



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC PETITION NO. 16 OF 2018

IN THE MATTER OF ARTICLE 162(2) (b) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE PROVISIONS OF SECTIONS 13(2) (a) & (b) 13(7) OF TE ENVIRONMENT AND LAND COURT ACT NO. 11 OF 2011

AND

IN THE MATTER OF FAIR ADMINSTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF AN ALLEGED INFRINGEMENT OF THE RIGHT TO FREEDOM OF CONSCIENCE, RELIGION BELIEVE AND OPINION UNDER ARTICLE 32 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF AN ALLEGED INFRINGEMENT OF THE RIGHT TO PROPERTY UNDER ARTICLE 40(1) OF THE CONSTITUTION OF KENYA 2010

BETWEEN

NICHOLAS NJUGUNA KARANJA(As a member of

and in the interest of a group of persons gong by the

name CREYENTES PRAISE CENTRE formerly

BELIEVERS PRAISE AND WORSHIP CENTRE).....PETITIONER/APPLICANT

AND

FREDRICK NGUGI MWANGI.....1ST RESPONDENT

ANTHONY KAMAU MBUGUA

(The Chief Cianda Location Kiambaa District).....2nd RESPONDENT

THE LAND REGISTRATR KIAMBU.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

There are three matters for determination before this Court, one is the Application dated **17th October 2018**, the Notice of Motion Application dated **27th November 2018** and the Notice of Preliminary Objection s dated **31st October 2018**.

The 1st Application for determination is the Notice of Motion dated 17th **October 2018** by the Petitioner /Applicant seeking for orders that;

a) An order do issue to remove into this Honourable court and quash the orders of the Chief of Cianda Location in Kiambaa Sub-County of Kiambu County issued on 12th October 2018.

b) That a temporary Injunction do issue prohibiting the 1st and 2nd Respondents, their agents, servants, employees and / or any other person claiming from under any of them from inciting any person to take up and/ or maintain a forceful detainer of the property of the group of persons currently known as Creyentes Praise Centre and formerly known as Believers praise and worship Center namely the land parcel known as Tigoni/ Tigoni/ Block 1/403, the developments thereon or thereunder until the final hearing and determination of the Petition herein and / or until further orders of this Court.

c) That the costs of the Application be provided for;

The Application is premised on the grounds that on the 12th of **October 2018**, the Chief issued an order restraining the family of the Petitioner/ Applicant who are also members of the group of persons known as **Creyentes Praise Centre** from setting foot in the **Redeemed Gospel Church** at Kawaida Village in Cianda Location of Kiambu is unilateral as they were never heard. Further that the order is arbitrary as the Chief did not establish who owns the suit property and that the order is beyond the powers of the Chief and is unlawful in view of the fact that the Jurisdiction of hearing and determining titles to land is not vested in the office of the Chief by any statute in force in Kenya and therefore it is Unconstitutional by denying the group their constitutional right to property, the right to freedom of association and the right to freedom of conscience, religion, belief and opinion and the Court should stop the infringement and/ or violation and/or continued threat to infringement and violation. That there is no dispute between any member of the group of persons and the Redeemed Gospel Church and the inclusion of the Church in the Chiefs order is mischievous and intended to mislead any person who has not seen the title deed to the suit land.

In his supporting affidavit, the Applicant **Nicholas Njguna Karanja** reiterated the grounds on the face of the Application and averred that the group bought the suit land in the year **2014** and due to the absence of a registration certificate and a KRA Pin, the suit land was registered in his name and that of the 1st Respondent to hold in trust for the group of persons. He averred that around 12th **October 2018** the Chief issued an order restraining him and his family from setting foot in the **Redeemed Gospel Church** which church presupposes to be on the suit property and that the Chief did not attempt to establish who owns the suit land and his order on a dispute in relation to occupation and title to land should be out rights removed and quashed as it leaves the property of the Applicant insecure and prone to vandalism which will result in irreparable loss and damages.-

The Application is opposed and the 1st Respondent filed a Replying Affidavit sworn on the 31st **October 2018**, and averred that he is a Pastor at **Redeemed Gospel Church** also known as **Redeemed Gospel Church**

