



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 324 OF 2016**

**UNITED BRETHREN RESEARCH INITIATIVE**

**PASTOR STEPHEN FONDO.....PLAINTIFF/APPLICANTS**

**VERSUS**

- 1. ABDALA MOHAMED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**
- 2. SALIM MOHAMED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**
- 3. ALI MOHAMED.....3<sup>RD</sup> DEFENDANT/RESPONDENT**
- 4. ABDULREHMAN MOHAMED.....4<sup>TH</sup> DEFENDANT/RESPONDENT**
- 5. SAID MOHAMED KIDIKU.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Before me for determination are two applications. The 1<sup>st</sup> application is dated and filed herein on 28<sup>th</sup> November 2016. By that application, the two Plaintiffs herein pray for an order of permanent injunction to issue against the Defendants restraining them from entering, remaining, encroaching into or interfering with the Plaintiffs' Plot which was excised from the larger Plot No. 2267 in Gongoni Settlement Scheme pending the hearing and determination of this suit.

2. The said application is supported by an Affidavit sworn by Pastor Stephen Fondo(2<sup>nd</sup> Plaintiff) and is premised on the grounds:-

- i) That the 1<sup>st</sup> Plaintiff, United Brethren Research Initiative is the beneficial owner of the said Plot measuring 1 acre in size;***
- ii) That the Plaintiffs bought the property from one Jumaa Kitsao Menza through a formal agreement dated 26<sup>th</sup> October 2016 and they are therefore innocent purchasers for value who had undertaken due diligence before purchasing the property;***
- iii) The 1<sup>st</sup> Plaintiff has been using the said Plot as an assembly of its faithful congregation for worship and other Church activities for more than five years and has now embarked on a major development to put up modern and permanent structures;***
- iv) The Defendants who are tenants in common in a different parcel of land have however without any colour of right purported to stop the 1<sup>st</sup> Plaintiff's activities of modernizing its facilities; and***
- v) The Plaintiffs have invested heavily in the said development and if the actions of the Defendant are not stopped the Plaintiffs stand to suffer immense loss that may not be compensated.***

3. The 2<sup>nd</sup> Application is dated and filed herein on 18<sup>th</sup> May 2017. In the 2<sup>nd</sup> application, the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants are seeking an order of mandatory injunction requiring the Plaintiffs, their servants and/or agents to demolish the church and any other developments made by them on the Defendant's piece of land known as Land Portion number 155 Mambrui. In addition, and/or in the alternative they urge the Court to order that the status quo ante the unlawful invasion into the Defendant's land, be maintained.

4. The 2<sup>nd</sup> application is supported by an Affidavit sworn by Ali Mohamed Abdalla Kidiku and is premised inter alia, on the following

grounds:-

- 1. That they own the Portion of land known as Plot No. 155 Mambrui;**
- 2. That sometime in November 2016, the Plaintiffs trespassed upon the Defendant's portion of land aforesaid and commenced construction of what they claimed to be a church;**
- 3. That the Defendants reported the trespass to the local administration but instead of cooperating, the Plaintiff rushed to Court seeking orders against the Defendants; and**
- 4. That unless the orders sought are granted the applicants will suffer irreparable loss and damage.**

5. I have considered the two application and the response thereto. I have equally considered the detailed submissions filed herein by the Learned Advocates for the parties.

6. From the material placed before me the dispute herein relates to one or two Plots of land invariably referred to by the parties as Plot No. 2267 Gongoni Settlement Scheme and/or Plot No. 155 Mambrui. According to the Plaintiffs, the 1<sup>st</sup> Plaintiff is the beneficial owner of a Plot measuring 1 acre being a sub-division of the larger Plot No. 2267 Gongoni Settlement Scheme. The said Plot was according to the PlaintiffS initially allotted to one Kenga Pera Unda. The Plaintiffs have annexed a Letter of Offer dated 31<sup>st</sup> August 1997 addressed to one Kitsena Peter Unda in support of their contention.

7. The said letter from the Acting Director of Land Adjudication and Settlement reads in the relevant portion as follows:-

***"I am pleased to inform you that your application for a Settlement Plot has been successful.***

***The Government through the Settlement Fund Trustees offered you Plot No. 2267 of approximately \* hectares at Gongoni Settlement scheme in Kilifi District.***

***In pursuant thereto, please note that you are required to report to the District Land Adjudication and Settlement Officer Kilifi County so that you are shown the Plot boundaries and be issued with a letter confirming this before documentation.***

***This offer is valid for 90 days from the date of this letter. Within that period you should pay the 10% deposit for the Plot and be documented accordingly, failure to which will lead to cancellation of the offer without further notice."***

8. It is not clear from the document placed before me whether the said Kitsena Peter Unda was shown the boundaries of the land or even if he indeed paid the 10% deposit required to be documented as the owner of the said Plot. Nevertheless, by an agreement dated 26<sup>th</sup> October 2016 between one Jumaa Kitsao Mwenza and the Plaintiffs herein, the seller sold a portion of land measuring 1 acre to the Plaintiffs for the sum of Kshs 50,000/-. The agreement drafted in Kiswahili reads in the relevant part as follows:-

***"Mimi Juma Kitsao Menza, nambari ya kitambulisho 10304649 pamoja na mke wangu Kadzo Kahindi Karisa tumeamua kwa pamoja kuuza sehemu ya shamba letu, kiasi cha ekari moja pamoja na miti yote ilio ndani ya shamba kwa kanisa la Revival and Reformation kwa kina cha Kshs 50,000/ (Elfu hamsini Kamili).***

9. From the documents placed before me, the said Juma Kitsao Menza had bought the parcel of land from the original allottee Kenga Pera Unda vide a handwritten agreement dated 13<sup>th</sup> April 2009 for a sum of Kshs 7,500/-.

