



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 551 OF 2008**

**CHARLES ZABLON MWANIKI.....PLAINTIFF**

**AND**

**JACOB NEYOLE.....1<sup>ST</sup> DEFENANT**

**PHOEBE KARANI.....2<sup>ND</sup> DEFENANT**

**GLADYS KAMSA.....3<sup>RD</sup> DEFENANT**

**PASTOR DAVID KIFUDE.....4<sup>TH</sup> DEFENANT**

**DR. PEREZ OLINDO.....5<sup>TH</sup> DEFENANT**

**(ALL SUED AS OFFICIALS OF FRIENDS CHURCH OF KENYA (QUARKERS))**

**JUDGEMENT**

1. By a plaint dated 10<sup>th</sup> November 2008, the plaintiff seeks judgment as against the defendants jointly and severally for:-

**a. A mandatory injunction direction the defendants either by themselves, their agents and/or servants to remove/demolish all the structures erected on land reference number 209/14641 situated at Nairobi and registered in the name of the plaintiff and in default thereof the plaintiff be at liberty to demolish the same at the expense of the defendants.**

**b. A permanent injunction directed against the defendants jointly and severally either by themselves, their agents, servants and/or other persons authorized by them restraining them from interfering with the plaintiff's quiet enjoyment of Plot LR NO. 209/14641.**

**c. Mesne profits for use of the aforesaid plot.**

**d. Costs of this suit.**

**e. Interest on (c) and (d) above.**

2. Upon being served with summons to enter appearance and copies of plaint the 2<sup>nd</sup> - 4<sup>th</sup> defendants entered appearance through the firm of T. T. Aswani Advocates. They also filed their statements of defences. I note that there is no statement of defence in respect of the 1<sup>st</sup> defendant.

3. The 2<sup>nd</sup> and 4<sup>th</sup> defendants statement of defences are dated 2<sup>nd</sup> November 2019, the 3<sup>rd</sup> defendant's is dated 5<sup>th</sup> August 2009 and he 4<sup>th</sup> defendant's is dated 17<sup>th</sup> March 2009.

**The Plaintiff's Case**

4. PW1, Charles Zablon Mwaniki told the court that he is the registered owner of Land Parcel No. 209/14641. He produced the letter of allotment dated 9<sup>th</sup> March 1999 as exhibit P1 and a title as exhibit P2. He also produced the survey plan as exhibit P3. He further stated that

in the year 2002 he went to check on his parcel and found there was a board with the name “Nairobi West Friends Church”, erected.

5. He went to inquire from the Ministry of Lands and confirmed that he was still the registered owner of the suit property. The Commissioner of Lands wrote a letter to the Presiding “Clerk, Friends Church Quakers. The letter was produced as exhibit p5. The defendant did not comply with the said letter. He instructed his advocates M/S Alphone Mutinda to write another letter dated 22<sup>nd</sup> May 2002. The letter was produced as exhibit P6.

6. He prays that the defendant be stopped from interfering with his plot and be ordered to demolish the illegal structures thereon. He also seeks costs of the suit. The plaintiff also produced several documents in his supplementary list of documents dated 16<sup>th</sup> December 2011. They are the plaintiff’s witness statement and certificate of official search, a letter of allotment issued to the defendants, a development plan for the defendants’ plot, letter of acceptance by the defendants, letters before action and letter from the Commissioner of Lands dated 30<sup>th</sup> January 2001.

### **The Defendants’ Case**

7. Four witnesses testified. DW1 Phoebe Mudenyi Karani the 2<sup>nd</sup> defendant and adopted her witness statement as evidence in this case. She told the court that she resided in Nairobi between 1995 and 2001 and was a member of Friends Quakers church in Nairobi West, Madaraka Estate. She held the position of Presiding Clerk of the Church. She told the court that she has been sued as an official of Friends Church of Kenya yet she has never held a position in that organization. She stated that she is not the right party to be sued. She also stated that she was relying on the defendants’ list of documents filed on 14<sup>th</sup> May 2012.

