



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYAHURURU

ELC CIVIL APPLICATION NO.225 OF 2017

MARY NYAMBURA MUCHIRI.....APPLICANT/PLAINTIFF

VERSUS

PASTOR MWANGI KARIA.....1st RESPONDENT/DEFENDANT

AFRICA INDEPENDENT

PENTECOSTAL CHURCH OF AFRICA...2ndRESPONDENT/ DEFENDANT

R U L I N G

The application before me for determination is a Notice of Motion dated 5th November 2015 and filed on the 6th November 2015 under certificate of urgency, seeking for orders that:

1. *That this application be certified urgent and the same be heard ex-parte in the first instance and service upon the same (sic) be dispensed within the 1st instance(sic)*
2. *That the honorable court be pleased to issue orders of injunction restraining the respondents whether by themselves, their servants/ agents workers or anybody claiming to be under them from entering, alienating, encroaching, trespassing, fencing or in any way with making any use of land parcel Nyandarua/Melangine/4618 pending the hearing and determination of this application as well as the suit.*
3. *That costs of this application be provided for.*

The said application is premised on the grounds that

- (i) The respondents built a church within the compound of the land parcel *Nyandarua/Melangine/4618* despite being aware that the land was the property of the applicant.
- (ii) That the defendants had fenced off the whole of the land thereby obstructing and hindering the applicant from accessing her land or making use of the same.
- (iii) That the applicant depends on farming for livelihood and the Respondents/defendant's action were obstructing her activities especially during the current rain (sic) period.

The said application is supported by the affidavit of Mary Nyambura Muchiri sworn on 5th November 2015.

The above application, which was filed under certificate of urgency, was placed before **Hon. Munyao J**(ELC judge- Nakuru) on 6th November 2015, who directed that the same be served upon the respondents for hearing *in te-partes* on 15th November 2016 as the same had not been certified as urgent. No interim orders were granted

Thereafter, the file was transferred to the newly established Environment Land Court in Nyahururu wherein the same was placed before me on the 15th March 2016 and both parties, who appeared in person, indicated to the court that they were ready to proceed.

This court had been asked to grant temporary injunctions against the Defendants/Respondents *restraining them whether by*

themselves, their servants/ agents workers or anybody claiming to be under them from entering, alienating, encroaching, trespassing, fencing or in any way with making any use of land parcel Nyandarua/Melangine/4618 pending the hearing and determination of this application as well as the suit.

At the hearing of the application, I heard oral rival submissions made by the parties in person which I have carefully considered.

The issue for determination by this court is whether the plaintiff established a case to enable this court grant her the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420)."

The Plaintiff/Applicant through a translator (as she spoke in Kikuyu language) urged the court to grant the orders sought in her application dated 5th November 2015 and relied on her affidavit sworn on 5th November 2015 and her annexure which was a photo of the church herein.

She submitted that the defendants who were members and representatives of the Africa Independent Pentecostal Church of Africa, herein referred to as the church, ought to be restrained from entering her piece of land or allowing their agents, servants and other people from grazing their cattle therein.

Upon being prompted further by the court, the Applicant/Plaintiff stated that the 1st Respondent/ Defendant was the deacon and chief of the church while the 2nd Respondent/ Defendant, Joseph Muchiri Mathenge was the person who had taken over the church leadership after the first defendant was transferred.

The Applicant/Plaintiff referred to the suit land as Nyandarua/Melangine/4618, and stated that she had the title deed to the same although she had left it at home but had come to court with only a copy. The Applicant/plaintiff further informed the court that she did not know when she was issued with the title deed, which the court noted was dated 22nd September 2014, but that she had been living on the suit land since 1964. She confirmed that she had been given the land after having finished paying for it through a loan she had taken with the Settlement Scheme. (No documents were exhibited.)

The Applicant/plaintiff submitted that the church had been built on her land, despite her protests, in 1985. After the distribution of her property to her children, the piece of land where the church stood was her only remaining property. She prayed for orders from the court for the church to be ejected from her land being Nyandarua/Melangine/4618

The first Defendant who also appeared in person informed the court that he had been sent to that church to head the same in the year 2012 and stayed there up to the year 2015. That he had no idea that there was a case concerning the church but maybe the church elders who included the pastor (Joseph Muchiri) would have been in a better position to shed more light on the issues at hand.

Joseph Muchiri who submitted in court as a representative of the 2nd Respondent/Defendant informed the court that he had been a pastor in the church for 30 years and was also a chief within that locality for the past 17 years. He submitted that when the church was under construction, the Applicant/Plaintiff was gracious enough to keep the church's building materials for them on her land but that upon completion of the building, they had removed all the residue materials from her land.

The 2nd Respondent/Defendant upon being questioned by the court on his role as a representative of the church, he stated that the church had its officials who included the chairperson as the leader of the church, the secretary and the treasurer but that he had not deposed in his replying affidavit that he had been granted authority to act on behalf of the church. He further stated that the church was not built on the Applicant/ Plaintiff's piece of land as when the church was under construction in 1985, the plaintiff was on her own piece of land being Melangine 365 while the land on which the church stood is No. 54 Tumaini trading center. He further stated that there was a permanent boundary separating the two pieces of land which could be well explained by the Land Registrar Nyandarua. These are matters of facts to be determined during trial.

When the plaintiff was asked by the court if she had anything else to add, she produced a copy of a map which I must confess could only be interpreted by a land surveyor.

I have carefully considered the said submissions by both parties. The issue for determination by this court is whether the plaintiff established a prima facie case to enable this court grant her the interlocutory injunction so sought. I have noted that no substantive documentary evidence was produced by either party to support their claim. The church has been on the suit land since 1985 (which is not in dispute) and has constructed a permanent structure therein, at this stage it would not be prudent to issue eviction orders at an interlocutory stage.

Having looked at the principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought, I find that the plaintiff has not established a prima facie case for reasons contained in the body of the ruling and further that there has been doubt created in the court's mind as to whether there are two distinct parcels of land or not, a matter which can only be determined after the full hearing of the main suit.

I therefore decline to grant the orders sought herein and dismiss the plaintiffs application herein dated 5th November 2015 with costs to the Respondents.

The second issue that this court considered important to tackle is whether the Respondents/Defendants are properly suited and whether there was authority obtained from the board of trustees, as required under Chapter 9 of the Church Constitution, to defend the suit or swear an affidavit on behalf of the Second Defendant the Africa Independent Pentecostal Church of Africa.

This court was not shown any evidence authorizing either Pastor Joseph Muchiri or the 1st Defendant to defend the suit on behalf of the church. This court thus hesitates to declare the defendants non-suited to defend the suit on behalf of the Church. That notwithstanding, leave of the court is hereby granted to the Plaintiff/ Applicant to amend her plaint with corresponding leave to the defendant(s) to amend their defence.

DATED AT NYAHURURU THIS 27th DAY OF APRIL 2017

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE