



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 103 OF 2007**

**ROBERT MUKARANI SIMITI.....1<sup>ST</sup> PLAINTIFF**

**JOSEPH WANDAKA.....2<sup>ND</sup> PLAINTIFF**

**FRED WANGILA.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**PETER BADHIA.....1<sup>ST</sup> DEFENDANT**

**PETER WEKESA.....2<sup>ND</sup> DEFENDANT**

**ANNE WEKESA.....3<sup>RD</sup> DEFENDANT**

**DR. TIMOTHY PIERCE.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application dated **21/6/2018** and filed in court on **25/6/2018** has been brought by the defendants/applicants. It seeks the following orders:-

- a. That the honourable court be pleased to certify this application urgent and to hear the same ex parte in the first instance.**
- b. That the honourable court be pleased to issue an order of eviction of the plaintiffs/respondents, their servants, agents or anyone else claiming through them from land title numbers Kiminini/Kinyoro Block 4/27 and 28.**
- c. That the County Land Registrar Trans-Nzoia County be directed to correct the register pertaining to the title numbers Kiminini/Kinyoro Block 4/27 and 28 to read the name of Doctor Harlod Timothy Pierce (in trust for Faith Centre Children's Home) in place of Hope Centre Children's Home.**
- d. That the Deputy County Commissioner Trans-Nzoia West Sub-County to provide security and to oversee the eviction exercise.**
- e. That costs of this application be provided for.**

2. The applicants have brought the application under **Sections 1A, 1B, 3, 3A and 34(1)** of the **Civil Procedure Act 2010** and **Order 51 Rule 10** of the **Civil Procedure Rules**. The application is supported by the sworn affidavit of the 4<sup>th</sup> applicant.

3. The grounds upon which the application is made are contained at the foot of the application. They are that this court in its judgment delivered on **8<sup>th</sup> March, 2017** found and held that land titles numbers **Kiminini/Kinyoro Block 4/27** were purchased using funds provided by Dr. Pierce; that the court found that that the respondents/plaintiffs did not contribute any money to fund the purchase of any of the suit properties and were only out to enrich themselves; that the respondents/plaintiffs' project is the Home Centre based at Kipsongo within Kitale Municipality and the attempt to continue operating on the suit properties after the court has pronounced its judgment is indeed denying the applicant the fruits of the judgment and that the respondents have conceded to the decree of the court and paying the decreed costs.

4. The application is supported by the affidavit of the 4<sup>th</sup> applicant dated **21/6/2018** which substantially reiterates the grounds on the face of the application.

5. In reply to the application the respondents/plaintiffs filed a replying affidavit sworn on 25/7/2018 by the 1<sup>st</sup> plaintiff in which he averred that despite the applicant having counterclaimed for eviction and correction of the register in his defence and counterclaim this court never granted those prayers and the only remedy in those circumstances is an appeal. They further aver that the reliefs sought in the application are the same as those sought in the counterclaim but which were denied and that the court became *functus officio* after the judgment and can not grant the prayers in the application.

6. It is also alleged that the application has been brought in bad faith and in order to frustrate the management of the operations of Hope Centre Children's Home.

7. The respondents/plaintiffs further opposed the application through their grounds of opposition dated 25/7/2018 in which they states as follows:-

**a. The application is vexatious and an abuse of the court's process as the orders sought cannot legally obtain by way of an application such as the one before court.**

**b. That the Honourable court having delivered its judgment is now *functus officio* and cannot grant the substantive prayers sought in the application and which can only be reliefs in a judgment at the end of the trial.**

**c. That if at all the defendants were by the judgment of the court, then they ought to have appealed against the same but not to move the court by way of application.**

**d. That the application is belated, untimely and a mere afterthought, misplaced and the applicants have not demonstrated sufficient and/or reasonable cause to warrant the orders sought therefore the application offends the inherent powers of the court given under Section 3A of the Civil Procedure Act.**

**e. In the circumstances and based on the foregoing reasons the application herein is baseless, misconceived and a clear abuse of court process therefore it is in the interest of justice that the orders sought therein be declined and the application be dismissed with costs.**

8. The parties filed submissions on the application, with the applicants filing theirs on the 29<sup>th</sup> October 2018, the respondents having filed theirs earlier on 23/10/2018. I have considered both the applicants' and the respondents' submissions.

