



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

ENVIRONMENT AND LAND CASE NO.75 OF 2015

DIOCESE OF MERU TRUSTEES REGISTERED.....PLAINTIFF

VERSUS

DENNIS KIMATHI KIOGI.....1ST DEFENDANT

SIMON MAINA MUNENE.....2ND DEFENDANT

R U L I N G

This application is dated 26/08/2015 and seeks orders:-

1. ***THAT this application be certified as urgent and be heard on priority basis.***
2. ***THAT this Honourable Court be pleased to issue an order of temporary injunction restraining the defendants by themselves, their agents servants, or whomsoever working for them and under them from proceeding, continuing, putting up or in any way putting a permanent construction on plot No. T/191 MERU TOWN in breach of the Lease Agreement between the parties until this application is heard interpartes.***
3. ***THAT this Honourable Court be pleased to issue an order of temporary injunction restraining the defendants by themselves, their agents servants, or whomsoever working for them and under them from proceeding, continuing, putting up or in any way putting a permanent construction on Plot No. T/191 MERU TOWN in breach of the Lease Agreements between the parties until this suit is heard and determined.***
4. ***THAT the costs of this application be provided for.***

The matter was heard exparte on 24/09/2015 and the following orders were issued:-

- 1) ***THAT, as undertaken, the Plaintiff to properly serve the Defendants through this Court's Process Server.***
- 2) ***THAT the Defendants are ordered to stop any further construction on the plot No. T/191 MERU TOWN forthwith.***
- 3) ***THAT the OCS Meru Police Station is ordered to ensure that the orders issued by this Court today are obeyed.***

4) **THAT interparties hearing on 5/10/2015.**

To put the circumstances of this suit into proper perspective, I deem it necessary to reproduce the supporting affidavit of the applicant and the Replying Affidavit proffered by the defendants.

The applicant's supporting affidavit states:-

I, FR. ANDREW MBIKO of P.O Box 16-60200, MERU make oath and state as follows:-

1. **THAT I am Trustee of the Diocese of Meru and therefore competent to make and swear this affidavit.**
2. **THAT the Defendants approached us with a request that we lease them our Plot No. T/191MERU TOWN to make a car park.**
3. **THAT we agreed and entered into a 7 years lease but with the understanding that we may need the Plot for development before 7 years are over.(annexed is a copy of the said Lease Agreement marked "FAM a").**
4. **THAT when the matter was put before the development Committee the 7 years lease was rejected as the Committee intended to put up offices and a chapel for Christians due to complaints that they have nowhere to pray during lunch time when in centre of Meru Town.**
5. **THAT it was agreed that the agreement be cancelled and parties enter into 1 year Lease Agreement but renewable. This was done and signed by all the parties. (annexed is the copy of the same marked "FAB b").**
6. **THAT after all was done and payments made, we received complaints that the Defendants were putting up a permanent storey building and not what had been agreed upon.**
7. **THAT I checked and was shocked and directed our Advocate to write to them and stop the permanent construction . (annexed is my letter marked "FAB c" and our Advocates Notice marked "FAB d")**
8. **THAT to our surprise they have continued with the construction and their intention is not known.**
9. **THAT the Christians are not happy and we need the Court's intervention as a matter of urgency.**
10. **THAT the contents of this affidavit are true to the best of my knowledge, information and belief.**

The defendant's Replying Affidavit states as follows:-

I, DENNIS KIMATHI KIOGI of Post office Box Number 2707 Meru do hereby make oath and states as follows:-

1. **THAT I am the 1st Respondent in this suit and have the full authority of the 2nd Defendant to depone this Affidavit on his behalf and thus hence competent to swear this Affidavit. (Annexed herein and marked as DKK-01 is a copy of the authority to swear this Affidavit on behalf of the 2nd Respondent).**
2. **THAT I have read and had explained to me by my advocates on record, Messrs Ahmednasir, Abdikadir & Company Advocates, the Plaintiff/Applicant's Notice of Motion Application dated 26th August 2015 together with the Affidavit in support sworn by Fr. Andrew Mbiko also dated**

26th August, 2015.