Believers Praise and Worship Centre and a co-owner of the suit property together with the Applicant herein. He further averred that on 7th **October 2018**, the Applicant his wife and their two Children, caused disturbance at the Church. As a result, the matter was reported to the 2nd Respondent who then summoned the Applicant and his wife. He stated that although he was present in the initial meeting, on 9th **October 2018**, the meeting did not bear positive results and the same was adjourned to 11th **October 2018**. However on the 11th of **October 2018**, the Applicant and his family failed to attend the meeting and the 2nd Respondent made a lawful decision in the interest of preserving peace at the Church's premises.

He alleged that the 2nd Respondent's decision is only directed to the Applicant and his family. He further averred that the Applicant's allegations that the suit land is owned by 11 members of **Creyentes Praise Centre** is nonsense due to the fact that the **Redeemed Gospel Church Kawaida** actually goes by the name **Redeemed Gospel Church Believers Praise and Worship Centre** and that it is false that the property was registered in their names due to the fact that **Believers Praise and Worship Centre** was not registered and that the true position is that the property was registered in the Applicant's name as security due to the fact that the Applicant had loaned the church members a sum of **Kshs. 750,000/=** after he had borrowed a sum of **Kshs. 800,000** from equity bank and as he had borrowed the monies with his own property as security, it was

necessary that it be register as a co-owner pending payments of the loan amount to the said bank which amount was paid in full by Church members. That the actual loan amount was paid by contributions from more than one hundred church members of **Redeemed Gospel Church- Kawaida** plus other outsiders and after the Applicant furnished them with a bank account of evidence of full repayment.

He further alleged that on the 28th of **October 2018**, he convened a Church meeting and based on church account records members confirmed that they had contributed a sum of **Kshs.1,577,500/=** towards purchase of the suit property and members reaffirmed that the suit property be registered in the name of **Redeemed Gospel Church** and as per the records it was also confirmed that the Applicant and his group only contributed **Kshs. 147,000/=** and the Applicant was refunded his contribution with interest. That out of the 11 members, that the Applicants purports to represent, some of them did not contribute anything while one of them was not a member of the Church.

It was his contention that **Redeemed Gospel Church** is aggrieved by the Applicants decision to retain the title deed of the suit property and he was therefore tasked by the Church with demanding from the Applicant the original title deed so that they could transfer it to the church as they were only trustees of **Redeemed Gospel Church Inc.** He averred that the Affidavit marked as **annexture NK3** was sworn after he got frustrated with

the failure by the Applicant to surrender the title deed and sign transfer documents and he was apprehensive that he might allege that he was not a trustee of the Church. He alleged that the **Redeemed Gospel Church** has written a letter to the Registrar of Societies asking him to decline the registration of **Creyentes Praise Worship Centre** given that it purports to have its registered offices in the suit property and the suit property though sourced by members of **Kawaida Church** can only be registered in the name of the mother church.. He further averred that **Francis Ngugi Mungai, Simon Muchemi and Rosemary Murugi** are not members of **Redeemed Gospel Church- Kawaida** and that

the church premises is secured and due to the actions of the **7th October 2018**, it is paramount that they be stopped from accessing the Church since if they are not stopped they will continue to disrupt the church.

The **2nd**, **3rd** and **4th** Respondents filed grounds of opposition and averred that there is no sufficient material before Court as evidence of the alleged violation of the Constitutional rights of the Petitioner as the Petition does not raise any constitutional issues but land ownership issues and the only viable remedy is to file an ordinary suit where evidence will be adduced. That further the **3rd** Respondent has been wrongly joined in the suit as the Application and the Petition raises no cause of action against it and that the Petitioner has not sought mandatory leave to apply for orders of Certiorari as required by law.

It was further averred that the **2nd** respondent in issuing the order was exercising his authority as provided for under the Chiefs Act Cap 128 Laws of Kenya.

