



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Suit 1192 of 1999**

**KIBERA SILANGA SELF-HELP GROUP**

**DAYNURSARYSCHOOL:::PLAINTIFF**

**VERSUS**

**THE PRESBYTERIAN FOUNDATION::DEFENDANT**

**JUDGEMENT**

The plaintiff moved to this court, by way of a plaint dated 7<sup>th</sup> day of June, 1999 and filed on the 15<sup>th</sup> day of June 1999.

The salient features of the same are as follows:-

-That the plaintiff is the owner and is entitled to possession of the property known as LR. NO. 209/13380 together with the development and improvements erected and being thereon to wit a nursery school, a community hall and residential houses that are leased out to servants paying a total sum of Kshs. 4,800/= per month.

- The defendant through its representatives, servants, agents or persons acting on its behalf here with the licence of the plaintiff been occupying and using some of the plaintiffs afore said buildings and facilities for their church known as PCEA church Kibera and other churches related functions.

- That in blatant breach of the licence so granted the defendant has through its representative's, servants, agents and persons acting on its behalf purported to lay claims to the plaintiffs said property and thereby hoping to diminish the plaintiff's title thereof.
- That on or about the 28<sup>th</sup> day of February 1999 the defendant unlawfully without the consent of the plaintiff or any colour of right and in purporting to assert title destroyed, demolished and completely knocked down the plaintiffs residential houses on the subject property valued at Kshs. 200,000.00.
- In consequence thereof, the plaintiff revoked and lawfully terminated the defendants licence and requested the defendant to vacate the suit premises but the defendant had out rightly and willfully refused, failed, neglected and declined to vacate and handover the suit premises to the plaintiff and has thereby become a trespasser and intends unless restrained by the court, to continue to trespass upon the plaintiffs' property aforesaid
- By reason of matters aforesaid the plaintiff has been deprived of the use and enjoyment of the said property and has thereby

suffered loss and damage being the value of the demolished residential houses and the monthly rent receivable there from.

In consequences thereof the court, prayed for the following reliefs

(a) *Possession*

(b) *Damages for trespass*

(c) *Kshs. 200,000/= being the value of the residential premises demolished by the defendant on the property.*

(d) *Mesne profits at the rate of Kshs. 4,800 per month from 28<sup>th</sup> day of February 1999 until delivery.*

(e) *An injunction restraining the defendant whether by itself, its servants or agents or otherwise from entering and remaining upon LR.*

*NO. 209/13380*

(f) *Costs of this suit and interest*

(g) *Any other or further relief that this Honourable court may be inclined to grant.*

In response to the assertion in the plaint the defendant filed a defence dated 31<sup>st</sup> day of August 1999 filed on the 16<sup>th</sup> day of September 1999. The salient features of the same are as follows:-

- The defendant has no knowledge of the property referred to in paragraph 3 of the plaint together with the particulars there to, but states that it has been in possession of a plot measuring 0.4045 hectares since 1971.
- That the defendant has effected the following development on the same namely a church, nursery school, water tank, Care takers house and residential tenant houses and fenced off the same with barbed wire.
- That the afore mentioned plot was allotted to the defendant by the commissioner of lands vide letter of allotment ref: no. 24605/XV/25 dated 17<sup>th</sup> June 1998.
- Denied occupying plot known as LR. NO. 209/13380 which measures 0.5580 hectares but occupies parcel No. 285 which measures 0.4045 hectares.
- It occupies the said plot as of right and not under licence by the plaintiff as alleged
- Concedes pulling down eight (8) semi-permanent houses on its plot referred to as parcel No. 285 with a view to constructing permanent residential houses for renting but denies that the said houses were on LR. NO. 209/13380 and belonged to the plaintiff.
- Contends that LR. NO. 209/13380 measuring 0.5530 hectares and parcel No. 285 measuring 0.4055 hectares are distinct plots situated at a different location within Kibera area.

Each side tendered witnesses. The sum total of PW1s evidence Janet Wangari Kahiros evidence as gathered from the record is to the effect that:-

- The plaintiff was shown the suit land in 1970 and they started construction in 1971, whereby they put up a hall, nursery school and a teachers house using mud and wattle. PW1 was the first nursery school teacher, and she taught at the said nursery and then resided in the teachers' houses.
- The plaintiff started off as a self-help group informally till 1992 when it was registered with the ministry of culture and social services and later the registration was renewed in 1995. Later on the plaintiff was incorporated into a Trust under the provisions of the Trustees (perpetual succession Act cap 164 registered on the 11/8/97 with PW1 as one of the trustees.
- Upon incorporation into a Trust, they applied to be allocated the suit plot and they received a letter of allotment dated 21/1/96 and fully paid rates on 3/12/97 to the tune of Kshs. 181,760/50 and 88,000/=. Upon the due payment of the said plot rent, the Commissioner of Lands gave instructions to the Director of surveys to survey the plot which instructions were carried out on the 20/1/97, a beacon certificate issued followed by a certificate of lease and since then the plot became theirs and have been paying

rates for the same.

Turning to the assertions of the defence, it is PW1's stand that it is the plaintiff which allowed the defendant a licence to use its facilities for worship starting on 2/2/72 through an elder of P.C.E.A called Benard Maina. These meetings were permitted on Saturdays and Sundays.

- The relationship between the two was cordial until 1985 when the defendants and other teachers from the nursery school where PW1 had taught both in the nursery and Sunday school since early 70s. It is her testimony that even one of the defence witnesses Isaac Irungu was her Sunday school pupil.
- They were later sued by the defendant in Milimani Commercial Court's CMCCC NO. 156/97 demanding that they plaintiffs do vacate the suit premises and give vacant possession to the defendants, which case was dismissed because the court, found that the plaintiffs had not trespassed as they had documents of title. Upon conclusion of the case the defendants did not appeal against that decision and paid costs to the plaintiffs.

When cross examined, PW1 gave the following responses.

