



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 76 of 2009

SEVENTH-DAY ADVENTIST CHURCH

EAST AFIRCA COMPANY LIMITED.....PLAINTIFF

VERSUS

ELIZABETH ONGORO MASHA.....DEFENDANT

R U L I N G

1. The suit herein was commenced by way of a plaint dated 2/03/2009 and filed in court on 3/03/2009. The dispute relates to a parcel of land known as LR No. 7899/4 lying along the Outering Road Off Thika Road in Utalii – Ruaraka Area. The Plaintiff alleges that it has built a church and a school on the said land for use by the residents living within Mathare North Area, its environs and beyond for inter alia sacred worship services, prayer, devotional meetings, pastoral counseling, preparatory and primary education. The Plaintiffs further allege that on or about 3rd and 4/11/2008 and again on or about 19/02/2009 the Defendant hired unruly and drunken local youths numbering more than 40 plus a private bulldozer who rudely destroyed all beacons and a stone wall which ringed the church compound and that at the command of the Defendant, the police who were on site randomly arrested any worshipper found at the church. The land in question, measuring approximately 96 acres was allegedly allocated to the Defendant who is an elected Member of the National Assembly of Kenya representing the Kasarani Constituency in Nairobi. As a result of the acts complained of, the Plaintiff prays for judgment against the Defendant for –

(a) An injunction restraining the Defendant by herself, servant and/or agent from demolishing, destroying or otherwise damaging any structure or building belonging to the Plaintiff erected on all that piece of land known as LR No. 7899/4 lying along Outering Road, off Thika Road in Utalii Ruaraka Area within the City of Nairobi.

(b) General damages for trespass to goods and malicious damage to property.

(c) Special damages in the sum of Kshs.1,438,825.00

(d) Punitive damages

(e) Cost of suit

(f) Interest on (b),(c), (d) and (e) hereinabove.

2. Filed contemporaneously with the plaint was a Chamber Summons application dated 2/03/2009. The application which was brought under Sections 3A, 63(c) and (e) of the Civil Procedure Act, Order XXXIX Rules 2 and 9 of the Civil Procedure Rules and all other enabling provisions of the law seeks the following orders:-

1. *THAT this application be and is hereby certified urgent.*

2. *THAT pending the hearing of this application the Defendant be and is hereby restrained by herself and/or servant any other agent (sic) from demolishing, destroying or in any other way damaging buildings or structures erected or building materials deposited by the Plaintiff on all that parcel of land known as LR No. 7899/4 situate in Mathare North Estate in Utalii – Ruaraka area along Outering Road, off Thika Road.*

3. *THAT pending the hearing and determination of this suit the Defendant be and is hereby restrained by herself and/or servant any other agent (sic) from demolishing, destroying or in any other way damaging buildings or structures erected or building materials deposited by the Plaintiff on all that parcel of land known as LR No. 7899/4 situate in Mathare North Estate in Utalii – Ruaraka area along Outering Road, off Thika Road.*

4. *THAT orders made by court in this summons be served upon the Officer Commanding Station at Muthaiga Police Station who is hereby directed to ensure that they are strictly obeyed.*

5. *THAT cost of this application is provided for.*

3. On the 4/03/2009, the Plaintiffs obtained a status quo order of the situation obtaining on the ground as at the time of filing suit pending the hearing of the application interpartes. On the 22/04/2009, the Plaintiff obtained a temporary prohibitory order of injunction in terms of prayer (1) of the application. The order was to be served upon the Officer Commanding Station at Muthaiga Police Station who was directed to ensure that the orders were strictly obeyed.

4. Thereafter counsel for the Defendant filed Notice of Appointment of Advocates on 12/03/2009. The Defendant's written Statement of Defence which is on the file is dated 16/04/2009 though it does not bear the court date stamp. The duplicate copy receipt shows the defence was paid for on 17/04/2009 and is drawn and paid for by M/s Rachier & Amollo Advocates.

5. By the said defence, the Defendant denies the Plaintiff's allegations of malicious damage and says that she is a bona fide purchaser of the suit land which was alienated to her by the Nairobi City Council and that the Plaintiffs are trespassers with no proprietary interests in the suit property. The Defendant wants the Plaintiff's suit dismissed with costs.

6. On the 30/04/2009, the Defendants advocates filed a Chamber Summons application pursuant to Order VI Rules 13(1) (a) (b) (d) and 16 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law seeking orders striking out the Plaintiff's suit for reasons

that the plaint discloses no reasonable cause of action as against the Defendant, is scandalous, frivolous or vexatious, that it is otherwise an abuse of the process of court and finally on grounds that the plaint together with the affidavit sworn in verification of the plaint are fatally defective. There are six grounds in support of the application which is also supported by the sworn affidavit of JOTHAM OKOME ARWA, an advocate of this honourable court.

7. To this application, the Plaintiff filed a Notice of Preliminary Objection dated 29/09/2009 on the ground that the application by the Defendant is grossly misconceived in law, fatally defective and ought to be struck out. The Preliminary Objection was duly served upon M/s Rachier & Amollo Advocates in time for the hearing slated for 7/10/2009 though it was date stamped by M/s Rachier & Amollo on 23/09/2009 (either deliberately or through inadvertence). The Defendant's Chamber Summons application was stated for hearing on 7/10/2009. That date was taken by Defendant's Counsel and served upon counsel for the Plaintiffs. On 7/10/2009 when the Defendant's application came up for hearing, the Defendant's counsel was absent. Being satisfied that it was the duty of the Defendant's counsel to be present in court to prosecute their application dated 16/04/2009 the court allowed Mr. Kajwang', counsel for the Plaintiff to argue the Plaintiff's Preliminary Objection dated 29/09/2009. This ruling concerns that Preliminary Objection.

8. Counsel for the Plaintiff submitted that for the reason that the Defendant's application is supported by affidavit evidence, then the application becomes defective and contravenes rule 13(2) of Order VI of the Civil Procedure Rules. Counsel submitted further that applications brought under Order VI Rule 13(1) (a) of the Civil Procedure Rules require the court to consider a pure question of law based on the pleadings as they are and that no other evidence is required. Counsel also submitted that it is only under paragraphs (b) (c) and (d) of Rule 13(1) of order VI of the Civil procedure Rules that the court is required to consider the evidence in support of the application. Counsel also submitted that bringing the instant application under incompatible provisions of Order VI Rule 13(1) of the Civil Procedure Rules makes the application so fatally defective that the only option open to the court is to strike out the said application.

9. Sub-rule (2) of Rule 13 of Order VI of the Civil Procedure Rules provides –

“(2) No evidence shall be admissible on an application under sub-rule 1(a) but the application shall state concisely the grounds on which it is made.”

This sub-rule (2) is couched in such mandatory terms that no evidence on an application under Rule 13(1) (a) is admissible. In the instant case, the Defendant purported to support that **“mixed-grill”** application by affidavit evidence. This affidavit evidence is admissible because the application is also brought under Order VI Rule 13(1)(a). The Defendant's application is also defective for mixing prayers under Rule 13(1) (a) (b), (c) and (d) of the Civil Procedure Rules.

10. In the circumstances, I agree with counsel for the Plaintiffs that the Defendant's application dated 16/04/2009 is fatally defective and ought to be struck out. The same is hereby struck out with costs to the Plaintiffs.

Orders accordingly.

Delivered and Dated at Nairobi this 26th day of January, 2010.

**R.N. SITATI
JUDGE**

Delivered in the presence of:-

Mr. Nyabena for Kajwang (present) for the Plaintiff/Respondent

No appearance for the Defendant/Applicant

Weche – court clerk