REPUBLIC OF KENYA

High Court of Kisii

Civil Case 511 of 2012

JACKSON MORURI……..…….1ST PLAINTIFF

JOHN OKEYO……..2ND PLAINTIFF

RECLYNE GESARE OROCHE……..…….3RD PLAINTIFF

(Suing on behalf of Riontonyi Water Dam Management).

VERSUS

REGISTERED TRUSTEES OF OMOSANGORA

CATHOLIC CHURCH……..……..1ST DEFENDANT

REGISTERED TRUSTEES OF NYANSIONGO

CATHOLIC PARISH…….2ND DEFENDANT

REGISTERED TRUSTEES OF CATHOLIC

DIOCESE OF KISII……..……3RD DEFENDANT

RULING

1.I have two applications before me. One by the Plaintiffs and the other by the defendants both seeking temporary injunction. The applications concern the parcel of land known as

HCCC.NO. 511 OF 2012

NO.57

Isoge/Settlement/Scheme/112(hereinafter referred to as **"the suit property"** where the context so admits). The Plaintiffs' application has been brought by way of Notice of Motion dated 8th November, 2012. The same is brought under **Order 40 Rules 1** and **2** and **Order 50 Rule 1** of the **Civil Procedure Rules**, **Sections 1A, 3A** and **63(e)** of the **Civil Procedure Act, Cap. 21 Laws of Kenya, Section 13(7)** of the **Environment** and **Land Court Act** and **Articles 70(2) (a)** and **159** of the **Constitution of Kenya.** The Plaintiffs are seeking in this application, a temporary injunction to restrain the defendants from

trespassing, entering, erecting, constructing any form of structures and/or conducting church services on the suit property pending the hearing and determination of this suit. The Plaintiffs' application is brought on the grounds that there is a water dam situated on the suit property which serves as the main source of water for Riontonyi Community and that the

defendants have trespassed on and encroached on the suit property where they have put up a temporary structure which they are using as a church and toilets for sanitary use by church members. It is the Plaintiffs' contention that the defendants activities aforesaid have led to the pollution of water in the dam situated on the suit property. The Plaintiffs claim that during the setting up of Isoge settlement scheme by the Settlement Fund Trustees, the suit property was reserved within the said scheme to be used as a water dam by the Riontonyi Community and a title deed has now been issued for the suit property in the name of Riontonyi Water Dam Management. It is the Plaintiffs' contention that the defendants have no legal interest whatsoever on the suit property in which they entered into illegally way back in the year 2006. The Plaintiffs claim that the defendants have refused to vacate the suit property despite several demands made upon them to do so by the Provincial Administration, Director of Land Adjudication and Settlement,

Nyansiongo Town Council and National Environment Management Authority(NEMA). In their affidavit in support of the application sworn by Jackson Moruri on 8th November, 2012, the Plaintiffs have exhibited a title deed for the suit property dated 10th July, 2012 in the name of Riontonyi Water Dam Management and correspondence going back to the year 2006 between the Provincial Administration, the Lands Department, Town Council of Nyansiongo, Riontonyi Community, the defendants, Lake Victoria Water Services Board, NEMA and Kenya Anti-Corruption Commission over the dispute between the Plaintiff and the defendants over the suit property. The Plaintiff's case is that the defendants' activities on the suit property are illegal and a mounts to a violation of the Plaintiffs constitutional right to clean water. It is their contention that they have made out a prima facie case against the defendants and have also shown that unless the orders sought are granted, they stand to suffer irreparable harm.