The Petitioner filed a Supplementary Affidavit and averred that from the contents of joint affidavit sworn by him and the **1st** respondent on **28th June 2016**, there is no room for argument as to the ownership of the suit land. He further averred that **Redeemed Gospel Church Inc** was registered as a Society under the Societies Act and not incorporated under the Companies Act and that a church registered under the Societies Act can only appear through its registered officials and/or registered trustees where an asset of the society is registered under the names of trustee and as such the **1st** respondent does not claim to be an official of the **Redeemed Gospel Church Inc** and any church going by the name **Redeemed Gospel Church Inc (Believers Praise and Worship Centre Kawaida)** has not been registered anywhere. It was his contention that there is no way a registered society would cause its property to be registered in the name of individual as and that the **1st** respondent has not exhibited any agreement or evidence of him servicing a loan in relation to the suit land and they have further not demonstrated any grounds upon which they want the property of the said **Creytes** to belong to them.

He further averred that **Creytes Praise Centre** uses the suit property and the developments thereon for worship and other social activities and it is only just that they are allowed to continue using the said property

The **2nd** matter for determination is the Notice of Preliminary Objection dated **31st October 2018** raised by the **1st** respondent who averred that the Petition dated **7th October 2018** and its accompanying Application dated the same day offends **Order 9 Rule 1 & 2** of the Civil Procedure Rules. That further the Honourable Court has no jurisdiction to entertain prayer f and g of the Petition dated **17th October 2018**. Further that the alleged "**Creytes Praise Centre** is a non-entity that offends the express provisions of Section 10 of the Societies Act and the Applicant cannot purport to represent it.

The Notice of Preliminary Objection is opposed and the Petitioner filed a Replying Affidavit and averred that the **1st** respondent has failed to appreciate that his Petition was brought to Court under the Constitution of Kenya (Protection of Rights and Fundamentals Freedoms) Practice and Procedure rules 2013 commonly known as the Mutunga Rules and that Civil Procedure Rules 2010 is another set of Rules under Civil Procedure Act Cap 21 Laws of Kenya.

He further averred that the **1st** respondent has not challenged the procedure used but introduced their preferred procedure, neither has he disputed the jurisdiction of the Court to entertain the other prayers. It was his contention that one cannot file two suits emanating from the same cause of action and the **1st** respondent has ignored the provisions of

Section 4(2) of the Environment and Land Court Act which bestow upon this Court the Jurisdiction of the High Court. He averred that his group of persons is yet to be registered and has sought for registration which is not disputed. He alleged that one cannot offend the Civil Procedure Rules by approaching the Court under the Constitution of Kenya and therefore the Preliminary Objection is misconceived, bad in law and an abuse of the Court process

The **3rd** Application is the one dated **27th November 2018** by the Petitioner Applicant against the Respondents seeks for orders that;

*a) That an order do issue stopping the **1st** respondent advocate on record from appearing any further for his now client.*

b) That the costs of the Application be provided for.

The application is premised on the grounds that the firm of **Ngari & Kaburu** Advocates on record for the **1st** respondent shall be required to give evidence in the proceedings herein over an affidavit sworn by the Petitioner/Applicant herein and the **1st** Respondent herein before learned **Mr. David K. Ngari** (Commissioner for oaths) and therefore it is in the interest of Justice and procedure, that the Advocate on record for the **1st** respondent should forthwith stop appearing

In his Supporting Affidavit the Petitioner averred that **Section 8 of the Advocates practice Rules, 1966** provides that an advocate who may be required as a witness to give evidence shall not continue to appear. That the firm of **Ngari & Kaburu Advocates** on record for the **1st** Respondent shall be required to give evidence in the proceedings herein over an affidavit that he and the **1st** respondent swore before **Mr. David K. Ngari**.

