



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CIVIL CASE NO. 514 OF 1995**

**PETER KAMAU ..... 1ST APPLICANT**  
**MARY WANJIRU NJAU ..... 2ND APPLICANT**  
**NICK P.T. MACHARIA ..... 3RD APPLICANT**  
**THE MANAGEMENT OF KING'EERO ..... 4TH APPLICANT**

**VERSUS**

**REV. LUTANGILO Y. MWINUKA ..... 1ST RESPONDENT**  
**REV. SAMUEL MURIGU ..... 2ND RESPONDENT**  
**THE PRESBYTERIAN CHURCH OF EAST AFRICA ..... 3RD RESPONDENT**  
**THE PARISH MINISTER KIKUYU P.C.E.A.,**  
**RUNGIRI KING'EERO CHURCH ..... 4TH RESPONDENT**  
**THE PRESBYTERIAN FOUNDATION ..... 5TH RESPONDENT**  
**THE REGISTRAR OF LANDS, KIAMBU DISTRICT ..... 6TH RESPONDENT**  
**THE HONOURABLE ATTORNEY GENERAL.....7TH RESPONDENT**

**RULING**

This Ruling relates to a Chamber Summons application dated 21st November 2003 filed alongside a Plaintiff of the same date. Both were filed on 24th November 2003 by four plaintiff's the first three of whom are described as the vice-chairman, Secretary/Headmistress and Treasurer presumably of the fourth Plaintiff, described as "the Management of Kingeero Nursery School." They are filed against three Church Ministers of the Presbyterian Church of East Africa, the Church itself, the Presbyterian Foundation, the Registrar of Lands, Kiambu District and the Attorney General. The application is for orders of this court for:

- 1. A mandatory injunction compelling the 1st and 2nd Defendants, their agents and/or servants to stop developing a building in Kingeero Nursery School plots and further be restrained from an illegal assembly on the (same) suit land (on 7th & 14th December (2003)), and declaring school plots T.126, T.127, T.128 and T.129 as*

*theirs and to surrender to the Court title or documents in their possession, believed by the Plaintiffs to have been obtained by fraud, pending the hearing and determination of this suit.*

*2. The defendants, their agents, assigns, servants beneficiaries and/or any other person acting on their behalf be restrained from any other further assembling on the suit premises and be ordered not to hold religious assemblies or consecrating ceremony on the suit land and to vacate the same pending the hearing and determination of the suit.*

*3. Costs of the application be provided for .*

The suit and the application are founded on the grounds, inter alia, that the land in dispute, being plot numbers Kabete/Kabete T.126 T.127 T.128 and T.129 on which Kingeero Nursery School is situated is community land and was set aside specifically for the building of a nursery school during the demarcation period in 1959. The nursery school was thereafter constructed in 1960 (?) and has existed since then, ran by a management committee currently comprising of the 1st 2nd and 3rd Plaintiffs with the full support and assistance of the Kiambu County Council. To support their claim to ownership of the said plots the Applicants have produced as exhibits copies of Greencards issued by the Kiambu County Council showing that the said plots were spare plots initially reserved for a nursery school before the inclusion of the defendants in the register as owners in 1988.

The application is opposed mainly on the issue of whether the suit itself is properly before the Court. The Respondents argue that there is no suit before the Court, hence no application for the following reasons.

*1. That the Complaint is filed by four Plaintiffs yet signed by only one contrary to the requirements of Order VI Rule 14 of the Civil Procedure Rules which requires that such party if suing on behalf of others must have authority.*

*2. That the Complaint is not accompanied by a verifying affidavit contrary to Order VII Rule 1 (2)*

*3. That no leave was obtained to file a suit in a representative capacity.*

*4. That the Plaintiffs have no locus standi being neither the Attorney General who should be the one to sue if the school in question is a government school or the Board of Governors if a private or Community school.*

*5. That the annexures to the supporting affidavits are not properly marked as required by the provisions of the law, there being only a fly sheet marked.*

*6. That the Respondents being the duly registered owners have indefeasible titles which must be protected as against the Applicants*

*7. That the essentials for an injunction as laid down in the case of GIELLA –vs- CASMAN BROWN LTD [1973] E.A. 358 have not been met.*

On the basis of the above, Counsel for the 1st 2nd 3rd and 5th and 6th Respondents Mr. Thangei submitted that the Complaint be struck out with costs. Mr. Mutungi for the 6th and 7th Defendant/Respondents adopted the above submissions and prayer as being relevant and applicable to his clients.

The Applicants have had the misfortune of first of all being represented by Counsel who filed their pleadings in a manner open to the above attacks then abandoning them to their fate once objections were raised. Counsel tried but, without convincing the Court by sensible argument, to orally apply for an amendments to the application whilst the inter partes hearing was almost concluded. I declined to grant the application in my ruling of 12.03.04 on the ground that the reasons given were too generalized and vague. For reasons appearing later my said ruling is revisited herein.

Having been abandoned by their advocate as earlier stated, the respondents, through the 3rd Plaintiff put in a commendable reply basically submitting that procedural irregularities as pointed out by the Respondents should not be used to defeat the suit since the same did not go to jurisdiction. The 3rd Defendant cited the case of BOYCE vs- GATHURE [1969] E.A. 385 in which it was held by the Court of Appeal that

“use of the wrong procedure did not

invalidate the proceedings, because

(a) It did not go to jurisdiction

(b) No prejudice was caused to the appellant.”

