



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 49 of 2011

GALLERY GOD MISSION TRUST PLAINTIFF/APPLICANT

VERSUS

TOBIKO MURUMBI

- 1. ALFRED TOBIKO YIANKASO alias ALFRED**
- 2. TOBIKO YIANKASO MURUMBI**
- 3. JOSEPH YIANKASO MURUMBI**
- 4. KEN YIANKASO MURUMBI**
- 5. JOHN KISPAN MURUMBI**

6. FLORA TOBIKO..... DEFENDANTS/RESPONDENTS

RULING

Before me is an application by way of **Notice of Motion** dated 23rd October 2012 brought under certificate of urgency. The application was filed under **Order 40 rule 1(a) (b), 2 and 3**, as well as **Order 51 Rule 2 and 9** of the **Civil Procedure Rules**, and sections **1A, 1B and 3A** of the **Civil Procedure Act (Cap 21)**. The application has 7 prayers, 2 of which have been spent as follows:-

1. (Spent).

2. (Spent).

3.A temporary injunction do issue restraining the Defendant/respondents by themselves, their servants or agents or otherwise from selling, threatening, harassing, trespassing, taking possession or disposing of all the land known as Plot No. KAJIADO/KAPUTIEI-SOUTH/1305 or dealing in any other way with the subject property pending the hearing and determination of the main suit herein.

4.That the Honourable Court do issue an order compelling the defendant/respondents to release the Plaintiff/applicant motorcycle registration No. KMCJ 108 D Engine Number 157 FM1 A0000379 which the Defendant/respondents have impounded and have subsequently taken possession of the same from the DCIO KAJIADO before the suit is heard and determined.

5.That the OCS Sultan Hamud to ensure enforcement and compliance of the orders issued by this Honourable Court.

6.That the Honourable Court be and is hereby pleased to grant such other orders it may deem just and fit to grant.

7.That costs of this application be borne by the Respondents.

The application has grounds on the face of the Notice of Motion. It was filed with an affidavit sworn by **Jane Odiya Advocate** for the applicant.

Among the grounds are that the plaintiff bought the subject land measuring 80 acres from the 2nd defendant and appointed the 1st defendant as trustee to run a children home on the premises. That the defendants had misinterpreted the order of this court made on 15/8/2012 withdrawing the applicant's appeal from a decision of the **Kajiado Resident Magistrate** ordering the closure of the Children's home and had gone ahead to harass, evict, assault and take possession of the piece of land subject of this suit.

In the supporting affidavit it was deponed that the plaintiff/applicant had done substantial developments on the subject land; that the 1st defendant had fraudulently converted the motorcycle to his own use and registered it in his own name; that on 18/10/12 the 2nd defendant purporting to act on the order emanating from the **Kajiado Magistrate's Court in P & C Case Number 50/2011** assaulted the plaintiff's watchman who was on his normal duties on which a report was made to **Sultan Hamud Police Station** vide OB No. 23/18/12; that on 23rd October 2012, the second defendant went to the DCIO **Kajiado** claiming that he had won the case before court and had the motorcycle belonging to the plaintiff released to him; that unless the orders sought herein were granted, the plaintiff/applicant would suffer gross and irreparable damage which could not be adequately compensated in monetary terms.

The application is opposed. A replying affidavit sworn on 6th November 2012 by **Alfred Tobiko Murumbi**, one of the defendants/respondents, was filed. It was deponed, *inter alia*, that the deponent and **Joseph Yiankaso Murumbi, Flora Tobiko** and **Kari Lerbo** were the registered trustees of the plaintiff; that the motor cycle in question belonged to and was registered in the name of the deponent; that the children who were in occupation of the premises prior to issuance of orders in **Kajiado P & C Case No. 50/2011** were no longer in **Situ**; that it was not be deponent but the 2nd defendant/respondent who went for the motorcycle; that the application before court was incompetent and based on an incompetent affidavit.

The defendants through their counsel **Moses N. Siagi & Company** also filed grounds of opposition on 6/11/12. There is only one ground which states as follows:-

“The application is incompetent and/or bad in law and/or otherwise an abuse of this court's due process.”

At the hearing of the application, **Mrs Odiya** for the plaintiff/applicant addressed the court. Counsel submitted that the applicant was the proprietor of the subject land which they bought from the 2nd defendant. It was 80 acres. Counsel argued that on 15/10/12 the plaintiff withdrew an appeal in the High Court challenging the closure of the charitable institution on the land. Immediately thereafter, the defendants went on to the land and damaged assets. The plaintiffs as owners therefore wanted to get preservative orders to preserve the properties and fixtures until determination of the main suit.

