



**REPUBLIC OF KENYA
IN THE REPUBLIC OF KENYA AT NAIROBI**

Civil Case 921 of 2004

SEVETH DAY ADVENTIST CHURCH (EAST AFRICA) LTD...PLAINTIFF

VERSUS

JOSEPH WACHIRA alias JOE T/A

MUGUMOINI AIR GARAGE.....1ST DEFENDANT

BENSON MULUZI.....2ND DEFENDANT

CHARLES OMONDI.....3RD DEFENDANT

ZADOK ONYANGO.....4TH DEFENDANT

BENSON MALIKAU.....5TH DEFENDANT

EPHENTUS IRUNGU.....6TH DEFENDANT

AMOS OCHIENG.....7TH DEFENDANT

PAUL OMONDI..... 8TH DEFENDANT

RULING

On 10.05.05 this matter came up before me for the hearing of prayers (ii), (iii), (iv) and (v) of chamber summons dated 20.08.04 and filed on 31.08.04 brought under order XXXIX rules 1 (a), 2, 3 and 9 of the Civil Procedure Rules and under sections 3A and 63 (c) and (e) of the Civil Procedure Act (Cap. 21) seeking the following orders:-

(ii) That the defendants either by themselves, their servants and/or agents or anyone whomsoever claiming under or through them, be ordered to vacate and remove all their properties or their equipment or any other equipment brought thereon by themselves or by their consent, from that piece of land particularly known as L.R. No. NAIROBI/BLOCK 60/494 (hereinafter referred to as “the suit premises”) within 14 days from the date of the order.

(iii) That the defendants be restrained either by themselves, their servants and/or agents or anyone whomsoever from entering upon, doing any act upon or in any other way interfering with the plaintiff’s right to occupation and quiet enjoyment of the suit premises until the hearing and final determination of the suit.

(iv) That pending the hearing and determination of this application, the defendants be restrained either by themselves, their servants and/or agents or anyone whomsoever from entering upon, doing

any act and/or carrying on the business of a garage at the suit premises.

(v) That costs of this application be provided for.

The application is supported by the affidavit of Geoffrey Kamau Wanyoike, pastor of the plaintiff church sworn on 20.08.04 and on the following grounds:-

(i) That the plaintiff is the registered proprietor of all that parcel of land more particularly described as L.R. No. NAIROBI/BLOCK 60/494.

(ii) That the defendants have by themselves, their servants and/or agents illegally and unlawfully trespassed into a portion of the aforesaid parcel of land and have erected structures for garage business and are continuously constructing structures to the annoyance of the plaintiff.

(iii) That the plaintiff will suffer irreparable loss unless the defendants are removed and restrained from entering upon the aforesaid parcel of land or in any other way interfering with the plaintiff's quiet possession and enjoyment of the suit premises.

The plaintiff/applicant was represented at the hearing of the application at the hearing of the application by learned counsel, Mr. C.O. Jaoko; the 1st defendant/respondent was represented by learned counsel, Mr. S.M. Muhia; while the 2nd - 8th defendants were represented by learned counsel, Mr. D.K. Maanzo.

The application is anchored on the plaintiff's main suit brought by way of plaint filed on 31.08.04 whose prayers are for:-

a) A mandatory injunction against the defendants, jointly and severally, by themselves, their servants and/or anyone whomsoever, claiming under or through them, ordering them to vacate and remove, all their properties or their equipment or any other equipment brought thereon by themselves or by their consent, from the plot particularly known as L.R. No. NAIROBI/BLOCK 60/494 within 14 days from the date of the order.

b) An order of permanent injunction restraining the defendants by themselves, their servants and/or agents or by anyone whomsoever entering upon constructing upon or in any way interfering with the plaintiff's quiet enjoyment and possession of all that parcel of land more particularly described as L.R. No. NAIROBI/BLOCK 60/494.

c) General damages for trespass.

d) Costs of this suit.

e) Any other or further relief this honourable court may deem fit to grant.

