



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.280 OF 2016**

**THE REGISTERED TRUSTEES**

**KENYA ASSEMBLES OF GOD .....PLAINTIFF**

**VERSUS**

**WILFRED EDWARD OYANDO .....1<sup>ST</sup> DEFENDANT**

**MICHEAL OBANDO OYANDO.....2<sup>ND</sup> DEFENDANT**

**STEPHEN MITURA.....3<sup>RD</sup> DEFENDANT**

**SHADRACK INYANGALA OYANDO.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. Through the notice of motion dated 28<sup>th</sup> April 2016, The **Registered Trustees Kenya Assemblies of God**, the Plaintiff, seeks for temporary injunction order restraining **Wilfred Edward Oyando, Michael Obando Oyando, Stephen Mitura and Shadrack Inyagala Oyando**, the 1<sup>st</sup> to 4<sup>th</sup> Defendants respectively, their servants and or agents from trespassing, cultivating or in any other way dealing or interfering with the Plaintiff's peaceful occupation and use of its plot **L.R. No.9341/482 Maseno**, pending the hearing and determination of this suit. They also pray for costs. The prayers 1 and 2 are now spent. The application is based on the four grounds marked (a) to (d) on its face and supported by the affidavits sworn by Patrick Obongita Ashindu, Senior Pastor, on the 28<sup>th</sup> April 2016 and 30<sup>th</sup> November 2016.

2. The application is opposed by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants through the grounds of opposition dated 30<sup>th</sup> May 2016. They also filed a notice to raise a preliminary objection dated 30<sup>th</sup> May 2016 on the ground that the suit and application had been filed in court without jurisdiction. The suit was initially filed before the Principal Magistrate's Court Maseno before being transferred to this court vide the order of 21<sup>st</sup> September 2016 in Kisumu ELC MISC. Application No.6 of 2016. The transfer order addressed the Defendants preliminary objection on the court's jurisdiction.

3. The application is also opposed by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendant through the affidavits sworn on the 17<sup>th</sup> March 2017 and 30<sup>th</sup> March 2017 by the 1<sup>st</sup> Defendant.

4. The application came up for hearing on the 22<sup>nd</sup> June 2017 when directions on filing of written submissions were given. The Counsel for the Plaintiff filed their written submissions dated 7<sup>th</sup> July 2017 on the 11<sup>th</sup> July 2017 while counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendant's filed theirs dated 26<sup>th</sup> July 2017 on the same date.

5. The following are the issues for determination;

a) Whether the Plaintiff has established a reasonable case with probability of success for temporary injunction order to issue at this interlocutory stage.

b) Who pays the costs of the application.

6. The court has carefully considered the grounds on the application and opposition, affidavit evidence by both sides, written submissions by both counsel and come to the following findings;

a) That from the onset, the 3<sup>rd</sup> Defendant, namely **Stephen Mitura**, has not entered appearance or filed any response to the application. That as the Plaintiff has not filed an affidavit of service of the summons to enter appearance and the notice of motion on the 3<sup>rd</sup> Defendant, the court will not make any adverse inference against him at this stage.

b) That from the affidavit and documentary evidence availed by the Plaintiff and the 1<sup>st</sup> Defendant, the suit property **L.R. 9341/482** is registered in the Kisumu County Government records in the name of **Patrick Auma Auma**.

c) That through the 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> Defendants claim that the suit property was part of their ancestral land, and did not belong to the County Council of Kisumu who allocated it to the said **Patrick Auma Auma**, there is no evidence of that allocation having been successfully challenged in accordance with the law. That the claim that the said Patrick Auma Auma subsequently sold the suit property to the Plaintiff vide the sale agreement dated 14<sup>th</sup> May 2004 has not been disputed by the Defendants.

d) That the sale transaction over the suit property between the said Patrick Auma Auma, and the Plaintiff later received the consent of the County Council of Kisumu who approved the transfer, through the Works and Town Planning Committee Minute **No.WTP/15/2007** of 19<sup>th</sup> June 2007. [see letter by the clerk to the council addressed to the Commissioner of Lands dated 16<sup>th</sup> August 2007 attached to the supporting affidavit.]

e) That as between the Plaintiff and the Defendants, the party with documentary evidence to support their legal claim of possession and entitlement over the suit land is the Plaintiff.

f) That further the Plaintiff has established a Church house and ECD School on the suit property since 2006 and it is fair and just that they should be allowed to continue utilizing the said facilities until such a time the ownership of the plot is otherwise legally decided.

7. That in view of the foregoing, the court finds merit in the plaintiff's notice of motion dated 28<sup>th</sup> April 2016 and the same is allowed in terms of prayer 3 with costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF APRIL 2018

In presence of;

Plaintiff

Absent

Defendants

1<sup>st</sup> & 2<sup>nd</sup> present

Counsel

Mr. Ojuro for Odeny for Plaintiff

Mr. Achura for Madialo for Defendant Respondent [1, 2, and 4<sup>th</sup> only

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**Court:**

The ruling dated and delivered in open court in the presence of

the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, Mr Ojuro for Odeny for the Plaintiff and

Mr. Acura for Madialo for the Defendants (1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> only).

**S.M. KIBUNJA**

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