



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS

**SAMUEL MUSAU & 33 OTHERS ..... PLAINTIFFS**

**VERSUS**

**ANDREW MAKAU & 10 OTHERS ..... DEFENDANTS**

**RULING**

In this ruling I will deal with the applications dated 16<sup>th</sup> November 2011 and 25<sup>th</sup> of November 2011 filed by Plaintiff/Applicants and the 11<sup>th</sup> Defendant applicant respectively.

The Plaintiffs/Applicants herein referred to as the Applicants have filed a Notice of Motion dated 16/11/2011 under order 40 Rule 1(a) of the Civil Procedure Rules 2010, seeking the following orders;

1. THAT the 11<sup>th</sup> Defendant be restrained either by it selves or through its agents, servants, employees, proxies or any one acting on its behalf from continuing to construct, furnish, putting up more structures, altering, letting hiring or offering for rent or any other benefit or in any other way allowing any one or tenant into the premises or shops in or within all that piece of land known as L.R. No. 209/1951 or part thereof on which the Salvation Army Nairobi Central Corps stands until hearing and determination of this suit.

2. THAT the 11<sup>th</sup> defendant to pay the cost of this application,

The application is based on the following grounds;

- a) THAT the 11<sup>th</sup> defendant is perpetuating an illegality by continuing with the construction.
- b) THAT the 11<sup>th</sup> Defendant is circumventing and breaching this court's orders dated 26<sup>th</sup> January 2011.
- c) THAT the 11<sup>th</sup> Defendant has no right of claim on the land in dispute.
- d) THAT 11<sup>th</sup> Defendant's acts are causing tension between the plaintiffs and the defendant's as they try to negotiate and amicable settlement of this dispute
- e) THAT the plaintiffs stand to suffer irreparable damages.

Mr. John Lusimba the 27<sup>th</sup> Plaintiff filed a supporting affidavit on behalf of the applicants. In brief he states as follows; After the Court gave an order of injunction on this matter on the 26<sup>th</sup> of January 2011 the 11<sup>th</sup> Defendant continued to construct at the suit premises despite being asked to stop after being

notified of the court order. The applicants state that the 11<sup>th</sup> defendant's actions are in breach of the court order but also that the 11<sup>th</sup> defendant trespassing on land which is the property of the church, which will interfere with their rights of worship. The Applicants therefore seeks to have the order directed to the defendants and argues that for if tenants are let into the premises it will be hard to evict them.

Daniel Gacheru Ndiang'ui the Managing Director of the 11<sup>th</sup> Defendant Company filed a replying affidavit dated 18<sup>th</sup> November 2011. In opposing the application he states that the prayers sought are vexatious, the application lacks merit, unfounded, frivolous and an abuse of the court process, that the 11<sup>th</sup> Defendant was not a party to suit at first and the orders issued in this suit will not affect it, that the only order he is aware of is ELC 561 of 2010 which restrained the City Council and two others from interfering with the construction in L.R. No. 209/1951. He explains his dealings with Salvation Army Nairobi Central Corps at paragraphs 11- 14 and states that the church gave them a letter that they could proceed with the project which is now completed and they have started paying the agreed rent. He states that they have invested a substantial amount in the project and the applicants have not demonstrated any justifiable cause of action against them.

The 11<sup>th</sup> Defendant herein referred to as the 11<sup>th</sup> Respondent/ Applicant has filed a Notice of Motion dated 25/11/11 under Order 40 Rules 2(2),7 and Order 26 Rule 1,2 5(1) and 6 of the Civil Procedure Rules, Section 3,3A of the Civil Procedure Act and all other enabling provisions of the law seeking the following orders;

1. THAT this Honourable Court be pleased to suspend and/or stay the interim Orders granted on 18<sup>th</sup> November, 2011, by the Honourable Justice R. Ougo pending hearing and determination of this application.
2. THAT the said order of 18<sup>th</sup> November, 2011, be varied by imposing a condition that the Plaintiffs deposit the sum of shs.1 Million in court every month as security for damages until the said order is varied, discharged or set aside.
3. THAT the plaintiffs within a time to be fixed be ordered to give security in sum of Kshs.10 Million for the 11<sup>th</sup> Defendant's Costs of this suit.
4. THAT if the Plaintiff fail to deposit the said sum and give security for costs to the 11<sup>th</sup> Defendant's as aforesaid then the Plaintiff suit should be dismissed with costs to the 11<sup>th</sup> Defendant.
5. THAT this Honorable Court be pleased to make such other or further orders it deems fit.
6. THAT the costs of this Application be provided for.

