



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 337 OF 2008**

**GILBERT MAJENGO.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**ROBINSHO NYARANGI.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**VERSUS**

**REGISTERED TRUSTEES,  
BAPTIST BIBLE MISSION  
OF EAST AFRICA.....PLAINTIFFS/RESPONDENTS**

**RULING**

This ruling relates to two applications, the first one dated 17<sup>th</sup> December, 2008 brought by the 1<sup>st</sup> defendant Gilbert Majengo for injunctive orders to restrain the plaintiffs, the Trustees, Baptist Bible Mission of East Africa, from removing the defendants or the Bible Baptist Church Nakuru, selling, entering or interfering with the Bible Baptist Church's occupation, possession and enjoyment of a property known as NAKURU MUNICIPALITY BLOCK 20/52 (the suit property) pending the determination of this suit.

In the second application, the plaintiffs seek that the defendant's statement of defence and counterclaim be struck out with costs and thereafter judgment be entered for the plaintiff as prayed in the plaint.

I will state briefly the grounds upon which each application is premised starting with the first application. The defendants seek restraining orders against the plaintiffs on the grounds that:

- i) the suit property was allocated to the Bible Baptist Church, Nakuru by the Commissioner of Lands in 1989
- ii) since the said allocation in 1989, the Bible Baptist Church has been in occupation of the suit property putting up a church with members' contributions (tithes and offering)
- iii) Rev. Olaf Konnerup served as the pastor of the church until 1997 when he resigned
- iv) subsequently Rev. Olaf Konnerup has been interfering with the running of the church and has threatened to evict the defendants and church members
- v) Rev. Olaf Konnerup and the plaintiffs fraudulently caused the suit property to be registered in favour of the plaintiffs

vi) registration, in the circumstances, was in trust for the Bible Baptist Church

vii) the present suit is statute barred as the defendants have been in an uninterrupted occupation of the suit property.

In support of the plaintiffs' application for striking out the defence and counter claim the plaintiff relies on the following grounds:

- i) that the defence and counter claim do not disclose reasonable defence or reasonable cause of action
- ii) that the Bible Baptist Church is neither a party to these proceedings nor a legal entity.
- iii) that the defence and counter claim are scandalous, frivolous and vexatious
- iv) that the defence and counter claim may prejudice, embarrass and delay the fair trial of the action.

I have considered these grounds in support of the two applications, submissions by counsel for both sides and the two authorities cited by learned counsel for the defendants, **D.T. Dobie Co.(K) Ltd. v Joseph Mbaria Muchina & Another, Civil Appeal No. 37 of 1978** and **Hosea v Njiru & others (1974) E.A. 526.**

I will consider the first application – for injunction first.

An interlocutory injunction will issue if the court is satisfied that the Applicant has a *prima facie* case with a probability of success at the trial. The court will, however, not grant an interlocutory injunction unless the applicant stands to suffer loss that is not capable of being compensated by an award of damages. But should the court be in doubt it must decide the matter on a balance of convenience. See **Giella Vs. Cassman Brown & Company Limited, (1973) EA 358**

In considering the first question, whether there is a *prima facie* case, it is not the duty of this court at this stage to indulge on the merit of the application. That consideration is only in the province of the court that will hear the suit.

At this stage the court is only concerned with any apparent violation of the applicant's rights by the respondent, which would require rebuttal from the latter. See **Mrao Limited Vs. First American Bank (K) Limited (2003) KLR 125.**

Has the applicant/1<sup>st</sup> defendant demonstrated a *prima facie* case?

I have set out at the beginning of this ruling the grounds upon which the applicant is relying. For instance the applicant has averred that the suit property was allocated to the Bible Baptist Church, Nakuru. There is no evidence at all, in form of any letter or any other form from the Commissioner of Land to support this claim. It is further claimed that the church has put up a church building using members' contributions, tithes and offerings without any evidence to back it up.

Although the defendants have been sued in their personal capacities, they have dragged in their defence, counter-claim and the instant application the Bible Baptist Church and appear to be basing their claim on that church, yet it is confirmed that the said church does not exist as a society or in any form recognized by law. On the other hand the plaintiffs have shown that it is the registered proprietor of the suit property. No fraud or existence of trust for the benefit of the defendants have been demonstrated.

