



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ENVIRONMENT AND LAND COURT IN THIKA**

**ELC.NO.85 OF 2017**

**JOSEPH NGANGA GATUA, CEPHAS NDUNGU**

**WANGO & EDWIN THUO GACHUNU**

**(Suing for and on behalf the**

**CHURCH OF RESTORATION (COR)..... PLAINTIFFS/APPLICANTS**

**=VERSUS=**

**DAVID NJOROGE EVANS.....DEFENDANT/RESPONDENT**

**R U L I N G**

There are two Notices of Motion applications and a Preliminary Objection for determination herein.

The 1<sup>st</sup> is an Amended Notice of Motion application dated **1<sup>st</sup> March 2017**, brought by the Plaintiffs herein **Joseph Nganga Gatua, Cephass Ndungu Wango** and **Edwin Thuo Gachunu**, suing for and on behalf of the **Church of Restoration (COR)**. The orders sought are against the Defendant, **David Njoroge Evans** brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules and all the other enabling provisions of the law. The Applicants have sought for these orders against the Defendant:

**a) Spent**

**b) Spent**

**c) THAT a temporary injunction be issued restraining the Defendant/Respondent his agents/servants people working under him or for him from entering, encroaching, trespassing, undertaking acts of waste, or in any other way interfering with the Plaintiffs' church quiet possession and use of the premises on Land Reference Number Thika Municipality Block 8/185 pending the hearing and determination of this suit.**

**d) THAT the costs of this application be borne by the Defendant/Respondent.**

The said application is based on the grounds stated on the face of

the application and on the Supporting affidavit of **Rev. Joseph Nganga Gatua**. These grounds are:

***i) The Church of Restoration. (COR) through its Trustees is the owner of Plot number, Thika Municipality Block 8/185.***

***ii) The said Church has constructed a College on the said plot which was being headed by the Defendant/Respondent as its Principal.***

***iii) That the Defendant/Respondent, has been excommunicated as a member and a Pastor of the Plaintiff Church and therefore have been rendered incapable of being a Principal of the said College.***

***iv) That when the Defendant was informed of the decision of the Church that he should not enter, trespass and/or interfere with the premises and the running of the said institution, he has refused and instead is using his agents, servants and even the Police to deny the Plaintiffs' officials from accessing and possession of the premises. He has been using the said premises as if it is his personal property.***

***v) The Plaintiffs Church as the registered leaseholder of the parcel of land upon which the premises exist has the full rights of use and possession of the subject plot and hence this application.***

In his Supporting Affidavit, **Rev. Joseph Nganga Gatua** averred that he is one of the officials of the Church of Restoration registered in trust for the Church as the leaseholder of land parcel number **Thika Municipality Block 8/185**, wherein the church has put up a Bible Training College known as the International Gospel Outreach (IGO). He further averred that together with **Cephas Ndungu Wango** and **Patrick Ndirangu** (Now deceased) they were registered as the owners of the said **Thika Municipality Block 8/185**, as trustees for and on behalf of the Church of Restoration as evident from annexure **JWG4**. It was his contention that in the year **2007**, the Church appointed the Defendant herein as the Principal of the Bible College in accordance with the Church's Constitution which provided that only a member and who was a Pastor of the Church could be appointed to such position. Further that due to various complaints against the Defendant, the Regional Council of Thika held a disciplinary meeting on **28<sup>th</sup> January, 2017**, and thereafter recommended excommunication of the Defendant from the church. That due to the said excommunication, the Defendant was immediately rendered incapable and/or lacking to be the Principal of the said **IGO Bible College**. He contended that the Defendant has refused and/or neglected to cease undertaking the duties of the Principal and has continued to enter the premises thus defying the orders from the church not to do so. The Plaintiffs therefore prayed for orders of injunction to restrain the Defendant, his agents, servants and people working under him from entering, trespassing, encroaching and interfering with the church's possession and use of **Thika Municipality Block 8/185**. This **Amended Notice of Motion** was a follow up to the Notice of Motion application dated **13<sup>th</sup> February 2017**, in which the Plaintiffs/Applicants therein were **'The Church of Restoration Registered Trustees'**.

