

REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 27 OF 2019

JOHNSON MWANGERA NJOKI & 8 OTHERS.....PLAINTIFFS

VERSUS

WELLINGTON SANGA & 13 OTHERSDEFENDANTS

RULING

1. This ruling is in respect of an application for injunction dated 20th February, 2019 which was filed by the plaintiff together with the plaintiff. The plaintiff's case as elaborated in the plaint is that it is the registered proprietor of the land parcel numbers CR 46287 Mtwapa, CR 13275, Mombasa, Kilifi/Chilulu 1542, Plot L.T.IV Folio 186/1 Mombasa, Plot L.T VII Folio 470/1 Mombasa, CR 50035 – Mombasa, Plot No. 50035-mombasa, Plot 2562/Section VI/MN, Plot No. 162/MN- Miritini, Plot No. 654/II/MN Jomvu, letter of Allotment Plot No. 12/3/CT/1/01, Letter of Allotment Plot No. NRB 55.2003.01, Sale Agreement on Plot Hurara Vibao Tana River 15 Acres, Power of Attorney dated 7/4/1959, and Power of Attorney dated 29/6/1956, among others, (hereinafter referred to as "the suit properties"). The plaintiff avers that it has since developed the suit properties by building churches, planting trees, demarcating and/or constructing other structures thereon. The plaintiff avers that it has been in peaceful enjoyment and use of the suit parcels since they lawfully acquired ownership thereof for well over 89 years. The plaintiff states that pursuant to its standing orders and Agenda, the overall management of all its properties is vested in its registered trustees.

2. It is averred that in or about January, 2019, the defendants, in total disregard to the plaintiff's standing orders, jointly and severally unilaterally and unwantonly resolved to form a splinter group termed Methodist Church in Kenya Coast Region Methodist Conference, and have since invaded encroached and or trespassed on and repainted the plaintiff's churches and have wrongfully taken possession of the suit properties from the plaintiff. It is their case that following the defendants trespass and occupation of the suit properties, the defendant have misused, damaged wasted, destroyed, polluted and or degraded the suit properties by reason of which the plaintiff has been deprived of the use and enjoyment of the properties and have suffered loss and damage. In the suit, the plaintiff wish to have orders of vacant possession of the suit properties and orders of permanent injunction to restrain the defendants from dealing with the affairs, assets and or properties of the plaintiff and from remaining on or continuing in occupation of the suit properties.

3. The application is supported by the affidavit sworn by Joshua Mithika M'Kiao one of the plaintiff's registered trustees on 20th February, 2020, and supplementary affidavit sworn on 19th March, 2020. He has annexed a copy of the plaintiff's Certificate of Incorporation/trust, standing order 2015 (revised) edition, copies of documents of ownership and/or purchases, photographs and newspaper cuttings capturing the defendant's activities and fresh paintings and copies of letters of appointments of various persons by the defendants. The plaintiff states that unless restrained by this court, the defendants have vowed to continue with their unlawful occupation of the suit properties. It is the plaintiff's contention that the defendants have divided the church into two warring factions and that unless the acts complained of are stopped, there is a likelihood of a breach of the peace.

4. The defendants have opposed the application through the replying affidavit of Bishop Wellington Tsuma Sanga, the 1st defendant sworn on 4th September, 2019. He has contended that the application is premature, misconceived, misconceived, misled, lacks merit and ought to be dismissed with costs. That the capacity described of the Applicants render them ineligible to file this matter in the manner conjured and that the suit is defeatist, illegal, unaided in law and cannot stand as pleaded. He deposed that there exists no trust or trust deed registered on 14th July, 2017 or at any given time as such the applicants have no locus standi to present both the suit and the application herein. The defendants denied that the plaintiff has a church as alleged in the applicants supporting affidavit and stated that the applicants are not bona fide office bearers in law. The defendants also denied the existence of a trust and standing orders. The defendants have extensively explained what a trust and trustee entails.