Similarly there is nothing to show that the defendants have been in adverse possession. It is common ground that the plaintiffs were registered owners of the suit property in October 1996. The defendants claim that they have been in occupation of the suit property since 1989.

First there is no evidence that that is the period they occupied the suit property. Secondly, from Rev. Olaf

Konnerup's letter dated June 1997 and a suit filed in the same year, being Nakuru CMCC No. 2351 of 1997, it cannot be true that the defendants have had a quiet and uninterrupted occupation of the suit property. They have been in occupation as licencees. Thirdly the defendants have not demonstrated that the rest of the church members are with them in this matter. Indeed the instant application and the counter claim have been instituted only by the 1<sup>st</sup> defendant without the 2<sup>nd</sup> defendant's authority. He has not shown any personal interest in the suit property.

For all these reasons I find that there is no *prima facie* case. I also find that without any evidence of ownership of the suit property the defendants will not suffer any loss that cannot be compensated by an award of damages. Being the lawful holders of a certificate of lease of the suit property, the balance of convenience is in favour of the plaintiffs.

I turn to the second application for striking out. A plaint or defence can be struck out or amended under **Order 6 rule 13** of the **Civil Procedure Rules**, at any stage on any of the grounds set out under **sub rule (1)(a)(b)(c) and (d)**. The plaintiff in this application is relying on the grounds that –

- i) the defence and counter claim do not disclose any reasonable defence or cause of action, or
- ii) the defence and counter claim are scandalous, frivolous or vexatious, or
- iii) the defendants' pleadings may prejudice, embarrass or delay the fair trial of the action.

Submitting, learned counsel for the plaintiff concentrated mainly on the first ground, that the defence and counter claim do not disclose any reasonable defence or cause of action.

This limb of **Order 6 rule 13(1)** aforesaid has been the subject of interpretation in a long line of judicial decisions.

The case of **D. T. Dobie Co. (K) Ltd** (supra) to which I was referred to has reviewed most of those authorities. The jurisprudence emerging from that review can be summarized thus –

- i) the court has an unfettered jurisdiction to either amend or strike out at any stage of the proceedings any pleadings on the grounds enumerated under **sub rule (1)(a)(b)(c) and (d)**.
- ii) the power to strike out is a very strong power indeed and must be exercised only in very clear cases
- iii) if the application is based on the ground that the pleadings do not disclose any reasonable cause of action or defence the court must not –
  - a) embark on examining the merit of, for instance the defence or counterclaim but it is relevant to consider all averments in the pleadings.
  - b) strike out a pleading before considering if it can be salvaged by an amendment.
- iv) strike out any pleadings summarily unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action or defence and is so weak as to be beyond redemption by amendment.

The defendants have categorically denied in their defence that the plaintiffs are the registered owners of the suit property and argued that if they are so registered then such registration was obtained through unlawful means; that the plaintiffs having been so registered are therefore trustees of the defendants.

The counter claim seeks the cancellation of the plaintiffs' title to the suit land or alternatively a declaration that the plaintiffs hold the suit property in trust for the Bible Baptist Church to which the defendants are a pastor and caretaker respectively and a further declaration that the occupation by the Bible Baptist Church of the suit property is an overriding interest to the title held by the plaintiffs.

In both the statement of defence and the counter claim the main issue is the defendant's capacity. Although they claim to be a pastor and caretaker of the Bible Baptist Church and that the suit property belongs to it, that church is not registered and not a single document has been exhibited in any of the affidavits to suggest that the suit property was allocated to the church. There is no nexus between the plaintiffs and the church in so far as the suit property is concerned.

In view of these matters, I come to the conclusion that the defendants do not represent the general membership of the church in this matter; that they were only permitted to use the church building on the suit property as licencees. Their licence has been revoked and their continued use of the church building amounts trespass. The defence and counterclaim disclose no reasonable defence and no reasonable cause of action. No amount of amendment can breath life in any of the two pleadings and a full trial of the issues herein will be a futile exercise.

For these reasons, both the defence and counterclaim are struck out and judgment, in terms of the plaint, is entered in favour of the plaintiffs. Costs of the suit and the applications are awarded to the plaintiffs.

**Dated, Delivered and Signed at Nakuru this 16<sup>th</sup> day of February, 2011.**

**W. OUKO  
JUDGE**