



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 4 OF 2010

**METHODIST CHURCH IN KENYA
TRUSTEES REGISTERED.....PETITIONER**

VERSUS

**THE ATTORNEY GENERAL.....1ST RESPONDENT
THE PERMANENT SECRETARY,
MINISTRY OF HEALTH.....2ND RESPONDENT
PERMANENT SECRETARY,
INTERNAL SECURITY.....3RD RESPONDENT
THE COMMISSIONER OF POLICE....4TH RESPONDENT**

THE DIRECTOR OF MEDICAL SERVICES..5TH RESPONDENT

**THE DISTRICT COMMISSIONER,
MERU NORTH DISTRICT.....6TH RESPONDENT
THE DISTRICT MEDICAL
OFFICER OF HEALTH.....7TH RESPONDENT**

AND

HON. MITHIKA LINTURI..INTENDED INTERESTED PARTY

IN THE MATTER OF SECTION 84(1) OF THE

CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE
INDIVIDUAL TO WIT SECTION 75, 76, 77 AND 82 OF THE CONSTITUTION**

JUDGMENT

The petitioner Methodist Church in Kenya trustees registered petition before this court praying that:-

(a) It be declared that the petitioner's interest, in land on which the Kiraone Dispensary stands, is property within the meaning of sections 75 and 117 of the constitution and can only be taken possession of under the procedures laid down in the said sections.

(b) It be declared that the 1st, 2nd and 5th respondents have not compulsorily acquired, within the meaning of sections 75 and or 117 of the Constitution, the petitioner's Kiraone Dispensary in Athiru Gatiti Location, Meru North District.

- (c) *It be declared that the 2nd respondent's decision of 11th August, 2006 to take from the petitioner and vest in the government the ownership of the said Kiraone Dispensary is a usurpation of the Judiciary's power to adjudicate upon property disputes between citizens and the Government, and is unconstitutional, null and void.*
- (d) *It be declared that the 2nd respondent's decision of 11th August, 2006 to take from the petitioner and vest in the government the ownership of the Kiraone Dispensary was taken in bad faith, is arbitrary, capricious, and a contravention of the petitioner's right, under section 82 of the Constitution, not to be subjected to arbitrary exercise of power.*
- (e) *It be declared that the 2nd, 5th, 6th and 7th respondents' planned taking over of the petitioner's Kiraone dispensary on 9th May, 2007 will, if it takes place, be a contravention of the petitioner's right, under section 76 of the Constitution, not to be subjected to arbitrary entries into its property.*
- (f) *It be declared that the Gazette Notice No. 1640 of 2007 dated 23rd February 2007 designating the petitioner's Kiraone Dispensary in Athiru Gaiti Location, Meru North District and approved institution, is null and void.*
- (g) *An order of certiorari do issue to remove and bring to the High Court of Kenya, Gazette Notice No. 1640 of 2007 dated 23rd February, 2007, for the purpose of quashing the same.*
- (h) *It be declared that the 3rd, 4th and 6th respondents are in breach of their constitutional duties to protect the petitioner's Kiraone Dispensary in Athiru Gaiti Location, Meru North District, and to apprehend members of the vigilante group who forcibly closed down the petitioner's said dispensary on 13th June, 2006 and have kept it shut down.*
- (i) *An order of mandamus to compel the 3rd, 4th, and 6th respondents to apprehend and charge in a court of law all persons preventing entry into and out of the said Kiraone Dispensary, and prevents any person from interfering with the petitioner's enjoyment of the said Kiraone Dispensary.*
- (j) *It be declared that the intended take-over of the petitioner's Kiraone Dispensary in Athiru Gaiti Location, Meru North District on 9th May, 2007 will be a contravention of the petitioner's right under section 76 of the Constitution, not to be subjected to illegal and arbitrary entries of its property.*
- (k) *A permanent injunction do issue to restrain the respondents by themselves, servants and or agents from entering into or taking possession of the petitioner's Kiraone Dispensary.*
- (l) *General damages.*
- (m) *Exemplary damages.*
- (n) *The costs of this suit.*

It was pleaded in the petition that the petitioner like other protestant churches own places of worship, hospitals, dispensaries, schools and other properties. The subject matter of this petition is Kiraone Dispensary (the dispensary). The petitioner stated that they own the dispensary which is situated in Athiru Gaiti Location in Meru North District. The petitioner in its pleadings stated that the respondents plan to take over the petitioner's said dispensary on 9th May 2007 in contravention of the rights of the petitioner. It should however be note that the alleged take over did not take place because the court in this matter on 8th may 2007 gave restraining orders. The petitioner in its pleadings stated that a vigilante group took possession of the dispensary on 13th June 2006 and in the process excluded the petitioner from it. It was pleaded that the police in breach of their duty as a police force in this country had failed to provide security to the petitioners in respect of their ownership of the dispensary. The petitioner pleaded that the dispensary was its property. Further that the dispensary was given to the petitioner in 1983 to provide health services to the community. Subsequently, there were concerted efforts to take away that dispensary from the petitioner. There is an exhibit annexed in this case which shows the efforts that were being made to take over the dispensary from the petitioner. The letter is dated 6th December 2006 and in is in the following terms:-

“The Chairman

Meru North District Development Committee

P.O. Box 1

MAUA

RE: PROVISION OF SERVICES AT KIRAONE

DISPENSARY

Kiraone Dispensary was constructed by the

Government through a loan from World Bank.