Mr Obare for the defendants submitted that the 1st and 5th defendants reside in one of the houses. The houses were built by the plaintiffs and the 1st, 2nd and 5th defendant are the trustees of the plaintiff. The 1st defendant is the manager. Counsel submitted that the plaintiff had not exhibited any document evidencing title or a transaction for the title to the land in question. It was also submitted that the plaintiff had not exhibited any document of title for the motorcycle. It was also counsel's view that the affidavit sworn by **Mrs odiya** was defective as it violated **Order 19 rule 3 (i)** of the **Civil Procedure Rules** since the deponent swore to facts which she could not prove.

In response to the submissions above, **Mrs Odiya** submitted that documents of title and receipt for the motorcycle were in the documents filed in the main suit.

Is the affidavit of the sworn by **Mrs Odiya** defective? The defendants say so. They have however not given the particulars of the defects. They claim that the deponent swore to facts which she cannot

prove. That allegation, in my view, does not make the affidavit fatally defective. The defendants have not called upon the cross-examination of the deponent. In addition, even assuming there is a defect as alleged, same is a matter of forms and is curable under **Order 19 rule 7** which provides:-

“7. The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”

This is an application for interlocutory injunction. The parameters to be considered by the court in such an application are well settled – *See Giella –vs Cassman Brown Ltd (1973) EA 358*. An applicant has to show a *prima facie* case with probability of success. Secondly, an injunction will not normally be issued unless the applicant will otherwise suffer irreparable loss that is not capable of adequately being compensated in damages. Thirdly, if the court is in doubt, it will decide the matter on the balance of convenience.

Has the plaintiff shown a *prima facie* case? The burden is always on an applicant to do so. The plaintiff is a registered trust. It has come to court through its own name. It was registered under **The Trustees (Perpetual Succession Act) Cap 164**. It can therefore sue in its name. However in my view, the suit cannot be initiated by a stranger. Therefore, the person to swear the verifying affidavit has to be a trustee or a person who is appointed or employed by the trust. In our situation, the verifying affidavit was sworn on 21/12/2010 by one **Trond Lepsoee** describing himself as manager and special appointee of **Gallery of God Mission Trust**. The subject land is registered in the name of the Trust. I find that the deponent of the verifying affidavit is a proper officer, and that the plaintiff has a *prima facie* case with probability of success.

Will the plaintiff suffer irreparable loss if the orders sought are not granted? The determination of this issue turns on the facts. Some of the defendants are the trustees of the plaintiff. They are the face and policy makers of the plaintiff. How does a manager seek to make the trustees trespassers? How does a manager, acting in the name of the **Trust** evict the trustees from houses which they already occupy at an interlocutory stage? As was stated in **Shepherd Houses –vs- Sadham (1970) 3 Ch D 402**.

“....if a mandatory injunction is granted on motion, there will normally be no question of granting a future mandatory injunction at the trial what is done is done and the plaintiff has, on motion, obtained once and for all the demolition or destruction he seeks.”

In my view, the plaintiff can only suffer irreparable loss from acts that will disentitle them from the property or that will permanently damage the property. Therefore, I will grant only those orders that will seek to preserve the property or interest. I will not grant mandatory injunctive orders. I will also not grant orders for enforcement by the police, as I find no legal basis for the same.

I do not find it necessary to delve into the balance of convenience as I have found that the plaintiff has a *prima facie* case with probability of success, and that they will suffer irreparable loss if some injunctive orders are not granted.

Consequently, I allow the application and order as follows:-

1. A temporary injunction is hereby issued restraining the defendants either by themselves, their agents, servants and or any one claiming under them from alienating, wasting, harassing, threatening or in any other manner interfering with the plaintiff’s operation and running of the children’s home (if it is currently operational) on property plot No. Kajiado/Kaputiei South/1305 situated in Samuli Area Kajiado Central pending the hearing and determination of the suit.

2. The costs of this application are in the cause.

I decline to grant any mandatory injunction, including the release of the motorcycle, as I find no legal justification for issuing such orders.

Dated and delivered at Machakos this **30th** day of **November** 2012.

.....
George Dulu
Judge

In the presence of:

Mr Meme for Plaintiffs/Applicants

Nyalo – Court clerk