



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MERU

ELC CASE NO. 83 OF 2015

BOARD OF GOVERNOR, CONSOLATA

HOSPITAL NKUBU.....PLAINTIFF

VERSUS

LAWRENCE MUNGIIRIA.....DEFENDANT

JUDGEMENT

BACKGROUND

The Plaintiff filed this suit against the Defendant for an order of permanent injunction restraining him whether by himself, his servants, employees, staff/agents or anyone claiming through him from entering, trespassing, occupying, taking possession, remaining in possession or in any other way interfering with the Plaintiff's quiet possession, occupation and use of land parcel No. NKUENE/TAITA/559. The Plaintiff is also seeking damages for trespass and mesne profits plus costs and interest. The Plaintiff also filed a Notice of Motion simultaneously with this suit seeking an order of inhibition inhibiting any dealings on the suit property pending hearing and determination of that application.

The Applicant also sought a temporary order of injunction pending the hearing and determination of that application. In their plaint dated 15th September, 2015, the Plaintiffs averred that though the suit property is registered in the name of the Diocese of Meru Registered Trustees, it is reserved for the Plaintiff and that fact is clearly indicated on the title deed. The Plaintiff further averred that they have always had possession and use of the suit land and that they are still in occupation and use of the same where they grow different food crops mainly bananas for use by patients at the hospital. At paragraph 6 of the plaint, the Plaintiff averred that the Defendant has without any colour of right trespassed onto the suit land and blocked the entrance to the suit property denying them access to the land.

In a defence and counterclaim dated 16th August, 2016, the Defendant denied the Plaintiff's claim and maintained that the Plaintiff as a purported beneficiary lacks the *locus standi* to institute and maintain these proceedings and that the suit as filed is frivolous, vexatious and an abuse of the court process.

By way of a counterclaim, the Defendant averred that by an agreement dated 4th March, 2015, the Diocese of Meru Trustee registered and entered into land exchange agreement wherein the Defendant agreed to surrender his land parcel No. NKUENE/TAITA/3086 (1 acre) in exchange of the Plaintiff's suit land LR No. NKUENE/TAITA/559. The Defendant further averred that pursuant to the said exchange agreement he took possession of the Plaintiff's land parcel No. NKUENE/TAITA/559 and carried out tremendous developments thereon. The Defendant further averred that on 28th July, 2015, without any reasonable or plausible cause, the Plaintiff's Health Services Co-ordinator FR. Silas Mwiti Thurania placed a caution on land parcel No. NKUENE/TAITA/559 claiming a licensee's interest.

PLAINTIFF'S CASE

The Plaintiff called three (3) witnesses. PW1 was Father Silas Mwiti who is the Health Co-ordinator of the Catholic Diocese of Meru and also the Administrator of Consolata Hospital Nkubu (Plaintiff). He stated that though the suit property is registered in the name of the Diocese of Meru Registered Trustees, the Plaintiff has been occupying the property until the Defendant trespassed and destroyed all developments in that land.

The witness also stated that there was an attempt to exchange the suit land with another land belonging to the Defendant. He said that the purported exchange took place without them being consulted. The trustees of the Diocese of Meru wanted to do the exchange without consulting the Plaintiff. The Plaintiff only came to know when the matter was taken to Nkubu Land Control Board. The Chairman of the Board informed the management of the hospital who upon deliberation decided that the idea was not good. The management of the Plaintiff hospital directed him to see the Bishop. He went and saw the Bishop and told them that the management of the Plaintiff hospital were not for the exchange of the land. The Bishop wrote a letter to the Chairman, Nkubu Land Control Board stopping the purported exchange. He

produced the letter dated 18/3/2015. The Defendant stopped the activities he was doing but came back later and destroyed their fence and crops on the suit land. He called for a Board meeting where it was resolved that a suit be filed in court.

PW2 was Gilbert Muriuki. He works with the Plaintiff organization as an accountant. He referred to his statement filed in court which was adopted in his evidence. In brief, the witness stated that he is a Member of the Board of the Plaintiff Organization representing the finance. He confirmed that they had held a Board meeting where they instructed the Board Administrator to see the Bishop to stop the purported transaction to exchange their land with that of the Defendant herein. The Administrator came back and informed them that the Bishop had written a letter to the Chairman Land Control Board in Nkubu to stop the transaction. He stated that in one of their Board Meeting with the Plaintiff, they agreed to construct a University on the suit property No. NKUENE/TAITA/559. They later heard that the land was being exchanged with another land. They held a Board Meeting where they instructed the Administrator to see the Bishop to stop the transaction. The Bishop wrote a letter instructing the Chairman of Nkubu Land Control Board to stop the purported sale. After a while, they realized that the Defendant was doing some developments on their plot. He stated that the sale of the hospital land was done without consultation. As a stakeholder, the community wishes to use the suit property for expansion due to its proximity and not to exchange with another land which is far from the hospital.