3. ***THAT I swear this Affidavit in opposition to the said Application and respond as follows.***
4. ***THAT in response to paragraph 1 of the Affidavit, it is not true that the deponent Mr. Mbiko is a Trustee of the Plaintiff Church. The trustees to my knowledge and per the Certificate of Incorporation under the Land (Perpetual Succession) Ordinance CAP 163 are: Andrew Mung'atia, Salesius Mugambi and Fr. Francis Xavier M' Mbijiwe. (Annexed herein and marked as DKK-02 is a copy of the Certificate of Incorporation).***
5. ***THAT in response to Paragraph 2 of the Affidavit, it is true that we approached the Plaintiff for a Lease over their property known as Plot No. T/191 Meru Town for duration of Seven years for purposes of constructing structures as may be approved by the County Government of Meru. (Annexed herein and marked as DKK-03 is a copy of the letter dated 5th November, 2015).***
6. ***THAT in response to Paragraph 3 of the Affidavit, the Plaintiff and ourselves entered into a seven years lease with no understanding as to repossession of the property before the agreed seven year period. Had this been the case, the same would have been captured in the Lease Agreement as a pertinent Term.***
7. ***THAT in response to paragraph 4 of the Affidavit, I am not privy to the in house affairs of the Plaintiff save that I would be at a loss to imagine that a contractually binding Agreement can easily be rejected and/or terminated unilaterally by a Committee months after it had already taken shape. Further, the Plaintiff has not produced a copy of the Minutes of the said meeting.***
8. ***THAT in further response, the same committee that entered into the Lease Agreement with ourselves is the same one now claiming that it had intended to construct an office block and a chapel for its followers as though a revelation came just right after the contract was executed!.***
9. ***THAT in response to paragraph 5 of the Affidavit, at no time did we agree to revoke and/or amend the lease Agreement neither did we enter into a new Lease Agreement.***
10. ***THAT in fact, the Lease Agreement produced by the deponent as annexature(sic) 'FAB b' is a forged document. I have reported the same to the Central Police Station under O.B Number 69/20/8/15 and investigations are underway.***
11. ***THAT a cursory layman look at our signatures on the Lease Agreement dated 21st November, 2014 and the ones on Agreement dated 12th February, 2015 are very distinct with the latter having explicit signs of forgery. (Annexed herein and marked as DKK-04 are copies of the last pages of the two agreements for ease of comparison).***
12. ***THAT I instructed a Handwriting Expert to conduct an examination of the forged signatures (annexed herein and marked as DKK-05 is the Report of the Document Examiner).***
13. ***THAT in response to paragraphs 6 and 7 of the Affidavit, it is pursuant to the provisions of clause 2 (c) of the Lease Agreement dated 21st November, 2014 that we put up semi-permanent structures. All in all, the Agreement is explicit in its wording that we, the Lessees, were permitted to put up (sic) structures whether permanent or otherwise provided that we shall clear the premises within three months after the expiry of the lease period.***
14. ***THAT it is unfortunate that men of the cloth are engaging in this type of conmantheatrics in a bid to deprive us of our legitimate entitlement to the premises.***
15. ***THAT perhaps the Plaintiff have (sic) realized that since we have put up permanent structures, we are more likely to bow to pressure to pay an increased rental.***

16. ***THAT I do not understand why the plaintiff is keen on pleasing third parties who are not privy to the contract between itself and us. I am advised by my Advocates on record that the doctrine of privity of contract applies.***

17. ***THAT we entered into the Lease Agreement with the legitimate trustees of the Plaintiff and the same was executed by themselves as true representatives of their worshipers and the Agreement is valid and binding as between ourselves and exclusive as against the whole world.***

18. ***THAT the Plaintiff/Applicants have not demonstrated a prima facie case with a probability of success and this Honourable Court ought to dismiss the Application forthwith.***

19. ***THAT what is deponed herein above is true to the best of my knowledge, information and belief save where the source is otherwise disclosed.***

Before the application could be heard interpartes, the parties proffered a consent and asked the Court to adopt its terms as its order. The Consent which is dated 19/10/2015 was in the following terms:-

1. **Defendants/Respondents be allowed 7 days to reply to the Supplementary Affidavit filed by the Applicant/Plaintiff.**
2. **Upon service of the said reply, the Applicant/Plaintiff to put in written submissions in support of the application dated 26th August, 2015 within 10 days. The Defendants/Respondents to put their written submissions/ opposition of the said application within 10 days upon service.**
3. **Advocates for the parties to highlight the said submissions on 12th November, 2015 and take directions for the Ruling.**
4. **Further to the above the defendants may complete the roof at second floor but not go further until the application is decided.**

The consent was adopted as an order of this court.

I have perused the submissions proffered by the parties. The plaintiff does not deny that there was a lease agreement for 7 years signed by the parties on 21st November, 2014. The plaintiff, however, argues that a later agreement signed on 12th February, for 1 year, cancels, revokes, rescinds, invalidates and annuls the earlier agreement. It prays for Injunctive orders, stating that it will suffer irreparable loss should the defendants continue to construct on their plot.

The Respondents submit that there was no second agreement and that the agreement proffered by the Plaintiff is a forgery. The Respondents have proffered the following cases to buttress their position that the orders sought in this application are unmerited:-

1. ***Giella versus Cassman Brown [1973] EA 358.***
2. ***American Cyanamid Ltd versus Ethicon Ltd [1975] All ER 504.***
3. ***Mrao Ltd Versus First American Bank of Kenya Ltd and 2 others [2003] KLR 125.***
4. ***Nguruman Limited versus Jan Bonden Nilson & 2 others[2014] e KLR.***

The Respondents have concluded that the applicant has not demonstrated that an award of damages would not be a sufficient remedy if the Court does not grant injunctive orders. They have also opined that the Plaintiff had failed to disclose relevant matters that had a bearing on the reliefs sought. For these reasons they pray for the dismissal of the application.

I need not reinvent the wheel. The Court of Appeal in the case of Mbutia Versus Jimba Credit Corporation [1988] KLR1 has opined as follows;-

“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each side's propositions. The lower court judge had gone beyond his proper duties and made final findings of fact on disputed affidavits.”

I opine that at this interlocutory stage, I can not make definitive findings regarding some of the issues raised by the parties. These include if or not the 2nd agreement was a forgery and if it could cancel the original agreement. Having weighed the parties propositions, I am inclined not to grant injunctive orders as sought in the application.

I opine that parties must be bound by their pleadings and other undertakings they proffer to Court. On 19/10/2015, the parties by consent compromised the application. Paragraph 4 of the apposite consent said:-

“4. Further to the above, the defendants may complete the roof at second floor but not to go further until the application is decided”.

I opine that the Consent for the defendants to complete their roof at second floor was that they would complete their construction at second floor. Any other interpretation would spawn awkward consequences. It is ordered as follows: -

1. The defendant's should complete their construction at the 2nd floor only until this suit is heard and determined.

2. Costs apposite to this application shall be in the cause .

It is so ordered.

Delivered in Open Court at Meru this 13th day of July, 2016 in the presence of: -

CC: Daniel/Lilian

Baikiata for Plaintiff

P.M NJOROGE

JUDGE