5. The defendants have deposed that they are members and/or part of the congregation in the Methodist Church within the coastal region. It is contended that the applicants have not demonstrated the type of trust relationship that they purport to subscribe to and their duties, responsibilities, and liabilities. It is deposed that the Applicants do not have proprietary rights over any of the suit properties. The defendants have given the ownership and current status of the properties as follows:-

NO.	PROPERTY	PURPORTED OWNERSHIP DETAILS
i	CR. 46287 – MTWAPA	Methodist Church in Kenya Mtwapa Circuit 18/11/2009
ii	CR 13275 – Mombasa	Methodist Church in Kenya Trustee Registered 13/2/2002

iii	KILIFI/CHILULU/1542	Does not exist
iv	KILIFI/CHILULU/542	Reserved for Tsunguni Methodist Church
v	Plot LT IV Folio 186/1 Mombasa	Unrelated to the plaintiff
vi	Plot LT VII Folio 470/1 Mombasa	Unrelated to the plaintiff
vii	Plot no 50035 – Mombasa	Methodist Church of Kenya Trustees Registered 1/6/2009
viii	Plot 2562/Section VI/MN	Unrelated to the plaintiff
ix	Plot 162/MN/Miritini	Non existent
x	Plot No. 654/11 MN – Jomvu	Non existent
xi	Letter of allotment plot no. 12/3/CT/1/01	Non existent
xii	Letter of allotment; Plot No. Nairobi 55.2003.01	Non existent
xiii	Sale agreement: Hurara Vibao Tana River 15 Acres	Non existent
xiv	Power of Attorney dated 29/4/1956	Non existent
xv	Power of Attorney dated 7/4/1959	Non existent
xvi	Among Others	Not ascertained

6. The defendants averred that members are the beneficiaries of the alleged trust and the trustees have no capacity to deny them their benefits or withhold it. That courts can only be called upon to enforce the trust if it exists and cannot be called upon to take away the benefits from the beneficiaries. That under the doctrine of impossibility, the consequences of carrying out the intent of the Applicants herein would be undesirable as it would be promoting bad faith, harm to the community by denying the Respondents and members of the local churches organization rights to association, assembly and freedom of worship and the promises and quarantees under the constitution especially Articles 1, 31, 32, 33, 36, 40 and 47 of the Constitution. It is deposed that the local Methodist Churches within the coastal region were built on land which was not bought by the Applicants or alleged trustees. That the local people organized themselves as members of the community of the larger Methodist Church in Kenya, while subscribing to the Methodist Church of England now domiciled in Kenya to start the local churches. That they identified the land and purchased it or the land was donated by one of their own, constructed a church through funds drives including donations, harambees or contribution grants and gifts until they establish what would constitute properties but would opt to associate themselves with the Methodist Church in Kenya for identity purposes. That the local churches have always been responsible for all aspects of their operations including management, development and the generation of their own income. It is contended that the Respondents as well as the local churches for that matter have always been independent from the Applicants and that they do not need the Applicants or their money or any funding. The Respondents state that the two listed properties within the coastal region which bears the name of Methodist Church in Kenya are simply held by the Methodist Church in Kenya for the benefit of the local congregants (beneficiaries) within the region and that that does not amount to exclusive possession and ownership of the same properties by the Applicants. It is further contended that an injunction cannot issue from court for the benefit of a trustee to deny a beneficiary the right accruing from the intended benefit flowing from the trust, and that a beneficiary cannot be said to be a trespasser to a property or be barred from accessing the property or benefit from it. The 1st respondent has annexed a trust deed, the extract of minutes of meeting of August 1996 showing the approval of the existence of the Methodist Coast Conference. He further annexed a 1963 Kenya Gazette Supplement Number 105, extra ordinary issue of 10th December, 1963 (legislative supplement No. 69) being legal notice number 178, some letters written by the Applicants to the local administration. Although a judgment is said to be annexed, the same however does not form part of the annexures.

7. The application was canvassed by way of written submissions which were duly filed by the advocates for both parties. The applicant's advocates filed their submissions on 6th May, 2020 while the Respondents' advocates filed theirs on 13th July, 2020.

8. I have considered the application, the affidavits filed and the submissions made together with the authorities cited. The issues for determination are whether the 1st respondent had authority to swear on behalf of the other respondents and whether the applicant has presented a case warranting issuance of the temporary injunction orders sought.

9. The Applicant's counsel submitted that the 1st respondent purported to have sworn the replying affidavit for and on behalf of the other respondents without any written authority as per the provisions of order 1 rule 8 and 13(1) and (2) of the Civil Procedure Rules. Counsel for the Applicant however, stated that they are prepared to concede that the Replying Affidavit remains only in respect to the 1st Respondent. The Applicant's counsel relied on the case of **Chalicha Farmers Co-operative Society Ltd –vs- George Odhiambo & 9 Others (1987)**

eKLR.