The Defendant did Enter Appearance on **24<sup>th</sup> February 2017**, and filed his grounds of Opposition even dated wherein he stated that:

***i) That the Plaintiffs/Applicants Notice of Motion dated 13<sup>th</sup> February 2017, is wholly misconceived and incompetent as the Plaintiff has no capacity to institute proceedings in Thika ELC No.85 of 2017 as it has no authority of the church to do so nor neither is it legally in existence.***

***ii) That the application is frivolous, vexatious and otherwise an abuse of the court process.***

The Defendant filed the **2<sup>nd</sup> Notice of Motion** for consideration by this Court. The said Notice of Motion is dated **24<sup>th</sup> February 2017**, and is also brought under Order 40 Rules 1 & 2 of the Civil Procedure Rules, Sections 1A, & 3A of the Civil Procedure Act and all the enabling provisions of the law. The Defendant sought for the following orders.

1) *Spent*

2) *That the Respondent, their servants and/or agents be enjoined from dealing in any way and or transferring of the properties of international Gospel Outreach Kenya Bible College pending hearing and determination of this application and this suit.*

3) *That the status quo where the Applicant will continue to run the College without interference or harassment from the Respondent or Church of Restoration be reinstated pending hearing and determination of this application and this suit.*

4) *That the OCS Thika Station do provide security to the Defendant to restore International Gospel Outreach Kenya Bible College to full operation and enforce the injunction.*

5) *That the costs of this application be provided for.*

The said Application is supported by the grounds states on the face of the application and the affidavit by **Rev. David Njoroge Evans**. These grounds are:

1) *That church of Restoration Pastors led by Reverend Joseph Nganga Gatua demolished the College Chapel and welded shut the classrooms and offices.*

2) *That they have posted guards at the entrance to prevent the Applicant from accessing the school.*

3) *That the staff and students have also been denied access.*

4) *That the property was purchased for the College by Missionary John Dodd and developed by him and the Late Bishop Patrick Murabu and the Respondent.*

In his Supporting Affidavit, **Rev. David Njoroge Evans** averred that he was privy to the purchase of the suit premises by **Missionary John Dodd in 1999** whereafter construction of the wall and classroom began. Thereafter the deponent put up office block and chapel and that he started the **Church of Restoration Thika Township** in 2010, without any financial support from the Church of Restoration.

Further that he was headhunted by **Bishop Ndirangu** and **Missionary John Dodd** to be the **Principal** of the **Bible College** and he was not appointed by the Church of Restoration as alleged by the Plaintiffs. It was his contention that the **International Gospel Outreach** (IGO) which was started by **Missionary John Dodd**, who was never a member of the Church of Restoration, was ran independently of the Church of Restoration but the Church later assumed the position of the local sponsor. He alleged that he was not aware of the said excommunication as alleged by the Plaintiffs and further the alleged excommunication could not sack him as Principal of IGO Kenya Bible College as the Church of Restoration neither hired him nor paid him salary. He contended that an injunction is necessary to restrain the Church of Restoration from interfering with the running of IGO, Kenya Bible College which has 49 students and 2 other teachers.

The two Notices of Motion are contested. **Rev. Joseph Nganga Gatua** filed a **Replying Affidavit** dated **20<sup>th</sup> March 2017**, in opposition to the **Notice of Motion** dated **24<sup>th</sup> February 2017**. He averred that indeed, **Cephas Ndungu Wango, Patrick Murabu Ndirangu** and *himself* were the registered owners of the suit property. That it was indeed true that the suit property was purchased through the support of one **John Dodd**, a **Missionary** from **USA**, but he averred that the said purchase was for and on behalf of the Church of Restoration. Further that the Defendant has been an agent and/or appointee of the Church and the said College was overseen by the Board of Management. It was his contention that the College is owned by the Church of Restoration. Further that the Defendant was procedurally excommunicated as a member of the church and this matter is before another Court of competent jurisdiction. It was his allegations that the church took possession of the premises but was ordered to close it down when the Defendant attempted to forcefully enter into the premises and take control of it. He also denied that there

was demolition of any chapel and/or structures as claimed by the Defendant.

The Defendant **Rev. David Njoroge Evans** swore a **Replying Affidavit** dated **22<sup>nd</sup> May 2017**, in opposition to the **Amended Notice of Motion** dated **1<sup>st</sup> March 2017**. He averred that **Rev. Joseph Nganga Gatua** is not one of the **Registered Trustees of the Church of Restoration**. He also reiterated the contents of his Supporting Affidavit for the Notice of Motion dated **24<sup>th</sup> February 2017**.

The court directed the parties to file their written submissions in respect of the two Notices of Motion and the Preliminary Objection. The parties did comply with the said directions and the **Law Firm of Jessee Kariuki & Co. Advocates** for the Plaintiffs filed their set of written submissions on **11<sup>th</sup> May 2017**, and urged the court to allow their application since they had established all the principles for grant of injunctive orders as laid down in the case of **Giella ..vs.. Cassman Brown Co. Ltd (973) EA 358**.

