



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 695 of 2005**

**EMBROSE ACADEMY LIMITED.....PLAINTIFF/APPLICANT**

**V**

**CATHOLIC ARCH-DIOCESE OF NAIROBI.....1<sup>ST</sup> DEFENDANT**

**(TRUSTEES REGISTERED)**

**ANNE NJERI.....2<sup>ND</sup> DEFENDANT**

**JECINTA WAMBUI.....3<sup>RD</sup> DEFENDANT**

**SUSAN WANGARI.....4<sup>TH</sup> DEFENDANT**

**(Being Sued in their Capacity as Officials of HUMAMA WOMEN GROUP)PERPETUA OMARY ODONGO**

**& OTHERS.....5<sup>TH</sup> TO 53<sup>RD</sup> DEFENDANTS**

**RULING**

This suit was filed on 7<sup>th</sup> June 2005 and simultaneously with the plaint the plaintiff filed a Chamber summons application seeking a temporary injunction against the Defendants. The application was heard by Hon,. Justice Kihara Kariuki (as he then was) and a ruling was rendered on the 7<sup>th</sup> June, 2006 dismissing he application for injunction by the plaintiff.

Since the filing of the suit there has been a multiplicity of applications such that the main suit is yet to be prepared and made ready for trial. The 1<sup>st</sup> Defendant has brought an application dated 26<sup>th</sup> July 2012 seeking the following orders:-

1. That pending the hearing and determination of the main suit, a temporary injunction be issued to restrain the plaintiff either by itself or through its agents, servants, workers, assignees and or anyone acting under it from developing, subdividing, alienating, disposing off, selling or transferring or in any other way dealing with all that parcel of land knowns as Plot No. 93 Komarock Infills otherwise referred to as Nairobi/Block121/245.
2. That a temporary mandatory injunction do issue directing and/or compelling the plaintiff to forthwith remove the container placed on land knowns as plot No. 93 Komarock Infills otherwise referred to as Nairobi/Block 121/245 pending the hearing and determination of the main suit.

3. That the orders be served through and its compliance be overseen by the Officer Commanding Station Kayole Police Station.

4. That costs of the application be provided for.

Fr. Tony Amissah has sworn an affidavit in support of the application that details the grounds of the application. The 1<sup>st</sup> Defendant placed reliance on the letter of allocation of Plot NO. 93 Komarock Infills by the City Council of Nairobi in November, 2003 for purposes of developing a public primary school. The letter of allocation dated 13<sup>th</sup> November, 2003 to the 1<sup>st</sup> Defendant shows Plot No. 93 Komarock Infills to be 1.040 hectares approximately. The certificate of lease in respect of Title No. Nairobi/Block 121/245 in the plaintiff's name shows this plot to be 4.456 hectares approximately and consequently the two (2) plots cannot be referred to as though they were one and the same plot having regard to their respective sizes. It may be that plot No. 93 Komarock Infills could be part of Title No. Nairobi/Block 121/245 but that will need to be established by evidence.

The 1<sup>st</sup> Defendant in the affidavit in support of its instant application states that he court on the 7<sup>th</sup> June 2005 while declining to grant an injunctive relief in favour of the plaintiff observed that the defendants claim to the suit land could not be dismissed as the court must investigate the claims made by the parties and decide who the true owner is. It is the 1<sup>st</sup> defendant's complaint in the instant application that the plaintiff has leased the suit land to a 3<sup>rd</sup> party, Zion Fellowship Church who are not a party to this suit and that the 3<sup>rd</sup> party has placed a permanent container on the suit land and intends to move in further to develop the land. The 1<sup>st</sup> Defendant contends that these acts constitute dealings and interference with the suit property when there is a suit pending and there is a risk of the 1<sup>st</sup> Defendant's interest being prejudiced to its detriment. The 1<sup>st</sup> Defendant avers that to the extent that the matter is pending in court the doctrine of Lispendens ought to apply such that no dealings on the suit land are permitted.

The plaintiff opposes the 1<sup>st</sup> Defendant's application and reiterates that the plaintiff is the registered absolute proprietor of title Number Nairobi/Block 121/245 since 30<sup>th</sup> July, 1993. The plaintiff avers that it has never authorised the subdivision of its said land and the allocation to the plaintiff of Plot No. 93 Komarock Infills by the City Council ought not to have affected its land.

At any rate the plaintiff avers that in 2003 when the 1<sup>st</sup> Defendant was allocated its plot there was in force a court order given in **Emorose Academy Ltd vs. Nairobi city Council in Nairobi HCCC No. 4007 of 1994** restraining any dealings with the plaintiff's parcel of land and therefore the City Council lacked capacity to allocate a portion of the suit property to the 1<sup>st</sup> Defendant during the pendency of the order of injunction. The plaintiff further contended that at the time of the commencement of the suit the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants had only encroached upon some parts of the plaintiff's land and argues that the 1<sup>st</sup> Defendant's plot No. 93 Komarock Infills land measures approximately **1.040 ha** whereas the plaintiff's land measure approximately **4.456 ha** and that the two properties cannot be the same.

