



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 162 OF 2016

THE PRESBYTERIAN FOUNDATION.....PLAINTIFF

VERSUS

1. DOUGLAS KIHICO WAIYAKI

2. LOISE MUKIRI

3. LEONARD NGIGI WAWERU

(Sued as the Chairman, Secretary and Treasurer

respectively of MAMA NGINA PRIMARY SCHOOL)

4. THE LAND REGISTRAR KIAMBU DISTRICT

5. THE COMMISSIONER OF LANDS

RULING

The plaintiff is a company limited by guarantee. The plaintiff has described itself as the legal custodian of all moveable and immovable properties of Presbyterian Church of East Africa (hereinafter referred to as "PCEA"). The dispute in this suit concerns the ownership of all that parcel of land known as Title No. Dagoretti/Kinoo/539 (hereinafter referred to as "the suit property"). The plaintiff has claimed that in the year 1972, it purchased a parcel of land known as Title No. Dagoretti/Kinoo/512 (hereinafter referred to as "Plot No.512") from the County Council of Kiambu. The plaintiff has averred that it subdivided Plot No.512 into four (4) portions namely, Title No. Dagoretti/Kinoo/537, 538,539 and 539. The plaintiff has averred that it caused Title No. Dagoretti/Kinoo/537 (hereinafter referred to as "Plot No.537") to be registered in its name as trustee of Mama Ngina Primary School and Title No. Dagoretti/Kinoo/539 (the suit property) to be registered in its name as trustee of Kinoo Girls High School. The plaintiff has contended that between 2006 and 2007 PCEA Kinoo Parish established a girls school on the suit property known as PCEA Kinoo Girls High School. The plaintiff has averred that the said school has been in operation since the year 2007.

The plaintiff has averred that on or around October, 2013, the 4th defendant colluded with the 1st to 3rd defendants and without consent of or notice to the plaintiff cancelled the title of the suit property in the name of the plaintiff as trustee of Kinoo Girls High School and registered the property in the name of the plaintiff as trustee of Mama Ngina Primary School. The plaintiff has contended that the cancellation of the said title in the name of the plaintiff as trustee of Kinoo Girls High School and the registration of the

property in the name of the plaintiff as trustee of Mama Ngina Primary School was carried out fraudulently, illegally and in violation of the plaintiff's constitutional right to own and deal with its own property. In its plaint dated 24th February, 2016, the plaintiff has sought the cancellation of the said registration so that the suit property can revert to the name of the plaintiff as trustee of Kinoo Girls High School.

Together with the plaint, the plaintiff filed a Notice of Motion application dated 24th February, 2016 seeking a temporary injunction restraining the defendants from occupying, trespassing on, entering, erecting upon or in any way transferring, charging, leasing or otherwise alienating or dealing with or disposing off and/or in any other manner whatsoever interfering with the plaintiff's use, possession and quiet enjoyment of the whole or any part of the suit property pending the hearing and determination of the suit.

The application is supported by the affidavit of Samuel Waweru Njoroge sworn on 24th February, 2016. In the said affidavit the plaintiff has contended that in February, 2016, the 1st to 3rd defendants invaded the suit property and purported to establish a school thereon by the name Mama Ngina Senior School. The plaintiff has contended that in pursuance of the said project, the 1st to 3rd defendants have trespassed on the suit property and started digging trenches with the intention of commencing construction on the property which acts are irregular and unlawful. The plaintiff has contended that Mama Ngina Primary School has its own parcel of land known as Plot No. 537 which is adjacent to the suit property. The plaintiff has contended that Mama Ngina Primary School has no proprietary interest in the suit property legal or equitable. The plaintiff has annexed to the said affidavit among others, a copy of the title deed for the suit property, a certificate of official search on the title of the said property, a copy of the extract of the register of the suit property and a number of photographs said to have been taken on the suit property.