However, on completion it was handed over to services at a fee. These charges are higher than Dispensaries.

Maua Methodist Church who started providing what is currently being charged at the Government

The handover of the facility (which was against the conflict and eventually boycott of services which

wishes of the community) resulted to ownership forced the dispensary to close down.

ones
Gaiti
Kamanja. The
Superintendent who
Hospital Administrator was

who allocated three (3) acres of land to Maua
dispensary stands. The land was donated by Mr.
others present were Rev. John Mungania and Dr.
were on behalf of the hospital and also Mr. Joseph
present.

Methodist Hospital where the Athiru
Peter Mbanga and Mr. M'Birithia
Joel Muthuri the then Medical
Mithika the then

then
the site.

The then area Chief Mr. Gideon M'Ithali (was a
DO – Mr. Were (current Igembe and Ntonyiri

chief for the current three divisions) and the
constituencies), were also present at

NB

When the clan met on 10th May 2005, it concluded
dispensary as indicated by the then Chief of
the hospital wants to follow their seventeen (17)

that he didn't give twenty (20) acres to the
Akachiu – Mr. Gideon M'Ithali. The clan said if
acres, let them ask Mr. Gideon M'Ithali.

From the time the hospital put up the dispensary
we fully support he hospital to carry on with their
anybody tampers with the dispensary, we as the

since 1983 we have been using their services and
developments within the fenced area and if
clan are answerable.

NB

Chief Gideon M'Ithali is not a member of Athimba
this man stop inciting people immediately.

clan and we don't border with him, so please let

Attached herewith is a list of the clan members

who attended the meeting.

Yours faithfully,

MR. HENRY KOBIA

MR. MUTURA M'IBIRITHIA

CC - Maua Methodist Hospital
- D.O. Igembe South East
- MP Igembe Constituency
- OCPD Meru North District
- Chief Athiru Gaiti."

The petitioner on obtaining that land and on the Ministry of Health participating in the handing over ceremony of the dispensary, the petitioner informed the general secretary of the protestant churches medical association. The petitioner thereafter fenced the 3 acres and built a stone gate with a metal door. They also installed a borehole, a water tank and a generator to pump the water. Since 1985, the dispensary had been manned maintained by the petitioner's employees. On 13th June 2006 the dispensary was forcibly closed down by a vigilante group. The dispensary according to a nurse who worked there Ashford Njogu was serving 20,000/= people in south east division of Meru North District. The petitioner, according to Njogu collected revenue between Kshs. 3,000/= to Kshs. 10,000/= from those who sought medical services. On the other hand, the average expenses were Kshs. 92,000/=. It happened that in the year 2004 the petitioner wished to increase the bed capacity by 12 beds in the maternity facility. That however was opposed by some leaders in that area. Those leaders who opposed that improvement begun to campaign for the petitioner to hand over the dispensary to the government. Njogu whilst he was working at the dispensary on 13th June 2006 was confronted by 1,000 people who demanded that he and his co-workers leave the dispensary. That threat was reported to the police post at Kiraone and to the district officer South Eastern Division. On reporting they were accompanied back to the dispensary by 5 to 7 police officers who instead of ordering the people who had invaded the dispensary pleaded with them which plea the people ignored. The dispensary remained closed because the police who again accompanied Njogu said that the situation on the ground was life threatening. No one however was arrested. A member of Athimba clan Daniel Maramba deponed in his affidavit in support of the petition that betw4een 1960 and 1985 the petitioner operated a mobile clinic to save the people of Atheru Gaiti from going for medical services far. In 1980, the petitioner received a donation of 3 acres of land in Karoni where the dispensary now stands. He deponed that the land was donated by Peter Mbanga and M'Birithia. The deponent also stated that he had served as a member of the adjudication committee and he was aware that the land where the dispensary stood that is, plot number 5118 was recorded as being owned by the petitioner. The petitioner has constructed a church on a plot next to where the dispensary is that is, plot number 5119. This deponent attributed the threat to take over the dispensary from the petitioner to religious rivalry and political ambitions of the leaders who were campaigning for the dispensary to be taken away from the petitioner. The petitioner stated that the 5th respondent had gazetted the dispensary as a government institution. The petition was opposed. In opposition a replying affidavit was filed by the permanent secretary of Ministry of Health Hezron Nyagito. In that affidavit, he stated that the dispensary had always belonged to the Ministry of Health. That the land where the dispensary stands was donated by the local community. He then in that regard relied on the letter dated 19th December 1983 which is reproduced in this judgment. When one looks at that letter it becomes clear that the land donated for the Kiraone dispensary was for the "proposed by the M.C.K. Maua Hospital." It is undoubtedly clear that those initials in that letter referred to Methodist Church Kenya Maua Hospital. The letter therefore shows that the land was not donated by the community to the Ministry of Health contrary to what is deponed on behalf of the respondent by Nyagito. Nyagito further deponed that the government of Kenya invited tenders for the construction of the dispensary which was financed with the funds from Unicef. The annexure that the respondent relied on to confirm that deposition is completely illegible. I am unable to confirm that it provides what he stated in the replying affidavit. Nyagito further deponed that the construction of the dispensary was done with the help of the local community whereby the local community provided piped water and manual labour. To support that

