



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 325 of 2011

MARGARET MUTHONI KANYUKU.....PLAINTIFF/APPLICANT

VERSUS

GLORY MINISTRY CHURCH1ST DEFENDANT

BISHOP BONIFACE MAKANDA

(sued on behalf of GLORY MINISTRY CHURCH).....2ND DEFENDANT

LEWIS MUREITHI.....3RD DEFENDANT

RULING

1. The plaintiff/applicant hereinafter referred to as the applicant has filed a notice of motion dated 5/7/2011 under sections 3A and 95 of the Civil Procedure Act, Cap. 21 of the laws of Kenya, Order 40 Rule 1& 4 Order 51 Rule 1&3 of the Civil Procedure Rules and all other enabling provisions of the law.

i. That this honourable court be pleased to issue a temporary injunction Order restraining the defendants whether acting by themselves or through their agents, servants or workmen from doing any of the following acts, that is to say trespassing, wasting, damaging, alienation, removal, disposition, disposing off, selling, parting with possession or interference or in any other manner whatsoever dealing or effecting transactions inconsistent with the plaintiff's rights or to her prejudice in all that parcel of Land known as Plot LR 209/14311/11 situate at Kariobangi South Outering Road pending the hearing and determination of this suit.

ii. That this honourable Court be pleased to issue a temporary injunction Order restraining the defendants/respondents whether acting by themselves or through their agents, servants or workmen from doing any of the following acts, that is to say trespassing, wasting, damaging, alienation, removal, disposition, disposing off, selling, parting with possession or interference or in any other manner whatsoever dealing or effecting transactions inconsistent with the plaintiff's rights or to her prejudice in all that parcel of land known as plot LR 209/14311/11 situate at Kariobangi south outering road pending the inter parties hearing of the application.

iii. That costs of this application be borne by the defendants in any event.

The application is based on the following grounds

a. That applicant is the registered owner of all those premises known as plot LR 209/14311/11 situate at

Kariobangi south outerring road(hereinafter referred to as the suit premises) in absolute title.

- b. That the defendants/respondents are in the process of laying a foundation for construction of illegal structures and or buildings on the applicant property without any colour of justification.
- c. That further to the above the defnants/respondents have caused the digging, hallowing out, ploughing ground-breaking works and or excavation on the suit premises without authority of the plaintiff whom they are well aware that he has acquired interest and rights over the suit property which rights have not been severed and therefore indefeasible.
- d. That despite attempts to reach the defendants with a view of sorting out the differences, the plaintiff has been unsuccessful and only the court now can come to his aid.
- e. That unless injunctive orders are issued forthwith, the plaintiff will suffer irreparable loss and damage should the defendants continue with the intended alienation and interference with the suit property.

2. The plaintiff/applicant filed a supporting affidavit dated 5th July 2011. In her affidavit she avers that she is the legal and beneficial owner of Plot 209/14311/11. To support this she has annexed an allotment letter dated 6/5/2001 issued to her by Nairobi City Council for commercial plot No. 290/1431/11, a bankers cheque dated 31/5/2005 showing she paid City Council of Nairobi 99, 975/-, a receipt from City Council of Nairobi dated 29th of June 2005 acknowledging the said sum, a beacon certificate issued to her by Nairobi City Council dated 10/4/2008, payments of ground rent, payment of survey fee and payment for occupation certificates and building plans. She avers that in July 2011 certain strangers embarked on the said land without authority started to interfere with the subject land to her detriment. That her ownership rights over the subject property remain indefeasible to the extent that other third parties cannot interfere with her title. She therefore seeks the Court protection to conserve and protect her right over the subject land property from being alienated by the respondents. That she will suffer serious prejudice and great loss for reason that the plot in question is a commercial one and she has heavily invested in the same, she has obtained the necessary consent to develop it and she has greater attachment to the property financially and sentimentally.

3. The respondents opposed the application. They filed grounds of opposition dated 25/7/2011 and state as follows; that the plaintiff's suit and application is frivolous and vexatious and an abuse of the process of the court, the plaintiffs have not satisfied the grounds for grant of an order of temporary injunction, the defendants are strangers to the allegations on the proceedings and the plaintiff's suit is defective and ought to be struck out in *Limine*.

