



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 105 of 2011**

**EDWARD STEVEN MWITI .....PLAINTIFF**

**- VERSUS -**

**PETER IRUNGU .....1<sup>ST</sup> DEFENDANT**

**JIMMY KIMANI .....2<sup>ND</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI .....3<sup>RD</sup> DEFENDANT**

**RULING (NO.2)**

1. This is the plaintiff's chamber summons dated 14<sup>th</sup> March 2011. The plaintiff seeks an injunction to restrain the defendants from causing nuisance, holding classes or church services at, or, breaching the conditions in the lease over L.R No Nairobi/Block 122/134. An order is also sought directing the National Environmental Management Authority to carry out an environmental impact assessment on the use, development and construction on the land. The application is expressed to be brought under order 40 of the Civil Procedure Rules 2010 and sections 3A and 63 of the Civil Procedure Act.
2. The application is anchored on a deposition sworn on 14<sup>th</sup> March 2011 by Edward Steven Mwiti and a further affidavit of the same deponent sworn on 4<sup>th</sup> April 2011. He is the registered owner of LR No Nairobi/Block 122/135, Kasarani area, Nairobi. It neighbours the suit land. He avers that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have acquired an interest in LR No Nairobi/Block 122/134 and are erecting unlawful structures on the land. They include a school and a church. They also use loudspeakers on the premises causing nuisance to the plaintiff. The plaintiff's case is that the area is reserved for low density residential dwellings. He contends that no change of user has been granted by the 3<sup>rd</sup> defendant council. The activities of the defendants are prejudicial to the interests of the plaintiff and may lower the value of his land and his quality of living.
3. The application is contested. The 1<sup>st</sup> and 2<sup>nd</sup> defendants at first raised a preliminary objection dated 5<sup>th</sup> August 2011. It was dismissed for considered reasons on 22<sup>nd</sup> May 2012. Reliance has thus been placed on a replying affidavit of the 1<sup>st</sup> defendant. The application is attacked for being incompetent and contrary to the rules of procedure. The orders sought against the National Environmental Management Authority are against a stranger to the suit. The defendants also contend that there is no evidence before the court on noise pollution or poor waste disposal affecting the plaintiff. It is a mere apprehension. While conceding that the suit land is being used as a church on temporary structures, the defendants contended that neighbours must tolerate and accommodate each other. In particular, a submission was made that there are no exclusive places to set up worship centres. The defendants aver that they have obtained conditional licences from the 3<sup>rd</sup> defendant for use of the suit land. They have made further applications

to develop the land. The defendants' case is that they have not breached local bylaws or regulations. Lastly, it was submitted that the application does not rise to the threshold for grant of interlocutory prohibitive injunction.

4. I have heard the rival submissions. I take the following view of the matter. The principles governing the grant of prohibitive injunctions are now well settled. When a litigant approaches the court for prohibitive 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. When I juxtapose those principles against the available evidence, I find as follows. The application is fraught with serious procedural difficulties. I would separate them into two. First, an application for injunction should be brought by way of notice of motion under the Civil Procedure Rules 2010. The present application is a chamber summons application. It contravenes the express provisions of orders 40 and 51 of the Civil Procedure Rules 2010. Procedural rules have been aptly described as the handmaidens of justice. True, article 159 of the constitution as read with sections 1A, 1B, and 3A of the Civil Procedure Act as well as order 8 rule 5 of the Civil Procedure Rules 2010 frown upon technical objections. But this is not a simple matter of want of form. The plaintiff is represented by learned counsel. If procedural rules were to be waived in all cases, there would be disorder in court processes. I do not see why the legislature in section 81 of the Civil Procedure Act created the Rules Committee if the Civil Procedure Rules were to be waved away casually. That is not to say that I shall not examine the merits of the application.