On the part of the Defendant, the **Law Firm of Nyage Njeru & Company Advocates** filed their written submissions on **23<sup>rd</sup> May 2017** and urged the court to uphold the Preliminary Objection. It was submitted that the Plaintiffs Notice of Motion was amended without the requisite leave of the court. Further, the Plaintiffs filed their Reply to the Defendants written

submissions on **26<sup>th</sup> May 2017**.

This court has carefully considered the two Notices of Motion and the annexures thereto. The court has also considered the Pleadings in general, the written submissions and the relevant provisions of the law. The court makes the following findings:

There is no doubt that the Plaintiffs and the Defendant are all members of the Church of Restoration, Thika Township. At the centre of the conflict is the suit property **Thika Municipality Block 8/185** in which there is a **Bible College** otherwise known as **IGO – International Gospel Outreach**. There is no doubt that this suit property **Thika Municipality Block 8/185** is registered in the names of **Cephas Ndungu Wango, Joseph Nganga Gatua and Patrick Murabu Ndirangu (now deceased)**. It is alleged that the three are holding the suit property **in trust** for the **Church of Restoration (COR)**. The suit property was registered in the names of the three persons on **24<sup>th</sup> March 2003**. It is evident from the Lease document that the three proprietors were named as **Trustees** of the **Church of Restoration of Thika**.

There is also a Sale Agreement attached to the Amended Notice of Motion, which shows that the suit property was sold by **Philomena Muthoni Mwaniki** to the **Church of Restoration**. What is in dispute is who provided the funds for the purchase of the church and whether the suit property was only meant to cater for the **Bible College of Kenya - IGO** or also the **Church of Restoration**.

What is also not in doubt is that the Defendant herein **Rev. David Njoroge Evans** has been the Principal of the **Bible college of Kenya (IGO)** since its inception. However the Plaintiffs/Applicants have averred that the church did excommunicate the Defendant and since he was holding the said position of the Principal by virtue of being a Pastor of the **Church of Restoration**, then with the excommunication, he has ceased to hold the said position and should be banned from entering into the suit premises or interfering with same.

On his part, the Defendant has averred that he was hired independently as a Principal of the **Bible College of Kenya (IGO)** by one **Missionary John Dodd** and **Bishop Ndirangu** and that the Church cannot sack him since it did not hire him nor pay his salaries.

All the above issued in dispute are issues which can only be determined after the calling of the evidence. At this stage, the court will be cautious not to dwell with issues which are meant to be canvassed at the full trial. See the case of **Airland Tours & Travel Ltd..vs.. National Industrial Credit Bank, Nairobi HCCC No. 1234 of 2002**, where the court held that;

***“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.***

Before delving into the two Notices of Motion, the court will first have to determine the Preliminary Objection raised by the Defendant.

The Defendant has raised a Preliminary Objection as to the competence of this suit and averred that the Plaintiffs are imaginary Plaintiffs as there were no registered Trustees of the ***Church of Restoration***. Further, that even if the Plaintiffs amended its Notice of Motion and the Complaint, the said amendment was done without the requisite leave of the court. The Defendant urged the court to uphold the Preliminary Objection and strike out the suit with costs to the Defendant.

The said Preliminary Objection is opposed by the Plaintiffs. The court will first determine whether what has been raised by the Defendant qualifies to be a Preliminary Objection. The description of Preliminary Objection was given in the case of **Mukisa Biscuits Manufacturing Ltd..vs.. West End Distributors Ltd, Civil Appeal no.9 of 1969:** where it was held that:-

***“A Preliminary Objection consists of a point of law which has been pleaded or which arise from a clear implication out of Pleadings and which if argued as a preliminary point may dispose of the suit ... It cannot be raised if any facts has to be ascertained or if what is sought is an exercise of judicial discretion”.***

The Defendant has alleged that the suit herein is brought by none existent parties and that the alleged amendment was done without the leave of the court.