4. The Respondents also filed two replying affidavits sworn by Asenath Wachera Maina dated 26 /7/2011 and the affidavit of Pastor Bonface Makanda dated 8/12/2011. Asenath Wachera Maina avers as follows:- That she is the legal/beneficial owner of plot Number land reference number 209/14311/11 and was allocated the same on 6th May 2001 by the City council of Nairobi. That upon acceptance of the allotment she duly paid the standard premium, other charges, all the ground rent and other charges demanded by the City Council. That she has owned and occupied the said property since it was allocated to her without any interference and she has embarked on following up on the preparation of a lease in her favour for registration. That the 2nd and 3rd defendants approached her in the year 2010 and were desirous of purchasing the said property to put up a church. That they entered into negotiations upon which they agreed on the terms of sale of the property. That upon seeing the plaintiffs letter of allotment herein bearing the same reference and date as hers, he has lodged a formal complaint with C.ID Buru Buru police division vide O.B No. 45 of 20th July, 2011 for investigation.

5. Pastor Bonface Makanda avers as follows: That he is the 2nd defendant herein and a pastor of Glory Ministries in Kenya, the alleged 1st defendant, and having authority of the 2nd defendant to swear the affidavit. .That there is no such body as Glory Ministry Church as sued as 1st defendant herein. He is aware that the 1st defendant is registered as a society as Glory Ministries in Kenya, a Christina church. That the suit against defendants is fatally defective and contrary to procedure of suing societies. That he is

aware that their church purchased the suit land from Asenath Wachera Maina who produced ownership documents from the city council of Nairobi. That he know that as soon as they paid the agreed deposit, they were permitted to take possession and develop the suit land by the seller. That they duly fenced the same and commenced construction of a church for holding of services. That all along the plaintiff never appeared on the scene. That he knows that the plaintiff never served them with any papers in this case but proceeded to pull down their fence and chase their workers from suit land. Their materials were carried away to an unknown destination. That the plaintiff armed with the court order restraining their dealing and developing the suit land then started erecting structures thereon. That he is aware that the city council of Nairobi then moved on site and demolished the developments erected by the plaintiff and the suit land is now bare. Neither the plaintiff nor themselves are in possession. That he is informed by the said Asenath Wachera Maina that the ownership papers shown by the plaintiff are fake and forgeries.

6. Counsels filed written submissions which I have carefully read and considered. They both relied on the case of Geilla vs. Cassman Brown & Co. Ltd (1973) EA 358. In addition the defendant cited cases of Shitakha vs. Mwamodo & 4 others (1986) KLR 445, Ragui vs. Barclays Bank of Kenya Limited (2002) 1 KLR 647 and Mobile Kitale Service stations vs. Mobil Oil Kenya Limited & Another (2004) 1 KLR.

7. Mr. Gachie argued in their submission that the plaintiff has establish a prima facie case with probability of success as she has shown she was allocated the plot by City Council of Nairobi, she paid for it and she was allocated a deacon certificate showing that she meant all the conditions of license and that she has been in actual possession and that the respondents are the ones who have trespassed on the land and commenced construction. He argued that the affidavit sworn by Asenath Wachera Maina has no probative value to the proceedings as the deponent is not a party to the proceedings neither as she applied to be enjoined, that she has sworn matters not within her knowledge and that the affidavits offends the law of affidavits as contained in order 19 of the Civil Procedure Rules as a form of tendering evidence. On the 2nd defendants affidavit he submits that it has failed to answer the plaintiff's application, it does not exhibit any material that can give any right of claim.

8. The Mr. Lutta argued as follows in the respondent's submissions, the applicant has failed to established a prima facie case. that the suit is bad in law, an abuse of the Court process frivolous and improperly brought before the court and ought to be struck off in *limine* for reasons that; the 1st defendant is sued as "GLORY MINISTRY CHURCH" instead of "GLORY MINISTRIES KENYA" which is a Registered society and ought to be sued through its registered officials, hence the 2nd and 3rd defendant are strangers to the 1st defendant, by reason of the mis- joinder of the party (s) there is absolutely no suit that lies before this Court and for that reason only the application dated 5th July 2011 must fail and the entire suit sought to be struck out in *limine* and lastly further the 2nd defendant is not a registered official and cannot therefore be sue on behalf of "GLORY MINISTRY CHURCH". Counsel relied on the case of *Jane Nyambura Vs. Apostolic Faith Church Nairobi HCCC No. 2824 of 1997 (OS)* in which the suit was struck out on the ground that a registered society can only sue or be sued in the names of the registered office holders/officials/trustees. He also relied on Halsbury's Laws of England, 3rd Edition, Volume 18 paragraph 239 in which the law is stated as follows " *The trustees of a registered society or branch or officers authorized by its rules may bring or defend actions of legal proceedings with respect to any property, right, or claim of the society or branch and may sue and be sued in their proper names without other description than the title of their office*"