2. In response to the Plaintiff's application for injunction, the defendants have contended that the title to the suit property in the name of Riontonyi Water Dam Management is unlawful and fraudulent the same having been issued on 10th July, 2012 after the defendants had on their part fulfilled all the conditions for allotment of the said property to them. The Defendants have exhibited in the replying affidavit of James Nyaribo Isaboke filed in court on 14th November, 2012 in opposition to the application, copies of a letter of allotment dated 2nd August, 2011 with respect to the suit property issued in favour of the 1st and 3rd defendants in which the Commissioner of Lands offered to grant to the 1st and 3rd defendants a lease over the suit property for a term of 99 years with effect from 1st August, 2011 on terms and conditions set out in the said letter, a copy of a cheque for Ksh.6922.00 dated 8th August, 2011 and a copy of a receipt issued by the Commissioner of Lands in favour of the 1st and

3rd defendants dated 13th January, 2012 for the sum of Ksh.6922.00. The defendants claim that the 1st defendant applied to Nyansiongo Location Development Committee on 8th May, 2006 to be allocated the suit property and that the said Committee at their meeting held on 5th June, 2006 approved the 1st defendant's request which request was also approved by Nyansiongo Town Council in a letter dated 25th November, 2008. The defendants claim that they have been holding church services on the suit property since the year 2006 and have never stopped such services at any time. It is their contention that there is no water dam on the suit property as what is situated on the suit property is a Water Pan and not a dam. The defendants claim that it is part of their plan to construct a water dam on the suit property where the water pan is situated for their own use and for the use of the local community. The defendants have denied that they have put up any toilet near a dam. According to the defendants, this suit has

been actuated by religious rivalry pitying adherents of S.D.A Church and those of the Catholic Church. The defendants claim that they have already put up a church on the suit property which church is far away from the water pan on the suit property. The defendants claim that the church put up on the suit property has the blessings of the Provincial Administration, NEMA and the local community save for a few families who are Adventists. It is the defendants' contention that they have spent considerable amount of money to put up a church on the suit property which is near completion with only the roof left to be put up. The defendants contend that the orders sought would have the effect of stopping the members of the 1st defendant church from attending worship services thereby infringing on their constitutional rights. The defendants have exhibited photographs of the church under construction on the suit property and the area set a part as the water pan. The defendants claim that the suit property has

been surveyed and the area where the church is put up and the water pan set a part. The defendants who also put in grounds of opposition to the application claim also that, the Plaintiffs have no *locus standi* to institute the present suit, that there has been misjoinder of parties and that the application has been brought after unreasonable delay. The Plaintiff's claim protection under section 30 of the Registered Land Act, Cap.300, Laws of Kenya (now repealed). The defendants have contended that the Plaintiffs' application does not meet the threshold for granting temporary injunction that was pronounced in the case of **Giella-vs-Cassman Brown & Company**

Ltd.(1973) E.A 358 and that the same is an abuse of the process of the court having been actuated by "religious bigotry".

3. On 26th November, 2012, the 3rd defendant filed an application by way of Notice of Motion dated 22nd November, 2012 brought under **Order 40 Rules, 1,2,3** and **4** of the **Civil Procedure Rules** and **Sections 1A,1B,3A** and **Section 63(e)** of the

Civil Procedure Act, Cap.21 Laws of Kenya. In this application, the 3rd defendant is seeking a temporary injunction to restrain the Plaintiffs from trespassing onto, charging, transferring, selling, taking over possession of, interrupting the 3nd defendant's possession of or in any manner whatsoever dealing with land parcel known as **L.R.No. Isoge Settlement/Scheme/112** (**the suit property**) pending the hearing and determination of this suit. The 3rd defendant's application has been brought on the same grounds that the defendants have put forward in opposition to the Plaintiffs' application for injunction. In

summary, the 3rd defendant claims that it is lawfully in occupation of the suit property where it has put up a church with the approval of all relevant authorities. The 3rd defendant claims that with full knowledge that the 3rd defendant is in occupation of the suit property and that the same has been allocated to the 3rd defendant and that the 3rd defendant has put up a church thereon, the Plaintiffs