9. In their submissions the applicants stated that there was no counterclaim the application to amend the defence to include the counterclaim having been dismissed on the 15<sup>th</sup> May 2013 and hence there is no duplication as alleged in the replying affidavit of the respondents. I have perused the court record in this matter and found that that is the correct position. I have also examined the judgment of the court dated 8/3/2017. Paragraph 20 thereof states as follows of the plaintiffs:

**"This case is a clear example of people who want to use donors and then dump them. It is clear that Dr. Pierce was brought on board not just as a donor but as a person with a stake in the Hope Centre. He solely provided funds for purchase of the suit properties. He found himself in the cross fire involving Pastor Simiti, Peter Wekesa, and Peter Badhia on the Management Hope Centre (sic). I therefore find that the plaintiff's suit against the defendants is misconceived."**

10. I will refer to yet another paragraph in the judgment which states as follows:-

**"There were attempts to have one of the properties transferred to Faith Centre. This did not work as the properties are still in the name of Hope Centre. The differences between the two groups escalated. There were even reports to police station and accusations of mismanagement. What is clear however is that the intention of the plaintiff and the defendants was to work together. This was not possible because of friction caused by the actions of Pastor Simiti.**

**What happened between the plaintiff and the defendants is what is commonly afflicting most donor funded projects. People have their own selfish interests and they want to benefit under the guise of helping the less fortunate in the society. Regrettably, most of the cases of such kind of behaviours fall on innocent children who end up being used to enrich some people."**

11. I find that the plaintiffs conduct was in breach of the trust bestowed upon them and that it disentitles them from dealing with the land and assets of that enterprise. I am also convinced that the application to have the plaintiffs evicted from the suit premises is merited.

12. However, regarding the third prayer in the motion, it may not be possible to regulate the activities of the plaintiffs and the defendants in the coming times especially regarding their engagements with the donor community.

13. It is necessary to note that the land that was purchased was for a noble purpose, to serve the less fortunate in society and that it is the backbone of a charitable public trust that can not be revoked by either the plaintiffs or the defendants. It also forms the launching ground for any of the positive action that any of the trustees to the charitable enterprise may consider fit for generations to come.

14. I note that no trustees to the Faith Centre Children's Home have been named in the application and that it is intended that the land be registered in the name of the 4<sup>th</sup> defendant to hold on behalf of the Faith Centre Children's Home.

15. I am of the opinion that a public charitable enterprise will outlive the pioneers and unless the contrary is shown to be the case that enterprise should perpetually treated as public and charitable. It can already be seen that any perceived ability on the part of any of the pioneers to seize and dispose of the suit land for their own benefit is occasioning harm to an already rolling project that may attract more benevolent attentions of any person organization or even government and in that event benefit the public more.

16. I consider that the control over the title and use of the land by the plaintiffs and the defendants ceased the day they decided that they wished to commence a charitable enterprise. That institution must remain a public institution to benefit the less fortunate long after the parties herein are departed.

17. I find no special need to therefore adjourn this application and insist on the names of the trustees of Faith Centre Children's Home to be provided to perfect prayer number 3 in the application, or to grant the said prayer as it is for the prayer I will grant will be considered by the defendants, if they are still minded for charity, to have the same effect as **prayer 3** or even better.

18. I find that it would be appropriate to have the land registered in the name of the Public Trustee of the Republic of Kenya while the activities of the Centre are managed by the Trustees of the Centre. It can only be hoped that the regulatory bodies will take care of the day to day activities of the trustees as would require them to be accountable in future.

19. In the final analysis I order as follows:

**a. That the plaintiffs/respondents, their servants, agents or anyone else claiming through them shall remove themselves from land title numbers Kiminini/Kinyoro Block 4/27 and Kiminini/Kinyoro Block 4/28 and hand over the said lands to the Trustees of the Faith Centre Children's Home with immediate effect in default of which they shall be evicted therefrom.**

**b. Subject to any governmental regulation mechanisms as from time to time may be in place, the physical management of the land and assets thereon and their use for day to day activities for the purposes of the Faith Centre Children's Home shall be the responsibility of the Trustees of the Faith Centre Children's Home.**

**c. The land comprised in title numbers Kiminini/Kinyoro Block 4/27 and Kiminini/Kinyoro Block 4/28 shall be registered in the name of the Public Trustee to hold it on behalf of Faith Centre Children's Home and the Deputy Registrar of this court shall execute all documents necessary to effect that registration.**

**d. The plaintiffs shall jointly and severally bear the costs of this application**

It is so ordered.

**Dated, signed and delivered at Kitale on this 13<sup>th</sup> day of November, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**13/11/2018**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga for plaintiffs/respondents

Mr. Samba for the defendants/applicants

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**13/11/2018**