In his submissions in support of the application, plaintiff's/applicant's counsel pointed out that the plaintiff is the registered proprietor of the suit premises being L.R. No. NAIROBI/BLOCK 60/494 as lessee thereof under the Registered Land Act (Cap.300). It is the plaintiff's case that the defendants have trespassed into a portion of the suit land and erected structures thereon for garage business and are continuing to construct structures there to the annoyance of the plaintiff. The plaintiff complains that the action of the defendants has caused the plaintiff to suffer loss as it closed down its school on the suit premises due to nuisance created by the defendants and that it is not possible for the plaintiff church to conduct its activities including running a nursery school while the defendants operate a garage emitting noise and fumes. Plaintiff's counsel pointed out that the plaintiff has been authorized by the Nairobi City Council to operate the school and that the school and the defendant's garage cannot co-exist. Counsel pointed out that the defendants have not shown or provided any evidence of ownership of the land where the garage is operating from, that the garage is not licensed and is illegal and that the defendants are trespassers on the suit premises. Plaintiff's counsel submitted that the defendants as trespassers have no protection against the plaintiff's claim for possession as registered owner or proprietor of the suit

premises. Counsel relied for this proposition on Court of Appeal Civil Appeal No.53 of 1995, Michael Githinji Kimotho -vs- Nicholas Muratha Mugo.

Commenting on the defendants' claim to occupy an adjacent road reserve, plaintiff's counsel contended that if the defendants indeed occupy an adjacent road reserve, the plaintiff has an easement or right of way through such road reserve under section 30 of the Registered Land Act. Regarding defendants' claim that they have letters from the Lands Office authorizing them to occupy the subject land, plaintiff's counsel contended that such letters cannot confer title to them over the land in question.

Plaintiff's counsel complained that the 1st defendant's replying affidavit is not dated. On this point I note that the copy in the court file indicates that it was sworn on 15.10.04. Plaintiff's counsel also complained that the 2nd defendant's affidavit does not indicate who drew and filed it and that it is defective for non-compliance with section 5 of the Oaths and Statutory declarations Act (Cap. 15). In this regard I note that the 2nd defendant is Benson Muluzi and that there is no affidavit by him but there is a replying affidavit by Benson Malikau who is the 5th defendant, not 2nd defendant. The 5th defendant's affidavit sworn on 15.10.04 does not state who drew or filed it. Plaintiff's counsel's complaint about such affidavit is that it is defective for non-compliance with section 5 of the Oaths and Statutory Declarations Act. Counsel relied for this proposition on Musa & Sons Ltd and Another - vs - First National Finance Bank & Another [2002] I KLR 581 where the High Court (Otieno, J – as he then was) held the affidavit in that case to be defective under the Oaths and Statutory Declarations Act “as it failed to state in the jurat the place where it was sworn.” This is not quite the status of the 5th defendant's affidavit, although it cannot be said to be perfect having regard to its omission to indicate who drew or filed it.

Plaintiff's counsel urged the court to grant prayers (ii,) (iii), (iv) and (v) in the chamber summons dated 20.08.04 and filed on 31.08.04 – prayer (i) seeking certification of the application as urgent having been granted earlier.

On the other hand, counsel for 1st defendant opposed the plaintiff's application and relied on the 1st defendant's replying affidavit of 15.10.04. Counsel apologized that the plaintiff's copy of the 1st defendant's affidavit was not dated. It was the 1st defendant's counsel's case that the 1st defendant denies having occupied the suit premises since 1991. Counsel said it is the 1st defendant's case that he has been occupying an adjacent road reserve, which is the property of the Government, with authority from the Ministry of Lands Settlement charged with administration of public land. Counsel pointed out that there has been a running boundary dispute between the plaintiff/applicant and the defendants/respondents herein and referred to the 1st defendant's replying affidavit of 15.10.04 to that effect. The 1st defendant's counsel said the 1st defendant has lived on the adjacent road reserve for the last 10 years and complained that the plaintiff never disclosed the material facts that there has been a running boundary dispute between the applicant and respondents and that the 1st defendant has been occupying the adjacent road reserve for the last 10 years. Counsel referred to HCCC No. 1077 of 2002, East African Foundry Works (K) Ltd - vs. - Kenya Commercial Bank Ltd to make the point that a party applying for injunction must make full disclosure of all material facts.