DEFENCE CASE

DW1 -the Defendant testified and stated that sometime in the year 2015, one Father Mungera visited him saying that he was the Land Officer In charge of the Diocese of Meru and that he had been sent by the Bishop to check if he had another shamba not far away to exchange with the suit property No. NKUENE/TAITA/559. He told him that he had another land which is about 200 metres. He went to check that land with the said Mungeria. After two weeks, Mr. Mungeria came in company of the Bishop and one Father Mbiko of the Diocese of Meru. The Bishop said that the land he had shown Mungeria was good and that they were ready to exchange with that of the Diocese of Meru ER NO. NKUENE/TAITA/559. The Bishop agreed to start the exchange agreement for the two plots with the developments in each plot. He then took possession of land parcel No. NKUENE/TAITA/559 while the Diocese took over his land parcel No. NKUENE/TAITA/3086. After about 14 days, the Bishop wrote to the Chairman, Nkubu Land Control Board asking them to stop the process as there was something they needed to address. After sometime, he received a demand letter and he took it to the Bishop. Before long, he received court summons which he took to his lawyers who advised him to take to the Bishop. He went and saw the Bishop who advised him to add another land.

He decided to give an additional land parcel No. NKUENE/TAITA/2893. They wrote another agreement dated 31/5/2016. He recorded a statement and a list of documents which was adopted in his evidence.

DW2 was Father Patrick Micheni Kaaria. He works with the Catholic Dioceses of Meru. He referred to a letter dated 26/7/2016 written by the Bishop of the Diocese of Meru addressed to the Chairman, Nkuene Land Control Board giving his consent to the exchange of the plots the Defendant wanted to give in exchange of land parcel No. NKUENE/TAITA/559. He also produced another letter dated 13/12/2016 written by the Bishop addressed to Father Silas Mwititi requesting that this case be dropped.

PLAINTIFF'S SUBMISSIONS

The Plaintiff through her advocates on record referred to the two agreements dated 4th March, 2015 and 31st May, 2016 respectively and stated that the first agreement is signed by Father Julius Mwongera who describes himself as Lands Officer, Diocese of Meru. He is not one of the registered trustees of the Diocese of Meru. The second agreement dated 31st May, 2016 is signed by an unknown person and stamped with the Diocese of Meru stamp. None of those signatories testified and that there was no evidence that they are the registered trustees of the Diocese of Meru. The Learned Counsel submitted that no single registered trustee of the Diocese of Meru testified in this case to verify that those two agreements were authored and authorized by the registered trustees of Meru. The Learned Counsel also stated that the Plaintiff was not involved at all in the agreement to exchange the plots and that their consent as the registered owner and by law the beneficial owner of the suit property was not sought and obtained. The Learned Counsel further submitted that the title deed of the suit land shows that the proprietor is the Diocese of Meru (Registered trustees- Consolata Hospital Nkubu) He submitted that the plaintiff is the registered owner of the suit land and by law is the beneficial owner. He cited Section 24- 29 of the Land Registration Act as relevant in buttressing the Plaintiff's claim.

It's further submitted that the Diocese of Meru (registered trustees) cannot confer any interest to the Defendant or any other person because their name has been put on the register to hold the property in trust for the benefit of the Plaintiff who are the beneficial owners and therefore they have no right to dispose the same without being sanctioned by the beneficiaries. They can only act in a manner which promote but not prejudice the interest of the beneficiaries who are the Plaintiff herein. They cited the case of **The Estate of TNN (deceased) [2014] eKLR**. The Plaintiff also submitted that the agreements allegedly produced in evidence by the defendant do not have the common seal of the Diocese of Meru registered trustees and that no single trustee testified confirming that the decision to exchange the land with that of the Defendant was the resolution of the registered trustees of the Diocese of Meru.