- The plaintiff group was established in 1970, she was the first nursery school teacher, concedes group started in 1970 although registration was in 1995, they were shown the plot verbally by the chief in 1971, maintaining they allowed the defendant group use of the hall through Benard but there is no documentary proof, concedes defendants chased them away in 1985 after their chairman had passed on.
- When they were sued by the defendant in 1997, they had a title to the said land. They stayed out of the land because the Milimani court, told them to stay out of the land until the said suit was determined.
- Maintains their land is plot No. LR. NO 209/133380 comprising 0.5530 ha. At the time the same was allocated to them the surveyor assured them there was nobody else on the said land.
- They filed the current suit after the conclusion of the Milimani case.
- Maintains the defendant demolished their structures in 1989.
- Has no documentary proof to show rental income was Kshs. 4,800.00 or the value of the destroyed property of Kshs. 200,000.00
- Maintains they were using the plot before acquiring title to it.
- It is their case that the injunction was discharged upon judgement being delivered in the Milimani case.

PW2 Benard Maina confirmed the evidence of PW1 to the effect that he was an elder of the defendant since 1969. He used to worship at Kenyatta before moving to Kibera. He is the one who approached the plaintiff for permission to allow them worship in their hall in 1974. He was a deacon then. He went alone and the person he talked to was PW1 who referred him to the chairman of the nursery school who after due deliberations they were allowed to start worship at the school on Saturdays and Sundays and continued worshipping as such until he retired in 1983. It is his evidence that PCEA did not own the plot where they were worshipping as the plot belonged to the nursery school. It is his testimony that the defendant never owned the plot where they used to worship, at Kibera Silanga but it owns a plot at Emmanuel centre Karaga road.

When cross examined, PW2 responded that he acted on his own volition to ask for a place of worship because, they were having problems where they were worshipping as they were worshipping in the open. It is his testimony that parents at SilangaDayNursery School were the owners of the said plot. They found the structures already in place conceded they demolished mud houses and replaced them with timber structures.

- Does not know if one Geoffrey Ikanga who was a parish minister overseeing the Silanga to Langata outreaches applied to be allocated a plot for the church. He retired from the church service and has no problem with the church. It is his testimony that when

he left the church service in 1985 he had not disagreed with the church. At first he placed his request to PW1 who said she had no authority to grant permission. PW1 referred them to the chairman who said he had no authority and the chairman referred him to a committee which granted him permission.

- During the time him and his colleagues worshiped at Silanga area the nursery used the building as owners.
- It PW2s testimony is that indeed they applied for a church plot and they were allocated one at Emmanuel Centre Karanja road.

PW3 Gave evidence as a surveyor concerning two parcels of land namely RL NO. 209/13380 and parcel number 285 both plots are in Kibera within Nairobi area. PW3 did not visit the site but gave evidence based on the documentation. Parcel number LR. 209/13380 had been surveyed by a government surveyor whereas parcel number 285 had been surveyed by a private surveyor.

- From the documents, parcel number LR. 209/13380 was registered under the Registration of titles Act, whereas that of plot 285 was registered under the registered land Act.

When cross examined he stated that he had never been to the site in question. Does not know if the surveyor who drew the survey maps visited the site. He drew a sketch plan using the survey maps.

The defence also called evidence. DW1 Jam Leck Ndungu Njoroge testified to the effect that indeed as per PW2s evidence they worshipped at KNH in a building which had previously been used as a military barrack and when they were asked to vacate the place, they went to pray at St. Luke's church during the afternoons only, then moved to a members house.

- He confirms that PW2 was their member when they used to worship at KNH. He was a deacon. Concedes they worshiped in Njaus house for a while before they approached the D.O. Kibera a Mr. Gitau and asked for land to put up a prayer house, and they were given a plot in Kibera around February 1971. It was a vacant plot. DW1 was present when they were shown the said plot. It is his testimony that after they had been shown the plot they put up a mud structure and they started worshiping there. This was followed by putting up of their rooms used as stores and then a nursery.
- The rooms put were 8. Some were rented out and others were used by teachers.

It is DW1s testimony that they elected one Benard Maina as a liason officer between the church and the nursery school teachers and parents. He did not bother much about the nursery school. He left the church in 1983.

When cross examined he had this to say:-

- He declined to swear by the bible because he could tell the truth even without swearing on the bible.
- He was 19 years old when he joined P.C.E.A KNH in 1969. Confirms Benard was a member of P.C.E.A KNH when he DW1 joined the same with Benard in Njaus house and at St. Luke's.
- Concedes he was not a church elder in 1970.
- Concedes they do not have the letter they used to apply for a plot to the D.O Kibera as well as the letter of allotment vide which the D.O Kibera allotted them the land in 1971, although these documents were in the church till.
- Denied the assertion of Benard that they asked the Nursery school for a place to pray in. It is his testimony that the nursery was housed by the church.

DW2 at the time of testimony said that he has been a church minister at the Kibera Silanga church for 4 ½ years. He only knows about the acquisition of the church plot through church records namely exhibit DA dated 18/2/71. They tend to put up permanent structures on the plot.

When cross examined he conceded that exhibit DA was a photocopy. The original could not be traced. Concedes that the letter does not mention the plot number. It is a promise that they would be allocated a plot on certain conditions. Concedes that DW2 did not produce to the court, anything to show that they had accepted the conditions set in exhibit DA. DW 2 become a minister in 2003 and knows about the

affairs of the church from that date. Anything else beyond that will be given in testimony by others.

DW3 Julius Mbuthia Maina had this to say:-

- He is a businessman who has been a member of the P.C.E.A Silanga church since 1990 and does not know about the history of the church. He took photographs of the facilities on the plot as at 2007.
- He does not know when the plot was acquired or by whom the church was constructed. DW3 denied having been a member of the church in 1987 but joined it in 1990. Denied having testified in any proceedings in respect to a dispute between the disputants herein. But when confronted with his testimony in exhibit 9 the proceedings in CMC civil case No. **156/97 P.C.E.A. FOUNDATION VERSUS HENRY KIOKO, JOSEPH MURUNGI AND GEORGE KAHIKO** he said indeed in that proceedings he had said that he joined the church in 1987 while in the current proceedings he said he joined the church in 1990 but attributes the discrepancy on the events having taken place long time ago.
- Asserts that he is one of those who wrote a letter to the commissioner of lands asking for the plot and they were issued with an allotment letter. Their application was presented in 1993.
- Concedes that in the other proceedings he had said that he was not among the persons who followed up the registration of the property but in the current proceedings he stated that he is among the persons who followed up the registration of the property.
- Confirmed he does not know when the structures on the land were put up. According to him he had never heard of anyone challenging the church over the said property.