The application is opposed by the defendants. The 1st to 3rd defendants responded to the application through a replying affidavit sworn by the 3rd defendant on 14th March, 2016 while the 4th and 5th defendants responded to the application through affidavit sworn by Winnie N. Miguro on 14th June, 2016. The 1st to 3rd defendant have contended that Plot No.537 and the suit property were at all material times registered in the name of the plaintiff to hold as trustee of Mama Ngina Primary School. The 1st to 3rd defendants have contended that Plot No.537 and the suit property were transferred to Mama Ngina Primary School by Kiambu County Council. The 1st to 3rd defendants have averred that as a sponsor of Mama Ngina Primary School, the plaintiff held the suit property as a trustee for the said school. The 1st and 3rd defendants have averred that the plaintiff's status as a trustee does not give the plaintiff ownership rights over the said property. The 1st to 3rd defendants have averred that the plaintiff has never owned the suit property.

The 1st to 3rd defendants have refuted the plaintiff's claim that Plot No. 537 originated from Plot No. 512 which was purchased by the plaintiff from Kiambu County Council. The 1st to 3rd defendants have contended that Plot No. 537 originated from Title No. Dagoretti/Kinoo/ 485(hereinafter referred to as "Plot No. 485") which was owned by Kiambu County Council. The 1st to 3rd defendants have averred that on 28th November, 2002, Kiambu County Council subdivided Plot No. 485 into two portions giving rise to Title No. Dagoretti/Kinoo/537(Plot No.537) and Title No. Dagoretti/Kinoo/538(Plot No.538). Title No. 537 was thereafter registered in the name of the Plaintiff as trustee of Mama Ngina Primary School.

With regard to Title No. Dagoretti/Kinoo/539 (the suit property), the 1st to 3rd defendants have admitted that the same originated from Plot No.512. The 1st to 3rd defendants have denied however that Plot No. 512 was purchased by the plaintiff from Kiambu County Council. The 1st to 3rd defendants have contended that Plot No.512 is a portion of Title No. Dagoretti/Kinoo/38 (Plot No. 38) which was owned by one, Kinyanjui Wamwiri. The 1st to 3rd defendants have averred that Plot No. 38 was adjacent to Plot No. 485 that gave rise to Plot No. 537 and Plot No. 538 upon subdivision. The 1st and 3rd defendants have

averred that sometimes in 1968, Kiambu County Council wanted more land for Mama Ngina Primary School and requested Kinyanjui Wamwiri to transfer to it a portion of his land, Plot No. 38 for the said primary school in exchange with a portion of land which Kiambu County Council owned a cross Nairobi-Naivasha Road. The request was accepted by Kinyanjui Wamwiri who subdivided Plot No. 38 into two portions namely, Plot No. 512 and Plot No. 513. Plot No. 512 was thereafter registered in the name of Kiambu County Council while Plot No. 513 was registered in the name of Kinyanjui Wamwiri who was added land measuring 6 acres by Kiambu County Council across Nairobi-Naivasha Road.

The 1st to 3rd defendants have averred that Kiambu County Council subdivided Plot No. 512 into two portions namely, Plot No. 539(the suit property) and Plot No. 540. It thereafter transferred the suit property to Mama Ngina Primary School with the plaintiff as its trustee. A title deed for the suit property was subsequently issued on 29th April, 2003. The 1st to 3rd Defendants have averred that Plot No. 540 remained in the name of Kiambu County Council. The 1st to 3rd defendants have contended that the plaintiff has never owned the suit property. The 1st to 3rd defendants have contended that Mama Ngina Primary School has been occupying the suit property and that its staff quarters are situated thereon. The 1st to 3rd defendants have contended that in the year 2003, Mama Ngina Primary School with the permission the School Management Committee established an Early Childhood Development (ECD) School and a public Secondary School by the name Mama Ngina Senior Secondary School. The 1st to 3rd defendants have contended that the two schools have been operating since the year 2007.

The 1st to 3rd defendants have contended that in the year 2008, the plaintiff with a view to dispossess Mama Ngina Primary School of its interest in Mama Ngina Senior Secondary School without the knowledge, consent or authority of the School Management Committee changed the name of Mama Ngina Senior Secondary School to PCEA Kinoo Girls High School. The 1st to 3rd defendants have contended that the plaintiff thereafter embarked on a fraudulent scheme to grab the suit property from Mama Ngina Primary School. The 1st to 3rd defendants have averred that again without knowledge, consent or authority of the Board of Governors of Mama Ngina Primary School, the plaintiff forged transfer documents and consents and caused the suit property to be transferred to its name as trustee of PCEA Kinoo Girls High School thereby illegally dispossessing Mama Ngina Primary School of its property and converting a public land to private land.

