



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 254 OF 2009

UMBISA MOSES GWEHONA.....PLAINTIFF/APPLICANT

VERSUS

SEVENTH DAY ADVENTIST CHURCH OF

EAST AFRICA (sued on behalf of

KAHAWA WEST SDA CHURCH.....DEFENDANT/RESPONDENT

R U L I N G

1. The application before me is the Plaintiff's Chamber Summons dated 29/05/09. The same is expressed to be brought under Section 3A of the Civil Procedure Act and Order XXXIX Rules 1, 2 and 9 of the Civil Procedure Rules seeking ORDERS of temporary injunction restraining the Respondent, its servants and or agents from trespassing onto, constructing upon, fencing and or in any other manner whatsoever interfering with Plot No. X104 Part of LR 71/5 in Kahawa West Estate pending the hearing and determination of this suit. The application is premised on 6 grounds which are that:-

1. ***The Plaintiff is the lawful owner of the suit property known as Plot No. X104 Part of LR 71/5 in Kahawa West Estate.***
2. ***The said plot was allocated to the Plaintiff by the City Council of Nairobi pursuant to the letter of allotment dated 5th March 1999 and upon acceptance and payment of the requisite fees the Plaintiff was issued with the beacon certificate dated 5th March 1999.***
3. ***The Plaintiff has been paying all the land rent and rates due upon the said plot to the City Council of Nairobi since 1999.***
4. ***The Respondent has encroached on the Plaintiff's land and has trespassed thereon.***
5. ***The Plaintiff apprehends (sic) that the Respondent will continue with the interference/trespass unless an injunction is issued by the honourable court.***
6. ***The court should therefore preserve the suit plot so that the Plaintiff can enjoy quiet possession without the interference by the Respondent.***

2. The application is also supported by the sworn affidavit of **Umbisa Moses Gwehona** dated 29/05/2009. The deponent says that he was allocated Plot No. X104 PART of LR No. 71/5 Kahawa West (the suit property) on 5/03/1999; that he was issued with a certificate of beacon by the City Council of Nairobi on 21/05/1999; and that since then he has recovered and settled rent invoices from the City Council of Nairobi. The deponent also says that upon allotment, he took possession of the plot and has been visiting the plot from time to time. The deponent says further that on a recent visit to the plot, he found out that the Defendant has trespassed onto the plot without the consent of the Plaintiff/Applicant. The deponent says that he knows as a fact that the Respondent owns an adjacent plot number KC2 which is also part of LR No. 71/5.

3. The application is opposed. The Replying Affidavit is sworn by **Nehemiah Michira Siika** who says he is an elder of the Defendant church. The deponent admits that the Defendant currently occupies the suit property on which they have constructed a pit latrine and/or a temporary structure. He also says that upon application by the Defendant to the City Council of Nairobi (the Council) the Defendant was allocated a parcel of land known as LR No. 71/5 situated at Kahawa West. He also says that the Defendant subsequently paid up the necessary dues in relation to the said allocation of the suit property and that in the circumstances, the Defendant has a right to use the suit property. He prays that the Plaintiff's application be dismissed with costs.

4. According to the Letter of Allotment marked "NMS1", the Defendant was allotted subplot No. "A" in Kahawa West and the allotment of the plot was to be used for residential purposes only and was to be constructed in accordance with approved plans. On the other hand, the allotment letter to the Applicant, which is dated 5/03/1999 says that the Applicant has been allotted plot No. X104 PART of L.R. No. 71/5 Kahawa West. The letter of allotment to the Applicant shows that the plot was transferred to him from one **Jadiel Githinji** Letter Ref. TC/HO/9/1002/96 dated 25/05/1996 refers. The Respondents letter of allotment does not have such details. The Applicant has also attached a receipt dated 19/4/1995 for payment of Kshs.13,160/= being survey fees. He has also annexed a receipt dated 25/02/1999 for Kshs.12,600/= being stand Premium and Ground Rent for the period 30/06/96 to 31/12/96. Both payments are in respect of Plot No. X104 Part of LR 71/5, Kahawa West. The Applicant has also annexed a copy of the map on which is shown the location of the SDA Church (0.1 ha). It is to be noted that the plot occupied by the SDA Church lies adjacent to plot number X104.

5. In his plaint dated 29/05/2009 and filed contemporaneously with the instant application, the Plaintiff/Applicant avers that the Defendant has encroached on his plot and/or unlawfully taken possession of part of the Plaintiffs plot by erecting a pit latrine thereon and/or a temporary structure where the Defendant conducts its activities without the consent of the Plaintiff. The Defendant does not deny these facts and says that it has the right to use the said property because it paid the necessary dues to the City Council of Nairobi.

6. The issue that now arises for determination is who between the two parties is the mother of the baby over whom the dispute has arisen. For the Applicant to succeed in this case, he must demonstrate to the court that (a) he has established a prima facie case with a probability of success, (b) unless the order sought is granted, he is likely to suffer irreparable damage and (c) that if the court is in doubt, the court should consider the case on a balance of convenience (see **Giella -vs- Cassman Brown & Co. Ltd.** [1973 EA 358]).

7. I have now considered the facts that have been placed before me. I have also considered the submissions made and the evidence that each party has placed before me. After the above consideration, I am satisfied that the Applicant has met the conditions set out in the **Giella case** (above) for the granting of the order of injunction sought. The Applicant's evidence clearly shows that the Respondent's church is located in a different plot. It is therefore unreasonable for the Respondents to allege that they have a right to use the plot belonging to the Applicant. The Respondents have not placed any evidence before me to show that they have made any payments to the Council for Plot X104 or for any plot at all. The Applicant has placed such evidence before me. There is therefore no doubt in my mind that unless the Orders sought are granted, the Applicants Plot X104 LR 71/5 is likely to waste away at great prejudice to the Applicant.

8. In the premises, I allow the Applicant's application dated 29/05/09 in terms of prayer (b) thereof and order that a temporary injunction be and is hereby issued restraining the Respondent, its servants and or agents from trespassing onto constructing upon, fencing and or in any other manner whatsoever interfering with Plot No. X104 Part of L.R. 71/5 in Kahawa West Estate pending the hearing and determination of this suit. The Applicant shall also have the costs of this application.

It is so ordered.

Dated and delivered at Nairobi this 30th day of July 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:

Mr. Mbogo (present) for the Plaintiff/Applicant

No appearance for the Defendant

Weche – court clerk