The plaintiff further submits Zion Fellowship Church against whom the order to remove the container is sought is a 3<sup>rd</sup> party and would be affected by such an order and is not a party to these proceedings and that it would be unfair, unjust, and injudicious to issue orders that would have a bearing on a non party. The plaintiff placed reliance in the case of **Elyasa Arap Mutwol vs. Henry Chepnyonyei Kimwei Eldoret HCCA No. 97 of 2002** where Hon. Justice Dulu held that it would be wrong for a court to issue orders against a person who is not a party to the proceedings before the court certainly because such a party needs to be given audience to be heard in pursuit of their cause in court. Zion Fellowship Church is in such a situation in the instant case as it has acquired an interest on the suit property on the basis of the lease signed with the plaintiff.

The plaintiff has further submitted that the 1<sup>st</sup> Defendant has not demonstrated that it would suffer irreparable loss/damage unless the order sought are granted and besides it has not been shown that the plaintiff is in the process of developing, subdividing, selling, disposing off and/or alienating the suit land.

Having regard to the rival contentions and arguments by the 1<sup>st</sup> Defendant and the plaintiff the court has to determine whether the applicant has satisfied the conditions for grant of a temporary injunction. The court has perused the ruling by Hon. Justice Kihara delivered on the 7<sup>th</sup> June, 2006 which is the fulcrum of the 1<sup>st</sup> Defendant's arguments in the instant application and notes that the Honourable Judge while dismissing the plaintiff's application for injunction did not make an order for status quo to be maintained as the 1<sup>st</sup> Defendant appears to suggest. It is indeed true that ownership of the suit land is contested. The 1<sup>st</sup> Defendant claims plot No. 93 Komarock Infills measuring 1.040 ha is part of Title No. Nairobi/Block 121/245 but then the latter parcel of land in respect of which the plaintiff claim absolute ownership of by virtue of being the registered owner is 4.456 ha and was allocated and registered in 1993.

Even assuming plot No. 93 Komarock Infills is part of title No. Nairobi/Block 121/245 where is it located on the ground? The injunctive order that the 1<sup>st</sup> Defendant seeks if granted would attach to the entire parcel of land title number Nairobi/Block 121/245 yet plot No. 93 Komarock Infills is less than one quarter of the said parcel claimed by the plaintiff. In the absence of a clear delineation of Plot No. 93 Komarock Infills it is not possible to determine whether the container that has been placed by the 3<sup>rd</sup> party is in the portion claimed by the 1<sup>st</sup> Defendant. In the circumstances the court is of the view that the 1<sup>st</sup> Defendant has not demonstrated a prima facie case to entitle the court to grant it the injunction it seeks. I am also not satisfied the 1<sup>st</sup> Defendant has demonstrated it stands to suffer loss and/or damage that cannot be compensated by an award of damages.

On the balance of convenience I would hold that the same does not tilt in favour of the 1<sup>st</sup> Defendant. As I have observed earlier the previous ruling by Honourable Justice Kihara Kariuki did not make any orders for status quo to be maintained and therefore there was nothing to stop the plaintiff from dealing with the 3<sup>rd</sup> party. The lease with the 3<sup>rd</sup> party has already been entered into and it would be inappropriate to make any orders which would prejudice the 3<sup>rd</sup> party without affording the 3<sup>rd</sup> party an opportunity to be heard.

In the present suit there appears to be contentious facts as regards the ownership of the suit property. This position was appreciated by Honourable Justice Kihara Kariuki way back in June, 2006 when he rendered his ruling. It is not clear or apparent why the parties have not progressed the matter to full trial to enable the ownership issue to be determined finally. The counsel for the parties should take the necessary actions and steps to facilitate the hearing and final determination of this suit to enable the contentions to be put to rest. The court of appeal in case of **Ougo & another vs. Otieno (1987)KLR 1** held that the general principle is that there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided in a trial. Applying that principle I would in the present suit order the maintenance of status quo until the suit is heard and determined which status quo would mean the 3<sup>rd</sup> party remains in site as a tenant and all the other parties maintain the present status quo.

Finally, a comment on the plea for a mandatory injunction. The principles that govern the granting of a mandatory injunction were discussed in the case of **Kenya Breweries Ltd & another vs. Wastington Okeyo (2002) 1EA 109** where the Court of Appeal held that the test of granting a mandatory injunction or not was correctly stated in Volume 24 Halsbury Laws of England 4<sup>th</sup> Edition paragraph 948 thus:-

***“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempts to steal a march on the plaintiff... a mandatory injunction will be granted on an interlocutory application”.***

An applicant must therefore before a court can grant a mandatory injunction at an interlocutory stage demonstrate and show the existence of special circumstances and the case has to plain and clear.

In the circumstances of this case I am not satisfied any special circumstances exist and neither has the 1<sup>st</sup> Defendant shown any which would persuade the court to grant the mandatory injunction sought. In the words of Honourable Justice Kariuki, Kihara... ***“The court must investigate the claims made by the***

***parties before a determination of who the true owner can be made***". Clearly pint to this case being not a clear and plain case in which a mandatory injunction can issue and I would decline to grant one.

In the circumstances and for all the reasons outlined above I dismiss the notice of motion application by the 1<sup>st</sup> Defendant dated 26<sup>th</sup> July, 2012 and order that the costs be in the cause. The court however, for the purposes of preserving the subject matter of the suit orders that the present status quo be maintained and observed until the suit is heard and determined on merits.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF MAY 2013.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the Plaintiff

..... for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> Defendant

..... for the 3<sup>rd</sup> Defendant

..... for the 4<sup>th</sup> Defendant