The 1st defendant's counsel informed the court that it is the 1st defendant's case that he has a licence from the Government to operate his garage from the adjacent road reserve. Counsel referred to Halsbury's Laws of England, Vol. 27 (1) paragraphs 9 and 10 on page 27 to make the point that the fact of the 1st defendant having been authorized to operate a garage on the adjacent road reserve makes him a licensee. Counsel also referred to what he described as “regulation” 20 (1) of the Government Lands Act (Cap.280) to make the point that the Commissioner of Lands may issue licences to individuals to occupy Government Land. The reference is actually to section 20 (i) of the Crown Lands Ordinance, 1902 reproduced as part of the Government Lands Act (for easy reference) to the effect that the Commissioner of Lands may issue licences for temporary occupation of Government land. The 1st defendant's counsel submitted that the mandatory injunction sought by the plaintiff/applicant at this interlocutory stage can only be granted in a very clear case and that the present case does not fall in the category of a very clear case. Counsel referred to Halsbury's Laws of England, Vo. 24 paragraph 848 at page 445 to make the point that, while a mandatory injunction can be granted on an interlocutory application as well as at the hearing of the main suit, in the absence of special circumstances it will not be granted .

The 1st defendant's counsel submitted that the applicant has not made out a prima facie case and urged the court to dismiss the application.

For his part, counsel for 2nd – 8th defendants/respondents also opposed the application and associated himself with the submissions of counsel for 1st defendant/respondent. Counsel for 2nd – 8th defendants too made reference to “2nd” defendant's affidavit, which, as pointed out by this court earlier, does not exist and that the reference to such affidavit must be to the replying affidavit of the 5th defendant. Counsel pointed out that the subject affidavit shows to have been sworn in Nairobi and that the jurat is by the defendant, attested by a Commissioner for Oaths, and submitted that *Musa & Son's case* (supra) does not apply to the present case. Counsel for 2nd – 8th defendants acknowledged that the affidavit in question (Benson Malika's/5th defendant's affidavit of 15.10.04) does not indicate the law firm which drew or filed it but pointed out that there have been conflicting decisions by the High Court on the effect of such omission. He referred to HCCC No. 82 of 2003, *Coast Bus Roadways - vs-David Muchelule & Another* said to have been decided by Bungoma Resident Judge (Sergon, J) in which the Judge is said to have opined or held that so long as the facts are outlined, the Oaths and Statutory Declarations Act is complied with and such affidavit is not defective. Counsel promised to avail a copy of the decision but never did. On the other hand, the same counsel for 2nd – 8th defendants drew attention to HCCC No. 1736 of 2001, *Barclays Bank of Kenya Ltd - vs – Dr. Solomon Otieno Obiero* in which the High Court (Njagi, J) essentially took the opposite view.

Counsel for 2nd – 8th defendants submitted that the defendants/respondents are not occupying the suit land at all and referred to 5th defendant's replying affidavit to that effect. Counsel pointed out that the court cannot issue orders in vain, i.e. orders for the defendants to vacate land they don't occupy and which is not part of the present proceedings, and urged that the application be dismissed.

In reply, plaintiff's counsel reiterated his earlier submissions. He pointed out that the correspondence annexed to the plaintiff's affidavit shows that the history of the matter under inquiry started in 1999 and submitted that the plaintiff never withheld any material facts. Counsel pointed out that there is no valid licence attached to respondent's affidavits and submitted that their continued operation of a garage at the suit premises contravenes Nairobi City Council bye-laws. He reiterated with regard to 5th defendant's replying affidavit that section 5 of the Oaths and Statutory Declarations Act requires that at the foot of an affidavit there should be an indication of who had drawn and filed the affidavit, that this was not done and that the affidavit in question is defective. Counsel reiterated that if the defendants occupy an adjacent road reserve, that infringes the plaintiff's overriding interests to have access to and from the suit premises through the road reserve. Counsel pointed out that there is nothing in the map annexed to 5th defendant's affidavit to establish that it is from the Survey of Kenya as it bears no authorization by signature or stamp.