The Application is opposed and the **1st** respondent through his Advocate **David K. Ngari** filed a replying Affidavit sworn **4th December 2018** and averred that in the present Notice of Motion the Petitioner/ Applicant seeks a substantive prayer which is to bar him from acting for the **1st** respondents. He averred that neither of the parties deny the existence of the affidavit and in his view evidence as to the existence of the affidavit is a matter of fact and does not amount to conflict of interest given that it is undisputed by both the Petitioner and the **1st** respondent that the Affidavit exist. He averred that the same was deposed before him and he same is not a basis to have him recuse himself

from acting for the 1st respondent and that in that regard no prejudice will be occasioned if he continues to represent the 1st respondent.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered and renders itself as follows;

The Court will determine the **Notice of Preliminary Objection** first. This is so because a **Preliminary Objection** is capable of determining the matter if upheld.

Black's Law Dictionary, 9th Edition describes '**Preliminary Objection**' as:-

"An objection that if upheld would render further proceedings before the tribunal impossible or unnecessary".

Further the description of what amounts to **Preliminary Objection** was stated in the case of ***Mukisa Biscuits & Co. Ltd....Vs...West End Distributors Ltd (1969) EA 696*** to mean:-

"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit".

It is also not in doubt that a **Preliminary Objection** should be capable of disposing off the matter preliminarily. See the case of ***Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999***, where the Court held that:-

"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings."

Further, the **Preliminary Objection** must stem or germinate from the pleadings. See the case of ***Avtar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004***, where the Court held that:-

"A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."

Having laid the background of what amounts to a **Preliminary Objection**, this court will now answer the question of whether what has been raised by the 1st Respondent/Objector herein amounts to a **Preliminary Objection**.

As was held in the above quoted cases, a **Preliminary Objection** raises pure points of law and must stem from the pleadings filed.

The 1st Respondent/Objector has raised two points. Firstly, that the Court has no jurisdiction to hear and determine the matter in terms of prayers (f) and (g) of the Petition. Secondly that the suit offends Order 9 Rule 1 and 2 of the Civil Procedure Rules.

It is trite that jurisdiction is everything. A court without jurisdiction cannot deal with the matter in issue. If the Court finds that it lacks jurisdiction, then the only option available is to down its tools. See the case of ***The Owners of the Motor Vessel 'Lillian S'...Vs...Caltex Oil (Kenya) Ltd 1989 KLR 1***, where the Court held that:-

"....Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

Further, a question of jurisdiction has to be raised at the earliest opportunity. See the case of ***Ndimu...Vs...Ndimu & Another (2007) EA 269***, where the Court held that:-

"A question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issues straightaway..... More importantly, the issue of jurisdiction is a pure point of law which can be raised at any time and it is better raised at the earliest possible opportunity".

Therefore, the Court finds that if it is to find and hold that it is divested of jurisdiction, then it will have no option but to proceed and down its tools. That will bring the matter to an end primarily.

Further, the issues of jurisdiction is a pure point of law and the **Preliminary Objection** herein falls within the description of what amounts to a **Preliminary Objection** as stated in the Mukisa Biscuits Case (supra).

Therefore the Court finds that what has been raised herein by the Defendant/Objector are issues of law which are capable of determining the matter preliminarily if upheld and consequently the Court finds that the objection herein falls within the description of what amounts to a **Preliminary Objection** as described in the *Mukisa Biscuits case(supra)*.

On the second issue, the 1st Respondent pleaded that the Petition and the Application offends the provisions of **Order 9 Rule 1 and 2**. The 1st respondent has submitted that the claim is a representative suit and any claim ought to have been filed by way of a Plaint. Further this Court notes that Order 9 Rule and 2 which the 1st respondent claims that the Applicant has offended deals with the issue of recognized Advocates and agents. For this Court to be able to determine whether or not the Petitioner is an agent or a Recognize agent, it must delve into facts and consider material that have been placed before it. This therefore means that this Court will be required to ascertain facts and it is not at all pure point of law. In the case of *Oraro ...Vs... Mbaja (2005)1KLR 141*, the Court held that;

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

Therefore this Court finds that the second points raised by the Defendants/Objectors on the Petition and Application offending **Order 9 Rule 1 and 2 of the Civil Procedure Rules** do not fall within the description of what amounts to a **Preliminary Objection** as described in the *Mukisa Biscuit Case(Supra)*.

