



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CASE NO. 474 OF 2010

SAMUEL MUSAU.....1ST PLAINTIFF
JOEL KIAMBU THUO.....2ND PLAINTIFF
WILFRED GERI.....3RD PLAINTIFF
ELIJAH MUTUA.....4TH PLAINTIFF
PAUL CHATUKA.....5TH PLAINTIFF
AHT ESTHER MWELU.....6TH PLAINTIFF
AGNES WAYWA.....7TH PLAINTIFF
JOEL NZIOKA.....8TH PLAINTIFF
HUDSON KIBIRA.....9TH PLAINTIFF
EPAINITO CHUNGULI.....10TH PLAINTIFF
ELIZABETH ADEMBESA.....11TH PLAINTIFF
GLADYS MMAIZI.....12TH PLAINTIFF
GRACE MODANI.....13TH PLAINTIFF
AGNES SYOMBUA.....14TH PLAINTIFF
MERCYLINE AFANDI.....15TH PLAINTIFF
HERMAN VODOLWA.....16TH PLAINTIFF
JOSHUA KIOKO.....17TH PLAINTIFF
TECLAH NAKHUMICHA.....18TH PLAINTIFF
NGARA MTAA.....19TH PLAINTIFF
EDDAH VISONYE.....20TH PLAINTIFF
MOSES KIDUSU.....21ST PLAINTIFF

MABLE SUDI.....	22 ND PLAINTIFF
ROSE ABUKUSE.....	23 RD PLAINTIFF
SOLOMON OMOLLO.....	24 TH PLAINTIFF
FRANCIS MANONO.....	25 TH PLAINTIFF
NICHOLUS ILIATI.....	26 TH PLAINTIFF
JOHN LUSIMBA.....	27 TH PLAINTIFF
HELLEN MUSIMBI.....	28 TH PLAINTIFF
MARGARET OGADA.....	29 TH PLAINTIFF
LILIAN VUYANZI.....	30 TH PLAINTIFF
MARGARET AJEMA.....	31 ST PLAINTIFF
EPHRAIM OYARO.....	32 ND PLAINTIFF
AZIBEDA KISIA.....	33 RD PLAINTIFF
JOSPAT MWASHI.....	34 TH PLAINTIFF

VERSUS

ANDREW MAKAU.....	1 ST DEFENDANT
HENRY MANGWALI.....	2 ND DEFENDANT
DAVID HAMISIS ADOLWA.....	3 RD DEFENDANT
JACKSON AZERE.....	4 TH DEFENDANT
HELLEN NDIEMA.....	5 TH DEFENDANT
FRANCIS ENDEREMA.....	6 TH DEFENDANT
FLORENCE MAKAU.....	7 TH DEFENDANT
JOHN OLEWA.....	8 TH DEFENDANT
STEVE HOWARD.....	9 TH DEFENDANT
WESTON NJIRU.....	10 TH DEFENDANT
FUNAN CONTRUCTION COMPANY LIMITED.....	11 TH DEFENDANT

JUDGEMENT

Background.

1. All the Plaintiffs and Defendants except the 11th Defendant are members of Nairobi Central Corps Salvation Army Church which is situated on LR No. 209/1951 off River Road/Racecourse Road in Nairobi.

2. In or around February 2010, the church officials spearheaded by the 1st Defendant entered into an agreement with the 11th Defendant who was to construct stalls and offices along the perimeter fence of the church. It was agreed that the 11th Defendant was to construct the stalls and offices using its own resources. The 11th Defendant was then to lease out the stalls and offices and operate them for a period of five years which period was later increased by six years to enable it recoup the money expended in the project before handing over the stalls and offices

to the church.

3. Some members of the church comprising the Plaintiffs filed a suit against seven church members. Three other members were brought into the suit through amendment of the Plaint which was filed on 8th October 2010. The Plaint was later re-amended and brought in the 11th Defendant.

4. The Plaintiffs withdrew the case against the 9th Defendant vide a consent filed in court on 15th November 2011. The Plaintiffs later withdrew the case against the 1st to 8th Defendants. The latter withdrawal was largely informed by the advice of Justice Ougo who advised the parties to try and settle the case out of court. The 10th and 11th Defendants could not agree to sit down with the Plaintiffs hence the Plaintiffs resolve to urge on their case against the two Defendants.

Plaintiff's Case.

