



REPUBLIC OF KENYA
IN THE E.L.C. COURT OF KENYA AT EMBU

ELC NO. 66 OF 2016

**BOARD OF TRUSTEES A.C.K DIOCESE OF
EMBU.....PLAINTIFF/APPLICANT**

VERSUS

**MACUMO DAY SECONDARY SCHOOL.....1st
DEFENDANT/RESPONDENT**

**THE PRINCIPAL MACUMO DAY SECONDARY SCHOOL.....2nd
DEFENDANT/RESPONDENT**

**THE B.O.G MACUMO DAY SECONDARY SCHOOL.....3rd
DEFENDANT/RESPONDENT**

RULING

1. By a Notice of Motion dated 12th October, 2017 under certificate of urgency under Order 40 CPR the Plaintiff/Applicant sought the following orders:

- a) That the application under certificate of urgency be certified urgent and heard ex-parte in the first instance.
- b) That the respondents, their agents, servants or anybody acting under them be restrained from entering, interfering with, transferring, leasing, alienating or in any way interfering with the Applicant's occupation and use of parcel No. LR KAGAARI/WERU/1005 until this application is heard inter-partes.
- c) That the Respondents be restrained in a similar way to prayer (b) above pending the hearing and determination of the suit.
- d) That costs of the application be provided for.

2. The grounds of the application is stated on the face of the Notice of Motion and include:

- a) That the Applicant had been allocated the suit property in 1967 and had taken possession and developed the property extensively.
- b) That the said property was illegally and fraudulently acquired by the Respondents in 2016 who had since demanded that the Applicant should vacate the land.

c) That the Applicant would suffer irreparable harm, loss and damage unless the orders sought are granted.

3. The said application was supported by the affidavit of Bishop David Muriithi Ileri who is the Bishop of the A.C.K Diocese in Embu. The Bishop swore that the suit property was sometime in 1967 allocated to the church for educational purposes on the basis of resolution or minute 36/67 of the then County Council of Embu Education Committee. The said property is said to be adjacent to LR No. KAGAARI/WERU/1003 which is said to belong to MACUMO SCHOOL

4. The supporting affidavit states that upon taking possession, the church established a Farmers Training Centre, a church and other facilities as enumerated in the annexure marked as DMI.III. These developments include:

- i. A hostel
- ii. 2 lecture halls
- iii. Administration block
- iv. Dining hall and kitchen
- v. Sunflower processing factory
- vi. Rice hauler factory
- vii. Zero grazing unit
- viii. Goat rearing unit
- ix. Rabbit rearing unit
- x.. Green house
- xi. Well
- xii. Mango, sunflower and banana farm.

5. The applicant also attached photographic evidence of some of the developments on the suit property. The applicant also filed a supplementary affidavit on the 18th January, 2017 in support of the said application.

6. The Respondents filed a replying affidavit in opposition to the said application for injunction. The affidavit is sworn by Faith Kaweru who is the Principal of the 1st Respondent and Secretary to the Board of Management of Macuma Day Secondary School. She states that although the suit property was initially reserved for the World Council of Churches in 1967, the defunct County Council of Embu decided to allocate the said property to the District Education Board vide minute No 26/77. She concedes, however, that the school was initially allocated 12 out of the 32 acres which was available.

7. Her replying affidavit has also annexed a copy of minute No. 53/87 which indicates that the Education Committee of the County Council of Embu had resolved that the entire 32 acres of land in Macumo be allocated to the District Education Board to the exclusion of the church commissioners for Kenya.

8. The Respondents further state that on 22.02.06 the full council of the defunct Municipal Council of Runyenjes approved the registration of Macumo Day Secondary School as the owner of LR. NO KAGAARI/WERU/1005 pursuant to which the school processed the title documents for the suit property through the facilitation of the then Ministry of Local Government and the Ministry of Education. A copy

of the title to the suit property has been annexed to the replying affidavit.

9. The Respondents have stated in the replying affidavit that the Applicant is a trespasser on the suit property and have sought dismissal of the application for interlocutory injunction as lacking merit.

10. The advocates for both the Applicants and the Respondents have filed their respective written submissions on the said application dated 12th October 2016. I have considered the rival submissions of the parties and the arguments raised therein.