DW4 Isaac Irungu had this to say:-

- He became a member of P.C.E.A church in 1970, attends Kibera Silanga P.C.E.A church. It is his testimony that when he joined the church in 1970, it had no title deed. They applied for the same in 1993, and received the allocation in 1998, paid for the same as per exhibit F, G., they paid the requisite fees and had the land surveyed in DW4s, presence by a government surveyor who placed beacons on the land, issued the beacons certificate which DW4 signed. The signing of the beacons certificate led to the issuance of the letter of allotment, map and certificate of lease exhibit D, J, K L, M.
- It is his testimony that the plot allotted to them is distinct from the plot being claimed by the plaintiff.

When cross-examined he had this to say:-

- Born in 1961 and started school at Mbagathi Primary School but denies having been taught at the church nursery school.
- Know PW1 in 1973/74. In 1993 he was around 12 years old but had become a member of the PCEA church in 1970 (age 9)
- Denied being one of the children who used to collect the key from PW1 for church service on Saturdays and Sundays.
- They had a smooth co-existence with the plaintiff till 1999 when the disturbances started.
- Concedes that the defendants filed the Milimani CMS civil case No. 156/97 seeking an injunction against the plaintiff restraining them from interfering with the suit property subject of these proceedings.
- Concedes that he is the one who drafted the letter of application for allotment and had the same signed by the then church minister John Nina Mwakichoda who was in charge of the parish.
- DW4 concedes that Mwakichoda gave evidence in the Milimani case to the effect that he was posted to Kibera in 1995, never mentioned being involved in the Kibera affair in 1993.
- Concedes the surveyor on exhibit H.J is different namely D. Obel and John Muraguri Ndegwa. It is his testimony that he does not know the connection between D. Obel who confirmed the beacons and John Muraguri who prepared the map.
- It is his testimony that the map produced by them exhibit F (ii) is proof that the plots owned by the two disputants are distinct from each other.

- Concedes the defendants did not appeal against the Milimani case.
- Concedes that as at the time they filed the Milimani case they did not have a title deed to their property.

DW5 John Muraguri Ayub had this to say:- It is his testimony that he joined the Kibera Silanga P.C.E.A church in 1977 and found 2 structures up, one used as a church on Sundays, and as a nursery on weekdays. The others were residential dwelling places. It is the church which received rent to pay expenses for the nursery. He left the congregation in 1981 and we left the building in the same state. But before leaving they put up a prefabricated building as the church and a timber structure as the nursery school. It is DW5s evidence that nobody stopped them from putting up the said structure.

When cross examined, he stated that he found the structures they worshipped in there, and does not know if the building was put up by the plaintiff or not. When he joined the congregation, he did not see any ownership documents. During his stay with this congregation that is 1977-1981 he never heard of the plaintiff as being in existence. It is his testimony that he is the one who fenced off the plot after being shown the boundary by the area chief and not a surveyor. Concedes he found Benard Maina already worshipping at the church before him but does not agree with Benard's evidence that the land belongs to the plaintiff.

At the close of the case, both sides filed written submissions. Those of the plaintiff are dated 13<sup>th</sup> June 2008 and filed the same date. This court, has had occasion to go through the same and noted that the salient features of the same are as follows:-

- That the plaintiff did not offer evidence in respect of the value of the damaged property and for that reason prayers C and (d) of the plaint stood abandoned.
- It is their assertion that the plaintiff is entitled to possession of the suit plot because of the following:-
  - (i) As per the testimony of PW2 the two parcels of land are located on the same position on the ground.
  - (ii) There was no proof that both maps were registered with the survey of Kenya and deposited with the Director of Surveys.
  - (iii) The defence did not call any evidence to support their stand that their plot had been surveyed and that the same exists on the ground.
  - (iv) It is on record that the defendants sued the official of the plaintiff vide Nairobi Milimani HCCC NO. CMCC NO. 156 of 1997 in which the court, ruled that the plot belongs to the plaintiff herein and that the certificate of lease issued to the defendant came after the suit had been filed as against the defendants therein.
  - (v) The court, is invited to hold that a court, of competent jurisdiction made findings in number (iv) above on the 15<sup>th</sup> day of February 1999, which findings was to the effect that plot number LR. NO. 209/13380 and Nairobi Block 106/285 are one and the same which findings the defendants herein did not appeal against and which finding is to the effect that the suit plot subject of proceedings Milimani CMCC NO. 156/1997 belongs to the plaintiff herein.
  - (vi) Although the decision of the subordinate court, is not binding on this court, nonetheless the defendants who did not appeal against that decision are estopped from challenging that decision.

Turning to the evidence, the court, is invited to go by the plaintiffs evidence because of the following:-

- (i) PW1 is the nursery school teacher described by Dw1.
- (ii) PW2 is trustworthy as his testimony was confirmed by DW1
- (iii) DW1 is un trust worthy as he refused to swear by his own faith.
- (iv) The evidence of DW2 and DW3 is immaterial as they were not present during the year 1970, and they testified that they do not know who acquired the said plot.
- (v) The evidence of DW4 is also to be dismissed as being un trustworthy because he alleged he is the one who drafted the letter of application for the allocation of the suit plot in 1993 and gave it to the minister in charge then a Mr. Mwakichoda to sign

the same contrary to the testimony of the said Mwakichonda to the effect that he was posted to the Kibera church in 1995 and as such he could not have signed the application letter in 1993. This is confirmed by the fact that the said Mwakichonda who gave evidence in the subordinate court, never mentioned it. And DW4 herein never gave evidence in the subordinate court, proceedings.

(vi) There is lack of consistence in the defence evidence as it is not clear which surveyor surveyed their plot, pointed out the beacons and certified them.

- Turning to the validity of the documents of title, they submit that the defendant documents of ownership were processed in 2000 long after those of the plaintiff had been processed in the year 1997 and by reason of which registration the plaintiffs title became subject of the protection of the provisions of section 23 of the Registration of titles Act.

(ii) The defendant has not moved to fault the said title on grounds of fraud and or misrepresentation on the part of the plaintiff and as such the said title is absolute and indefeasible.

(iii) Since there is no move to cancel the plaintiffs' title, the same must prevail and when so held to prevail, it means that as at the time the defendants were purportedly allocated the same land, there was nothing to be allocated.

- By reason of what has been stated above, the court, is urged to declare the defendants title invalid and order the same to be cancelled as the same was obtained in bad faith after the subordinate court, had ruled in favour of the plaintiffs.