caused the suit property to be registered in their business name for the purposes of grabbing the same from the 3rd defendant. The 3rd defendant is apprehensive that unless the orders sought are granted, the Plaintiffs may transfer the suit property to third parties now that they have the title thereof in their name. In his affidavit in support of the application sworn on 22nd November, 2012 **Fr. Dennis Rogena Ondieki** has explained how the 3rd defendant acquired the suit property and the development it has put up thereon. It is the 3rd defendant's contention that the title deed held by the Plaintiffs that was issued subsequent to the allocation of the suit property to the 3rd defendant is fraudulent. The 3rd defendant's application is opposed by the Plaintiffs. In their replying affidavit sworn by **Jackson Moruri** on 4th December, 2012, the Plaintiffs reiterated the grounds that they had put forward in support of their injunction application. The Plaintiffs maintained that the suit property was reserved as a

community water dam which is now registered in the name of Riontonyi Water Dam Management. The Plaintiffs claim that the Riontonyi community were not consulted at all before the alleged approvals for the allocation of the suit property to the 3rd defendant were issued if at all. The Plaintiffs' have challenged the truthfulness of the alleged minutes of the meeting of Nyansiongo Location Development committee which allegedly approved the allocation of the suit property to

the 3rd defendant. The Plaintiffs have denied that they obtained the title to the suit property fraudulently.

4.On 4th December, 2012, the advocates for the parties agreed that the Plaintiffs' application and the defendant's application aforesaid be consolidated and heard together. It was agreed further that the same be disposed of by way of written submissions. The Plaintiffs filed their written submissions on 21st January, 2013 and further submissions on 6th February, 2013. The defendants filed their written submissions on 1st

February, 2013. The submissions filed by both parties related to the two applications. I have considered both applications and the parties' respective responses thereto. I have also looked at the parties' submissions and the case law cited by them. The following is the view I take of the matter. The law on interlocutory injunction is now well settled. As was stated in the case of **Giella-vs-Cassman Brown & Company Ltd. (supra)** which has been cited by both parties, an applicant for a temporary injunction must show that he has a prima facie case with a probability of success against the defendant and that he will suffer irreparable harm unless the orders sought are granted. If the court is in doubt as to the above, the court would determine the application on a balance of convenience. It should also be remembered that injunction is a discretionary and equitable remedy. This means that sometimes even if a case is shown for the grant of injunction, the order may be refused if it would be inequitable to grant the same or where

the conduct of the applicant is such that the court cannot exercise its discretion in his favour or where the circumstances will not favour such order being granted. Due to the foregoing, the Plaintiffs had a duty to demonstrate to the court that they have a prima facie case against the defendants and that unless the orders sought are granted they will suffer irreparable harm. They also had to satisfy the principles relating to equitable reliefs. On the part of the 3rd defendant, it needed to demonstrate that it has a strong defence to the Plaintiff's claim and that its counter-claim has prima facie good chances of success. Furthermore, the 3rd defendant needed equally to show that unless the injunction sought is granted it will suffer irreparable harm. The two applications are interdependent as the determination of one will automatically determine the other. The court will therefore while considering the two applications only look at the arguments put forward by the

parties for and against the Plaintiffs' application for injunction the determination of which will determine the defendant's application. On the material placed before the court, I am satisfied on a prima facie basis that the suit property was reserved for a water dam within Isoge Settlement Scheme to serve the residents of Riontonyi. The defendants' own documents submitted to court attest to this fact. In the defendants' application made to the Sub-Location Development Committee to be allocated this plot dated 8th May, 2006(exhibit "JN13" to the affidavit of James Nyaribo Isaboke sworn on 13th November, 2012), the Chairman of the 1st defendant stated as follows **"secondly we shall protect the dam and preserve it for the entire community".** With this statement, the defendants cannot turn round and claim that what is situated on the suit property is a water pan and not a water dam. I am equally persuaded that the defendants'

proprietary interest on the suit property is doubtful. The suit property as I have already stated was reserved for public use within a settlement scheme. The said public use was clearly spelt out as a water dam and not a church. My understanding of the history of settlement schemes in this country is that they were meant to resettle citizens that were displaced from their