11. The time tested case of *Giella v. Cassman Brown & Co 1973 EA 358* lays out the 3 important principles for the grant of an order of injunction. Has the Applicant satisfied the first principle on a prima facie case with a probability of success? There is no dispute that the suit property was trust land reserved for “educational” purposes which was vested in the defunct County Council of Embu.

12. It is also apparent that the Applicant took possession of the suit property and established a training centre, hostels, a church and other developments on the property spanning over several decades.

13. At some point, the clerk to the County Council of Embu wrote a letter to the Church Commissioners of Kenya in 1987 informing them of the allocation. One year later, the same council wrote to the commissioner of Lands requesting him to put on hold the processing of title documents until further notice due to some internal misunderstanding within the council.

14. It is also apparent from the pleadings and affidavits on record that both the Applicants and the Respondents have coexisted side by side for many years without any covert property dispute between themselves. At least, it does not appear that any such dispute was brought before any judicial or administrative forum for resolution other than a caution which was reportedly lodged by a Bishop of the Applicant in 1999.

15. So how did the 1st Respondent get registered as owner of the suit property which had been under actual possession and occupation of the Applicant for several decades? Was such registration lawful and undertaken in accordance with the law? The Applicant has pleaded in paragraph 13 of the plaint that the Respondents obtained registration of the suit property fraudulently. It has listed several particulars of the alleged fraud. It would be prejudicial at this interlocutory stage for the court to express any adverse opinion on this matter of fraud since it may prejudice the fair trial of the main suit. The findings on the allegations of illegality and fraud will be within the province of the trial court.

16. It is sufficient for this court to be satisfied that the facts and circumstances of this case are such that an explanation or rebuttal is required by the respondents at the trial of the action on the allegations of fraud put forth by the Applicants. In the circumstances, I am satisfied that the Applicants have made out a prima facie case with a probability of success.

17. The second principle relates to demonstration of irreparable damage or injury which cannot be adequately compensated by an award of damages. The nature of the operations the Applicant is undertaking on the suit property is such that an award of monetary damages cannot possibly be an adequate remedy.

18. The Applicant is running a Farmers’ Training Centre and other ancillary facilities for the purpose of importing knowledge and skills on the learners attending the training centre. It is therefore my considered opinion that the Applicant has satisfied the second principle for the grant of an order of interlocutory injunction.

19. In case I am wrong on the second principle, I would still consider the balance of convenience to favour the Applicant who admittedly is in possession of the suit property and who appears to have been in possession for several decades now and who is running a Farmers’ Training Centre on the suit property. It should be remembered the initial entry by the Applicant was not unlawful, forcible or clandestine. It was with the consent and blessings of the then registered proprietor who was holding the property on

behalf of the public.

20. It would cause greater hardship to evict the Appellant at this interlocutory stage before the rights of the parties are conclusively determined at the trial, than it would to the Respondents were the injunction to be granted. In the circumstances of this case, therefore, the balance of convenience is in favour of the Applicant.

21. Before I conclude this ruling, it is clear that the defunct County Council of Embu was an actor in the dispute giving rise to this suit but its successor has been omitted from the proceedings.

22. The court is of the view that the County Government of Embu is a necessary party to these proceedings and ought to be joined as such. It is for the Applicant to take necessary steps, if it deems fit, to join the County Government of Embu in the proceedings.

23. I therefore make the following orders on the application for injunction dated 12th October, 2016.

a) An injunction be, and is hereby issued, against the respondents, their agents, servants or anybody claiming under them from transferring, leasing, alienating or in any way interfering with the Applicant's occupation and use of L.R No. KAGAARI/WERU/1005 until this suit is heard and determined.

b) That the Applicant shall give a written undertaking as to damages and file it in court within fourteen (14) days from the date of this ruling.

c) That costs of the application shall be costs in the suit.

Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **28th** day of **FEBRUARY, 2017**

In the presence of Ms Muraguri for the Plaintiff/Applicant and Mr Ireri holding brief for Mr. Kieti for the respondents.

Court clerk Njue.

Y.M.ANGIMA

JUDGE

28.02.17