The defendants counsel filed main submissions on the evidence and then replied the plaintiff's submissions. Those on the evidence are dated 24<sup>th</sup> June 2008 and filed on the 25<sup>th</sup> day of June 2008 and the salient features of the same are as follows:-

- The court, is urged to dismiss the plaintiffs case for the following reasons:-

(i) Though the plaintiff allege to have acquired the plot in the early 1970s, the documentations of ownership relied on by them are dated 1996-1997.

(ii) The plaintiffs were purportedly allotted a nursery school plot where as the documentation of ownership of the defendants plot show that the defendants were allotted a church plot which they have been occupying and making use of since the 1971.

Turning to the law, the learned counsel for the defence submitted as follows:-

(i) Before the plaintiff applied to be allotted the said plot, they were squatters on an un surveyed nursery school, plot B Kibera Nairobi

(ii) Before registration, the plaintiff had no legal right to possession of the said plot as the same was government land

(iii) The plaintiff before in corporation under the trustees (perpetual succession Act, the plaintiff had no legal capacity to own any land.

(iv) Likewise the defendant was asquatter on the church plot before the same was allotted to it on 17<sup>th</sup> June 1995 and subsequently registered on the 19<sup>th</sup> June 2000.

(v) Both disputants having been squatters on government land, the rights of occupation of the same could only be confirmed to them either by land Registrar or the Commissioner of Lands.

(vi) The rights of the disputants herein were confirmed separately. Those of the plaintiff were confirmed under the registration of titles Act when it was registered as LR. NO. 209/13380 under the registration of Title Act. Whereas those of the defendants were confirmed when the defendants' was registered in respect of LR. NO. Nairobi Block/106/285 under the Registered land Act.

(vii) The court, is invited to note that both titles are protected under their systems of registration. That of the plaintiffs under

section 23 of the RTA and that of the defendants under section 28 of the RLA.

(viii) It is their stand that the plaintiff is not entitled to its relief as against the defendant, because the defendant, is in occupation of its parcel of land rightfully and those rights can not be defeated save as provided for by the same Act.

- Further, submit that, the plaintiff having failed to join the Commissioner of Lands to the proceedings and having failed to challenge the authenticity and validity of LR. NO. Nairobi/Block 106/285 in the plaint, it has no business trying to deny the defendant enjoyment of the same.

The defendant also put in a reply to the plaintiff submissions and stressed the following:-

- PW3's evidence is of no value as it was not based on what he saw on the ground as he never visited the site, but it was based on what he reconstructed from the documents handed to him by the plaintiff.
- The plaintiff does not claim in its plaint that plot LR. NO. 209/13380 and LR NO. Nairobi/Block/06/285 are one and the same. This has been confirmed by the plaintiffs' counsels' submissions to the effect that LR. NO. 209/13380 and Nairobi/Block 106/285 are the same though different in size and secondly that the surveyor for the Nairobi Block 106/285 was negligent by failing to see beacons for LR. NO. 209/13380, which to the defence counsel, demonstrates that the two parcels are distinct because they cannot be different in size and yet beacons on the one hand and on the other hand it is a demonstration that both plots exists and are different.
- Nairobi Milimani CMCC NO. 156/97 did not decide that LR NO. 209/13380 and LR NO. Nairobi Block 106/285 were one and the same as at the time the decision was made the title documents for LR. NO. Nairobi Block 106/285 had not been issued.
- It is not true as submitted by the plaintiffs counsel that the issue of ownership was decided by the lower court, in the said case No. 156/97 because, had that been the case, the plaintiffs would not have filed this case in the first instance and in the second instance, the lower court, would not have known that it had not been called upon to determine ownership.
- The cases cited by the plaintiffs counsel are distinguishable in the manner demonstrated in the reply to the plaintiff submissions.
- No evidence has been adduced to support the claim for damages in the first instance and in the second instance no evidence has been adduced to prove that the defendant is a trespasser on LR. NO. 209/13380.

The court, was also referred to case law. The case of **MICHAEL GITHINJI KIMOTHO VERSUS NICHOLAS MURATHA MUGO NAIROBI CA NO. 53 OF 1995** decided on the 20<sup>th</sup> day of March 1997. In this case the Respondent sued the appellant that he was at all material times the registered proprietor as owner of parcel of land known as Dagoretti/Kangemi/269 as lessee from the government of Kenya, that on or before 30<sup>th</sup> January 1991 the appellant wrongfully entered that land and trespassed thereon, thereby depriving the respondent use and enjoyment of the same and has thus suffered loss and damage. It was alleged that despite demand the appellant had refused to vacate the said parcel of land forcing the respondent to seek vacant possession and damages for trespass.

The appellants defence had been that he had been asquatter on the suit land for many years and the governments' allocation of the same was unlawful and erroneous. Evidence was given that the commissioner of lands had written to the respondent informing him that the allocation to the Respondent and as alternative site was being looked into. The central theme on appeal was that the superior court, was wrong in holding that he had no defence. The CA held interalia that "*Though the appellant had for long time been in occupation of the suit land which was government land before it was allocated to the respondent, this could not have helped him in resisting the respondents claim where the letter is registered as owner of the land. Similarly if he, the appellant had commenced any development on the suit land, he did so at his own permit and he could not expect any compensation in that respect. Even if for arguments sake the suit land had been erroneously*

allocated to the respondent, the appellant as a squatter on the suit land had no locus standi and the so called erroneous allocation could not be an answer to the respondents claim for his eviction. His position as a trespasser could not have given him any protection against the respondents claim for possession as the registered owner of the land.

The issue whether the allocation of the land to the respondent was erroneous or not can only be an issue between the commissioner of lands and the respondent. The protected rights of a proprietor under section 28 of the Registered Land Act cannot be defeated except as provided in that Act and certainly not at the instance of the appellant.

