REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 130 OF 2002

MESHACK MOGO WAMBUGU...PLAINTIFF

VERSUS

REV. SAMUEL KARIUKI GATHUMA T/A FAITH GOSPEL CHURCH....DEFENDANT

R U L I N G

By a Chamber Summons dated 14th January 2005, Meshack Mbogo Wambugu (hereinafter referred to as the Applicant) has come to this court under Order XXXIX rule 1, 2 and 2A of the Civil Procedure Rules and section 3A of the Civil Procedures Act seeking an order directed to Rev. Samuel Kariuki Gathuma t/a Faith Gospel Church (hereinafter referred to as the Respondent), to unblock the entrance to plot No. Tetu/Unjiru/620 by removing the fence on plot Number 54 and that the Respondent be further restrained from erecting the fence or blocking the entrance to Tetu/Unjiru/620 until further orders of the court.

The application is supported by the affidavit of the applicant in which he depones that he is the registered proprietor of plot No. Tetu/Unjiru/620 wherein he has a school having 160 children and 11 teachers, and that the Respondent has been allocated or has purchased an unsurveyed and unregistered plot known as plot No. 54 which has been hived off part of the access road to the applicant's aforementioned property, and that the Respondent has fenced off plot 54 thereby completely blocking the access to the applicant's school forcing the students and teachers to access the school through a barbed wire. The applicant denied the Respondent's suggestion that he is the one who has blocked the access to his property by putting up iron-sheet on the access road.

The Respondent has objected to the application relying on a replying affidavit sworn on 20/1/05 and a further affidavit sworn on 2nd February 2005, the gist of which is that he neither owns plot No. 54 nor has he fenced it or caused it to block the entrance to the applicant's property. He maintained that the applicant is the one who has blocked the access to his property by erecting iron-sheets. The Respondent who was cross-examined by the advocate for the applicant admitted that he uses plot No. 54 as a temporary church and is interested in purchasing the same, he however maintained he was not the owner of the plot. The Respondent further admitted having previously signed a consent judgment in this case in favour of the applicant, but explained that he signed the same without reference to his advocate in an effort to keep the church out of the dispute.

It is evident that the orders being sought by the applicant is both of a mandatory nature and restraining nature. The court has powers under Order XXXIX rules 1 & 2 to grant interlocutory orders of a restraining nature. However the rules therein does not extend the powers to the granting of interlocutory orders of a mandatory nature. This is not to say that the court cannot grant mandatory orders at interlocutory stage. The court has inherent powers under section 3A of the Civil Procedure Act to make orders as may be necessary to meet the ends of justice.

The principles upon which an order of interlocutory injunction may be granted were well stated in the celebrated case of **Giella v/s Cassman Brown & Co. Ltd. [1973] EA 358 at page 360** as follows:

"*First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer*

irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt it will decide an application on a balance of convenience."

In this case it is apparent from the affidavit evidence that the applicant is the registered proprietor of Tetu/Unjiru/620. It is also clear that the disputed plot No. 54 is adjoining the applicant's land and from the minutes annexed to the affidavit there has been an issue regarding the access to Tetu/Unjiru/620 which was being affected by plot No. 54 amongst others. It is also not disputed that a fence has recently been erected around plot No. 54 and this is what the applicant contends has blocked the access to the school situated on his property. Although there are disputed issues such as ownership of plot No. 54 and whether the applicant has an alternative access which he has blocked, these are issues that can only be determined after a full trial. It is sufficient at this stage that the applicant has satisfied this court that he has a prima facie case with a probability of success. It is evident that the applicant and the entire school are suffering loss and inconvenience due to the lack of access to the school. Although the court will not normally grant a mandatory injunction except in very special circumstances I find that the Respondent is currently the occupant of plot No. 54 and that it is fair and just that he be ordered to remove the recently constructed fence around this plot and that he is further restrained from erecting any fence blocking the entrance to the Applicant's school until this suit is heard and finally determined.

I do therefore grant the application dated 14th January 2005 in terms of prayer (1) and further order that the applicant shall be at liberty to remove the fence if no action is taken by the Respondent within 7 days from the date hereof.

Costs of this application shall be in the cause.

Dated, signed and delivered this 11th day of February 2005.

H. M. OKWENGU

JUDGE