10. Having purchased the land as per the Agreement of 26<sup>th</sup> October 2016, the Plaintiffs sought to develop a modern and permanent church thereon. The Defendants were however opposed to the same and sought to stop the construction which they contended was being carried on their land. The Plaintiffs however insist that the Defendants are tenants in common in a different and distinct parcel of land known as Portion No. 155 Mambrui and that they have no basis to stop the Plaintiff's activities on the parcel of land they bought. When the Defendants persisted in their objection to the construction, the Plaintiff filed this suit and the 1<sup>st</sup> Application herein dated 28<sup>th</sup> November 2016. This was but only a month after they bought the parcel of land.

11. In a Replying Affidavit filed herein on 18<sup>th</sup> May 2017 and sworn by the 3<sup>rd</sup> Defendant Ali Mohamed Abdalla Kidiku, the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants who are all brothers on their part aver that they are the owners of the portion of land known as Portion No. 155 Mambrui. They accuse the Plaintiffs of invading the land in November 2016 and commencing construction of what they claimed to be a church on their land. The Defendants aver that as law abiding citizens they reported the Plaintiffs' trespass to the local administration and sought to stop the illegal construction with a view of undertaking a survey to establish the location of the portion of land claimed by the Plaintiffs.

12. It is the Defendant's case that rather than co-operate in undertaking the survey, the Plaintiffs rushed to Court and filed this suit and thereafter rushed to complete the church building which is right within the boundaries of the Defendants' Plot No. 155 Mambrui. It is the Defendants case that the Plaintiffs have illegally built their church in the Defendants parcel of land hence their prayer for a mandatory injunction dated 18<sup>th</sup> May 2017 seeking to compel the Plaintiffs to demolish the same.

13. I have agonised over the two applications before me. The Plaintiffs describe their property as a 1 acre sub-division of the larger Plot No. 2267 at Gongoni Settlement Scheme. The said Plot is unsurveyed and it is not clear to me how the Plaintiffs identified the boundaries thereof. On the other hand, even from the documents annexed to the Plaintiffs application, it is clear that the parcel of land claimed by the

Defendants was surveyed and is now known as Portion No. 155. The same belongs to the Defendants as shown in the Certificate of Title annexed as item 2 on the Plaintiff's List of Documents.

14. From the documents filed herein, it is apparent that the said Portion No. 155 is surrounded by other Portions which are also registered and known as Portion Nos 154, 157 and 158 Mambui as shown on the Surveyor's Report dated 28<sup>th</sup> December 2012 and a copy of the Survey Plan. It is not clear to me how the Plaintiff's unsurveyed Portion came to be in the middle of all these other surveyed portions.

15. As it were, one of the conditions for the grant of an interlocutory injunction is that the Applicant must establish a prima facie case with a probability of success. On the material placed before, the Plaintiffs have not satisfied me that they have a case which may at the trial hereof succeed. As Lord Diplock stated in the case of *American Cyanamid –vs- Ethicon Limited (1975) AC 396*;

***“If there is no prima facie case on the point essential to entitle the Plaintiff to complain of the Defendant's proposed activities that is the end of any claim to interlocutory relief.”***

16. Arising from the foregoing, I do not find any merit in the Plaintiffs application dated 28<sup>th</sup> November 2016.

17. On the other hand, when considering an application for a mandatory injunction as sought by the Defendants, a Court must be satisfied that there are not only special and exceptional circumstances but also that the case is clear to warrant such orders. As the Court of Appeal stated in *Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others(2016)eKLR:-*

***“....In an application like the one before the Court where an applicant seeks a mandatory interlocutory injunction, the Court will act sparingly and only accede to the request and grant such an order in the clearest of cases.”***

18. From the record, it is apparent that the Defendants invited the Plaintiffs to conduct a joint survey to determine the portion or location of the two parcels of land cited in this dispute. It is equally apparent that even though there was doubt as to the right parcel of land which the Plaintiffs had bought, the Plaintiffs accelerated their efforts and completed the construction of the church which they now use and claim sentimental attachment to.

19. From the pictures annexed to the Plaintiffs Supporting Affidavit annexed to the application dated 28<sup>th</sup> November 2016, it is evident that the building was yet to commence and the Plaintiffs had only dug the foundation and deposited building materials. In the subsequent documents filed before me, the Plaintiffs now aver that they have clearly shown that they have developed the church to its completion and that it is the place the believers in their church worship. According to the Plaintiffs, it is proper that their rights of worship and the sentimental attachment to the church are protected until all issues raised in these proceedings are determined.

20. It is clear to me that while they hurried to complete the construction of the church on the disputed grounds, the Plaintiffs were conscious of the fact that they had brought this dispute to Court and that a determination could be made either way. They are presently enjoying the full advantage and use of the property to which they now purport to have sentimental attachment to. In my mind and as was stated by the Court of Appeal in *Kamau Mucuha –vs- Ripples Ltd(1993)eKLR:-*

***“A party as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act.”***

21. Arising from the foregoing, I think it would be improper to allow the Plaintiffs to continue taking full advantage of their deliberate acts taken in obvious disregard of the fact that this dispute was in Court, and using the grounds for prayers while we await the hearing and determination of this dispute. While I think it may be too harsh to order a demolition of the church as demanded by the Defendants at this stage, I think that the Status quo prior to the construction of that church ought to be maintained.

22. In the circumstances, the application dated 18<sup>th</sup> May 2017 is allowed in terms of Prayer No. 4 thereof in the alternative.

23. The Defendants will have the costs of both applications.

**Dated, signed and delivered at Malindi this 11<sup>th</sup> day of October, 2018.**

**J.O. OLOLA**

**JUDGE**