



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 220 OF 2017

KELVIN KIMILU (suing as guardian Ad Litem of Children

at KISII CHILDREN HOME 1ST PLAINTIFF

CHILD WELFARE SOCIETY OF KENYA 2ND PLAINTIFF

CHILD WELFARE SOCIETY OF KENYA (KISII BRANCH) 3RD PLAINTIFF

HON. ATTORNEY GENERAL 4TH PLAINTIFF

VERSUS

JOSHUA ABUGA 1ST DEFENDANT

PAMELA ISENSI 2ND DEFENDANT

REBECCA MBOYA 3RD DEFENDANT

PETERSON ONDICHO 4TH DEFENDANT

FRED NYAKUNDI 5TH DEFENDANT

PETER OYARO 6TH DEFENDANT

SEVENTH DAY ADVENTIST CHURCH 7TH DEFENDANT

RULING

1. The Child Welfare Society of Kenya and the Child Welfare Society of Kenya, Kisii, the 2nd and 3rd plaintiffs respectively brought the present suit vide a plaint dated 21st November 2017. The 3rd plaintiff averred that it was the legal owner of **LR No. Kisii Municipality/Block III/153** where it has established a children's home and presently houses over 300 children under the charge and care of the 1st plaintiff who is the guardian Ad Litem of all the children.

2. The plaintiffs state that during the year 2010 following approach by the defendants the Seventh Day Adventist Church (Millenium) they permitted the defendants to construct a temporary shelter on the suit premises for their use on Saturdays during their worship service. The plaintiffs aver that they only granted the defendants a limited licence for the use of the premises and that the defendants were not to engage in any subversive acts which could affect the welfare of the children. The plaintiffs further averred that around the year 2012 the defendants in contravention of the terms of the licence started engaging in illegal activities as they started erecting new structures on the site of a permanent nature and further were creating noise which caused interference to the children. The defendants further engaged in acts which were inconsistent with the terms of the licence they had been granted as they started laying ownership claims to the portion they had been allowed to temporarily use. The defendants destroyed the plaintiffs' perimeter wall that was under construction and have engaged the County Government officials to cause the transfer of the portion to themselves.

3. The defendants seek an order of permanent injunction against the defendants restraining them from in any manner interfering with the suit premises and further seek an order for the eviction of the defendants from the suit premises and the demolition of the temporary structures erected on the suit premises by the defendants.

4. The defendants filed a replying affidavit through Peterson Ondicho dated 9th January 2018 in opposition to the plaintiffs' application for a temporary order of injunction. The defendants however did not file a defence. The defendants under paragraphs 7, 8, 9 and 10 of the replying affidavit set out the basis on which they occupy part of the suit premises.

7. It is not true that we were granted temporary shelter by the applicants to conduct prayers. The applicants could not exercise rights over land which they did not own.

8. The church popularly referred to as "Millenium" which operates under the auspices of the Seventh Day Adventist (E.A) Ltd has never sought accommodation from the applicant.

9. Millenium obtained occupation of the land presently in its occupation by way of an allotment – attached and exhibited is a copy of an allotment letter marked SAC 5.

10. The land in occupation by Millenium, that is to say "Unsurveyed Plot" and that in occupation of the applicants are distinct and exist separately of each other. Attached is a Demand Note marked SAC 6 confirming the exclusive interest of Millenium in the "Unsurveyed Plot".

5. During the inter partes hearing of the interlocutory application on 16th January 2018 the plaintiffs insisted they were the owners of land parcel **Kisii Municipality/Block III/153** and that the respondents were encroaching thereon and were intent on abusing the licence they had been granted by the plaintiffs to operate on a portion of the land. The respondents/defendants on their part claimed that the portion of land they occupied did not form part of land parcel **Kisii Municipality/Block III/153** stating that the land they occupied was outside land parcel 153. The court faced with the rival contentions of the parties formed the view that what was in issue was the determination of the delineation and extent of land parcel Kisii Block III/153. The court in the premises issued directions in the following terms:-

"The plaintiff's claim to be the owners of land parcel Kisii Municipality/Block III/153 which they state they had given the defendants a portion to operate from. The defendants claim they do not occupy land parcel 153 but other land. As the plaintiffs claim is restricted to land parcel 153 and the defendants do not lay any claim to it, the court directs the land registrar and the county surveyor Kisii to visit the site and delineate and fix the boundaries of land parcel Kisii Municipality Block III/153 and file a report in court within the next 30days from today. The land registrar to confirm whether there has been any encroachment by the defendants on the said land. Mention on 28th February 2018 for further directions."

6. On 28th February 2018 when the matter came up for mention the court extended the order made on 16th January 2018**"to include the land registrar and surveyor in carrying out the exercise to include a sketch map showing the portions occupied by the Child Welfare Society and the Seventh Day Adventist Church if the same fall within land parcel 153 and the estimated areas occupied by them. The land registrar/surveyor should proceed to implement the order of 16th January 2018 as directed with the variations made herein."**

7. The land registrar and the surveyor filed a joint report dated 8th July 2018 with annexures. The findings as per the report were as follows:-

(i) That parcel Kisii Municipality/Block III/153 was delineated as per survey plan No. 44/12 of Kisii Municipality and measures 1.559acres.

