



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Case 18 of 2010

RAPHAEL NJUGUNA CHEGE 1ST PLAINTIFF
BENARD GOKO KARWENJI 2ND PLAINTIFF
JAMES MBURU MWANGI (*Suing as trustees of Christian Community Church and Services*) 3RD
PLAINTIFF
VERSUS
MANDERA TOWN COUNCIL 1ST DEFENDANT
KULLOW MOHAMED SHEIKH 2ND DEFENDANT
RULING

The plaintiffs who sued as trustees of “*Christian Community Church and Services*” filed this action seeking to injunct the defendant from trespassing on plot No. 126 or L.R. No. 13139/131 Manderu town. The plaintiffs alleged in the plaint that the plot is owned by the church. The plaintiffs filed a Chamber Summons dated 12th February 2010 which was brought under certificate of urgency. When that Chamber Summons came before court for hearing *ex parte* on 18th February 2010, the court granted interim injunction stopping the defendants from interfering with the churches possession of that plot. The application was fixed for hearing *inter partes* on 3rd March 2010. When the matter appeared for *inter partes* hearing on 3rd March 2010, Mr. Omboga appeared for the 2nd defendant. The 1st defendant’s learned advocate Mr. Ochako was not present but his brief was held by Mr. Omboga. The plaintiffs were represented by learned advocate Mr. Ondari who held brief for Mr. Nyakundi. On that day, Mr. Ondari addressed the court thus:-

“Mr. Nyakundi requires leave to file a further affidavit. Parties have agreed there be status quo until such date as the court will give.”

Mr. Omboga in response stated:-

“That is so.”

The court on receiving that consent ordered that *status quo* on plot number 126 Manderu County be maintained until further orders of the court. An application has been filed dated 26th May 2010 by way of Chamber Summons. It is brought under Order XXXIX Rules 4 and 9 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure

Act. The application is filed by the 2nd defendant. By that application, he seeks that the court would vacate the orders of 3rd March 2010 and further that the court would dismiss the plaintiff's suit. The ground upon which the 2nd defendant seeks to set aside the order of 3rd March 2010 is that the said order which was by consent was obtained by misrepresentation. The misrepresentation, according to the 2nd defendant, is that one of the plaintiffs is not an official of the church. The 2nd defendant relied on a letter written by the Registrar of Societies dated 24th March 2010 which contains the names of the office bearers of the church. The letter is in the following terms:-

“24th March 2010

Omboga & Co. Advocates

P.O. Box 25460-00100

NAIROBI.

Dear Sirs,

RE: SOCIETIES ACT (CAP 108) AND SOC/52579 CHRISTIAN COMMUNITY CHURCH &

SERVICES

I refer to your letter dated 24th March 2010 and append below the names of the above mentioned society's office bearers as at 12th February 2010.

Chairman – Raphael Njuguna Chege

Vice Chairman – Johana Kimani Gachie

Secretary – Peter Njuguna Njoroge

Asst. Secretary – Jonathan Momo Kinyenzie

Treasurer – Bernard Goko Karwenti

Asst. Treasurer – Josphat Mwangi Mbugua

Yours faithfully

Joseph Onyango

Deputy Registrar of Societies.”

It is clear from that list of the office bearers of the church that the name of James Mburu Mwangi the 3rd plaintiff is not reflected. The 2nd defendant also relied on the absence of the name of the 3rd defendant in the above letter to seek to have the plaintiff's suit dismissed. Although the 2nd defendant sought the dismissal of the suit, what I believe he meant was that the plaintiff's suit be struck out. The 2nd defendant argued that the plaintiffs were not candid when they sought the *ex parte* injunction. It is correct to state that a party who approaches a court and particularly when he appears *ex parte* is expected to show utmost good faith (*uberrima fide*). See the case **The King Vs. The General Commissioners for Purposes of the Income Tax Acts the District of Kensington** [1917] IKB. The Court of Appeal also made a similar statement in regard to a party who appears before court *ex parte* in the case **Uhuru Highway Development Limited Vs. Central Bank of Kenya & Ano.** Civil Application No. Nai 140 of 1995 (UR 62/95) as follows:-

“Order 39 Rule 3 (1) of the Civil Procedure (Revised) Rules, permits the granting of ex parte injunctions but it must clearly be understood that a party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the judge all the relevant materials, including even

material which is against his interest. The basis for this requirement is obvious: It is a universal rule of natural justice that court orders ought to be made only after hearing or giving all the parties an opportunity to be heard. Ex parte orders, whether they be injunctions or whatever, form an exception to this rule and for a party to benefit from the exemption, there must be a good and compelling reason for it."

The plaintiff as can be seen from the above case had an obligation to make full disclosure even of such information that would not have favoured their case. The question is, was there non disclosure? Although the 2nd defendant relied heavily on the letter of the Registrar of Society reproduced above, he also annexed to his affidavit in support the Trust Deed of the church. The trustees that are named in that Trust Deed are all the three plaintiffs in this action out of the four in the Trust Deed. That Trust Deed provides that all real property acquired by the church are to be vested in the names of the trustees to hold in trust for the church. It does seem that it is on the basis of that Trust Deed and the obligation it lays on the trustees that the plaintiffs herein filed this action. It does seem that this action was filed to safeguard what the trustees claim to be the church's property. Where immovable property is concerned, as far as the church is concerned, the responsibility of safeguarding such property is on the plaintiffs who instituted this action. It therefore become clear that the plaintiffs did not misrepresent themselves in filing this suit and therefore did not deceive the 2nd defendant. I find also that there is no basis in view of what I have stated for striking out the plaintiff's suit. The other issue to be considered is that the order of 3rd March 2010 was by consent of all parties. A consent order can only be set aside on the same ground that a contract can be vitiated. The 2nd defendant sought the setting aside of that consent order on basis of misrepresentation that the plaintiffs were entitled to file the suit on behalf of the church. As I have stated before, there is no such misrepresentation. For that reason, the consent order of 3rd March 2010 cannot be set aside and the 2nd defendant's application dated 25th May 2010 is dismissed with no orders as to costs.

Dated and delivered at Meru this 26th day of July 2010.

MARY KASANGO
JUDGE