Having found that the issue of jurisdiction falls under the category of issues that can be raised in the **Preliminary Objection**, the next issue for determination is whether the said **Preliminary Objection** is merited. Jurisdiction is everything and it has to be determined at the first instance .See the case of” *The Owners of the Motor Vessel ‘Lillian S’...Vs...Caltex Oil (Kenya) Ltd 1989 KLR 1(Supra)*

The court’s jurisdiction is derived from the Constitution, an Act of Parliament or both.

Article 162(2) (b) of the **Constitution** empowers Parliament to establish Courts with the status of the High Court to hear and determine disputes relating to-

“(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.”

Sub-Article (3) thereof authorizes Parliament to determine the jurisdiction and functions of the courts contemplated in Sub-Article (2). Pursuant to **Article 162(3)** of the **Constitution**, Parliament enacted the **Environment and Land Court Act**.

Section 13 of the Act outlines the ELC’s jurisdiction as follows:

“(1) The court shall have original and appellate jurisdiction to hear and determine all dispute in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.”

It therefore follows that the Court has jurisdiction to hear and determine issues that deal with land matters. In this Petition this Court notes that the main issue is the ownership of the suit property. The 1st respondent has alleged that this Court has no jurisdiction to grant the prayers sought under prayer (f) and (g).

It is not in doubt that this Court has an equal status as the High Court and can hear and determine matters that deal with infringement of a

Petitioner's right. What the Court has to determine is to establish whether it has jurisdiction and what is the dominant issue and if there are two issues that are intertwined in the Petition, then the Court having established the dominant issue will be best placed to deal with the issue and therefore is the court with jurisdiction. The orders sought are with regards to the rights in violation of the use of the suit property. Further this Court has also noted that the dominant issue in question is the ownership of the suit property. Therefore the court finds that it has Jurisdiction to deal with the matter in question and grant the prayers as sought if the Petitioner proves his case. See the case of **Delmonte Kenya Limited ...Vs...County Government of Murang'a & another [2019] eKLR**

In the end we find and hold that the dominant issue in the petition is the right to renewal of leases over the suit land. We further find that the issue is intrinsically connected to the use and title to land. The dispute thus falls squarely within the purview of the ELC under Article 162 (2) of the Constitution as read with section 13 of the ELC Act. We also find that although the petitioner claims violation of various constitutional rights, those claims are intertwined with the dominant issue and that the ELC has jurisdiction to deal with the alleged violations.

Taking into account the above findings of the court, this court too holds and finds that it has Jurisdiction to grant the prayers sought herein. consequently, the Preliminary Objection is not merited and the same is dismissed with costs to the Petitioner.

The 2nd Application for determination is the one dated 27th November 2018 by the Petitioner seeking for the recusal of the 1st respondent's Advocate for the reason that he commissioned an Affidavit that is part of evidence that has been adduced by the Petitioner as evidence and therefore he may be called a witness to testify on the same. The 1st respondent Advocate in his Replying Affidavit stated that the Affidavit is not disputed by either of the party and therefore being that the same is not contentious there would be no need for him to recuse himself just because he commissioned an Affidavit. The Law Applicable to this issue was stated in the case of **Dorothy Seyanoi Moschioni ...Vs... Andrew Stuart & another (2014) e KLR**, where the Court held that;

"[12] I will not re-invent the wheel. All the cases which have been quoted by counsels are relevant. I will not multiply them too. What I need to state is that, in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that "these advocates participated in the drawing and attestation of the Deeds in dispute"; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant say "I intend to call them as witnesses". What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be "their counsel" in the conveyancing transaction. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a law suit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation. But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be oblivious of the centrality of the right to legal representation in the Constitution as the over-arching hanger; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these, it must be convinced that real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. The real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy? Or is there other evidence which will serve the same purpose as the evidence by counsel? Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and real prejudice, then a disqualification of counsel will not be ordered.