6. Secondly, the application seeks orders against the National Environmental Management Authority. It is a statutory body capable of suing and being sued under the Environmental Management and Co-ordination Act 1999. It is not a party to this suit. The plaintiff did not sue it. The plaintiff has not elected to move the court for its joinder under order 1 rule 10. The orders then sought are in a void and cannot extend to a non party. I would thus dismiss prayer number 4 in the chamber summons.

7. I now return to the evidence and merits of the application. Although the plaintiff avers that the 1<sup>st</sup> and 2<sup>nd</sup> defendant have acquired "an interest" in the suit land, no particulars of ownership are provided. As it is now, I have no clear evidence that the 1<sup>st</sup> and 2<sup>nd</sup> defendants or the alleged evangelical church own LR Nairobi/Block 122/134. But I have evidence that the plaintiff owns the adjacent land by virtue of a registered lease over LR Nairobi/Block 122/135. I cannot assume however that the special conditions appearing on his title are similar or the same for the adjacent land. But from the pictures annexed marked "EM 1" there are two semi-permanent structures. One seems to be a school and the other a church. The signpost reads "Deliverance church Muirigo of P. o. Box 134 – 00618 Ruaraka". It is not a named defendant. It is not clear whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants run it and in what capacity. They are not sued in a representative capacity. The plaintiff is not doing so either. Yet the orders sought in the suit would affect numerous parties. At the trial, most of those matters will be disentangled on tested evidence.

8. Faced with an application of this nature, it behoved the defendants to show the extent of their compliance with environmental and physical planning regulations. The letter of authority to pitch up a temporary worship tent marked "PI 2" relates to a different property LR No Nairobi/Block 122/133. It says nothing about the school. But I have also looked closely at the pictures supplied by the plaintiff marked "EM 2". Although the plaintiffs assert that the area is a low density residential zone, the pictures show in the background highrise commercial or residential buildings. I cannot tell whether they are in the same zone. But doubts are created by the 3<sup>rd</sup> defendant's letter of authority to pitch or erect a temporary structure for the church. From the photographs again, I can clearly see a pitched tent and other temporary

structures on the suit land. I see no permanent developments. I am therefore unable to say conclusively that the defendants are in breach of the City Council by laws. It will be the true province of the trial court on tested evidence.

9. I have no evidence before me of the nuisance. In particular, I see no cogent evidence of waste disposal to the plaintiff's land. True, the defendants may have positioned loudspeakers on worship days. The true test or noise pollution would be an expert report showing violations of the Environmental Management and Co-ordination Act regulations. In the plaintiff's submissions dated 4<sup>th</sup> May 2011, he concedes he is not opposed to the activities of worship: only that the defendants should be sensitive the interests of their neighbours for peaceful occupation of their property. Yet, the prayer for injunction seeks to stop the defendants from holding any church service, educational activities or in any other manner. I think that would be too wide a remedy on the basis of the inconclusive evidence. I would venture to think the trial court may, on the evidence, deal with the nuisance and breaches of the conditions in the grant of lease over the suit property. But the defendants or the church must comply fully with environmental and physical planning regulations.

10. For now, I find that the plaintiff has not established a strong *prima facie* case for grant of interlocutory prohibitive injunction. I am not in doubt about that head of the *Giella* case. For the type of injuries complained of by the plaintiff, damages may not be a suitable remedy. But it is not lost on me that the injunction is sought against a registered interest in land that would prejudice the proprietary rights of the owner. The church or the 1<sup>st</sup> and 2<sup>nd</sup> defendants are in possession. I would then say that the balance of convenience tilts in favour of the defendants.

11. For all the above reasons, I find that the plaintiff's chamber summons dated 14<sup>th</sup> March 2011 lacks merit. I order that the same be and is hereby dismissed. Costs shall abide the final judgment.

It is so ordered.

**DATED and DELIVERED at NAIROBI** this 25<sup>th</sup> day of October 2012.

**G.K. KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of**

Mr. Gichuru for Mr. Mwangi for the Plaintiff.

Mr. Mwangi for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

No appearance for the 3<sup>rd</sup> Defendant.