The case of **WREK MOTORS ENTERPRISES VERSUS THE COMMISSIONER OF LANDS, SATPAL SINGH BHATT, CITY COUNCIL OF NAIROBI AND CHAMOMO ENTERPRISES, NAIROBI CA NO. 71 OF 1997** decided on the 24<sup>th</sup> day of October 1997. Where the CA held inter alia that:-

*“His title takes precedence and is supreme over all other alleged equitable rights of title. The Act is very specific on this protection, and sanctifies titles”*

The case of **DR. JOSEPH N.K ARAP NG’OK VERSUS JUSTICE MOIO OLE KEIWA AND 5 OTHERS NAIROBI CIVIL APPLICATION NAI 60 OF (1997) (27/97 UR)** decided by the CA on the 17<sup>th</sup> October 1997. At page 2 line 13 from the bottom the following observations were made

*“It is trite that such title to landed property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance there after of title document pursuant to provisions in the Act under which the property is held”*

At page 3 line 14 from the bottom, it is stated *“section 23 (1) of the Act (RTA) gives an absolute and indeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law take procedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”*

The case of **GIT WANY INVESTMENT LIMITED VERSUS TASMAL LIMITED AND 2 OTHERS NAIROBI HCCC NO. 1114 OF 2002** decided by Lenaola J on a date not indicated. At page 11 of the said decision the learned judge made observations at paragraph 40 thus:-

*“40. Having concluded that L.R. NO. 209/3088 is infact the same on the ground with L.R. NO. 209/12004 this court, is then confronted with really the main issue in this matter. Both Gitwany and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were issued with title documents by the Commissioner of Lands Gitwany’s title for LR NO. 209/12004 was issued on 24/7/1995 and it is signed by Wilson Gacanja as such Commissioner in the presence of the Registrar of titles whose name is unclear. The one on the name of Max towers and Njage was signed by Summy Silas Kamen Mwaita as Commissioner of lands on 12/2/2001 in the presence of J.K. Wanjau Registrar of Titles. The land was then transferred and is presently held in the name of the 1<sup>st</sup> defendant which transfer was registered against the title on 26/7/2001.*

*The position as at now is that both Gitwany and Tasmai limited and in fact have title to the same piece of land which title should prevail the one issued on 24/7/1995 or the one issued on 24/2/2001? It is to section 23 (1) of the Registration of titles Act cap 281 that this court has to turn”*

After due consideration the learned judge held inter alia:-

1. It is hereby decided that the plaintiff Gitwany investments limited is the bonafide owner of land parcel No. L.R. 209/12004

formerly known as L.R. NO. 209/3088

2. The title held by the 1<sup>st</sup> defendant Tamal Limited over No. 209/3088 which is the same as LR. No. 209/2004 is hereby declared to be invalid and the 3<sup>rd</sup> party ought to cancel it within the next 30 days.
3. There shall be a permanent injunction restraining the 1<sup>st</sup> defendant, its servants and or agents from further erecting any structures or fences, engaging in any construction on the suit land or in any other way interfering with L.R. NO. 209/12004.
4. The structure constructed on LR. NO. 209/12004 by the 1<sup>st</sup> defendant shall be removed there from within the next 90 days in a manner to be agreed between the parties, failure to which the 1<sup>st</sup> defendant shall determine in the manner in which the structures should be removed and where they should be deposited such agreement between the parties should be negotiated within 30 days from today's date failure to which the default clause above shall apply.
5. All costs incidental to the removal of the structures in number (4) above shall be borne by the 3<sup>rd</sup> party, the Commissioner of Land.
6. The 3<sup>rd</sup> party shall pay to the 1<sup>st</sup> defendant Kshs. 151,500,000/= being the costs and expenses incurred in the purchase and improvement of the suit land.
7. The 3<sup>rd</sup> party shall pay interests on the amount stated in (6) above at court, rates from the date of filing of the suit to the date of payment in full.
8. The 3<sup>rd</sup> party shall pay the costs of the suit to the plaintiff and the 1<sup>st</sup> defendant
9. Any party shall have liberty to apply.

Due consideration has been made by the court of the above rival evidence and the same considered in the light of submissions made by counsel for both sides, case law as well as exhibits relied upon by both and in this court's opinion the following facts do not seem to be in contest:-

1. It is common ground that both sides seem to be laying claim to a portion of land located at the same site.
2. It is common ground that despite it being apparent that the site being claimed by both sides appears to be sited at the same site, each side has title documents bearing different numbers namely LR. NO. 209/13380 the title asserted by the plaintiffs and Nairobi Block 106/285 as the title asserted by the defence.
3. It has transpired that the title asserted by the plaintiffs is registered under the registration of titles Act while that of the defence is registered under the Registered land Act.
4. It is also evident that the title of the plaintiffs' was registered earlier in time than that of the defendants.
5. It is apparent that the disputants had been engaged in litigation before in respect of the same piece of land. The proceedings had been commenced in the chief magistrates **court Nairobi at Milimani vide CMCC NO. 156/1997** the defendants were indicated as the plaintiffs. The defendants were named as Henry Kioko, Joseph Murungi and George Kahiko alleged to have been sued in their capacity as representatives of the plaintiff herein. The claim was alleged to have been damages for trespass. It is alleged that the case was dismissed and in essence it ended in favour of the current plaintiffs.
6. It is common ground that the defendants who were the plaintiffs in the lower court, case did not appeal against that decision of the lower court.
7. It is also common ground that the defendants have not counterclaimed for the land allegedly being claimed by plaintiffs on the basis that their land is distinct from that being claimed by the plaintiff.

8. It is common ground that neither party took a surveyor to the ground to confirm the exact location of each site. All the court, has on record is the evidence of PW2 who conceded in evidence that he did not visit the site but used documents relied on by both sides and on the basis of that assessment arrived at the conclusion that the two plots are not one and the same.

The question that the court, has to ask itself is which side is the winning party and why. The answer has to be determined by the courts', assessment of the evidence and the exhibits. The testimonies of each side have been set out at length in the record. A scrutiny of the exhibits follows. The plaintiffs have relied on exhibits which are a certificate of registration with the Ministry of Culture and Social Services dated 28/4/95. There is no earlier certificate. This group later incorporated itself into Trustees under the Trustees Perpetual Succession Act under chapter 164 of the laws of Kenya. There is no dispute that this incorporation is dated 30<sup>th</sup> day of July 1997 as P/S 702 and endorsed by the Registrar of the documents exhibit. The plaintiffs have also armed themselves and produced to court a letter of allotment from the department of lands dated 21<sup>st</sup> January 1996. They were required to pay certain monies towards the same evidenced by production of exhibit 3, 4 (a), 4 (b). The two receipts both dated 3/12/97 bear an amount of Kshs. 88,000/= and Kshs. 181,766,150 accordingly. Exhibit 5 dated 18<sup>th</sup> day of December 1996 whose consents confirms the contents of exhibit 3, 4, (a) (b) that the offer of the allotment of the suit plot to the plaintiff was accepted and fully paid for and the Director of Surveys was being instructed by the Director of survey to go a head and survey the plot in favour of the plaintiff.