10. The Respondents' advocates, on their part submitted that the rules as prescribed in the Civil Procedure Rules are handmaidens of justice and that the errors in the replying affidavit should not be allowed to occasion injustice to the other Respondents. Counsel submitted that in the interest of justice the court should mete out orders that apply to the other thirteen Respondents.

11. Article 159(2)(d) of the Constitution provides that courts can no longer deploy technicalities as the basis for their decisions. That sub-article provides as follows:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles;

(a) Justice shall be done to all irrespective of status;

(b) Justice shall not be delayed;

(c) Alternative forms of dispute resolution, including reconciliation, meditation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)

(d) Justice shall be administered without undue regard to procedural technicalities.”

12. In this case, the Applicants accuse the 1st Respondents of citing a non-existent authority. The Applicant submitted that the application remains unopposed by the 2nd to 14th Respondents. In my view, whichever way the court decides the application, no doubt such decision will affect all the Respondents, not only the 1st Respondent. Indeed the Applicant has submitted that it is prepared to concede the Replying Affidavit remains in respect of the 1st Respondent. I will therefore proceed to determine the application based on the affidavits on record, including the Replying Affidavit by the 1st Respondent.

13. The other issue is whether the injunction orders should issue in favour of the Applicant. The conditions for the grant of temporary injunction were laid in the case of **Giella –versus- Cassman Brown & Company Limited (1973) EA 358** as follows;

“First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

14. The question that then arises is whether the plaintiff has made out a prima facie case with a probability of success. In the case of **Mrao –versus- American Bank of Kenya Limited & 2 Others (2003) KLR 125**, a prima facie case was described as follows:

“A prima facie case in a civil application includes but is not confined to “a genuine and arguable case”. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

15. The plaintiff's case is that it owns the suit properties and the defendants therefore ought to be kept off the same. There are claims from the 1st defendant that the suit properties are local Methodist Churches within the coast region which were built on land bought or donated by the local people. The defendants also seem to claim that the local churches have always been responsible for all aspects of their operations, including management, development and generation of their own income. The Respondents accuse the Applicant of attempting to seize the properties from the ownership and control or benefit of the Respondents and the local worshippers. The Respondents also seem to claim that they are justified in protecting themselves and their properties from the Applicant.

16. I have looked at the material before me. I have seen the copy of the trust of Methodist Church in Kenya Trustees Registered annexed to the Applicant's supporting affidavit. It is clear that on 14th July, 2017, MR Johnson M'mwongera Njuki, Mr Shadrack Kiruki M'laaria, Mrs Elizabeth Kitzaio, Rev Joshua Mithika M'lkiao, Mr Samuel Ntoiti M'mborothi, Mr Solomon Mukaba Matiri, Rev. Micheal Benjamin Simba, Mr Lawi Muchai and Rev. John Kipkeomoi Koskei were appointed as trustees of the Applicant. Their names were duly registered by the Registrar of Documents as trustees of the Applicant on the said date. In addition, the said trust empowered the trustees to hold any land or any interest therein, including the use and occupation thereof. Therefore, until some vitiating factors are advanced and proved, the court is to assume that the Applicant, through its duly appointed trustees is the custodian of the Applicants properties. I further note that the defendants have not displayed any other instrument bestowing on them or on the local churches the ownership of the Applicant's properties that is contrary to the instrument that the plaintiff has displayed.

17. Given the above position, it follows that the plaintiff has established a prima facie case with a probability of success. The plaintiff certainly stands to suffer irreparable loss if the defendants proceed with their intention of taking over the suit properties, repainting the same and barring the plaintiff from accessing them with a view to wrestle for possession of the properties without following due process of the law. That intention is manifested in the re-painting being carried out by the defendants and re-naming the properties. To me, it is irrelevant at the moment that the defendants intend to break away from the Applicant with a view to owning and managing the properties. The defendants will have a chance at the hearing of the suit to show that the suit properties do not form part of the Applicant's properties. And until that is determined, the defendants ought not to interfere with the suit properties. Even if I was to consider the balance of convenience, the same tilts towards maintaining the status quo aute until this suit is heard and determined.

18. Given the above discourse, I do allow the application dated 20th February, 2019 in terms of prayers 3, 4 and 5 thereof.

19. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 16th day of September, 2020.

C K YANO

JUDGE

In the presence of:

Ileri for Kithi for Defendant/Respondent

No appearance for plaintiff/Applicant.