I find myself inclined to look into the issue of jurisdiction first and foremost in view of the weighty matters herein and the allegations of fraudulent acquisition of the land to which the Plaintiff/Applicants claim an interest. Firstly, I take the question of locus standi to be of prime importance since without it the Applicants ought not to have approached the Court at all and I on the other hand ought not to have granted them audience. This being a land matter, the Applicants’ interest as part of the Kingeroo Community, in respect of whom the subject plot was reserved for a nursery school is not disputed. That they are indeed involved in the running/management of the Kingeroo nursery school has also not been challenged. They have submitted before this Court copies of the green cards which clearly show that the disputed land had been kept aside for the development of a nursery school and proved by uncontroverted affidavit evidence of Mary Wanjiru Njau that a school was built and has been in existence since 1963. It is not disputed also that the Plaintiffs/or the community did accord the Respondents a license of sorts to use the said land temporarily. Correspondence produced before the Court irrespective of the mode of production does establish a doubt as to how the titles to the disputed property were acquired by the Respondents (P.C.E.A. Church).

I find that on the authority of NJOROGE –vs- MBITI [1986] KLR 519 they do have locus standi to bring this action in order to preserve the community’s interest in the suit land while the ownership thereof is being sorted out. Indeed in the case of HINGA –vs- ANOTHER & P.C.E.A. Thro’ REV. DR. NJOYA & ANOTHER [1986] KLR 319 the Court while holding that a representative suit ought to have been filed did recognize the need to preserve a suit wherein the issue between parties does concern a right of property. The land in question being public utility land, a trust could be inferred on the part of Kiambu County Council and the Respondents must show how and in what circumstances the same was relinquished by the Council to them.

My reading of Order I Rule 8 is that one or more persons may sue or be sued for the benefit of numerous persons having the same interest. The court may authorize one or more persons to defend in such suit and where such authorization to defend is given then the Court may direct that the Plaintiff to give notice of the institution of the suit to such persons to enable them defend themselves. Nothing in this provision requires that the 3rd Plaintiff applies to the Court for leave to file suit or prosecute the same on behalf of other Plaintiffs. Furthermore, I note that save for the Notice of Preliminary Objection filed by the Attorney General in which the issue of locus standi was raised among other objections, the 1st 2nd 3rd and 5th Respondents did not raise any of the other technical objections in their Replying Affidavit sworn by REV. SAMUEL MURIGUH on 15th December 2003. In the circumstances I uphold the Applicant’s submission that a notice of a preliminary objection ought to have been given. The effect of the failure to do so is quite evident from the conduct of the Counsel previously on record for the Applicants who felt so

ambushed that he had to abandon ship while adrift.

I find that the said objections, being in the very nature of a preliminary objection cannot be allowed to stand in the presence of fundamental questions which questions cannot be disposed of a preliminary stage. The ownership of the suit premises and whether or not fraud has been committed in connection therewith are matters for a full hearing which a court of justice must allow for determination. Accordingly I will proceed to find on the issue of the injunction and leave other matters for determination at a later stage.

I find that the essentials of granting an injunction have been met. Firstly I find that on the basis of the greencard, and the existence of a school on the ground, and in the absence of clear evidence as to how the Respondent acquired titles to the suit premises the Applicants have established a prima facie case with a probability of success. They have as a school (said to be owned by the community and managed by them) an investment of over forty years, which faces a real threat of extinction or expropriation, a fact which clearly demonstrates a real likelihood that they would suffer irreparable loss not capable of adequate compensation in damages if this application is not allowed. I find that on the balance of probabilities they are entitled to an injunction if only, as I have earlier stated to preserve their interest in the suit land and the school existing thereon. I cannot however issue an injunction as prayed but will make a preservative order in the following terms, noting that part of the orders sought has been overtaken by events.

- 1. The Defendants, all and/or any of them, their agents, and/or servants be restrained from further building and or developing the plot(s) known as Kabete/Kabete T.126, T.127 T.128 and T.129 pending the hearing and final determination of this suit.*
- 2. The defendants all and/or any of them be restrained from consecrating the said plot and or any developments thereon pending the hearing and final determination of this suit.*
- 3. The Plaintiffs to take steps towards setting the suit down for hearing within the next 45 days failing which these orders shall automatically lapse.*
- 4. Costs of this application shall be in the cause.*

Whilst allowing this application I do revisit my earlier ruling on the amendments and, on my own motion invoke the power of this Court under Section 100 of the Civil Procedure Act to allow the Applicants/Plaintiff's if they so wish, to amend their pleadings in such a way as will enable the Court determine the real questions or issues in controversy herein and to correct any defect or errors in their pleadings as would make it impossible for the Court to arrive at a fair, just and conclusive determination of such issues. I must conclude by commending Counsel for all the Respondents for their patience and restraining in these proceedings.

*Dated and delivered at Nairobi this 7th day of December 2004.*

**M.G. Mugo**

**Ag. Judge**

**In the presence of**

***Macharia Applicant in person***

***Mr. Thangei Advocate present for the 1,2,3,4 and 5 th Respondents***

***N/A for 6 th and 7 th Respondents***

