



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E142 OF 2021

CHURCH OF GOD IN EAST AFRICA (KENYA) (*suing through Rt. Rev James Obunde,*

Rev. Wycliffe Omusebe, Rev. Raphael Muyele, Rev. Monicah Opanga, Rev. Benson Maosa and

***Mr. William Shimanyula (The Registered Trustees of Church of God in East Africa (Kenya)....*PLAINTIFF**

=VERSUS=

HUSSEIN SOMO.....DEFENDANT

RULING

1. This is the Notice Motion dated 28th April 2021 brought under 40 rules 1, 2, 3 and 4 and order 51 rule 1 of the Civil Procedure Rules.
2. It seeks orders:-
 1. *Spent.*
 2. *Spent.*
 3. *That pending the hearing and determination of this suit or further orders of this court a temporary injunction be issued against the defendant by himself, his servants, officers, employees, agents and/or person acting through or under his from entering, remaining, using, occupying, possessing, evicting, fencing, constructing, subdividing and/or in any other manner interfering with the plaintiff's parcel of land known as Plot NO. E off general Waruinge Street-Pumwani.*
 4. *That the costs of this application to be paid by the Defendant.*
3. The grounds are on the face of the application and are set out in paragraphs (a) to (g).
4. The application is supported by the affidavit of Reverend Rexam Ambubi Likulu pastor of Kariakor Church of God in East Africa (K) sworn on the 28th April 2021 and further affidavit of sworn on 8th May 2021.
5. The application is opposed. There are grounds of opposition filed by the Defendant/Respondent dated 7th May 2021. He has also filed a replying affidavit sworn on the 7th May 2021.
6. On the 2nd June 2021 the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

The Plaintiff's submissions

7. They are dated 22nd June 2021. The applicant has satisfied the three conditions set out in the case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. They have also relied on the cases of **Mrao Ltd vs First American Kenya Ltd & 2 Others [2003] KLR 125;** **Nguruman Ltd vs Jan Bonde Nielsen & 2 Others [2014] eKLR**.
8. The Plaintiff is the absolute allottee by the Government of Kenya of all that parcel of land known as Plot No E off General Waruinge Street-Pumwani where it has built a church known as Kariakor Church of God in EA (K). The Plaintiff has demonstrated that it is on the suit

land following the issuance of an allotment letter. It has been in occupation of the suit land for 22 years uninterrupted. The Defendant claims Plot NO. B Racecourse Road Pumwani.

9. The position in law is that where two titles are issued to two different parties in respect of the same parcel of land without fraud, the title issued in the first instance is absolute and indefeasible. It has put forward the case of **Gitwany Investment Ltd vs Tajmal Ltd & 3 Others [2006] eKLR**.

10. Though the authority applies to a title, the same should also apply in the case of letters of allotment. The first in time prevails. The plaintiff's letter of allotment was issued first and regularly and has not been withdrawn. A letter of allotment is not a title but once a party has complied with the conditions therein, the plot should not be allocated again. It has put forward the case of **Nasir Maalim Arte vs Kenya Power & Lighting Co. Ltd [2015] eKLR**.

11. The Plaintiff/Applicant has shown the irreparable injury it would suffer. The Plaintiff has been in occupation uninterrupted for 22 years. It has built a church and other permanent buildings. If the orders are not granted Plaintiff's members will have no place to worship and demolition of the church and other buildings will see millions of cash in investment go to waste. It prays that the application be allowed.

The Defendant's Submissions

12. They are dated 13th July 2021. The Defendant is the absolute and indefeasible proprietor of LR NO 209/16780. The validity of the letter of allotment to the Plaintiff is in question as the same is issued by the defunct Nairobi City Council. The same cannot be ascertained as the Nairobi City County has not been made a party to this suit.

13. The Defendant/Respondent has demonstrated how he acquired the registrable proprietary interest to the suit parcel from the letter of allotment to the issuance of the lease certificate he holds over the property. He has relied on Section 26(1) of the Land Registration Act, 2012.

14. The legality of the title document has not been contested and/or challenged by the Plaintiff/Applicant.

15. The Plaintiff/Applicant has failed to establish a prima facie case with probability of success at the trial.

16. The Plaintiff claims the removal of the unauthorized structures it has erected on the suit land will result in irreparable injury. The Nairobi City County itself through its enforcement department has ordered demolition since they are illegal structures that were erected without the approval by the Physical Planning and Development Department.

17. This means the Plaintiff/Applicant is in illegal encroacher with no proprietary interest on the suit parcel and cannot claim any interest thereon or damages for the removal of the illegal structures it has erected.

It has put forward the case of **Philemon L. Wambia vs Gaitano Lusitsa Mukofu & 2 Others EA [2019] eKLR**. He prays that the application be dismissed with costs to the defendant/Respondent.

18. I have considered the Notice of Motion, the affidavits in support and the annexures. I have considered the grounds of opposition, replying affidavit and the annexures, the written submission filed on behalf of the parties and the authorities cited. the issues for determination are:-

(i) Whether the Plaintiff's/Applicants application meets the threshold for grant of temporary injunction.

(ii) Who should bear cost of this application?

19. In the application for injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, the Court of Appeal, stated what amounts to a prima facie case.

I am guided by the above authorities.

20. I am guided by the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557** in finding that the Plaintiff/Applicant deserves the protection of this court.

Its claim that it has been in possession of the suit land for over 22 years has not been challenged by the Defendant/Respondent.

21. It is also not in dispute that there is a church and other structures on the suit property. The Plaintiff/Applicant stands to suffer irreparably if they are demolished.

22. As to whether the Plaintiff/Applicant and the Defendant/Respondent are claiming the same parcel, will come out during the hearing where evidence will be tendered. In the meantime, there is need to maintain the status quo.

23. All in all, I find that the Plaintiff has established a prima facie case with probability of success at the trial. The balance of convenience tilts in favour of the Plaintiff/Applicant who is in possession of the suit land.

24. I find merit in this application and the same is allowed in terms of prayer no 3 of the notice of motion. The costs of this application do abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 14TH DAY OF OCTOBER 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Mbiyu for the Plaintiff

Mr. Jaleny for the Defendant

Steve - Court Assistant