DEFENDANT'S SUBMISSIONS

The Defendant's through the firm of Kiautha Aruthi & Co. Advocates submitted that the Defendant is not a trespasser in LR No. 559 as he entered with the consent and permission of the Diocese of Meru. The Defendant also submitted that the agreements to exchange the suit property with the two plots belonging to the Defendant are valid agreements which enjoy the protection of the law. Finally, the Defendant submitted that being a legal entity, the Plaintiff did not authorize PW1 to swear the verifying affidavit on its behalf and the suit herein is therefore defective and ought to be struck out.

ANALYSIS AND DECISION

I have considered the testimony of the Plaintiff witnesses and that of the Defendant. I have also considered the documents produced in evidence and the submissions by their counsels. I have looked at the authorities relied and the applicable law. The Plaintiff in this case is the Board of Governors, Consolata Hospital who have sued the Defendant seeking an order of injunction restraining him from entering, taking

possession, occupying and using land parcel No. NKUENE/TAITA/559 (herein after referred to as the suit land) The Plaintiff is also seeking damages for trespass and mesne profits. From the copy of title deed for the suit property LR No. NKUENE/TAITA/559 and the copy of green card produced by the parties in evidence, the same is registered in the name of the Diocese of Meru/Trustees/Registered/Consolata Hospital.

My understanding of that registration is that the Diocese of Meru acquired the suit property for purposes of constructing a hospital known as Consolata in Nkubu where the suit property is situate. The proprietor of the suit land went ahead to construct a hospital in the suit land which has its own Board of Management where Father Silas Mwitwi who is the Hospital Administrator is also a member. Since the Plaintiff is noted in the title deed, it is my understanding that the Diocese of Meru were to hold the suit property for the benefit of the Plaintiff who were the beneficiaries of the facility. It therefore goes without saying that before any decision is made by the proprietor, the beneficiaries must be consulted. I also wish to state that by being noted in the title deed, the Plaintiff acquired a beneficial interest and any disposition over the property must be sanctioned by the plaintiff. It can therefore be said that by being included in the register and the title deed, the proprietor becomes a trustee and the Plaintiff become beneficiaries.

It follows therefore that the trustee should not act in a manner prejudicial to the interest of the beneficiaries. The Plaintiff has produced a notice of meetings dated 17/3/2015 and copies of minutes of the Board of Management held on 25/8/2015 and 17/3/2015. These minutes clearly shows that the Plaintiff was not consulted when the agreements for the exchange of the suit property with that of the Defendant was entered into. Those two agreements are therefore null and void and of no legal force. I have also looked at the two sale agreements dated 4th March, 2015. I note that the name of the Registered Trustee who signed the first agreement is given as Fr. Julius Mwongera of ID No. 12405613 who is also given as Lands Officer, Diocese of Meru. The Lands Officer of the Diocese of Meru has not been stated as a trustee of the Diocese of Meru or authorized to execute documents on behalf of the trustees registered.

The second agreement contains a signature but does not indicate the name of the person who signed on behalf of the Diocese of Meru. There is also a space for signature by another trustee of the Diocese of Meru but the same is not signed. These are fundamental discrepancies in a sale agreement. There are also no minutes by the Diocese of Meru resolving to sale the suit property. There must be a resolution by the Registered Trustees to exchange the suit property with that of the Defendant. No such resolution was produced by the Defendant.

I am satisfied that the inclusion of the Plaintiff's name on the register and the title deed is a manifestation that the proprietor of the suit land (Diocese of Meru/Registered Trustees) were to hold the same for and on behalf of the Plaintiff as a beneficial owner who shall be consulted before any decision affecting their interest relating to that property is made. In the result, I find and hold that the Plaintiff has proved its case against the Defendant on a balance of probabilities. Consequently, I enter judgment for the plaintiff against the Defendant as follows:

1. A permanent injunction order be and is hereby issued restraining the Defendant whether by himself, his servants/employees/staff/agents, or anyone claiming through him from entering, trespassing, occupying, taking possession or in any other way interfering with the Plaintiff's quiet possession, occupation and use of land parcel Number NKUENE/TAITA/559.

2. Each party to bear her own costs of this suit.

DATED AND SIGNED THIS 18TH DAY OF OCTOBER, 2018.

E. C. CHERONO

ELC JUDGE - KERUGOYA

DELIVERED IN OPEN COURT AT MERU THIS 31ST DAY OF OCTOBER, 2018

LUCY N. MBUGUA

ELC JUDGE - MERU

In the presence of:

Mutuma for plaintiff

C/A: Janet/Galgalo