The Court has noted that initially, the suit herein was brought in the name of ***Church of Restoration, Registered Trustees***. The Defendant alleged that the said ***Registered Trustees*** did not exist. In response thereto, the Plaintiff amended its ***Complaint*** and the ***Notice of Motion*** and filed the suit in the name of ***Joseph Nganga Gatua, Cephas Ndungu Wango and Edwin Thuo Gachunu*** who have sued on behalf of the ***Church of Restoration***. The above named persons are ***members*** of the ***Committee of Executive Board of Church of Restoration(COR)***. Whether the Plaintiffs have capacity to sue on behalf of the ***Church of Restoration*** is a matter of evidence and therefore the court will have to ascertain facts on whether the Plaintiffs were justified to amend the Complaint and the Notice of Motion. The court finds that these amendments have been done before the close of the Pleadings. Order 8 Rule 1(1) is very clear on that:

***“A party may without leave of the court amend any of his pleadings once at any time before the Pleadings are closed”***

It is clear that the Defendant herein has not filed his Defence and the Pleadings have not been closed. The amendment was therefore done within the stipulated period. Therefore the court finds that the Preliminary Objection herein is not merited and the court will decline to uphold the same.

The Court will now turn to the two Notices of Motion which are seeking for injunctive reliefs. The two applications will be determined together. It is evident that injunctive reliefs are equitable remedies which are granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **CMC Motors Group Ltd & ANo. ..vs.. Evans Kagecha Boro, Civil Appeal no.295 of 2001,** where the Court held that

***“in granting the injunctory reliefs, the Superior Court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the Learned Judge if it is satisfied that the Learned Judge did not exercise his discretion judicially....”***

Both applicants have brought their applications under Order 40 and it is trite law that injunctions are granted where there is evidence of immediate danger to property by sale or other disposition. See the

case of *Noormohammed Janmohammed..vs.. Kassam Ali Virji Madhani (1953)20 LRK 8*, where the Court held that:

***“To justify temporary injunctions, there must be evidence of immediate danger to property by sale or other disposition. The purpose of temporary injunction is to preserve the status quo”***

Order 40 rule 1(a) upon which the application is anchored states as follows:

“Where in any suit it is proved by Affidavit or otherwise,

***a) That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree, the court may order grant of the temporary injunction to restrain such act or make such other orders for the purpose of staying and preventing the wasting, damaging, alienating, sale removal or disposition of the property as the court thinks fit until further orders”.***

The parties herein who have sought temporary injunctive orders must establish that the suit in dispute is in danger of being wasted, damaged or alienated.

As the court had found earlier, the suit in dispute herein is the land parcel ***Thika municipality Block 8/185***, which is registered in the names of ***Joseph Nganga Gatua, Cephas Ndungu Wango and Edwin Thuo Gachunu*** to hold as ***Trustees for Church of Restoration, Thika***. The dispute herein is whether the suit property was purchased by the ***Church of Restoration*** or by ***Missionary John Dodd*** for and on behalf of the ***International Gospel Outreach of Kenya*** which is a ***Bible College***. However, the Sale Agreement available shows the suit land was purchased by the ***Church of Restoration***. The issue of who provided funds for the purchase of the church is a matter of evidence which issue will be determined after calling of witnesses and production of exhibits and interrogation of the said evidence through cross-examination in the main trial. The said issue cannot be determined at the state. However it is not in dispute that the suit property is in the name, of the Plaintiffs herein. Therefore the Plaintiffs enjoys the rights of a proprietor as provided by ***Sections 24 and 25*** of the ***Land Registration Act*** which provides as follow:

24. Subject to this Act:-

***a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto:***

***and***

***b) the registration of a person as a proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.***

***25.(1) The rights of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-***

The Plaintiffs have averred that they have been forced to come to court to seek for restraining orders against the Defendant since he was excommunicated by the Church of Restoration and he is therefore not a Principal of the ***Bible College*** that is situated in the Plaintiffs suit land. However, the Defendant alleges that the ***Bible College*** is independent of the Church and the Plaintiffs cannot sack him as they did not hire him. It is evident that the ***Bible College*** is situated in the suit land. The issue of whether the said college is independent from the Church is a matter of evidence which cannot be determined now

through affidavit evidence. See the case of **Ramji Jethabhar Vs Mr & Mrs C.E Fischer , Civil Appeal No 5 of 1980**, where the Court held that:

***“where weighty issues are raised, it is better to subject them to the salutary test of cross-examination”***

Equally, the Court finds that the issue raised herein on whether the Defendant was excommunicated or not or whether he ceased being the Principal of the college or are all weighty issues which will only be determined after the calling of evidence and testing of the same through cross-examination in the main trial.

Having now analysed the available evidence, the Court finds that the Plaintiffs are the registered proprietors of the suit property as evident from the certificate of title, attached as an annexure to the pleadings. As proprietor of the suit property, the plaintiffs enjoy the rights of a proprietor as provided by Sections **24 and 25** of the Land Registration Act. Further, the said certificate of title can only be challenged under Section **26(1) (a) &(b)** of the said Act. For now there is no such challenge so far. The court finds and holds that the Plaintiffs have established that they have a prima-facie case with probability of success. That is therefore the finding is in respect of the Plaintiffs Amended Notice of Motion dated **1st March 2017**.

