



**REPUBLIC OF KENYA**

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

**Environmental & Land Case 734 of 2011**

**ARCHDIOCESE OF NAIROBI REGISTERED  
TRUSTEES.....PLAINTIFF/APPLICANT**

**VERSUS**

**MANAGEMENT COMMITTEE KANYORE POLYTECHNIC .....1<sup>ST</sup>  
DEFENDANT**

**CHAIRMAN, SECRETARY AND**

**TREASURER, BOARD OF GOVERNORS MAKUYU SECONDARY SCHOOL....2<sup>ND</sup>  
DEFENDANT**

**RULING**

The Plaintiff filed an application by way of a Notice of Motion dated 7<sup>th</sup> December 2011 seeking an order that a temporary injunction do issue restraining the Defendants by themselves, their agents and or servants from entering, using, interfering or committing any works, constructing, fencing, alienating, encroaching and or trespassing part of suit property Title No. Githunguri/Gathangari/T.688, (hereinafter referred to as the suit property), pending the hearing and determination of this suit.

The grounds for the application are that the Defendants have separately encroached into the Plaintiff's Land without its authority or consent and that the 1<sup>st</sup> Defendant has started construction on the suit property which will interrupt learning and create a child unfriendly atmosphere. The application is supported by an affidavit sworn on 7<sup>th</sup> December 2011 by Peter Njora Kariba, the Headmaster and Secretary of the School Management Committee of Kanyore Primary School, which is sponsored by the Plaintiff and is situated on the suit property.

The 1<sup>st</sup> Defendant's response is in a replying affidavit sworn on 8<sup>th</sup> February 2012 by Joseph Kimani Njoroge, its management committee Chairman. The 1<sup>st</sup> Defendant averred that at all material times it has been a local community public facility and that the local community has always regarded the suit property as public utility land, and registered in the name of the County Council of Kiambu in trust for the local community. Further, that the Plaintiff acquired the title to the suit property fraudulently and without any regard for the overall well-being of the local community in whose trust the same was held at all material times.

The 2<sup>nd</sup> Defendant on its part averred in a replying affidavit sworn on 12<sup>th</sup> February 2012 by its Principal, Mr. Charles Gitonga, that it occupied 0.260 hectares of the suit property in exchange to an equivalent

parcel of land being transferred to the Plaintiff, namely Githunguri/Gathangari/T/1137. Further, that the school hall and kitchen put up on the said 0.260 hectares were constructed with the knowledge of the Plaintiff and no encroachment has been occasioned.

The parties at the hearing of the application on 26<sup>th</sup> July 2012 reiterated on the pleadings and submissions filed. The Plaintiff in its submissions dated 23<sup>rd</sup> April 2012 argued that under section 23 (1) of the Registration of Titles Act, the title with respect of the suit property that was in his possession shall be taken as conclusive proof that he is the proprietor of the said land as the absolute and indefeasible owner. Further, that the 2<sup>nd</sup> Defendant was in 1973 allowed to temporarily utilize the portion encroached upon in exchange of equivalent land, but since this has not taken place, the Defendants continued stay on the suit property amounted to trespass. The Plaintiff submitted that he had met the prerequisites for the grant of an injunction.

The 1<sup>st</sup> Defendant in reply submissions dated 30<sup>th</sup> April 2012 argued that the registration of the title to the suit property in the Plaintiff's name was not a first registration and had previously been held in trust by the County Council of Kiambu as public utility land. Further, that it had not been demonstrated that the necessary legal provisions had been complied with in allocating the suit property to the Plaintiff. Counsel for the 2<sup>nd</sup> Defendant made oral submissions and relying on its replying affidavit argued that an order of *status quo* would best serve all parties.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. At this stage all I am required to do is determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of title to the suit property a copy of which is annexed to its supporting affidavit and marked PNK1. The Defendants did not produce any such evidence. The Plaintiff also provided evidence of the said encroachment by the Defendants by way of a letter annexed dated 3<sup>rd</sup> November 2010 by the District surveyor, Kiambu District showing that the 2<sup>nd</sup> Defendant had encroached on 0.60 hectares of the suit property, and photographs showing structures built on the suit property by the 1<sup>st</sup> Defendant. I have also noted that the decision by the 1<sup>st</sup> Defendant to construct on the suit property was made in 2011 after the Plaintiff was already registered as owner of the suit property. All this evidence was not disputed by the Defendants.

It is therefore my finding that the Plaintiff has established a *prima facie* case. The issue of whether the Plaintiff's ownership was obtained fraudulently as alleged by the 1<sup>st</sup> Defendant can only be decided after full trial and not at this stage. In addition, in my view the question of whether damages will be an adequate remedy does not arise in this application as the land being encroached upon is being used by the Plaintiff as a primary school, which is a public utility and which cannot be relocated.

Notwithstanding these findings, it is my opinion that the prayers as framed would result in some final orders being given by this Court at an interlocutory stage, given that the Defendants have erected on and been in occupation of structures on the suit property. In addition, in the case of the 2<sup>nd</sup> Defendant this was done with the initial consent of the committee of Kanyore Primary School as illustrated by the correspondence produced in evidence.

This Court will therefore only allow the Plaintiff's application to the following extent:

1. The Defendants by themselves, agents and/or servants are restrained from undertaking any further encroachment, works, construction, or fencing on the suit property pending the hearing and determination of the suit filed herein or until further orders.
2. The Plaintiff shall not in any way interfere with the structures erected on the suit property by the

Defendants, or the use of the said structures pending the hearing and determination of the suit filed herein or until further orders.

3. The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_10<sup>th</sup>\_\_\_\_ day of \_\_\_\_October\_\_\_\_, 2012.

**P. NYAMWEYA**

**JUDGE**