(ii) On the plot there five (5) houses and an ablution block which are claimed by the children's home.

(iii) There is a temporary structure which is being used by the Seventh Day Adventist Church Millineum.

(iv) The attached plan including the google map showed the structures that are on the plot.

(v) The temporary structure occupied by the Seventh Day Adventist Church (Millineum) is shown to be inside land parcel 153.

(vi) To the South Plot 153 is bordered by land parcel 662 and to the West it borders the Kisii-Nyamira road.

8. The parties gave their comments and observations on the report by the land registrar and the surveyor in writing. The 1st, 2nd, 4th and 5th defendants filed their comments on 9th April 2019 and the plaintiffs filed theirs on 12th April 2019. I have carefully reviewed the pleadings, the report and annexures filed by the land registrar and the comments/observations made by the parties.

9. The court in making a reference to the land registrar and the surveyor to delineate the dimensions of land parcel **Kisii Municipality/Block III/153** was cognizant that the land registrar under Sections 18 and 19 of the Land Registration Act 2012 had the mandate to define and establish boundaries of all registered parcels. The plaintiffs claim ownership of land parcel **Kisii Municipality/Block III/153** which they assert the defendants have encroached upon. The defendants for their part claim the portion that they occupy did not form part of land parcel **Kisii Municipality/Block III/153**.

10. The record shows the Child Welfare Society of Kenya was allocated the subject parcel of land vide a letter of allotment from the Commissioner of Lands dated 22nd April 2009. Under paragraph 5 of the special conditions **"The land and buildings shall only be used for Children's Home."**

11. The defendants in the affidavit sworn by Peterson Ondicho in reply annexed pleadings in a previous suit before the Children's Court being Kisii Children's Case No. 39 of 2015 as "SAC4" where by the correspondences at pages 34 and 35 the Seventh Day Adventist Church Millenium vide letters dated 22nd February 2010 and 4th April 2010 respectively to the management of Kisii Children's Home sought permission from the Children's Home to improve the prayer shade they had put up on the plot. They also indicated they were looking for a plot and that they would physically move out of the home as soon as they found a plot which they stated they were looking for within Jogoo area. This in my view constituted admission that the church was infact being housed in the Children's Home grounds denoting they were there courtesy of the 2nd and 3rd plaintiffs.

12. The report by the land registrar is clear that the Children's Homes buildings which are in use by the Children are all located on land parcel **Kisii Municipality/Block III/153**. This is evident from both the sketch plan annexed as attachment No. 5 and the google earth downloads for the area attached and marked No.4. The report has identified all the plots and features bordering land parcel Kisii Municipality/Block III/153 and there is no identification of any unsurveyed plot that abuts the suit land. The alleged letter of allotment annexed in the defendant's replying affidavit as "SAC5" is incomplete. Only the first page is availed. The unsurveyed plot is not identified and no Part Development Plan (PDP) is attached to show its location. The rates demand notice marked "SAC6" does not assist. No plot is identified and only indicates the plot is unsurveyed.

13. I am in the premises satisfied that the land registrar's report conclusively establishes the plot on which the plaintiffs have their buildings and where the Children's Home is located is land parcel **Kisii Municipality/Block III/153**. It is on this parcel of land that the defendants' temporary structure where they hold prayers is located. I adopt the report by the land registrar as establishing the fact that the plaintiffs are the rightful legal owners of the suit property and as such legal owners are vested with rights of ownership and use. As the Land Registrar's report disposes of the issues in contention, I enter judgment in favour of the plaintiffs in the following terms:-

- 1. That land parcel Kisii Municipality/Block III/153 belongs to the 2nd and 3rd plaintiffs and they are entitled to its exclusive use.**
- 2. That the defendants have occupied a portion of land parcel Kisii Municipality/Block III/153 as licencees of the 2nd and 3rd plaintiffs.**
- 3. That the defendants have acted inconsistently with the licence granted to them by staking ownership claims to the portion they were permitted to use and accordingly the licence stands cancelled and/or revoked.**
- 4. The defendants shall vacate the premises they occupy on the plaintiffs land and deliver vacant possession within 90 days from the date of this ruling failing which an order for the forcible eviction will issue on the application of the 2nd and 3rd plaintiffs.**
- 5. The parties will bear their own costs of the suit.**

RULING DATED, SIGNED AND DELIVERED AT KISII THIS 13TH DAY OF MAY 2019.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Chepkirui for the 1st, 2nd, 3rd and 4th plaintiffs

Ms. Kebungo for the 1st - 5th defendants

N/A for the 6th defendant

Mr. Ochwangi for Ondari for the 7th defendant

Ruth Court assistant

J. M. MUTUNGI

JUDGE