Plaintiff's counsel reiterated the prayers in the application under consideration and urged that they be granted and also that interim orders in place be extended.

I have given due consideration to the lengthy submissions of the parties' counsel and the authorities cited by them. From the pleadings and submissions by counsel for the parties, the following appear to be the basic or principal issues in the application now under consideration:-

1. Is the plaintiff/applicant the registered proprietor of the suit premises?
2. Have the defendants/respondents trespassed onto the suit premises and are they trespassers thereon?

The plaintiff/applicant church has annexed to its application, inter alia, a Certificate of Lease for 99 years over the plot issued under the Registered Land Act (Cap. 300) on 05.12.95. The approximate size of the land is given in the said Certificate as 0.4414 hectares. Geoffrey Kamau Wanyoike, Pastor of the plaintiff church has deposed at paragraph 4 of his supporting affidavit sworn on 20.08.04 that while applying for the plot, the plaintiff indicated that it intended to utilize the land, inter alia, for construction of a church, school. Pastor's home and dispensary.

One of the plaintiff church's complaints is that the nursery school the church established on the subject land has had to close down following the defendants' activities of running a garage which emits noise and fumes. The plaintiff church annexed to its application a single Business Permit issued to it by Nairobi City council to engage in the activity of a nursery school on the subject land for the period ending 31.12.04. Geoffrey Kamau Wanyoike also annexed to his affidavit some correspondence of 1999 and 2000 from both the Provincial Administration and the Ministry of Land & Settlement in Nairobi indicating that the plaintiff church had complained to the two authorities about the defendants' interference with the plaintiff's quiet enjoyment of the subject land.

The rejoinder on record from the defendants is principally through the affidavit of the 1st defendant sworn on 15.10.04. There is also the questioned affidavit of the 5th defendant likewise sworn on 15.10.04. The essence of the 1st defendant's affidavit is that the defendants have since 1985 operated the business of motor vehicle repair garage and allied works on a 60 - metre road reserve adjacent to the suit premises; that their occupation of the road reserve has been authorized by the Government; that on 27.07.96 the plaintiff's agents entered into the road reserve and demolished the defendant's structures; that sometime in 1999 the plaintiff fenced off its plot but in the process extended its boundary into the road reserve by one acre; and that the defendants sought the intervention of the Provincial Administration and Ministry of Lands & Settlement in Nairobi over the boundary dispute, which has not been resolved conclusively. The questioned 5th defendant's affidavit basically repeats the 1st defendant's averments. The 1st and 5th defendants have denied that they and their co-defendants have invaded and occupied any part of the suit premises. The 1st and 5th defendants annexed to their affidavits some correspondence and sketch plan purporting to show the suit land and the adjacent road reserve.

It is true that there have been conflicting High Court decisions regarding the effect of such omission as that pertaining to the 5th defendant's affidavit. The totality of the affidavit evidence availed to court does in my humble view make the omission a peripheral issue in the present case and I shall consider the 5th defendant's affidavit. There is also annexed to the 5th defendant's affidavit a document marked 'BM1' described in the said defendant's affidavit as a report from a licensed private surveyor. I pause here to observe that the sketch plan does not show who drew it or what relevant qualifications the drawer held. I also observe that the document 'BM1' described in the 5th defendant's affidavit as a report from a licenced private surveyor bears no authentication confirming that it is a report by a qualified surveyor.

Among the documents annexed to the 5th defendant's affidavit is a copy of Ministry of Lands and Settlement letter of 15.05.03 addressed to the plaintiff church and the 1st defendant and copied to Nairobi City Council. The letter captioned "RE: COMPLAINT LODGED TO THE MINISTER" has the following text:

"Please refer to our discussion on 14th May 2003. You are aware that the church has legally been allocated the plot next to the road reserve the Garage is operating from. The church is supposed to confine its operations to ONLY within the beacons area without interfering with the operations of the Jua Kali Garage. The church can only complain to the City Council of Nairobi for redress should it feel that the Garage should not operate from a road reserve but has NO powers to stop the Garage operating from the said reserve. Any contest of ownership of the church plot can only be handled by the Court of Law."