land by the colonialists and more recently they have been used to resettle the landless. The statutory organ with the mandate to execute the resettlement programs is the Settlement Fund Trustees established under section 167 of the Agriculture Act, Cap. 318, Laws of Kenya. I doubt if Nyansiongo Location Development Committee, Nyansiongo Town Council and the Commissioner of Lands that have been mentioned by the defendants to have allocated the suit property to them had the power to do so. I don't think that a locational development committee has jurisdiction to allocate land. For the town council, it could only allocate land within its jurisdiction, which

is owned by it and which it does not require for its own use and only with the consent of the Minister for Local Government See **Section 144(3)** of the **Local Government Act, Cap.265, Laws of Kenya** (now repealed). As far as the powers of the Commissioner for Lands were concerned, the Commissioner could only allocate un-alienated Government land and where such land was situated in a township, only if such

land was not required for public purposes. See **Sections 3** and **9** of the **Government Lands Act, Cap.280, Laws of Kenya** (now repealed). I have not seen any evidence to the effect that the suit property belonged to Nyansiongo Town Council. Even if it belonged to the said council, I don't think that it would fall in the category of land that could be allocated by the council as it was reserved for public use and could not be described as land which the council did not require for its own use. The case of **Hava Isak Suleiman-vs-Zubeda Bhachu, Nairobi High Court Civil Case No. 659 of 1997**(unreported) cited by the defendants which

concerns allotment of land by a county council is distinguishable. Furthermore, I have not seen any evidence of allocation of the suit property by Nyansiongo Town Council to the defendants or a consent from the Ministry of Local Government to such allocation. What has been exhibited by the defendants is a copy of a letter dated 25th November, 2008 which is not in the letter head of Nyansiongo Town Council but which is purported to have been written by its town clerk to the 1st defendant to the effect that the said council had no objection to the 1st defendant's application to be allocated the suit property (see page 9 of the exhibits attached to the replying affidavit of James Nyaribo Isaboke). This letter cannot by any interpretation amount to an allotment letter. The defendants have also claimed proprietary interest on the suit property based on the letter of allotment dated, 2nd August, 2001 issued in favour of the 1st and 3rd defendants by the

Commissioner of Lands (exhibit "JNI 1" to the replying affidavit of James Nyaribo Isaboke). As I have stated above, I am doubtful whether the Commissioner of Lands had the power to make such allotment. This is because, first, the suit property was land within a settlement scheme under the jurisdiction of Settlement Fund Trustees and secondly, the same was already reserved for a particular public purpose. I am also of the view that unless the defendants prove that the title to the suit property obtained by the defendants is fraudulent, the letter of allotment held by the defendants has been overtaken by the Plaintiffs title. In other words, the Plaintiff's title deed unless obtained fraudulently confers rights which are superior to those conferred by a letter of allotment. In the Court of Appeal, **Civil Application No.NAI 60 of 1997(27/97 UR),Joseph N.K.Arap Ng'ok-vs-Justice Moijo Ole Keiwua & 4 Others (unreported),** the court held that:

existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to the provisions in the Act under which the property is held" .

The legality of the defendants' claim to the suit property on the strength of the said letter of allotment is in the circumstances doubtful more particularly on the face of a title already issued in favour of the Plaintiffs. The defendants have also based their claim to the suit property on section 30 of the Registered Land Act, Cap.300, Laws of Kenya (now repealed). I doubt whether this provision can assist the defendants. Before the defendants took possession of the suit property, the same had been set aside for a public water dam for the Riontonyi community. I don't see how the defendant's entry into land set aside for public use before such entry would create an overriding interest in favour of the defendants. I believe

that an overriding interest on account of possession under **Section**

HCCC.NO. 511 OF 2012

NO.57

30(g) of the **Registered Land Act** would only affect the interests of persons acquiring such land subsequent to such occupation but it cannot accrue against the interest of the owner of such land who acquired the same prior to such occupation save where the possessor has acquired prescriptive rights over the land. When the defendants were taking possession of the suit property, the same was reserved for Riontonyi community to use as water dam. On the evidence before me, I don't think that the suit property has changed hands. The same is now registered in the name of Riontonyi Water Dam Management. Although I cannot vouch for the legal status of this entity, it is clear from the material before the court that the entity is a community based self-help group in charge of Riontonyi Water Dam which is situated on the suit property. There is no evidence to the effect that Riontonyi Water Dam Management is a private business name as claimed by the defendants. In the circumstances, the validity of the defendants' claim to the suit