He cited the case of *Maurice Ooko V. Mater Hospital Civil Case No. 607 of 1993* where Lady Justice Angawa J held that "..... *the law requires that a suit be brought against a legal entity. This is an individual, a limited company, the Attorney Genral on behalf of government department, certain parastatal and or cooperation's.*"

9. Counsels argued that the 1st defendant is not a legal entity and its existence is questioned and cannot be sued by the plaintiff and even if it existed as a registered society the applicant out to have sued through the registered trustees. That the defects makes the suit bad in law and is fatally incurable in law and the suit ought to be struck out in *limine*. On the applicant establishing a prima facie case with probability of success counsel argued that the applicant has not done so, she has never been in possession, that it only

the lease of Asenath Maina and City Council of Nairobi that is still effective to date and that she has failed to demonstrate that she is the legal owner of the suit property as required under the common doctrine that he who alleges must prove. On the 2nd principle of irreparable damages counsel argued that she has failed to prove the same and she can be compensated by City Council of Nairobi for double allocation and that she has not suffered any loss as she has not been in possession. On balance of convenience he argued that it tilts in favour of the respondents who bought the premises from the bona fide owner, the applicant has not been in possession nor has she lodged any caveat/ caution /prohibition to the relevant registry prohibiting any dealings in the land and that the defendants are the sub lessees having purchased the plot from Asenath Wachera Maina who was the holder of a registered lease entered into by the City Council of Nairobi and herself.

10. I have considered the affidavits filed together with the annexures, submissions made, oral and written, cases cited and I find as follows; the parties in this suit have each annexed a letter of allotment addressed to each of them by City Council of Nairobi dated 6th of May 2001 referring to the subject property and various payments made thereafter by them. The parties have also annexed receipts of various payments to City Council of Nairobi for subject property. It is obvious that this is a case of double allocation by City Council of Nairobi who has not been enjoined in this matter by any of the parties in this suit. City Council of Nairobi is the only one who can state whom amongst the two is the rightful allottee/owner of the subject plot. I find that there is nothing wrong in having the affidavit of Asenath Wachera on record as it explains how the subject property was allocated to her which she later sold to Glory Ministries Church. The case of *Geilla vs. Cassman Brown E.A 1973* clearly establishes the principles of granting an injunction. In this case I have found that there is double allocation by City Council of Nairobi of the suit property. The church was on the ground and had started construction, the plaintiff has not been in occupation and right now there appears to be no party on the ground. This is a matter that needs to go to full hearing so that the property allottee can be declared the owner of the subject property. However, the defendants Counsel has also raised an issue of the suit being bad in law. I note that the plaintiffs did not respond to the said submissions. I agree with Mr. Lutta submissions that the suit against the defendant as sued cannot stand. Pastor Bonface Makanda in his replying affidavit has attached the certificate of registration which states that the church sued is known as *Glory Ministries in Kenya*. As correctly submitted a registered society can only be sued in the names of the registered officer holders/official/trustees. In the plaint filed at paragraph 3 the plaintiff avers that the 2nd and 3rd defendant are mandated to carry out the functions of the 1st defendant including advocacy, ministering and/or acting as trustees of the affairs of the 1st defendant. The applicant despite being notified of the same failed to amend her pleadings. The plaintiff has not stated what position Bishop Makanda holds or Lewis Mureithi the 2nd defendant. I agree with the defence Counsel that the suit is bad in law and should be struck out. I therefore find that the suit against the defendants is bad in law and I strike out the application and suit with costs to the defendants/respondents.

Orders accordingly.

Dated, signed and delivered this Day 12th of November 2012.

R. OUGO

JUDGE

.....Plaintiff/Applicant

.....1st Defendant

.....2nd Defendant

.....3rd Defendant

.....Court Clerk