



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO.272 OF 2010

SAMUEL MUSAU & 33 OTHERSPLAINTIFF

VERSUS

HENRY MAGWALI & 5 OTHERS.....DEFENDANT

RULING

The plaintiffs brought this suit against the defendants in respect of a parcel of land known as LR NO. 209/1951 said to be owned by the Salvation Army church in Nairobi. The plaintiffs have described themselves as Christians and worshippers at the same church and the defendants are also said to be worshippers in the said church with the 1st defendant being *in* charged with a title “The Local Officer” it is the plaintiffs case that the defendants have started a project which was not known to the church and which is against the rules and regulations of the said church. The said project is said to be illegal and meant to benefit the defendants as individuals and which jeopardize the plaintiff’s rights and freedom of worship and clean environment. It is their case that when they approached the defendant’s it was agreed that the project was illegal and against the church principles and that construction would stop until due consultation was done, but the defendants have gone against this agreement and are continuing with the construction. The said construction is said to have interfered with the plaintiffs and other worshippers’ right of way, clean environment and worship. They have set out particulars of fraud and at the end, they have sought orders of a permanent injunction to restrain the defendant either by themselves or through their agents, servants, employees, proxies or anyone acting on their behalf from constructing, obstructing, putting up structures altering or in any other way interfering with the said piece of land known as LR NO. 209/1951 or any part thereof without consulting or involving the plaintiffs.

There is also a declaration sought that the said construction amounts to infringement of the plaintiffs constitutional right to freedom of worship and clean and safe environment. Alongside the said plaint the plaintiffs filed chambers summons under order 39 Rules 1, 2 and 3 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act, seeking interim orders pending hearing of the main suit. The grounds raised on the face of the application are that the defendants are perpetuating an illegality by continuing with the construction and that they are flaunting the rules of the church involved. The plaintiffs also state that their rights are being infringed by the defendant and that they stand to suffer irreparable damage. The said application is supported by an affidavit sworn by John Lusimba who is said to have the authority of the rest of the plaintiffs to do so.

The said application is opposed and in reply thereto, there are affidavits sworn by the 1st defendant Mr. Andrew Makau and the 9th defendant Stephen Howard. The thrust of the reply by the defendant is that the development which is being carried out by the defendants on behalf of the church was authorized and approved by the City Council of Nairobi and that the National Environmental Management authority

granted a license for the said development. It is also the defence case that the plaintiffs have no *locus standi* to bring this suit and in any case, some plaintiffs have denied that they gave Mr. Lusimba the authority to sue on their behalf.

It is also their case that the plaintiffs have no proprietary interest in the property and therefore have no right to sue in that respect. The learned counsel on record agreed to address the injunction application by way of written submissions which have been filled.

I have also gone through the record, together with all the annexure and sited authorities. For the plaintiffs to succeed in obtaining the orders sought, they must first establish they have prima facie case with probability of success. Secondly they must show that if the order is not granted, they are likely to suffer irreparably loss which may not be adequately compensated by an award of damages. And thirdly if the court is in doubt it will decide the matter on a balance of convenience-: ***See Giella vs Cassman Brown and Co. Limited (1973) E.A 358*** the documents on record show that the construction being carried out on the said parcel of land is either in respect of proposed offices or stalls. I get the description of public building – proposed offices from a letter dated 18th May, 2010 addressed to Salvation Army, Nairobi Central by the Director of City Planning on behalf of the Town Clerk. On the other hand, the description of proposed stalls appears in the letter addressed to Salvation Army Church, Nairobi Central Corps dated 20th September, 2010 by the provincial director of environment Nairobi Province.

Other than the various correspondence annexed to the affidavit on record, no approved plans have been annexed to show that the project being undertaken by the defendants has received a seal of approval by the City Council of Nairobi. Two fronts have been presented by the plaintiffs here. The first is the illegality of the project for non compliance with the Local Authority regulations and the 2nd is that of the environmental impact.

The title document in the name of the general of the Salvation Army dated 26th September, 1930 annexed to the Affidavit of Mr. Stephen Howard is instructive. The title contains special conditions the relevant of which are that the title holder shall use and permit the said land together with the buildings erected thereon to be used for religious philanthropic and educational purposes in connection with the work usually performed by the Salvation Army. There is a racial condition in that grant which says that nothing contained in or implied by this condition shall be read or construed so as to restrict the European in Church using one sixth of an acre of the erection of a building for the purpose of an office and also a place of residence or to restrict residence by an African caretaker.

The other condition which is instructive is that the title holder shall not assign sub-let or otherwise part with the possession of the land or any part thereof without the previous written consent of the Governor. The title holder shall also comply with all the bylaws and other requirements applicable to the Nairobi City Council.

I have already observed that the documents on record show that the proposed or the construction in progress relates to offices and stalls. This would appear to be contrary to the special conditions set out in the grant. There is no authority or consent that has been exhibited which may have been given by the commissioner of lands. With that as it may, there is the allegation by the plaintiff that the national environment management authority has not issued any consent to the project. Prima facie that is true. The letter I refer to above was setting out the conditions to be complied with and cannot be construed to be a licence. The environmental management and co-ordination Act 1999 States at Section 3 (3) as follows-

“ if a person alleges that the entitlement under Subsection (1) (to a clean and healthy environment) has been, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawful available, that person may apply to the High court for redress and the High Court make orders, issues such writs or give direction as it may deem appropriate, (a) “to prevent, stop or discontinue any act or omission deleterious to the environment”.

Going by the said provision in would appear on the pleading so far, the plaintiff has disclosed a prima facie case with probability of success. Before I conclude this ruling, I make the following observation. Disputes involving Churches and mo so worshippers are becoming more and more in number. There is an obvious breakdown in communication and dialogue, divisions are obvious between the worshippers and church leaders. It is important that the institution of the Church should go back to the drawing board in order to ensure that tranquility is restored such that disputes of the nature such as the one before this court do not go out of the province of the institution known as the church. I say so because from the material before me, there is evidence of a struggle between the church on the one hand and some other group which is opposed to play the role of the shepherds. Having said so, I believe that the best order that commends itself in these proceedings is that the construction has to be stopped until the final determination of this suit. Each party shall bear their own cost.

Orders accordingly.

Dated, signed and delivered at Nairobi this 26th day of January , 2011.

A. MBOGHOLI MSAGHA
JUDGE