5. It is the Plaintiff's contention that the construction of the stalls and offices was commenced without them being informed and that the construction did not have the requisite approvals from Nairobi City Council and the National Environment Management Authority (NEMA). The Plaintiffs further contend that the construction reduced the children's playground and the parking lot for church goers. The Plaintiffs further argue that the constructed stalls and shops blocked the church's exit and that some stalls which were let out stocked alcoholic drinks which is against the church doctrines.

6. The Plaintiffs further argue that the other stalls stocked electronics and were playing loud music which interfered with the church proceedings. The Plaintiff further argue that the 1st Defendant is the one who sneaked in the 11th Defendant and that there was no competitive process in its hiring and that the whole project was meant to enrich the few church members at the expense of the larger church membership.

7. The Plaintiffs further argue that due to the construction of the stalls and the shops, their constitutional rights to a clean and healthy environment was infringed. It is on this basis that they are seeking the reliefs in the re-amended plaint.

Analysis.

8. Though the 10th and 11th Defendant were served for hearing, they did not attend court. Timelines for filing submissions were given but neither the 10th nor the 11th Defendants filed any submissions. It is only the Plaintiffs who filed their submissions. I have considered the evidence adduced by the Plaintiffs as well as their submissions. The issues which emerge for determination are firstly whether the 11th Defendant had the authority of the church to construct the stalls and shops. Secondly, whether there were requisite approvals before the construction was commenced. Thirdly, whether the Plaintiffs' constitutional rights to a clean and healthy environment were infringed. Fourthly, are the Plaintiffs entitled to the reliefs in the re amended Plaint. Lastly, which order should be made on costs.

9. The Plaintiffs pleaded particulars of alleged fraud against the Defendants. These particulars included failure to inform and consult the church and stakeholders as the rules and regulations require, failing to obtain an Environmental Impact Assessment Report, failure to obtain Physical Planning approval, withholding critical information from the Plaintiffs and sneaking in a contractor who had not signed an agreement with the church.

10. Though the 10th and 11th Defendants and more particularly the 11th Defendant did not testify, the 11th Defendant filed a bundle of its documents. In the bundle, it is clear that the 11th Defendant was authorized to carry out construction. The 11th Defendant was picked from among three bidders. The 11th Defendant was the lowest bidder hence its choice as a contractor.

11. The documents filed further show that the project got approval from the Nairobi City Council and the Environmental Impact Assessment Study Report was duly approved by NEMA.

12. There was no evidence adduced in which manner the constitutional right to a clean and healthy environment of the Plaintiffs were infringed. The plaintiffs were complaining of noise and dust from the construction. There was no evidence adduced to show that the contractor was carrying out construction even on days the church business was being conducted. There was no evidence adduced to show that the construction had either contributed to clogging of the drainage systems or in any way interfered adversely with free flow of air or lighting in the area. In the absence of any evidence as to any violation, there is no basis upon which this court can find that there was violation of the constitutional rights of the Plaintiffs.

13. The Plaintiffs are seeking a permanent injunction restraining the Defendants from carrying out construction on the land on which the church is built. The evidence on record is that as at the time the Plaintiffs moved to court, the construction had advanced and some stalls had been leased out. Though the court granted an injunction stopping continuation of the construction, the construction went on upto completion. This is why the Plaintiffs filed an application seeking to commit the directors of the 11th Defendant to civil jail for contempt. It is therefore clear that no injunction can be given as to do so will be acting in vain.

14. There is no evidence adduced to show that the Plaintiffs freedom to worship has been infringed. In fact the 11th Defendant may by now be on its way out and will soon leave the shops and offices to be run by the church after expiry of the years given to operate and recoup its investment.

15. This is a case of rivalry between members of the same church. When the Plaintiffs went to Nairobi City Council and alleged that the construction was going on illegally, the City Council came and demolished the buildings but when the 11th Defendant and the church sued

the council, the council realized that they had been misled and the dispute was amicably sorted out of court and the approvals which had been revoked were reinstated.

Disposition.

16. It is clear from the analysis hereinabove that the Plaintiffs have failed to prove their case against the 10th and 11th Defendants. The suit is hereby dismissed with no order as to costs.

Dated, Signed and Delivered at Nairobi on this 28th day of January 2021.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

Mr Musyoki for Plaintiff

Court Assistant: Hilda

E.O.OBAGA

JUDGE