It is the stand of the plaintiffs that, the Director of survey duly carried out the exercise, and placed beacons on the said plot and issued a beacon certificate exhibit 6. Thereafter the plaintiffs met all their financial obligations to the relevant authorities on account of the said plot exhibit 7 (a) Kshs. 60,000.00 dated 25/7/96, Kshs. 60,000.00 dated 22/7/96, Kshs. 80,000.00 dated 14/5/96, Kshs. 30,000.00 dated 25/6/96, Kshs. 80,000.00 dated 10/9/96, Kshs. 76,884.00 dated 22/11/96, Kshs. 20,000.00 dated 22/7/96 and 90,000.00 dated 26/2/96. Upon compliance with the financial obligations, a certificate of Registration of title was issued and was produced as exhibit 8. It relates to LR. NO. 209/13380. Whose size is 0.5530. The title has an annexed deed plan giving the size of the plot. Reliance has also been placed on the proceedings in the lower court exhibit 9. The portion of the judgement that is relevant to this judgement is found at page 28 line 4 from the top and it reads:-

*“The plaintiffs have failed to prove that the defendants were trespassing on the plot where the nursery school is built which same is rightfully owned by Silanga self-help group which has a certificate of lease produced herein. The plaintiff’s case entirely fails and the same is dismissed with costs to the defendants. Interim injunction is hereby disclosed”.*

The judgement is dated 15/2/99. One thing which came out clearly in the judgement is that, the plaintiffs had not produced any title documents to show that the property belonged to them. Whereas the defendants who are the current plaintiffs herein, produced title documents. As mentioned earlier on, the plaintiffs in the lower court, who are the current defendants did not appeal against that decision. As argued by the plaintiffs, that judgement is valid and needs to be respected. It is trite law that this court, has judicial notice of that there is now a wealth of case law on the subject, to the effect that a court, order is valid and must be respected and obeyed by the addressee inclusive of the court itself. There is the case of **HADKINSON VERSUS HADKINSON (1952) 2AER 567** whose gist of the holding is that:- *“ It is the duty of everyone in respect of whom a court, order is made to obey such an order, unless and until it is discharged and disobeying of such an order results in the person disobeying it being in contempt”*

The case of **GORDON VERSUS GORDON (1940-7) ALLER 704** where it was held inter alia that:- *“ a litigant might also have a reprieve where he demonstrate that the orders alleged to have been disobeyed should not have been made as the court, had no jurisdiction to*

do so”

The case of **RAMESH POPATLAL AND SUREISHA SHOBHAG CHANDRA SHAH** suing in their capacity as the administrators of the estate of late **SHOBHAG CHARA TILAL. A. SHAH T/A LENTO AGENCIES VERSUS NATIONAL INDUSTRIAL CREDIT BANK MILIMANI HCCC NO. 515/2003** where Njagi J pronounced the following principles:-

- (i) *Unless and until a court, order, is discharged, it ought to be obeyed.*
- (ii) *As long as the orders are not discharged they are valid.*
- (iii) *Since they are valid, they should be obeyed in obedience and not in breach.*
- (iv) *The only way in which a reprieve from obeying court orders before it is discharged, can be obtained by applying and obtaining a temporary stay.*
- (v) *As long as the order is not stayed and it is not discharged, then a litigant who disobeys it, does so at the pain of committing a contempt of court.”*

Against the plaintiffs aforesaid exhibits, there is the documentation relied upon by the defence, some of which were produced by the plaintiffs. There are two correspondences emanating from the current plaintiffs namely exhibit 10 dated 1<sup>st</sup> July 1998 and 11 dated 3<sup>rd</sup> July 1998. The content of exhibit 10 reveals that the plaintiffs counsel protested to the provisioncial surveyor against the action of a surveyor from Messers Wamu Investments revisiting the current plaintiffs plot and resurveying the same. Counsel opined that should that survey result into an allocation then it will be a new allocation on top of the title already held by the current plaintiffs. The provincial surveyor Nairobi reacted to that communication vide their letter dated 3<sup>rd</sup> July 1998 addressed to the Director of surveys. The subject is LR NO 209/13380. The content reveals that the writer was in agreement that since the current plaintiffs were the title holders, any subsequent re survey of the plot would mean that it will lead to another allocation. The Director of surveys was also informed that survey for, the current plaintiffs plot had been forwarded to the Directors’ office vide a letter Ref. CS/1/NP/VOLVI/20 of 21<sup>st</sup> January 1997 and the Directors office was asked to intervene in the event this second survey found its way to that office. Apparently, the survey in favour of the current defendants went a head and also yielded a title hence their finding ground to contest the current proceedings.

In support of their oral testimonies, there is in place documentary exhibits. Exhibit A is a letter dated 18<sup>th</sup> February 1971 to a Mr. G.M. Gikanga Parish minister of P.O BOX 12582 Nairobi. It is ref. No. Kib/COTO/VOL.1/23 signed by the District officer Nairobi area, whereby the addressee had been promised to be allocated land to put up a temporary church, on condition that the addressee agreed to abide by government orders and be prepared to move out when requested to do so. Exhibit B is a photograph of a temporary church constructed of timber walls and iron sheet roof, exhibit C is a secondary school, D is a toilet and E is permanent toilet. Exhibit F is a part development plan showing the existing site for the church and nursery school approved by the commissioner of lands on 30/1/1971 and by the Director of physical planning on 18/3/97.