8. She told the court that vide a letter dated 28<sup>th</sup> March 2000, the church applied for a plot for a church and a nursery school. They identified a vacant plot in Madaraka Estate area. They got a sketch map (page 7 of the defendants’ list of documents). They put up a temporary structure. There is a letter from the Commissioner of Lands to the Director Physical Planning referring to Friends Church Quakers Madaraka. A letter of allotment dated 23<sup>rd</sup> October 2001 was issued to the church. The plot measures 0.4 hectares. They accepted the allocated plot just so that they could appeal to the Commissioner of Lands to allocate them the size they had asked for or what they had originally been allocated. She further stated that during her term as Presiding Clerk she never met the plaintiff. She told the court that the church is in possession of the said property. She relied on the documents in the defendants’ list of documents dated 14<sup>th</sup> May 2012. They were produced as exhibit D1 to D13 respectively.

9. DW2 Gladys Kareha Kamsa, the 3<sup>rd</sup> defendant told the court that she was a member of Friends Church Quakers- Nairobi West. She held the position of recording clerk. That the church was looking for a plot to put up their church. They identified a vacant plot within Madaraka. They applied for it. In the year 2000 the Ministry of Lands allowed the church to put a temporary structure. There is a letter from the Director of Physical Planning stating no objection to the plot being allocated to the church as it was outside Madaraka Estate. The part development plan is dated 25<sup>th</sup> May 2000 drawn by one Njuguna Chege.

10. She further stated that on 23<sup>rd</sup> October 2001 the church was allocated 0.4 hectares. The plot allocated was marked ‘A’. Part of whole plot had been hived off. The church then appealed to be given the whole portion. She stated that she has since ceased to be an official of the church and does not know what became of the appeal. She prays that the plaintiff’s suit be dismissed with costs.

11. DW3 Pastor David Kifude the 4<sup>th</sup> defendant, in this case told the court that he was a pastor at Langata area with Nairobi yearly meeting of the Friends Church Quakers. He told the court that he was not an official of Friends Church of Kenya Quakers. He stated Nairobi West Friends Church was under his jurisdiction. He adopted his witness statement dated 11<sup>th</sup> May 2011 as part of his evidence in this case. He also relied on the list of documents dated 14<sup>th</sup> May 2012.

12. He confirmed what DW1 and DW2 told the court. He stated that the application for the plot was signed by the presiding clerk and the recording clerk (DW1 and DW2). He recalls that at one time he accompanied DW1 and DW2 to the Commissioner of Lands office. The Commissioner of Lands directed them to the Director of Physical Planning. He stated that by the time he retired in 2005, the church had put up a structure on the suit property and nobody had complained. When he was served to testify in this case he realized that part of the plot had been hived off. He also prays that the plaintiff’s suit be dismissed with costs.

13. DW4, Perez Malande Olindo, the 5<sup>th</sup> defendant in this case, adopted his witness statement and told the court that he belonged to the Nairobi yearly meeting. That Nairobi West Church was a village meeting under Langata monthly meeting. He was the Chairman of the Finance Committee of the Langata monthly meeting. That in the year 2000 members of the Nairobi West Village Meeting, approached the Finance Development Committee. They stated that they had identified a vacant plot adjacent to Madaraka estate. He also adopted the list of documents dated 14<sup>th</sup> May 2012. He confirmed that the church moved to the plot in the year 2000.

14. He further stated that when the church realized they had been allocated less acreage than they had asked for they appealed to the Commissioner of Lands but got no reply. The church then relied on the earlier communication from the Commissioner of Lands and continued to use the plot. He said he learnt of the plaintiff’s claim when he was served with summons in respect of this suit. He prays that the plaintiff’s suit be dismissed with costs.

