



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Civil Case 142 of 2009

**AMOS OCHIENG SIAJE
NAFTALI OLOO NYADHI
AMOS OTIENO
SAIKUKU.....PLAINTIFFS**

-VERSUS-

**PEREZ ATIENO OTIENO
SILPA OYAMO
MARTIN OLUOCH
ERICK CHERUIYOT (OLEKNINI)
.....DEFENDANTS**

R U L I N G

The plaintiffs/applicants are members of Evangelical Christ Church Of Africa (Eccla) Hera Mar Adiera- Oruba and brought this suit and application on own behalf and on behalf of the church. They are Chairman, Secretary and Treasurer respectively of the church. Their case is that the church is the registered proprietor of land parcel no. **Kanyamkago/Kawere/543** measuring approximately 0.32 Hectares together with the developments thereon including a church building. On 10/5/2008, they alleged, the defendants/respondents jointly and severally trespassed upon this property and forcefully ejected them and other members of the church out of the church premises and have since placed the 4th respondent thereon with instructions to refuse members of the church the use of such premises and the land. By reason of this act, members of the applicants church have nowhere to worship from and have thus been denied their constitutional right of freedom of worship. The applicants sued for a permanent injunction to restrain the respondents by themselves, their servants and /or agents from trespassing on the land or interfering with their right to worship.

With the suit was filed a Chamber Application under *Order 39 rules 1,2,2A 3 and 9 of the Civil Procedure Rules* and *sections 3A and 63(e) of the Civil Procedure Act* for a temporary injunction. The respondents did not file any Replying Affidavit or Grounds of Opposition, but filed a Statement of Defence in which they stated that they use the church in their capacities as officials of church of Christ in Africa who have an injunction barring the applicants from interfering with the suit property. It was pleaded that there exists another suit, *HCCC no.21 OF 2005 at Kisumu*, over the same cause of action and that a request shall be made to have the present suit dismissed. Jurisdiction of this court to hear this suit was

denied. The respondents pleaded the applicants had no capacity to sue them and stated that there is no society by the name Evangelical Christ Church of Africa (ECCA). Hera Mar Adiera- Oruba.

The Title Deed for this land was annexed to the affidavit sworn by 1 st applicant to support the application. The registered proprietor is Hera Mar Adiera (ECCA). There was no effort to demonstrate that that was the same entity as Evangelical Christ Church of Africa (ECCA) Hera Mar Adiera- Oruba. This is important because the applicants capacity to sue has been brought into question. There is no *prima facie* evidence that the entity named in the plaint is the registered owner of the land in dispute.

Secondly, the evidence contained in the Supporting Affidavit indicates that the respondents have taken over the church and the land and excluded the applicants. The action sought to be restrained has already taken place and consequently a temporary inj unction, which is prohibitory in nature, cannot do. The applicants require the talking of positive steps to eject the respondents from the land, and from their place of worship. They should have sought a mandatory injunction. (*See East African Spinners Ltd And Others .V. Bedi Investment Ltd, Civil application no. 72 of 1994 at Nairobi*).

In short, the application cannot be granted. The same is dismissed with costs.

Dated, signed and delivered at Kisii this 23rd day of October, 2009

A.O.MUCHELULE

JUDGE

23/10/2009

Before A.O.Muchelule-J

Court clerk-Mongare

Mr. Nyariki for the respondent

Court: ruling in open court.

A.O.MUCHELULE

JUDGE

23/10/2009