It is a letter of allotment addressed to PCEA Silanga church. It is dated 17<sup>th</sup> June 1998. The area indicated is 0.5 hectares, for a term of 99 years from the year 1/6/98. On the reverse of the said allotment, it is indicated that government approval had been given vide file No. 24605/XV/1. There are the following words added in typed form just before the signature of the commissioner of lands:- “ *The government shall not accept any liability whatsoever in the event of prior commitment or otherwise.*” G is a receipt for payment of the money shown to be payable as per exhibit F.1 exhibit H is a beacon certificate allegedly placed by one J. D. Obel and verified by one Isaac Mwangi in respect to the plot in Kibera for PCEA church Silanga. The communication is dated 12/9/1998. Exhibit 1 had been signed by a Mr. G.F. Onyango on behalf of the commissioner of lands. Exhibit J is dated 30<sup>th</sup> April 1999, signed by the same G.F. Onyango on behalf of the Commissioner for Lands. It is Ref. No. 207867/9. It is addressed to the Director of surveys Nairobi. It was asking the Director of survey to forward to the said

office a copy of the amended R.I.M. reflecting the plot Block 106/285 in reference to the officers' indent ref. No. 207867/7 of 24<sup>th</sup> February 1999 and allotment reference No. 24605/6V/25 of 17<sup>th</sup> June 1998 exhibit F1. Annexed to exhibit J as a letter emanating from survey of Kenya addressed to J. D Obel signed by one T. Kirui for Director of surveys in which the addressee was being asked to amend the R.I.M. to reflect the said plot No. 285. Exhibit K is the map for parcel number 285. whereas exhibit L is a certificate of lease for title number Nairobi/Block/106/285 issued on the 19<sup>th</sup> day of June 2000, issued to the Presbyterian Foundation of P.O BOX 19742, Nairobi, a company limited by guarantee and duly incorporated under the companies Act chapter 486, P.O BOX 19742 Nairobi Exhibit M is a lease to the Presbyterian Foundation a company limited by guarantee and duly incorporated under the companies Act chapter 486, O.O BOX 19742 Nairobi Exhibit M is a lease to the Presbyterian Foundation a company limited by guarantee duly incorporated under the companies Act chapter 486 of. It is dated 19<sup>th</sup> day of June 2000. The lease is indicated to have been signed by one Sammy Silas Kamen Mwaita of 31<sup>st</sup> day of May 2000. The common seal of the lessee was alleged to have been affixed hereto in the presence of a Director and Director secretary but there is no seal indicated and the names of the said officials are not also given.

From the above survey of the exhibits relied upon by both sides, it is evident that there is reliance on them to support each sides case. It is also evident from the oral testimony of each side that in so far as the physical facilities go to show the stand of each side, there is no doubt that the fight is over the same piece of land as the parties claim ownership of the physical structures as well as the land. it therefore follows that the piece of land on which the physical structures stand and which is being claimed by both sides is one and the same. As mentioned, both were allotted the land, duly paid the requisite fees, and titles issued, one under the Registration of Tititles Act, and the second one under the Registered land Act. It is also evidently clear that, the title held by the current plaintiffs was earlier in time. While that relied upon by the deendants was issued later in time and to a company.

The question that this court, has to ask itself is which of the two sets of allotments is to be believed and upheld?.

In this court's opinion a comparison of the very documents will assist the court determine which of the two sets of documents is to be believed. Starting with the initial request for allocation of the plot, it is evident that from the evidence on record there is only oral testimony from the plaintiffs that they asked and were allocated the suit plot way back in 1971. The defence on the other hand rely on exhibit A dated 1971 but from the evidence non of those witnesses who testified on behalf of the defendants could tell for which plot the application had been presented. It is not disputed that both sides have fronted allotment letters. As mentioned the allotment in favour of the plaintiff exhibit 3 was earlier in time as it is dated 21<sup>st</sup> January 1996 where as that of the defence is dated 17<sup>th</sup> day of June 1998. The beacon certificate exhibit 6 for the plaintiff is dated 21/1/1997 and is indicated to have been pointed out to the group chairman. Where as that of the defence is dated 12/9/98 and is alleged to have been pointed out to one Isaac Irungu DW4 by the surveyor.

Turning to the title documents, it is evidently clear that the title for ownership for the plaintiff's namely the beacons certificates, exhibit 6 allotment letter exhibit 3, and the title documents exhibit 8 are consistent in so far as they relate to the title holder namely M/S Kibera Silanga Self-help group day nursery school. Where as those of the defence differ. The beacon certificate exhibit H and the allotment letter exhibit F1 bear the name of P.C.E.A. Silanga church. Whereas the certificate of lease and the lease bear the names of a different entity. The Presbyterian Foundation, described in the lease and certificate of lease as a company limited by guarantees. It is instructive to note from the proceedings, that the defendant is described in paragraph 2 of the plaint as a body corporate capable of suing and being sued. Vide paragraph 1 of the defence, the defendant admitted paragraph 1 and 2 of the plaint, meaning that it accepted description itself as a body corporate capable of suing and being sued in its name. Despite this revelation, the defence witness produced no Articles and memorandum of Association of the said company to show that it indeed exists, that it was the board of Directors and a resolution of either the board of

Directors or shareholders which was passed authorizing the person who brought the action against the current plaintiffs in the lower court and to defend the current action.

It is also instructive to note that none of the defence witness testified in their capacity as either Directors or shareholders of the said defendant company. As such, in the absence of production of Articles and Memorandum of Association, production of a company resolution to defend the action herein, the court, makes a finding that the evidence on record does not assist the defendant in any way.

Further as observed, in the lease documents, there is a section on the last page of the lease which required the seal of the company to be affixed but the same was not affixed. This is supposed to have been done in the presence of a Director and a Director/Secretary. There are signatures appended with no names. The said signatures are supposed to have been appended before an official of the lands office on a particular date, but the said date remains black, and there is no signature of the person who certified those signatures or the person who identified the person signing on behalf of the company before the certifying officer. For this reason, this court, has no doubt that defence exhibit M, the lease is suspect and invalid due to lack of proper authentication.

Further on the validity of the title documents, issue arises as to whether the defendants documents can oust those of the current plaintiff. The answer to these is in the negative. The reason for giving the answer in the negative is because, the title documents of the plaintiffs were earlier in time, and therefore protected by virtue of the provisions of section 23 of the Registration of title Act which reads:-  
*“section 23 (1) of the RTA cap 281 the certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, averments restrictions and conditions contained there in or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”*

Applying the said ingredients to the rival arguments herein, it is instructive to note that the defendant is not challenging the title holding of the plaintiff, but alleges that it owns a different parcel of land and yet they agree that the physical structures on the land are claimed to have been owned by them both separately.

This being the case, it was necessary for the person sued to prove evidence to show that the land they claim is different from that claimed by the plaintiff.