[23] In line with the above rendition, I do not think there was any possibility of real prejudice being occasioned to the Applicant by representation of the 1st Respondent by the said firm of advocates. And I so hold fully aware of the Applicant's desire to call them as witnesses- and I suppose only the advocate who witnessed and or drafted the agreement was to be the witness. The Rules even allow such advocate to testify on matters which are not contentious."

This Court must therefore determine whether there will be any real prejudice that will be occasioned to the Petitioner of the 1st Respondent is represented by the firm of Advocates on record. This Court notes that the existence of the Affidavit has not been disputed by either of the parties and further the same has been acknowledged and therefore the same is not contentious. The Petitioner has not proven what prejudice would be occasioned to him if the said Firm of Advocates remain so. The allegations that the Advocate would be called to give evidence

with regards to the Affidavit are baseless the court finds the Affidavit contains what was deposed to by the Petitioner and the 1st Respondent and the Counsel commissioning was only affirming that the two parties were before him and signed before him facts which are not contentious in any way. See the case of Serve In Love Africa (Sila) Trust .v.. David Kipsang Kipyego & 7 Others [2017] Eklr, where the Court held that:-

“Rule 9 of the Advocates (Practice Rules) basically prevents an advocate appearing as advocate in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the Court. I have considered the application and the reply by Mr. Korir where he admits transacting the sale on behalf of the defendants and do find that though Mr. Korir has admitted that the dispute revolves on who is the legitimate and bonafide trustees and has also stated that to the best of his knowledge, the defendants are bonafide trustees it has not been demonstrated that he will be called to testify as a material witness as to who is the bonafide trustee. The defendants have a right that is sacrosanct to be represented by an advocate of their choice, of Mr Jonar Korir’s vigour, that can only be taken away in exceptional circumstances thus if the same becomes prejudicial to the other parties and to enable the ends of justice being met a fact that has not been demonstrated by the plaintiffs.”

Therefore the court finds that the instant application is not merited and is consequently dismissed with costs being in the cause.

The third and final application is the one dated 17th October , 2018 by the Petitioner seeking to quash the Chiefs order and for temporary injunction.

This Court notes that the Petitioner has sought to have the Chiefs Orders quashed at an interlocutory stage. However if the said orders are quashed, it will mean that this Court will have made a final order at an interlocutory stage issuing the said order would be prejudicial to the Respondents. Therefore, the court finds that it is not prudent to issue this order at this interlocutory stage and thus, the said prayer is not merited.

The Petitioner/Applicants sought for injunctive orders.. Since the Applicant is seeking for injunctive orders, this Court cannot conclusively deal with the disputed issues as the Court is only called upon to determine whether the Applicant is are deserving of the injunctive orders. The principles for grant of temporary injunction have been long settled in the case of Giella ...Vs... cassman Brown Co Ltd (1973)EA 358 , which are:-

“The conditions for granting a temporary injunction is East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs...Trufoods (1972) EA 420.”

For the Petitioner/Applicant Application to be allowed he must establish that he has satisfied all the three grounds that have been enumerated above.

1. Whether the Applicants have established a prima facie case.

The court in the case of Eldo City Limited v Corn Products Kenya Ltd & Another [2013] eKLR defined a prima facie case as

“Prima facie case has been defined in Black’s Law Dictionary 2nd Edition as:-

“At first sight; on the first appearance; on the face of it.....A prima facie case is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced on the other side”

Further in the case Mrao –vs- First American Bank Ltd & 2 others (2003) KLR 125, the Court of Appeal defined prima face case as ;

“a case where on the material presented to the court, a tribunal properly directing itself will conclude that there was a right that had been breached by the other party as to call for a rebuttal.”