However in respect of the Defendant’s Notice of Motion dated **24th February 2017**, it is not very clear and evident that the Defendant was running the Bible College which is situated in the suit property independent of the Church of Restoration. That would only be determined after the trial. This court therefore finds and holds that the Defendant and/or applicant for the Notice of Motion dated **24th February 2017** , has not established a prima facie case to warrant the grant of any injunctive orders sought.

Having found that the Plaintiffs have established that they have a prima-facie case with probability of success and having found that the defendants has not established in his Notice of Motion dated **24th February 2017**, that he has a *prima-facie* case with probability of success, the Court finds that there is no need of delving into the other Principles for grant of injunctive orders. This is because the said principles are sequential. See the case of **Kenya Commercial Finance Company Limited Versus Afraha Education Society & Others, Civil Appeal No 142 of 1999 (2001) IEA86** where the Court held that:-

***“The judge should address himself sequentially on the conditions for granting of an application for injunction instead of proceeding straightaway to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title’s dispute and therefore has not demonstrated that it has a prima facie case with probability of success, no interlocutory injunction would be available”***

Having now carefully analysed the two Notices of Motion:- Amended Notice of Motion dated **1<sup>st</sup> March 2017**, by the Plaintiffs, the Court finds it merited and it is allowed entirely in terms of prayers No (c) and (d). However in respect of the Notice of Motion dated **24th February 2017**, filed by the Defendant, the Court finds it not merited and it is dismissed entirely with costs being in the Cause.

Further the Court dismisses the Defendant’s Preliminary Objection and directs that the suit herein should be set down for hearing and be decided on merit.

Further, taking into account the nature of this matter, the Court directs that this suit should be heard expeditiously so that the issues in disputed can be canvassed and determined at once. For that reason, the parties should prepare the suit for hearing by filing all relevant pleadings and complying with Order 11 within the next 3 months from the date of this Ruling.

It is so ordered

Dated, signed and delivered this **20th June 2017**.

**L. GACHERU**

**JUDGE**

**20/6/2017**

In the presence of

Hon Gacheru Judge

Court Clerk: Rachael

Mr. Kariuki: Plaintiffs/Applicants/Respondents

Mr. Nyaga Njeru: Defendant/Respondent/Applicant

**Court:** Ruling read in open Court in the presence of the above stated advocates.

**L. GACHERU**

**JUDGE**

**20/6/2017**

**Mr. Nyaga:** I would want to seek for leave to appeal because the Plaintiffs:- the National Church is being confused with the Regional Church. The Plaintiffs cannot have status to sue. May the Court Stay the Order pending the intended appeal. We will file a formal application for Stay. The Defendant is running the College. The land is for IGO. The college belongs to IGO. At the appropriate time, the court will be called to visit the site. I seek for the two prayers as indicated.

**L. GACHERU**

**JUDGE**

**20/6/2017**

**Mr. Kariuki :** Application for Leave to Appeal is unnecessary. Right of Appeal is a matter of right. The second prayer should be ignored. The Court should not sit on its own Appeal.

**The 3rd prayer:** The stay would defeat the orders granted by the Court

today. One need a formal application so that the Plaintiff/Applicants can respond.

The Plaintiffs are in possession, that order of Stay, what would it entails. May the Defendant be asked to file a formal application for stay. May the Court disallow the said application.

**L.GACHERU**

**JUDGE**

**20/6/2017**

**Mr. Nyaga:** Injunction are appealable. Right to appeal is in respect of the Preliminary Objection. That is not appeal-able as a matter of right. Grant of Stay is not an appeal against your order. I sought for



Stay as provided by **Order 41**. There is a Chapel and College. The Defendant has no access to the premises. We are seeking for stay of the Orders granted today.

**L. GACHERU**

**JUDGE**

**20/6/2017**

**Court:** The Court has pronounced its Ruling and granted an injunction in favour of the Plaintiffs. There is a lot of evidence coming from the Bar. The Court will not grant any Stay of the Orders issued now but will request the Defendant to file a formal application for Stay the soonest so that the same is adequately responded to by the Plaintiff.

On the Leave to Appeal today's Ruling, the same is granted.

Further, the Defendant to be issued with certified copies of the Ruling and the Order of the Court for purpose of Appeal.

**L. GACHERU**

**JUDGE**

**20/6/2017**