



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 24 of 2005

ELIUD CHEPTOO.....1ST
PLAINTIFF

MICHAEL CHERONO.....2ND
PLAINTIFF

JOSHUA CHERONO & 94 OTHERS.....3RD
PLAINTIFF

VERSUS

COUNTY COUNCIL OF BARINGO.....1ST
DEFENDANT

REGISTERED TRUSTEES OF CATHOLIC DIOCESE OF NAKURU.....2ND
DEFENDANT

RULING

The plaintiff herein filed an application dated 7th February 2005 by way of a chamber summons brought under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. They prayed for 2 substantive orders.

1. That a temporary injunction be issued restraining the second defendant herein by themselves, their servants, employees and/or agents from being in possession or developing and/or constructing structures on land reserved for Kaptere Secondary property as **L.R. BARINGO/KAPCHEPKOR 725** pending the hearing and determination of this suit.

2. That further or in the alternative a mandatory interlocutory injunction be issued ejecting the 2nd defendant from **L.R. NO. BARINGO/KAPCHEPKOR 725** until the hearing and determination of this suit or until further orders of this Honourable court.

There were also other prayers which were abandoned at the time of the hearing of the application. The application was made on grounds that were summarised as hereunder:-

- (a) The second respondent had obtained a title fraudulently in respect of the suit property without the consent of the applicants and without consent of the area Land Control Board.
- (b) The suit property was a school land donated by the applicants and members of Kaptere Community for purposes of constructing a public school whose fees the applicants could afford.
- (c) That the suit property was a property of the plaintiffs and no other person had a right to transfer the same to the second respondent without the consent of the applicants and consent of the Land Control Board.
- (d) That the suit property stood on grounds of a public primary school known as Kaptere Primary School which was donated by the plaintiffs to the Ministry of Education.
- (e) That the second defendant had advertised for the opening of St. Peters Girls High School at Kaptere on L.R. No. BARINGO KAPCHEPKOR 725 and this state of affairs had brought tension and confusion among the parents and the community who are the applicants herein whose children had been denied access due to inability to afford school fees yet the plaintiffs were the owners of the suit land
- (f) That no Land Control Board's consent was sought and obtained before the first defendant transferred the suit land to the second respondent.
- (g) That the applicants are apprehensive that once the school becomes private they will not be able to afford school fees and their children will not be able to go to school therefore defeating the purposes for which they had donated the land on which Kaptere Public Primary School is situated.

The application was supported by an affidavit sworn by the first applicant.

The respondents opposed the said application and filed lengthy affidavits and raised several grounds of opposition which can be summarised as follows:-

- (a) That the application was misconceived, defective and an abuse of the court process.
- (b) That the school whose opening was sought to be stopped had been opened, teachers employed, students admitted and classes started.
- (c) That major construction work in respect of the school was already completed.
- (d) That the suit land was legally transferred to the second defendant which had put the same into the use intended for the benefit of the entire community of Kaptere.
- (e) That the suit land was not agricultural land and no consent of the Land Control Board was required before its transfer was effected.
- (f) That the applicants had no *locus standi* to bring the suit.

I have carefully studied all the affidavits filed by all the parties, the grounds of opposition and the submissions made. It is not in dispute that the school in question has already been put up magnificent permanent buildings as shown in the photographs annexed to the affidavit of the second defendant have been constructed. Students have been enrolled, teachers employed and learning has commenced and in all respects, the schools operations are in full swing. One of the prayers in the application which sought an order to restrain the opening of the school was rightly abandoned by the applicants. The first prayer as quoted herein, though not properly framed, is seeking to restrain the second defendant from developing and/or constructing structures on the suit land pending the hearing and determination of the suit. That prayer has been overtaken by events and cannot be considered now. Prayer number 2 seeks a mandatory injunction to eject the second defendant from the suit land until the suit is heard and determined. The second defendant is the registered sole proprietor of the suit land since 24th July, 2003. Although the

applicant has alleged that there was fraud on the part of the defendant in getting the suit land registered in the name of the second defendant, that issue cannot be conclusively resolved until this matter is heard and *viva voce* evidence is taken. Given that the second defendant has already constructed the school buildings, admitted students and began the school operations in earnest, should the mandatory injunction be granted as sought? I do not think so. In ***THE DESPINA PONTIKOS*** [1975] E.A. 38 the Court of Appeal held that interlocutory mandatory injunctions should only be granted with reluctance and in very special circumstances. No special circumstances have been shown in this case to warrant grant of a mandatory injunction.

While I agree that the plaintiffs may have weighty issues of law which will be canvassed during the full hearing, I am not satisfied that the orders sought in the present application can be granted for reasons aforesaid. I dismiss the plaintiff's application with costs but direct that this matter be given early hearing dates as it involves a big community and a school.

DATED at Nakuru this 9th day of December, 2005.

D. MUSINGA

JUDGE

9/12/2005

Ruling delivered in open court in the presence of Mr. Ngoge for the plaintiff/applicant and Mr. Orege holding brief for Mr. Chebii for the first defendant/respondent and appearing for the second defendant/respondent.

D. MUSINGA

JUDGE

9/12/2005