15. At the close of the oral testimonies parties tendered final submissions.

### **The Plaintiff’s Submissions**

16. They are dated 18<sup>th</sup> September 2019 and filed in court on the 19<sup>th</sup> December 2019. The plaintiff is the registered owner of LR No

209/14641 (hereinafter referred to as the suit property). He was granted a lease of 99 years with effect from 1<sup>st</sup> March 1999 through a lease dated 12<sup>th</sup> September 2001 Grant No IR 88651. On or about the year 2002, the defendants through their Church known as Friends Church of Kenya (Quakers) was allocated the adjacent plot which they put up structures but which structures extended to the suit property without the plaintiff's consent, approval or authority.

17. Despite oral and formal communication, the defendants refused to demolish their structures. The plaintiff went ahead and wrote to the Commissioner of Lands who in turn wrote to the church stating that they were illegally occupying the suit property.

18. The plaintiff relied on the letter from the Director of Physical Planning dated 25<sup>th</sup> July 2001, the letters from the Commissioner of Lands dated 30<sup>th</sup> January 2001 and 18<sup>th</sup> September 2002, the letter of allotment to the defendants refers to Nairobi/Madaraka UNS Plot A for a church, attached plan No 41/8/00/02 showing their allotted land marked A in red and the size of the plot being 0.4 hectares. The defendants accepted the letter of allotted and paid Kshs.3,602/- vide cheque No. 007342 dated 13<sup>th</sup> November 2002, the amount demanded for the allotment.

19. The submissions raises two issues for determination:-

**i. Whether the defendants are encroaching on LR NO. 209/14641.**

**ii. Whether the plaintiff is entitled to the reliefs he seeks.**

20. The defendants made an application to be allocated an unspecified plot. They made plans on how they wished to have the plot developed. They got the Part Development Plan dated 25<sup>th</sup> May 2000 and approved on 23<sup>rd</sup> July 2001 with reference Number PDP/NO.42/08/00/02 on their allotment letter. It was rectangular piece of land specified and marked as "A". it measures 0.4 hectares while the suit property measures 0.1000 hacteres and which borders Strathmore College. They accepted the allotment by paying the requisite fees for it and even wrote to the Commissioner of Lands accepting the allotment. They possess no right over the property, they produced no documents show casing ownership, they have no claim on the said, property and therefore they are trespassers who are encroaching on the suit property and are infringing on the plaintiff's right bestowed to him under Article 40 of the Constitution.

21. The plaintiff followed due process in the application and registration of title for the suit property. He accepted the offer of allotment by paying the requisite fees, followed up with paper work and got his certificate of title. He is protected under Article 40 of the Constitution and is expected to enjoy quiet possession of his property without interference. He has put forward the cases of **Dr. Joseph. Arap Ng'ok vs Justice Moijo Ole Keiwua & 5 Others [1997] eKLR; Wreck Motor Enterprises vs The Commissioner of Lands & Others [1997] eKLR**. The plaintiff is the registered owner and holds good title to the suit property. The church is encroaching on the suit property and denying the plaintiff a right to quiet possession and enjoyment of this property. He has further relied on Articles 40 and 22 of the Constitution and the cases of **R vs Chief Immigration Officer [1978] 3 AER 843; Mike Maina Kamau vs Attorney General [2017] eKLR**.

22. The plaintiff has proven through documentary evidence that he is indeed the absolute and indefeasible owner of LR 209/14641. The certificate of title has not been revoked or restrictions placed on it and yet he neither enjoys quiet possession nor has he been able to profit off the land for more than a decade now due to the defendants' church trespass and encroachment. He has put forward the case of **Kenya Hotel Properties Limited vs Willesden Investments Ltd [2009] KLR 126**. The plaintiff is entitled to mesne profits. The defendants' church is a trespasser and the remedy rests on that fact. The action is based on the plaintiff's possession or right to possession, which has been interfered with. He has relied on Section 2 of the Civil Procedure Act and Order 21 rule 13 of the Civil Procedure Rules together with the case of **Attorney General vs Halal Meat Products Ltd [2016] eKLR**. Had the plaintiff put up a residential home, he would have probably enjoyed an income of Kshs.50,000 per month. The defendants were in occupation of the suit property for a period of 6 years and 6 months. He claims Kshs.3,900,000/- as mesne profits and accruing interest thereto.