The application is supported by a replying affidavit dated 18<sup>th</sup> November 2011 of Mr. Daniel Gacheru.

The application is based on the following grounds.

1. The Honourable Court on 18<sup>th</sup> November, 2011, granted the plaintiffs interim Orders restraining the 11<sup>th</sup> Defendant from leasing/letting out premises situated at L.R. No. 209/1951.
2. By the dint the order of 18<sup>th</sup> November 2011, the Applicants have stopped hiring out of premises which have cost over Kshs 150 Million to construct.
3. The completed construction has more than Sixty (60) offices. The Applicant has already leased out twenty units to tenants and the remaining unoccupied are forty (40). The current rent being (Kshs.30,000/-) for twenty units and Kshs.20,000/- for the remaining twenty units. It therefore translates that the rent due would be Kenya Shillings One Million only (Kshs.1 Million).

4. The applicant is entitled to recoup the constructs costs from the monthly rent within a stipulated period.
5. The plaintiffs have no known assets.
6. That some of the Plaintiffs have disowned giving authority to institute this case.

The 11<sup>th</sup> respondent's application is supported by affidavit of Daniel Gacheru Ndiang'ui the Managing Director of the 11<sup>th</sup> Defendant Company.

In brief he states that sometimes in February, 2010, the 11<sup>th</sup> Defendant made a bid to the Salvation Army, Nairobi Central Corps with a proposal to develop perimeter offices/stalls along the perimeter fence within their property situated on L.R. No. 209/1951. The request was accepted by a letter dated 17<sup>th</sup> February, 2010. That Corps forwarded to the 11<sup>th</sup> Defendant copies of the certificate of Title and Deed plans for the 11<sup>th</sup> Defendants to process the relevant plans and obtain various Government authorization. That they sought and obtained plan authorization from the City Council of Nairobi and the NEMA, that having obtained all authorization and having fulfilled the conditions set by the Corps, the Salvation Army, Nairobi Central Corps gave them authorizations to move onto the site and commence the works. That after commencement of the construction, some individuals went to the city council of Nairobi and falsely indicated that the developments were not sanctioned by the church. The City Council relying on the said information came to the ground and demolished the building they had erected and this made them to go to court and obtained a court order in ELC No. 561 of 2010 which restrained the City Council of Nairobi and 2 others from interfering with the construction on L.R. No. 209/1951. That there being misunderstanding within the church members they insisted that before they proceed with project the church to iron out their differences and thereafter the church gave them letter confirming that they proceed with the project. That they have invested a substantial amount of money in the project and are entitled to recover their outlay within a period of 5 years. The interim orders are occasioning substantial loss to the 11<sup>th</sup> Defendant but also denying them a source of income on their investment. That the project has cost over Kshs.150 Million up to the completion. That in the pleadings there is no where the plaintiff raises any justifiable cause of action against the 11<sup>th</sup> Defendant. That any dispute between the plaintiffs and first 10 Defendants should not be a reason to deny it its rightful dues. That the suit herein was filed against the first 10 Defendants on 7<sup>th</sup> October, 2010 and the 11<sup>th</sup> Defendant was not a party to the suit. That no pleadings or court orders were served upon the 11<sup>th</sup> Defendant, to restrain them from construction or at all and the same proceeded without any interference from the plaintiffs. That the 11<sup>th</sup> Defendant came to know about this case when it was served with the Application dated 1<sup>st</sup> July, 2011 and the order enjoining the 11<sup>th</sup> Defendant to this suit was made on 8<sup>th</sup> July, 2011. That since it was enjoined, the plaintiffs have not bothered to serve the 11<sup>th</sup> Defendant with summons, plaint and all other proceedings prior to it being enjoined. That the court then declined issue grant reliefs sought in particular that the 11<sup>th</sup> defendant be bound by the orders in existence. That the 11<sup>th</sup> Defendant not having been a party to the suit from the start, then it follows that any orders issued did not affect them unless they were enjoined to the suit. That 11<sup>th</sup> Defendant completed the construction of more than sixty (6) offices. It has already leased out twenty units to tenants and remaining unoccupied are forty (40). The current rent being Kenya Shillings Thirty Thousand (Kshs 30,000) for twenty units and Kenya Shillings twenty thousand (Ksh.20,000) for remaining twenty units. That they are apprehensive that the tenants who have already taken up the stalls might refuse to pay once they learn existence of the current interim orders. That as per the contractual obligations with the church having completed project, they have to pay the agreed rent. That they are worried about who will pay its costs and loss of business once the case concluded. That seven of the alleged plaintiffs have withdrawn from the case as shown by the affidavits filed in this case. That the plaintiff assets are unknown and this is compounded by the fact that several of the plaintiffs have disowned the suit. That the orders should be varied and plaintiffs be ordered to give security of Kshs. 5 Million given that mostly likely there will be the period the stalls will be empty pendency hearing of the main application.