Further in the case Director of Public Prosecutions ...Vs... Justus Mwendwa Kathenge & 2 others [2016] eKLR ,the court held that;

“Traditionally the basis of application of the equitable remedy of injunction has been section 63 of the Civil Procedure Act and

Order 40 (previously 39) of the Civil Procedure Rules. Today Article 23 of the Constitution specifically identifies an order of injunction as one of the reliefs that a court can grant if it is satisfied that a person’s right or fundamental freedom under the bill of rights has been denied, violated or infringed or is threatened. Needless to emphasize, the remedy of temporary injunction is a vital tool intended to preserve the property in a dispute until legal rights and conflicting claims are established, so as to prevent the ends of justice from being defeated. Order 40 recognizes that a temporary injunction will be sought where a property in

dispute is in danger of being wasted, damaged, or alienated, or wrongfully sold in execution of a decree, or where a party threatens or intends to remove or dispose of the property in order to defeat any execution that may ultimately be passed. An injunction may also be applied for to restrain a party from committing a breach of contract or other injury. It is equally settled that a temporary injunction cannot be claimed as a matter of right, neither can it be denied arbitrarily by the court.

In line with the said decisions the Court will therefore sought to look at whether the Petitioners/Applicants have demonstrated that there is a right that has been breached by the Respondents.

The Petitioner/Applicant has averred that he is the registered owner of the suit property together with the 1st Respondent. These facts which have not been disputed as the parties have produced a title deed that bears the names of both parties. Further the Petitioner has averred that he holds the suit property in trust for a group of persons known as **Creyentes Praise Centre** who were formerly known as **Believers Praise and Worship Centre**. This Court has gone through the Affidavit sworn by the Petitioner and the 1st respondent and notes that indeed they deponed that they hold the suit property in trust for **Believers Praise and Worship Centre Kawaida** but there is no mention of **Creyentes Praise Centre**. While the Petitioner has sought for temporary Injunction on behalf of the said **Creyentes Praise Centre**, it is not clear at this stage whether the said Group known as **Creyentes Praise Centre** and **Believers Praise and Worship Centre Kawaida** are the same group as the 1st respondent has also alleged that Redeemed Gospel Church also refer to themselves as **Redeemed Gospel Church Believers Praise and Worship Centre**. All these are issues that can only be determined after parties have adduced evidence in the main trial for the Court to make the proper determination.

However at this stage, the Petitioner has failed to prove that the group in which he claims on behalf of have any interest in the suit property as there is no evidence that the **Creyentes Praise Centre** is the same as **Believers Praise and Worship** which they hold the suit property in trust for. Further it is clear that **Creyentes Praise Centre** sought for registration on the **12th of October 2018**, and this suit was filed on the **17th of October 2018** and therefore is at this stage, the court is unable to find that **Creyentes Praise Centre** is the same group in which the Petitioner and the 1st respondent hold the suit property in trust for as the property was acquired and title deed issued in the **21st of February 2014**.

This Court also having gone through the Chief's Letter, notes that it is only the Petitioner and his family who were barred from causing disturbance and not **Creyentes Praise Centre**.

For the above reasons the Court finds that the Petitioner/Applicant has not established a *prima-facie* case with probability of success.

Having found that the Applicant has not established a *prima-facie* case with probability of success, the Court finds no reason to deal with the other limbs of **Giella...Vs...Cassman Brown** since they are sequential. See the case of **Kenya Commercial Finance & Co. Ltd...Vs...Afraha Education Society (2001) 1EA 86**, where the Court held that:-

“The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima-facie case with probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella..vs..Cassman Brown & Co. Ltd 1973 EA pg.360 Letter E. The conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

Consequently, the Court finds that the Petitioner/ Applicant has failed to prove that he is entitled to the Orders of temporary injunction and for the above reasons, the court is unable to issue the said orders.

The upshot of the foregoing is that the Notice of Preliminary Objection dated **1st November 2018**, is not merited and the same is dismissed entirely with costs to the Petitioner. The Application dated **27th November 2018** is also not merited and the same is dismissed with costs being in the cause. Further the Application dated **17th October 2018** is also not merited and the same is dismissed entirely with costs.

It is so ordered.

Dated, Signed and Delivered at Thika this 15th day of November, 2019.

L. GACHERU

JUDGE

In the presence of

Petitioner present in person

Mr. Kinuthia holding brief for Mr. Ngari for) 1st Respondent

) for Interested Party

No appearance for 2nd Respondent

No appearance for 3rd Respondent

Jackline - Court Assistant.