ Church of Africa and its members from interfering with church of Christ in Africa's properties including church buildings and operations.
7. On 28<sup>th</sup> November 2005, the defendants in the Kisumu suit (some of whom are registered officers of the Evangelical Christ Church of Africa) obtained leave to defend that suit on behalf of the entire members of Evangelical Church of Christ Africa.
8. Upon hearing an application for injunction, Mwera, J. allowed the same on 14<sup>th</sup> May 2007 and it was served by an advertisement on the Standard newspaper dated April 4, 2008.
9. The Evangelical Church of Christ Africa was registered on 21<sup>st</sup> August 2006 while Church of Christ Africa was registered on 6<sup>th</sup> January 1959.
10. It was agreed by both counsels that they would argue their cases in form of written submissions. I have read the rival submissions and noted the authorities cited.
11. After reading the submissions, the following 4 issues arise for determination:-
  - 1) *Does the suit form part and parcel of HCCC No.121 of 2005 in Kisumu High Court?*
  - 2) *What is the effect of the orders of injunction given on that suit (HCCC No.121 of 2005) in relation to this suit?*
  - 3) *Is the plaintiff the absolute owner of land parcel No. Kanyamkago/Kawere I/489?*
  - 4) *Are the plaintiffs justified to get an injunction against the defendant's action?*
12. With regard to the 1<sup>st</sup> question, the plaintiffs stated in clause 18 of their plaint that **“there is a civil suit No.121 of 2005 before Kisumu High Court which is totally distinct from the instant suit in terms of the subject and the parties”**. I do not agree with the plaintiffs' contention on this issue because there is evidence that the plaintiffs herein are defendants in the Kisumu suit (see advertisement poster). In addition, the property in dispute in this suit is one of the properties affected by the order issued on 14<sup>th</sup> May 2007 and was even the subject of an application for contempt of court in the Kisumu suit. (see replying affidavit paragraph 8 (g)). The 1<sup>st</sup> plaintiff was in fact named as being one of those who had interfered with Manyonge church of Christ in Africa Church. Therefore this case is not distinct from HCCC NO.121 of 2008.

13. Furthermore, the substantive suit filed in Kisumu is still pending and the effect of an order allowing the present application would be that the court would grant an order that contradicts the injunction order issued by Mwera, J. on 14<sup>th</sup> May 2007. This answers the second question.

14. As to whether the 1<sup>st</sup> plaintiff is the absolute owner of parcel NO. Kanyamkago/Kawere I/489, I have perused the file and based on the certificate of official search, it appears that the 1<sup>st</sup> plaintiff owned ½ shares and his deceased father owned the other ½ share. The 1<sup>st</sup> plaintiff is proceeding on the assumption that since the father is dead; the ownership of the entire piece of land reverts to him. This assumption is wrong because the 1<sup>st</sup> plaintiff and his father (deceased) owned the piece of land in a tenancy in common and not as joint owner. Under tenancy in common, the doctrine of survivorship does not apply. An owner under tenancy in common may leave his share in death to a person in his will. The 1<sup>st</sup> plaintiff in this case did not show any evidence that he had taken out letters of administration or grant of probate on his father's half share of the estate. Therefore his father's survivors have a right to the ½ share of parcel No. Kanyamkago/Kawere I/489. The 1<sup>st</sup> plaintiff therefore has not produced any evidence to show that he is the administrator of his father's half estate.

15. Furthermore, on the plaintiff's contention that he donated the land to the Evangelical Christ Church of Africa and built the building in dispute, I find it hard to believe him on this because:

- *Evangelical Church of Christ Africa was registered in 2006 yet a receipt he has exhibited to his affidavit was issued in 1998.*
- *Church Christ of Africa came into being in 1959.*

16. It seems to me that this church must have been used by the church Christ of Africa before the plaintiff severed ties with the church of Christ Africa.

17. I agree with counsel for the defendant that an injunction is an equitable remedy. A party coming to court for such an order must come with clean hands. Lying on oath takes away the right to an injunction. The 1<sup>st</sup> plaintiff is clearly lying when he exhibits a receipt issued in 1998 to support a claim that he was helping a Church registered in 2006. This in turn answers the fourth question.

18. I urge both parties in this case to conclude the case HCCCNo.121 of 2005 so as the court finally decide on the ownership of the properties of both churches.

19. In conclusion, I dismiss the application dated 15<sup>th</sup> February 2011 and award costs to the defendant. In addition, this suit shall be stayed until Kisumu HCCC No.121 of 2005 is heard and determined.

**Dated and delivered at Kisii this 12<sup>th</sup> day of September, 2012**

**RUTH NEKOYE SITATI**  
**JUDGE.**

In the presence of:

Mr. G.S. Okoth for Kisera for Ex-parte Applicant

Mr. N. M. Omondi for D. Otieno for Respondents

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**