23. The prayer for mandatory injunction ought to be issued to the defendants directing them to remove and/or demolish all the structures erected on the suit property is well within his right as well as a permanent injunction against the defendant's church. He has put forward the case of **Giella vs Cassman Brown & Company Ltd [1973] EA 358 Park Towers Ltd vs Moses Chege & 7 others [2014] eKLR. Livingstone vs Rawyards Coal Co. [1880] 5 App Cases 25**.

24. The plaintiff was not a party to the defendants' application for allotment of land and the events that followed. The suit property should not be used as collateral especially since the root of the plaintiff's letter is traceable and the registered and absolute owner is known and identified. The defendants' church has no color of right to be in occupation of the suit property. The plaintiff prays that he be granted the reliefs sought.

#### **The Defendants' submissions**

25. They are dated 25<sup>th</sup> March 2020. The plaintiff ought to have adduced evidence to prove that the defendants were officials of the Friends Church of Kenya (Quakers). The plaintiff failed to prove that they (defendants) were officials of the Friends Church of Kenya (Quakers) and if they were properly and legally sued on behalf of the said church.

26. The letter of allotment dated 23<sup>rd</sup> October 2001 from the Commissioner of Lands is addressed to "Friends Church (Quakers)" which is not a reference to or the same name as that of "Friends Church of Kenya (Quakers)" cited in the plaint. There is no proof by the plaintiff that the defendants herein were the right people to be sued on behalf of the Friends Church of Kenya (Quakers).

27. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants stated that they belonged to a local church known as Nairobi West Friends Church which operated under Langata monthly meeting, the latter which operates under Nairobi yearly meeting of Friends Church (Quakers). DW3, confirmed that the

Friends Church of Kenya is an umbrella body coordinating all yearly meetings in Kenya of which Nairobi yearly meeting of Friends Church (Quakers) is a member. DW4 also denied that he was ever served as an official of Friends Church of Kenya (Quakers) which he knew to be an umbrella organization which brings together over sixteen (16) yearly meetings of Friends Church (Quakers) in Kenya.

28. No evidence has been led to the effect that the Friends Church of Kenya (Quakers) was the employer of the defendants. The plaintiff was aware of the existence of the correct church to sue as per the letter of allotment dated 23<sup>rd</sup> October 2011, the letter from Ochieng G. O. for the Commissioner of Lands dated 18<sup>th</sup> September 2002 and the letter form M/S Alphonse Mutinda & Co. Advocates dated 22<sup>nd</sup> May 2002 but has done nothing to comply with that correct legal position.

29. The plaintiff has neither established that the Friends Church of Kenya (Quakers) is responsible for the actions he is complaining of nor has he established it had any connection with the defendants, that it cannot be held liable under the doctrine of vicarious liability or under master and servant doctrine in regard to the conduct of the defendants in this matter. This suit cannot stand the test of *locus standi* and should be struck out with costs.

30. The plaintiff has failed to prove that the plot encroached is his as at the time he was allegedly allocated, another church Friends Church (Quakers) and not Friends Church of Kenya (Quakers) had been allocated the land. It had been authorized to occupy it as far back as 1999. It had constructed a church building thereon.

31. The plaintiff could not produce copy of his application for the plot nor a receipt he made in respect of the letter of allotment. The plaintiff's letter read Langata Nairobi where as the one to Friends Church/Quakers read Nairobi Madaraka.

32. It is clear that the Commissioner of Lands was aware of the existence of Friends Church (Quakers) on the said plot before their application was made on 11<sup>th</sup> March 2000. The church followed all the procedures for allocation of unsurveyed plots. There was no other allottee to the same plot. By a letter of allotment dated 23<sup>rd</sup> October 2001 addressed to Friends Church (Quakers), the church was allocated only 0.4 hectares from the whole plot they had applied for. The area was reduced without the church being given an opportunity to be heard.