deposition, there was attached to the replying affidavit minutes of a meeting held on 20th June 2006. In other words, the deponent relied on someone else's narration of the history of the dispensary in the year 2006 of matters that took place in 1983. In that year, 2006, the dispute over the dispensary had already arisen and therefore anyone's narration of the history must be understood in the backyard that there was already that dispute. Since there was that dispute it is more likely than not that the narrator would give the history that favours his side. Nyagito deponed that the government being unable to provide the health services required by the community handed over the dispensary to the petitioner. That handing over of the dispensary according to him, did not signify the transfer of ownership. The dispensary was handed over to the petitioner who was able to offer health services to the community. He deponed that the petitioner however did not operate the dispensary to the satisfaction of the community. In this regard, Nyagito annexed minutes relating to the dispute that arose. The petitioner filed this petition in High Court at Nairobi on 7th May 2007. The case was transferred to this court by an order of the High Court Nairobi dated 15th March 2010. The learned advocate for the petitioner Mr. Kamau Kuria Senior Counsel filed the petitioner's written submissions on 16th October 2007. The learned state counsel Mr. Maroro filed the respondent's submissions on 12th July 2010. The reasons I highlight those dates is because the party's evidence and their written submissions refer to the old constitution. Since 27th August 2010 this country gave itself a new constitution. If I do not therefore refer to the law relied upon by the parties, it is because the law quoted by them is no longer applicable. The new constitution has under Article 10 outlined the National Values and Principles of governance of this country. Article 10 (1) (a) to (c) and sub Article 2 (a) to (d) provide as follows:-

- “10 (1) The national values and principles of state officers, public officers and all persons governance in this Article bind all state organs, whenever any of them –**
- (a) **patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**
 - (b) **human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;**
 - (c) **good governance, integrity, transparency and accountability; and**
 - (d) **sustainable development.”**

The state organs such as the respondents are required by that Article to observe the National Values and Principles as set in that Article. One such principle relevant to our case is the principle that this country shall be governed by the rule of law. Thomas Paine wrote in his pamphlet, “Common sense” that “In America, the law is king..... In free countries the law ought to be king; and there ought to be no other”. The constitution of Kenya does provide by setting out the National Values and Principles that the law in this country will be the king. That being so, there is no other king above the law. Bearing that in mind, the rule of law was not followed in the action that took place in respect of the closure of the dispensary. In respect of the action taken by the respondent, particularly the Ministry of Health, the law, in my view, was not followed. The letter relied upon by both the petitioner and the respondent of the then chief of Akachiu Location dated 19th December 1983 stated that the land was donated to the Methodist Church for the purpose of construction of Kiraoni dispensary. Daniel Maramba deponed in his affidavit in support of the petitioner that 3 acres of land was given to the petitioner by two specific people. The petitioner began to run the dispensary after it was constructed in 1985. Daniel Maramba was a member of the adjudication committee when the land was adjudicated in Athiru Gaiti Location in 1980. He stated that he was aware in his capacity as an adjudication officer that the ownership of plot number 5118 where the dispensary stands was recognized by the adjudication committee as belonging to the petitioner. Article 40 (2) (a) of the Constitution provides that:-

“Parliament shall not enact a law that permits the state or any person –

to arbitrarily deprive a person of property of any description or of any interest in, or right over any property of any description.