[underling mine.]

It is clear to me from the above material placed before me through the present application and the rejoinder thereto that the plaintiff church has established a prima facie case that it is the registered proprietor of plot L.R. No. NAIROBI/BLOCK 60/494 ("the suit premises") and also that there is an adjacent road reserve whereupon the defendants operate a motor vehicle garage. There is, however, a fierce dispute as to where the boundary between the plot claimed by the plaintiff and the adjacent road reserve lies. This is the crux of the matter now before me.

On 13.04.05 I did, at the invitation of the parties, visit the site where the suit premises are located near

Otiende Estate, Nairobi. Among other things, I was shown two main entrances to the subject land, three survey beacons alleged to have been in their original positions, one survey beacon alleged to have been removed and re-established plus one survey beacon position from where the beacon was alleged to have been removed. Upon return to court that afternoon, I fixed the chamber summons application now under consideration for hearing on 10.05.05. Subsequently I arranged for the matter to be mentioned before me on 27.04.05 whereat I asked the parties counsel why the main suit could not be heard on 10.05.05 instead of the chamber summons application? Plaintiff's counsel's response was that it was necessary for the chamber summons application to be disposed of first prior to full trial of the case in order to preserve the status of the suit premises. Counsel for the 1st defendant said that since pleadings had not been completed, the matter could not go to full trial. For his part, counsel for 2nd – 8th defendants informed the court that summons for the plaint attached to the chamber summons application had not been served upon the 2nd - 8th defendants and that full trial of the suit was not possible because the 2nd – 8th defendants have not been given an opportunity to file responses to the suit. On the basis of the parties' advocates' submissions, the date of 10.05.05 previously allocated for hearing of the chamber summons was reaffirmed.

It will be clear from my above analysis that, in my respectful view, the affidavit evidence availed to the court through the chamber summons application and the rejoinder thereto is inadequate to determine the boundary dispute subject matter of the suit herein. The parties claim that their activities have been carried out within their respective authorized arrears of operations. Whether that is so or not has to be determined by the court upon hearing evidence and that determination cannot in my view be made solely on the affidavit evidence availed to court at this interlocutory stage. The matter can only be properly determined through trial of the main suit. I note, however, that the plaintiff/applicant has annexed to its application a Certificate of Lease of the suit premises plus a Single Business Permit to run a nursery school there. The only outstanding issue is whether the plaintiff applicant has encroached on the adjacent road reserve or vice-versa. On the other hand, the defendants/respondents have not annexed a Temporary Occupation Licence to operate on the adjacent road reserve. Subject to identification of the location of the boundary of the two plots, to be done at the main hearing, the plaintiff/applicant appears generally to have a superior claim.

Prayer (ii) in the chamber summons application seeks an order that the defendants/respondents and/or their agents vacate the suit premises; prayer (iii) seeks an order restraining the defendants/respondents and/or their agents from entering upon the suit premises until the hearing and determination of the suit; and prayer (iv) seeks an order restraining the defendants/respondents and/or their agents from entering the suit premises pending the hearing and determination of the present application. Apart from the fact that the restraining orders sought vide prayer (iii) are supposed to last until hearing and determination of the suit while those sought vide prayer (iv) are supposed to last until hearing and determination of this application, I find no difference in the orders sought vide the two prayers. Since the boundary between the plot claimed by the plaintiff/applicant and the road reserve is in dispute, the status at the site visited by the court on 13.04.05 should be maintained until the boundary dispute is resolved. Prayer (ii) in the chamber summons is, therefore, refused. Since prayer (i) in the chamber summons has been spent, the remaining prayers for me to consider are prayers (iii), (iv) and (v). Prayer (iv) was previously granted and the same is hereby reaffirmed and merged with and made part of prayer (iii).

The end result is that the restraining orders previously issued under prayer (iv) of the chamber summons application dated 20.08.04 and filed on 31.05.04 is now made part of prayer (iii) and shall remain in force pending hearing and determination of the main suit.

Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 17th Day of June 2005.

B.P. KUBO

JUDGE