33. The plaintiff did not adduce any evidence to show that he had applied for the conversion of the plot from 'religious' purposes to either 'commercial' or 'residential' purposes and when pressed in cross examination he changed his stand to state that his plot was residential not commercial.

34. Section 9 of the Land Act 2012, requires that the conversion be carried out before the Commissioner of Lands could proceed to allocate the plot to the plaintiff. There is no evidence of that process having been complied with by the Commissioner of Lands and consequently the title deed given to the plaintiff LR 209/14641 is irregular and should not be validated, authenticated or affirmed by this honourable court.

35. The defence has adduced evidence to show that the plaintiff and other persons in the Ministry of Lands and Settlement frustrated the church's full right to the acquisition of the plot that had been reserved.

36. The conduct of the officials of the Ministry of Lands and Settlement and their association with the plaintiff leads to an irresistible conclusion that the provisions of sections 9 and 158 of the Land Act, 2012 were contravened before the issuance of the title deed for LR No. 209/14641 to the plaintiff. The said title deed ought to be nullified.

37. The plaintiff is not entitled to the reliefs sought and the suit should be dismissed with costs.

38. I have considered the pleadings and the evidence on record. I have considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

**i. Who is the registered owner of LR NO. 209/14641, the suit property.**

**ii. Are the defendants encroaching on the plaintiff's suit property?**

**iii. Is the plaintiff entitled to the reliefs sought?**

39. It is the plaintiff's case that he is the sole proprietor of LR NO. 209/14641. He was granted a lease of 99 years with effect from 1<sup>st</sup> March 1999. The lease is dated 12<sup>th</sup> September 2001 Grand IR 88651. He produced a Letter of Allotment dated 9<sup>th</sup> March 1999, a Certificate of Title dated 12<sup>th</sup> April 2002, a Survey Plan Number 404/89 and a Certificate of Official Search as exhibits on this case. The letter of allotment to the plaintiff is for 'Residential Plot NO. 'D'- Langata, Nairobi. It is addressed to C. Z. Mwaniki P. O. Box 52235 Nairobi. The same is signed by Kilimo J L for Commissioner of Lands. Upon the plaintiff accepting the offer he was issued with a title deed for LR 209 (14641)(IR 88651) following a survey plan NO. 404/89.

40. The defendants' letter of allotment on the other hand is dated 23<sup>rd</sup> October 2001. It is addressed to Friends Church (Quakers) P. O. Box 51654 Nairobi. It is for Nairobi Madaraka:Unsurveyed Plot "A" for a Church. It refers to an attached plan Number 42/8/00/02. The area allotted is 0.4 hectares. The lease is for 99 years with effect from 1<sup>st</sup> November 2001. The same is signed by S. G. Gikonyo for Commissioner of Lands. The defendants accepted the offer and paid Kshs.3,602 vide a cheque No. 007342 dated 13<sup>th</sup> November 2001. From the attached plan No. 42/8/00/02 dated 23<sup>rd</sup> July 2001. Survey Plan No 405 Plot Marked 'A' is stated to measure 0.4 hectares. Although they accepted the offer, they wrote to the Commissioner of Lands appealing against the subdivision of the plot they had applied for. They wanted to be allocated the whole plot. The letter is dated 12<sup>th</sup> November 2001 and signed by Perez M. Olindo, Chairman Development Committee and Pastor David Kifude Resident Pastor. They testified as DW4 and DW5 respectively.

41. As things stand the defendants have not tendered any evidence to show that they were allotted the whole plot. It is the defendants' contention that the plot was divided illegally and that the plaintiff acquired the suit property illegally. They have not tendered any evidence to this effect. I find that the plaintiff is the registered owner and sole proprietor of LR No. 209/14641.