Mr. John Lusimba the 27<sup>th</sup> plaintiff filed a replying affidavit dated 1<sup>st</sup> December 2011 to the 11<sup>th</sup> Defendant's application dated 25<sup>th</sup> November 2011 and a supplementary affidavit dated 1 December

2011. In brief he states in the two affidavits that the 11<sup>th</sup> defendant was aware of the court order as it was served on their advocates, that it is not true that the tenants have paid any deposits, that even though the 11<sup>th</sup> defendant was made aware of the court order, it carried on with the construction even with the resistance from the church members yet the land does not belong to them, that the 11<sup>th</sup> defendant has not exhibited any agreement with the church in regard to the construction and that there was no proper approval from NEMA and that there is no proof of the alleged construction. Lastly that the 11<sup>th</sup> defendant is the agent of the other defendants and is bound by the court orders that no shop has been leased out.

I have carefully considered all the affidavits filed by the parties in this suit and counsel submissions in court, I have also gone through the court record and I find as follows; the applicants filed an application dated 5<sup>th</sup> October 2010. Justice Mbogholi delivered a ruling on the 26<sup>th</sup> of January 2011 stopping the construction until the determination of this suit. In his ruling Justice Mbogholi noted the relationship that the parties had and found that the plaintiffs had a *locus standi* and had disclosed a prima facie case with the probability of success. None of the parties appealed against this ruling. From the court record I note that after the ruling of 20<sup>th</sup> January 2011 was given, the applicants filed an application dated 1<sup>st</sup> July 2011 under certificate of urgency. The application sought the following prayers;-

i. That Funan Construction Company Limited and its directors be enjoined in this suit as respondents in the plaintiff's application dated 20<sup>th</sup> day of April 2011.

ii. That Funan Construction Company Limited and directors be bound by the orders made in respect of the plaintiff's application dated 20<sup>th</sup> April 2011.

iii. That the defendants and Funan Construction Company Limited do pay costs of this application.

The application was allowed and the court ordered that the new party be the 11<sup>th</sup> defendant and service was to be effected upon the new party. The new party as per the said application was Funan Construction Limited.