HCCC.NO. 511 OF 2012

NO.57

property on the basis of **Section 30** of the **Registered Land Act,**

Cap.300, Laws of Kenya is equally doubtful.

5. Due to the forgoing, I am of the view that the Plaintiffs have established a prima facie case with a probability of success against the defendants. The court has found the defence put forward by the defendants and the 3rd defendant's counter-claim shaky. A part from establishing a prima facie case with a probability of success, the Applicant was also supposed to prove that unless the orders sought are granted, the applicant would suffer irreparable harm. I am not persuaded that the Plaintiffs stand to suffer irreparable harm if the orders sought are not granted. The Plaintiffs have not placed any evidence before the court to prove the alleged pollution of the water dam on the suit property. The Plaintiffs have not even shown the court evidence of the toilets which are alleged to be very close to the dam. This court cannot assume that there are toilets near the dam and that the said toilets are polluting the

HCCC.NO. 511 OF 2012

NO.57

water in the dam situated on the suit property. The Plaintiffs were under a duty under **Sections 107, 108** and **109** of the **Evidence Act, Cap.80, Laws of Kenya** to prove all the allegations of fact made by them on which they wanted the court to rely on in making a determination in their favour. The other point connected to this issue of irreparable harm is the fact that the defendants have been on the suit property since the year 2006. This is a fact which is not disputed. I do not see in the circumstances what injury the Plaintiffs would suffer if the defendants remain on the suit property for another year or so pending the hearing and determination of this suit. The Plaintiffs have failed therefore to prove that they stand to suffer irreparable injury if the orders sought are not granted.

6. The orders sought by the Plaintiffs cannot therefore be granted as prayed. On the 3rd defendant's application, I have already stated herein above that I am not satisfied that the defendants have established a prima facie case against the Plaintiffs. In the

HCCC.NO. 511 OF 2012

NO.57

circumstances, I am not obliged to consider whether or not the 3rd defendant would suffer irreparable injury if the orders sought by the 3rd defendant are not granted.In the circumstances, both applications must fail. The order that commends itself to me is to maintain the status quo and at the same time preserve the suit property pending the hearing and determination of this suit. The provisions of **Section 13(7) (a)** of the **Environment** and **Land Court Act, No. 19 of 2011** as read with **Sections 3A** and **63 (e)** of the **Civil Procedure Act, Cap. 21 Laws of Kenya** gives the court the power to make such order**.** I therefore disallow the Plaintiffs' application dated 8th November, 2012 and the Defendants' application dated 22nd November, 2012. In place thereof, I order that the Plaintiffs shall not transfer, charge, lease or alienate the suit property in any way or manner pending the hearing and determination of this suit. The Plaintiffs should also not enter or interfere in any way with the portion of the suit property in the possession of

the defendants pending the hearing and determination of this suit. I have in the same breath ordered that, save for the roof of the church building which the defendants seem to have been in the process of putting up, the defendants shall not continue with any further construction of the said church or any portion thereof and they shall also not put up any more structures on the suit property pending the hearing and determination of this suit. The defendants are however at liberty to continue with their church services on the portion of the suit property where the church is situated as before. The costs of both applications shall be in the cause.

Signed, dated and delivered at KISII this 3rd day of May, 2013

S. OKONG'O,
JUDGE.

In the presence of:-

No appearance for the Plaintiffs

Mr. Minda holding brief for Nyangau for the Defendants

Mobisa Court Clerk.

S. OKONG'O,
JUDGE.