42. Section 24 of the Land Registration Act, 2012 provides that:-

**a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**

**b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.**

43. Section 26(1) of the Land Registration Act, 2012 provides that:-

**1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

44. In the case of Dr. Josph Arap Ng'ok vs Justice Moiwo Ole Keiwua & 5 Others [1997] KLR it was held that:-

**“It is trite law that landed property can only come into existence after issuance of letters of allotment, meeting the conditions stated and actual issuance thereafter of title document pursuant to provisions of the Act under which the property is held”.**

I am guided by the above authority.

45. It is the plaintiff's case that in or about 2002 the defendants' Church started putting up structures on their land which structures extended to the suit property. The structures were put up without the plaintiff's consent, approval or authority. He made a report to the Ministry of Lands. There is a letter dated 18<sup>th</sup> September 2002 from the Commissioner of Lands addressed to:-

**“The Presiding Clerk**

**Friends Church (Quakers)**

**P. O. Box 51654**

**Nairobi**

**RE: ILLEGAL OCCUPATION OF PLOT NUMBERS 209/14641 & 14642 MADARAKA**

**We have received representation from the grantees of Plots LR Nos 209/14641, 14642 complaining that you have erected temporary structures on their plots. You are aware that you were allocated an unsurveyed plot of approximately 0.4 hectares at Madaraka vide letter of allotment Ref No. 209/63/V of 23/11/2001 which you accepted and paid for vide your letter of 13<sup>th</sup> November 2001.**

**In view of the above complaint I wish to advise that you confine our developments within the plot allocated to you as outlined in Part Development NO. 405 (42/8/00/02)**

**Please note that LR NOS 209/14641 and 209/14642 are private property over which you have no proprietary interest, and if the complains are true you then risk legal action.**

**Signed**

**Ochieng G. O**

**For Commissioner of Lands”**

46. When cross examined by the plaintiff's counsel DW1 could not confirm the validity of the map they presented to the Lands' Office while applying for the allocation. The defendants do not deny that they are in occupation and have put up structures on the suit property. There is no doubt that the defendants' church has encroached on the suit property. The 2<sup>nd</sup> – 5<sup>th</sup> defendants have admitted that they held position of

officials of the church at the time. I find that they have been rightly sued.

47. I find that the defendants have encroached on the suit property being LR NO 209/14641. It is however not clear when the defendants put the structures as the plaintiff did not tender any evidence in this respect. The plaintiff is not entitled to mesne profits. In the case of **Attorney General vs Halal Meat Products Limited [2016] eKLR** the Court of Appeal stated thus:-

**“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another”.**

The plaintiffs stated that he would have put up residential house which would have earned him Kshs.50,000 per month. He has presented evidence of such intention. There is also no evidence that he would have made Kshs.50,000 per month. There is no evidence to show that he would have put up a house for rent. This claim for mesne profits must fail. I only award Kshs.100,000 general damages for trespass which I think is adequate.

48. I find that the plaintiff has proved his case as against the defendants. He is entitled to the reliefs sought.

49. Accordingly, judgment is entered for the plaintiff as against the defendants jointly and severally for:-

**a. That a mandatory injunction is hereby issued against the defendants either by themselves, their agents and/or servants to remove and or demolish all the structures erected on Land Ref No. 209/14641 situated at Nairobi and registered in the name of the plaintiff. In default the plaintiff shall be at liberty to demolish the same at the defendants’ expense.**

**b. That an order for permanent injunction is hereby issued restraining the defendants either by themselves, their agents, servants and/or other persons authorized by them from interfering with the plaintiff’s quiet enjoyment of Plot NO. LR 209/14641.**

**c. General damages for trespass Kshs.100,000.**

**d. Costs of the suit and interest.**

It is so ordered.

**Dated, signed and delivered in Nairobi on this 10<sup>th</sup> day of December 2020.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the plaintiff

Mr. T. Aswani, advocate for the defendants

Kajuju – Court Assistant