The 1st to 3rd defendant have contended that it was not until 2013 that the plaintiff's acts of fraud aforesaid were discovered and appropriate complaint made to the Police and the Land Registrar, Kiambu County. The 1st to 3rd defendants have averred that upon investigations, the Land Registrar Kiambu County confirmed the fraud that had been committed by the plaintiff and in exercise of the powers conferred upon him by law, caused the fraudulent transfer to be cancelled. The 1st and 3rd defendants have contended that the plaintiff has approached the seat of justice with dirty hands and as such it does not deserve the equitable reliefs sought.

The 1st to 3rd defendants have contended that the orders sought by the plaintiff if granted would prejudice the activities of Mama Ngina Primary School. The 1st to 3rd defendants have annexed to their affidavit in opposition to the application copies of, an extract of the register for Plot No. 485, an extract of the register for Plot No. 537, a certificate of official search on the title of Plot No. 537, an extract of the register for Plot No. 538, an extract of the register for Plot No. 512, an extract of the register for Plot No. 513, an extract of the register for Plot No. 539(suit property), an extract of the register for Plot No. 540, a letter dated 28th May, 2003 by PCEA Stevenson Githii Memorial Church to Mama Ngina Primary School and a number of photographs said to have been taken on the suit property.

In their replying affidavit, the 4th and 5th defendants reiterated the averments contained in the affidavit of the 3rd defendant the contents of which I have highlighted above. The 4th and 5th defendants have averred that before the fraudulent transfer of the suit property to the plaintiff was cancelled by the Land Registrar, the plaintiff's officials were summoned by the Land Registrar to appear before him and show cause why the fraudulent entry in the register should not be cancelled. The 4th and 5th defendants averred that the

said officials refused to appear before the Land Registrar. The 4th and 5th defendants have averred that in exercise of the powers conferred upon him under section 79(2) of the Land Registration Act, 2012 the Land Registrar rectified the register by transferring the property back to Mama Ngina Primary School. The 4th and 5th defendant have contended that the rectification of the register of the suit property was done in good faith and within the limits of the law. The 4th and 5th defendants have averred that the plaintiff did not follow the laid down procedure for acquiring public land.

The application was argued by way of written submissions. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendants' affidavits in reply to the application. Finally, I have considered the written submissions filed by the parties' respective advocates and the various authorities cited therein. What the Plaintiff is seeking in its application is a temporary injunction pending the hearing of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in the case of Giella vs. Cassman Brown & Co. Ltd (1973) EA 358, an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

I am not satisfied that the plaintiff has met the threshold for granting a temporary injunction. The plaintiff has not satisfied the court that it is the owner of the suit property. The defendants have placed uncontroverted evidence before the court showing that the suit property was at all material times owned by Kiambu County Council who transferred the same to the plaintiff to hold in trust for Mama Ngina Primary School. The plaintiff has not controverted the averments and documentary evidence placed before the court by the defendants showing that the plaintiff fraudulently caused the suit property to be registered in its name as trustee of PCEA Kinoo Girls High School. The plaintiff has not placed any material before the court showing how the parcel of land which it held as a trustee for a public school, Mama Ngina Primary School changed hands to PCEA Kinoo Girls High School which is a private school. I am not satisfied that the plaintiff has established a prima facie case with a probability of success.

I am also not persuaded that the plaintiff would suffer irreparable harm which cannot be compensated by an award of damages if the orders sought are not granted. There is no evidence before the court that the defendants are interfering with the learning activities in the school situated on the suit property. There is also no threat that the defendants may dispose of the suit property. This is because the suit property is still registered in the name of the plaintiff as trustee of Mama Ngina Primary School. Having held that the plaintiff has failed to establish a prima facie case and also to show that it will suffer irreparable harm if the orders sought are not granted, it is not necessary for me to consider the balance of convenience.

The upshot of the foregoing is that the Notice of Motion dated 24th February, 2016 has no merit. The same is dismissed with costs to the defendants.

Delivered and signed at Nairobi this 10th day of November 2017

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Njomo h/b for Thangei for the Plaintiff

No appearance for the 1st, 2nd, and 3rd Defendants

Mr. Kamau for the 4th and 5th Defendants

Catherine

Court Assistant