From the facts adduced in the affidavits it is clear that the 11<sup>th</sup> defendant/respondent knew of the dispute that the plaintiffs and the defendants had. The 11<sup>th</sup> defendant correctly states that the orders of 26<sup>th</sup> January 2011 were made before they were enjoined in the suit. However, what the 11<sup>th</sup> defendant was doing, that is the construction is what was stopped. The 11<sup>th</sup> defendant dealt with the 1<sup>st</sup> defendant in their agreements over the said construction as shown in the annexures. The 1<sup>st</sup> defendant was amongst the defendants who were stopped from continuing with the construction. The 11<sup>th</sup> defendant therefore was carrying out works which the defendants had been stopped from performing. Due to the relationship between the parties and the plaintiff having established her prima facie, Justice Mbogholi stopped the construction to enable the parties resolve dispute. By continuing with the construction even though the Court Order did not relate to it, the 11<sup>th</sup> defendant was not helping the matter. There is still a dispute between the plaintiffs and the applicants and allowing the 11<sup>th</sup> defendant to continue with what it has been carrying out would not be just. I find that the plaintiff has established that they have a prima facie case with a probability of success against the 11<sup>th</sup> defendant as they have court orders that bind the 11<sup>th</sup> defendant for acts that it continues to perform, on a contract they have with the defendants. For the sake of the church the plaintiffs and the defendants need to be reconciled. Reconciliation between the two will indeed give the 11<sup>th</sup> defendant peace if he is to continue with the business it states it has heavily invested in. The irreparable damage here is likely to be on the relationship that this church members have and the balance of convenience tilts in their favour. I also find that in the interest of justice and for the benefit of all parties it is appropriate that the 11<sup>th</sup> defendant be restrained as sought in prayer 3 of the Notice of Motion dated 16<sup>th</sup> November 2011. I therefore grant prayer 3 of the application dated 16<sup>th</sup> November 2011. The Plaintiffs/Applicants speed up the matter should amend their plaint to include the 11<sup>th</sup> defendant as a party and clearly state their claim against it. The applicants should do so within 21 days from the date of this ruling. Costs of the application dated 16<sup>th</sup> of November 2011 shall be in the cause.

On the application dated 25<sup>th</sup> November 2011, the 11<sup>th</sup> defendant seeks to have the Court impose a condition that the plaintiff deposits one million in court every month as security for damages until the order is varied, discharged or set aside and that the plaintiffs within a certain time be fixed, that the plaintiffs be ordered to give security in sum of Kshs.10million for the 11<sup>th</sup> defendant's costs of this suit. The 11<sup>th</sup> defendant states that they have heavily invested in the development to the tune of over 150 Million, that they have completed the construction and already leased out part of the premises to tenants, that the applicant is entitled to recoup the construction costs from the monthly rent within a stipulated period, that the plaintiffs have no known assets, that some of the plaintiffs have disowned giving authority to institute this case, that if the plaintiffs don't succeed and are ordered to pay costs to the 11<sup>th</sup> defendant it is highly unlikely that the plaintiffs would be able to pay the costs to the 11<sup>th</sup> defendant which would be in the region of ksh.10Million, that the said order is occasioning the defendant immense damage as it has already collected deposits from tenants who should take possession of the premises. These facts have been countered by the plaintiffs in the replying affidavit. I note that the 11<sup>th</sup> defendant has not adduced evidence of the sums they claim they used in the investment. In my findings I have already noted that it is important that the reconciliation between the plaintiffs and defendants should be promoted. Article 159 (2) (c ) of the Constitution states that in exercising the Judicial authority the Courts shall be guided by the following principles, alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. I do recognize that the 11<sup>th</sup> defendant has to some extent incurred expenses in putting up the construction and will suffer loss. However, in exercising my discretion in declining to grant the orders sought by the 11<sup>th</sup> defendant in their application I take into account the relationship between the plaintiffs and the defendants. In the case of Shah .vs. Shah KLR 1982 at page 95 the Court of Appeal held that the Court's discretion in such applications should be exercised reasonably and judicially. I take note of that but find that in the interest of justice and to promote reconciliation between the parties, I will not order any security of costs. The plaintiffs should endeavor to fix this case for hearing as soon as possible. The parties are encouraged to reach an out of court settlement on the way forward with what is happening within the premises. If no reconciliation is reached I order that the plaintiff shall serve the necessary pleadings on the defendants, amend their pleadings if need be within 30 days and take a date for pretrial conference once the defendants file their pleadings. The Court shall thereafter give directions on the hearing.

**Dated and delivered this 2<sup>nd</sup> Day of March 2012**

**R. OUGO**

**JUDGE**

In the Presence of:-

For the Applicant

For the 1st to 10<sup>th</sup> Respondents

For the 11<sup>th</sup> Respondents/Applicant

Court Clerk