The fact that at present parliament has not enacted such legislation is not an impediment to this court recognizing the rights in that Article. The fact is that the Constitution recognizes a person would not arbitrarily be deprived of his property or an interest in property. The petitioner having had plot number 5118 donated to it and having run the dispensary from 1985, no one had a right to deprive it of that interest. Even if as argued by the respondent that the petitioner does not have proprietary right over plot number 5118, it was unlawful for a group of people to brutally and forcibly remove the petitioner from the dispensary as narrated by the petitioner. It is unfortunate that the learned Deputy Chief Litigation Counsel Mr. Maroro would submit that the petitioner should have taken care of its own security. Mr. Maroro in his written submissions stated:-

“.....if the petitioner have failed to convince the community they purport to

serve that they require this facility (the dispensary) then the government cant force

the citizen that go to the facility security. The petitioners would (sic)

“The citizen should be their (petitioner) own dialogue with the community.....”

What those submissions imply is that the petitioners should either have given in to the demands of the vigilante group or should have provided their own security. Such submission show dereliction of duty on the part of the executive arm of government. The police force is mandated by section 14 (1) of the Police Act to maintain law and order where there is a threat of law and order as was in the case of the petitioner's dispensary. The police should have exercised their mandate as per that section. That section provides as follows:-

“14 (1) The Force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged.”

As a result of the police failure the petitioner was ejected from the dispensary on 13th June 2006. On 8th May 2007, the court in this case restrained the 2nd to the 7th respondents from taking possession of the dispensary as they intended to on 9th May 2007. That order is still in force to date. The dispensary would seem to have remained unused since June 2006. I am however aware that there is another case pending before this court being High Court Meru Civil Case No. 37 of 2010 filed by the petitioner against individuals other than the respondents in this case who since February 2010 took over the running of the dispensary. The dispensary is a fixture attached to plot number 5118. There is a Latin term, "*Quicquid plantatur solo, solo cedit*" which means, "*Whatever is affixed to the soil belongs to the soil.*" By application of that principle, the dispensary which is affixed to plot number 5118 became part of that land and therefore the title to the fixture that is the clinic is part of and passes with the title of land. It was therefore unlawful, that is the action that resulted in the taking over the running and the ownership of the dispensary. The police also did in fact fail to protect the petitioner's interest in the dispensary. Now that we are governed by a new constitution, which requires the respect of the rule of law, it is hoped that there would not be a repeat of what happened to the petitioner which action seemed to have had the tacit approval of the executive arm of government, even though it was unlawful. What ought to have been done by those claiming to have a more superior right than that of the petitioner in respect of the dispensary is that such a right should have been enforced through a court of law and not through brute force as was the case here. It is hoped that such act by vigilante groups will now be limited to the history books of this country. The respondent argued that because the land in question was still under adjudication, the petitioner should have obtained consent of the land adjudication officer before filing this case as provided under section 30 (1) of the Land Adjudication Act. That section provides as follows:-

“30 (1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the section has become final in all respects under section 29 (3) of this Act.”

The respondent's learned counsel in his written submissions seems to have gotten it right in his submission in respect of that section in its comparison to the Constitution. He stated in his written submission:-

“The petitioner may be tempted to argue that this is a constitutional reference hence it cannot be subjected to a lesser statute.”

That indeed is the answer. The constitution does not provide that when one seeks to enforce their rights as under Article 40 that is, a fundamental right, that such a party is required to obtain consent as provided under the Land Adjudication Act. Article 23 (3) provides that the court in enforcing rights or fundamental freedoms in the Bill of Rights can grant appropriate relief including:-

“(a) a declaration of rights;
(b) an injunction;
(c) a conservatory order;
(d) a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in that Bill of Right and is not justified under Article 24;
(e) an order for compensation;
(f) an order of judicial review.”

Bearing the provisions of that Article, and considering the evidence produced before this court, I make the following orders and declarations in this judgment.

1. **I declare that the petitioner is the owner of plot number 5118 within Upper Athiru Gaiti adjudication Section. The District Land Adjudication and Settlement Officer Igembe District is directed to record the petitioner as the owner of that plot.**
2. **An order of certiorari is issued to call to this court and quash the gazette number 1640 dated 23rd February 2007 whereby Kiraone Dispensary was gazetted as an approved institution under section 22 (2) (b) of the Medical Practitioners and Dentist Act.**
3. **Permanent injunction is hereby issued against all the respondents, their servants or agents or anyone claiming under them restraining them from interfering with the running by the petitioner of Kiraone Dispensary on plot number 5118 Upper Athiru Gaiti Adjudication Section.**
4. **An order is hereby made ordering the local officer in charge of police station near Kiraone Dispensary to afford and provide the petitioner, its employees and agent's security as they provide health services to the community at Kiraone Dispensary.**
5. **The 3rd, 4th and 5th respondents are ordered to pay to the petitioner, Kshs. 3m as general damages.**
6. **The petitioner is awarded costs of this action as against all the respondents.**

Dated and delivered at Meru this 5th day of November 2010.

**MARY KASANGO
JUDGE**