Further to this, it is instructive to note that unlike the plaintiffs title documents, those of the defendants do not agree in all respects. For example, those of the plaintiffs all bear the plaintiffs name as the entity which was allotted the land, shown the beacons, and issued with the title documents whereas, those of the defendants do not flow. The beacons certificate and allotment letter were given to the PCEASilangaChurch. Whereas the main title documents were given to the Presbyterian Foundation, a company incorporated under the companys Act cap 468, laws of Kenya, does not have the key back up documents, namely the letter of allotments, and the beacon certificate. Likewise it means that the P.C.E.A. Silanga church only has a letter of allotment and a beacon certificate do not have supporting title documents. This means that neither set of documents support the defendants claims to the land. This is so because the letter of allotment contains a disclaimer by the issuing authority to the effect that it will not be held responsible for any prior allocation of the suit property. Meaning that, having ruled that the disputants are fighting for possession over the same piece of land, if the title of the plaintiff is upheld then it means the defendants assertion to the suit land is rendered of no consequence.

For the reasons given in the assessment, the court, is satisfied that the plaintiff has established its case on a balance of probability and that the defendants defence stands ousted on the following grounds:-

1. From the oral testimony on record, as tendered by both sides, the parties are disputing over the same parcel of land on the

ground as well as the physical structures standing on the same. This being the case, it is not true as asserted by the defence that the two plots are distinct from each other.

2. The holding in number 1 is fortified by the fact that the defendants took out legal proceedings against the current plaintiffs vide Milimani CMCC case No. 156/97 alleging that the current plaintiffs are trespassers on the suit land which proceedings ended in favour of the current plaintiffs who were found not to be trespassers. The said orders were not appealed against by the defendants, and as long as they stand, they are supposed to be obeyed and respected by the addressee of the family, the defendants as well as the court, in terms of the principle in the case law namely
3. The plaintiffs title that crystalized by the decision in Milimani CMC NO. 156/97 has received back up from the flowing title documents relied upon by the plaintiffs, namely, the letter of allotment, beacons certificate and the title which all bear the names of Kibera Silanga Self Group which has now been given legal identity through incorporation under the Trustees Perpetual Succession Act cap 164 laws of Kenya. Which documents were Registered earlier in time than those of the defendants.
4. By reason of the Registration of the plaintiffs title under the Registration of titles Act cap 281 laws of Kenya, the said title becomes a beneficiary of the provisions of section 23 of the said Act whereby the holder thereof in this case the plaintiff, becomes the absolute holder of the said title, which title can only be defected by reason of proven fraud, misrepresentation or mistake to which the title holder is alleged to have been a party. The defendants herein are not attacking the plaintiffs title on account of those grounds. Instead they are alleging that it is a different parcel of land they are laying their claims on.
5. Turning to the defendants title documents, the court, is of the opinion that the same do not hold neither do they operate to oust the plaintiffs title documents because of the following reasons:-
  - (i) As at the time the defendants moved to court in 1997, they only had the letter from the local administration issued in 1971, defence exhibit A, which document was simply a premise to allocate a church plot whose area was not specified.
  - (ii) The beacons certificate and allotment letter are in the name of P.C.E.A. Silanga church which is not a party to these proceedings.
  - (iii) Even if these documents had been in the correct names of the defendants, they would not have operated to oust the plaintiffs beacons certificate and letter of allotment which were earlier in time. This is confirmed by the disclaimer on the second allotment by the issuing authority that it will not be held responsible in the event of any earlier allotment in respect of the same parcel of land.
  - (iv) There is no beacon certificate and letter of allotment in favour of Presbyterian Foundation, meaning that the title documents exhibited by the defence namely the lease title and certificate of lease do not have back up beacons certificate, and allotment letter and as such they are hanging in the air (floating). By reason of this floating, they cannot oust the well founded title documents of the plaintiffs.
  - (v) There has been no demonstration by the defence that the entitles P.C.E.A. Silanga church and the Presbyterian Foundation are one and the same entities in order to make the title documents to be referring to one and the same entity.
  - (vi) There was no production of the Articles and Memorandum of Association and a certificate of incorporation of the defendant to demonstrate that the entity does in fact exists in law on the one hand, and on the other hand that it is a conversion of the P.C.E.A church.
  - (vii) The seal of the company was not affixed to the certificate of lease in the space provided. Neither were the names and

signatures of other company officials given, verified by the authorized officer. The document is therefore invalid and cannot be used to oust the firm founded title documents of the plaintiffs.

(viii) It is doubtful whether one parcel of land will have 2 registration systems applicable to it namely under the RTA and RLA. This court, has judicial notice from the discharged of its adjudication duties that the prevailing registration system within Nairobi are those under the RTA. This fortifies the stand of the court, that the defence lease and certificate lease are invalid.

6. By reason of what has been stated in numbers 1-5 above, an order be and is hereby made to the effect that the plaintiff herein are entitled to possession of the suit property forthwith.

7. As regards damages for trespass, no quantification was made by the plaintiffs. However in view of the testimony that the church was allowed to worship in the plot, trespass can only arise after the plaintiff has been declared the titleholder and the defendant required to vacate and the defendant refused to do so and that is when the right to claim damages for trespass arises. The CMCC NO. 156/97 would have provided an anchor for this claim had there been a counterclaim by the current plaintiffs. For this reason this claim is disallowed.

8. Prayer C and D are disallowed on the ground that no testimony was given to prove those claims on the one hand and on the other hand prayer (c) was abandoned.

9. Prayer (e) is allowed and an injunction be and is hereby issued and granted in favour of the plaintiff against the defendants itself, its servants or agents or otherwise from entering and remaining upon LR.NO. 209/13380.

10. By reason of the injunctive relief granted in number 9 above, the defendant be and is hereby ordered to vacate the premises within 30 days from the date of the extraction and service of the decree issued herein upon them.

11. In default of the number 10 above, the plaintiff will be at liberty to execute the decree by way of eviction.

12. The plaintiff will have costs of the proceeding.

13. There will be liberty to apply.

14. By reason of what has been stated in number 5 above the certificate of lease and lease documents tendered herein by the defendants are declared fake documents. They are null and void and the same ordered to be cancelled forthwith, under any other further or other relief that the court, may deem fit to grant.

**DATED, READ AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF FEBRUARY 2010.**

**R.N. NAMBUYE**

**JUDGE**