



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

**Civil Case 52 of 2007**

**NZILILI MUTHINGA ..... PLAINTIFF**

**VERSUS**

**JULIUS MBILO MUINDE ..... 1<sup>ST</sup> DEFENDANT**

**GOOD NEWS CHURCH OF AFRICA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The background to this Application is this:-

On an unclear date, the 2<sup>nd</sup> Respondent printed the now famous “**harambee**” cards inviting donations for “**the construction of pastor’s house and fencing the church compound**”. The fund-raising was slated for 10/5/2008 at Matiliku. The church pastor was named in the card as Pastor Dismus Mwandau.

2. On 8/5/2008, the Plaintiff who had filed this suit on 4/7/2007, instituted the present Application and he sought the following orders under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules:-

- i. **THAT** this application be certified urgent and heard ex parte, in the first instance notwithstanding the fact that the same has not been served upon the Respondent.
- ii. **THAT** the Defendants, their agents, servants and/or and other persons claiming under their title be restrained by an order of injunction from alienating, disposing, cutting down trees, constructing any further structures permanent or otherwise, and/or disturbing the status quo, obtaining on the land known as Nzau/Kawala/676 including holding of the fundraising scheduled on 10/5/2008 pending the hearing and determination of this application.
- iii. **THAT** the Defendants, their agents, servants and/or any other persons claiming under their title be restrained by an order of injunction from alienating, disposing, cutting down tree, constructing any further structures, permanent or otherwise and/or disturbing the status quo obtaining in land known as Nzau/Kawala 676 including holding of a fundraising scheduled on 10/5/2008 pending the hearing and determination of the suit.

iv. **THAT** the Defendants do, jointly and severally, bear the costs of this application.

3. The specific grounds are as follows:-

- a. The defendants have organized a fund raising ceremony on 10/5/2008 aimed at raising funds to fence and construct a permanent house for the pastor on the disputed parcel of land.
- b. The said construction will involve clearing of the site area where the building is to be put up and trees and other vegetation will be cut down.
- c. Ground breaking ceremony for the construction is scheduled to be done on the 10/5/08 when the fund raising will be done.
- d. If the Defendants are not restrained, the Plaintiff will suffer irreparable loss and damage because it will make it impossible for the Plaintiff to execute any decree of this Court that may ultimately be issued by this Court and also deprived of the use of the land that he has used since time immemorial.
- e. The Plaintiff also has a prima-facie case against the Defendant and in any event the balance of convenience tilts in favour of the Plaintiff who has since time immemorial used the parcel of land save where the church stands.

4. In his Supporting Affidavit and in submissions by his advocate, the Applicant's case is that the 1<sup>st</sup> Defendant who was a licensee on parcel number Nzau/Kawala/214 had fraudulently caused 0.18 ha. of that land to be exercised and registered as Nzau/Kawala/676 which he then transferred to the 2<sup>nd</sup> Defendant. In the Plaintiff, he seeks certain declarations relating to the suit land and in the meantime he seeks a temporary injunction as aforesaid. At paragraph 9 of the Supporting Affidavit, the Applicant then depones as follows:-

"That I have been using the parcel of land since time immemorial save for the portion where I allowed the Defendant to construct a temporary structure for a church as they looked for another parcel of land."

5. He further claims that he will suffer irreparable loss and damage if the injunction is not granted because **"on the land are trees that are indigenous and that is where"** he grazes his cattle.

6. In response, the 1<sup>st</sup> Defendant in his Replying Affidavit sworn on 14/5/2008 claims that he purchased a portion of land from the Applicant during demarcation and later obtained title to it when the portion was registered in his name as L.R No. Nzau/Kawala/676. A copy of the title deed is exhibited to his affidavit. He has also attached copies of the sale agreements between him and the Applicant showing that the alleged transaction took place between June and September 1972.

7. It is the 1<sup>st</sup> Defendant's case that he later donated the land as a gift to the 2<sup>nd</sup> Defendant church because he was its member and later had it transferred absolutely to it in 2004. That the Applicant's application is therefore mischievous and should be dismissed with costs.

8. The 2<sup>nd</sup> Defendant filed a Replying Affidavit sworn on 14/5/2008 and in it, Dismus Mwandau depones that as pastor and Trustee of the 2<sup>nd</sup> Defendant he is aware that the church first occupied the suit land in 1985 when the 2<sup>nd</sup> Defendant donated it to the said church. That the church building is permanent and the intended fundraiser was only meant to improve an existing facility. That the Applicant stands to suffer no loss as he has not been in occupation of the portion of land occupied by the church.

9. I am grateful for the authorities supplied by Mr Mulyungi for the Applicant but having considered the Application, the rival affidavits and submissions, I should merely begin by reiterating the law as relates to temporary injunction. The principles were firmly set in **Giella vs Cassman Brown and Co. Ltd. (1973) E.A. 358** and restated in **Mrao Ltd. vs First American Bank of Kenya Ltd. & 2 Others (2003) KLR 125** as being that:-

- a. **“the applicant must show a prima facie case with a probability of success;**
- b. **an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;**
- c. **if the court is in doubt, it will decide the application on a balance of convenience.”**

10. In this case, there is clearly no prima facie case with a probability of success because whereas fraud is alleged in the Plaint, no particulars thereof are given as in the mandatory rule in Order VI Rule 8 of the Civil Procedure Rules which provides as follows:-

**“8. (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing-**

- a. **particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and**
- b. **where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.”**

11. Further, the Applicant has made general assertions in the Supporting Affidavit backed by only a fund-raising card as evidence. The Respondents on the other hand, have exhibited documents showing that prima facie they have a better claim to the disputed portion of land than the Applicant. This includes title documents that are unchallenged.

12. Lastly on this aspect of the case, I see no reason why the Applicant has waited for all the more than 12 years since the church got on to the land while he actually admits that he was aware and did not stop the construction on the land.

13. As regards the issue of irreparable injury to be suffered, I do not think that loss of grazing land in the church compound can seriously be said to be so serious an issue that irreparable injury that cannot be compensated in damages has thereby been proved. In any event, the balance of convenience tilts in favour of the 2<sup>nd</sup> Defendant which has title to the land and has used and occupied it with the full knowledge of the Applicant since 1985.

14. In the end, the Application before me is without merit and is best dismissed as I hereby do with costs.

15. Orders accordingly.

Dated and delivered at Machakos this 24<sup>th</sup> day of **September** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Mulyungi for Applicant**

**Mrs Isika for Respondent**

ISAAC LENAOLA

JUDGE