



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 197 OF 2015

1. BISHOP MARK KUBAI KARIUKI

2. BISHOP J. B. MASINDE

3. BISHOP WILLIAM K. TUIMISING

4. REVEREND SAMUEL GAKUO

5. REVEREND GEORGE MULINDE MWAULA

6. REVEREND PAUL MUTUNGA (*suing on behalf of Deliverance*)

Church of Kenya.....**PLAINTIFFS**

=VERSUS=

1. JAPHET NOTI CHARO

2. COUNTY GOVERNMENT OF KILIFI

3. THE ATTORNEY GENERAL..... DEFENDANTS

RULING

1. On 29th October, 2015, the Plaintiffs filed a Notice of Motion dated 28th October, 2015 in which they sought for the following orders:-

(a) That a temporary injunction do issue restraining the 1st Defendant/Respondent by himself, his servant and/or agent or otherwise restraining htem from constructing, developing, blocking, erecting a wall, remaining in or in any other way interfering with the Plaintiffs/Applicants access and quiet possession to the Plaintiffs' unsurveyed plot known as LR. No. Portion 4,5,7,8,10 and 11 Sabaki Squatters Upgrading Scheme pending the hearing and determination of this suit.

(b) THAT mandatory injunction do issue compelling the 1st Defendant/Respondent to forthwith demolish at his own cost the wall erected on the suit property, an unsurveyed plots known as LR.No. Portions 4,5,7,8,10,11 within such time as the Court will deem fit and in default the Plaintiff be at liberty to demolish the wall at the 1st Defendant's costs.

(c) THAT the Officer Commanding Malindi Police Station do provide security for such undertaking.

(d) THAT the costs for this application be provided for.

2. In response, the 1st Defendant filed a Replying Affidavit together with a Notice of Motion dated 2nd November, 2015 in which he sought for the following orders:-

(a) THAT upon interpartes hearing, the ex parte orders of the 29th day of October, 2015 be discharged, varied and/or set aside.

(b) THAT upon interpartes hearing, the court be pleased to strike out this suit for being sub-judice Malindi ELC No. 2 of 2012 formally Malindi HCCC NO. 6 of 2012 Japhet Noti Charo versus Reverend Paul Mutunga (sued on behalf of the Deliverance Church of Kenya).

(c) THAT cost to this Application and those of the main suit be provided for.

3. This Ruling is in respect to the two Applications.

The Plaintiffs' case:

4. According to the Affidavit of Reverend Paul Mutunga, the Plaintiffs applied to the Agricultural Society of Kenya (ASK), Malindi committee to be allocated with plot numbers 4, 5, 7, 8, 10 and 11 of the Sabaki Squatters Upgrading Scheme.

5. It is the deposition of the 6th Plaintiff that the ASK Malindi Committee allocated to the Plaintiffs the said plots in 1997; that the Plaintiffs erected a worship hall, a pastor's house, a nursery school and toilet amenities on the said plots and that the Plaintiffs have had continuous occupation of the suit plot for the last nineteen (19) years with a church membership of over 400 people.

6. According to the 6th Plaintiff, the suit property also has a nursery school with a population of over 100 children and more than 10 teachers and workers.

7. It is the Plaintiffs' case that when the 1st Defendant entered the suit land in the year 2012, the Plaintiffs filed Malindi Constitutional Petition No. 4 of 2012; that the 1st Defendant's Title Deed was the subject matter in ELC case No. 86 of 2013 and that the construction of the wall by the 1st Defendant around the suit property is obstructing the access to the church and the nursery school and the same has been done without the approvals from the relevant authorities.

8. The 6th Plaintiff has deponed that the 1st Defendant is using the fake Title Deed to show his ownership rights; that the construction of the wall is hindering access to the suit land and that the presence of police will be necessary to enable access to be created to the premises.

The 1st Defendant's case:

9. In his Replying Affidavit, the 1st Defendant deponed that he is the registered owner of the suit property; that the orders being sought have been overtaken by events because he has finished fencing off the suit property and that the Plaintiff failed to disclose to the court about the existence of Malindi ELC No. 2 of 2012 (formerly Malindi HCCC No. 6 of 2012).

10. The 1st Defendant deponed that the subject matter in Malindi ELC No. 2 of 2012 is the same subject matter in this suit; that the Sabaki Squatters Upgrading Scheme is very far from his property and that under Section 6 of the Civil Procedure Act, this court cannot proceed with this suit in view of the pending matters.

Submissions:

11. The Plaintiffs' advocate submitted that the Plaintiffs have established that they have a prima facie case with chances of success because the Applicants' church has been in possession of the suit land for more than 19 years; that they have a nursery school on the land and that in any event the construction that was done by the 1st Defendant was done without the approval of the relevant authorities.

12. Counsel submitted that owing to the nature of the activities that they carry out on the suit premises, the same cannot be compensated by money; that the Applicants are running a church which has a following of over 400 members and that they are also running a nursery school.

13. The Plaintiffs' counsel submitted that whereas the said Malindi ELC NO. 2 of 2012 is in existence, the same does not make the issues herein to be sub-judice.

14. The 1st Defendant's counsel submitted that the Plaintiff is aware of the existence of Malindi ELC No. 2 of 2012; that the subject matter herein is also directly and substantially in issue in Malindi ELC No. 2 of 2012 and that in the circumstances the court cannot proceed with trial of this suit.

15. The Defendant further submitted that in any event, the plots which the Plaintiffs are claiming are very far away from 1st Defendant's plot.

Analysis and findings:

16. In their Complaint, the Plaintiffs are praying for a permanent injunction restraining the 1st Defendant from interfering with their interests in unsurveyed plot numbers 4, 5, 7, 8, 10 and 11 Sabaki Squatters Upgrading Scheme and for the cancellation of a grant in respect of portion number 14024 which is in the name of the 1st Defendant.

17. In the meantime, the Plaintiffs are seeking for a prohibitory and mandatory injunctions.

18. The 1st Defendant has challenged the Application and the entire suit on the ground that there exists Malindi ELC No. 2 of 2012 which is dealing with the same subject matter.

19. I will therefore deal with the issue as to whether this suit is sub-judice Malindi ELC No. 2 of 2012 first.

20. The 1st Defendant herein sued the 6th Plaintiff in Malindi ELC No. 2 of 2012.

21. In the said suit, the 1st Defendant herein averred that he is the registered owner of land known as portion number 14034 contained in Land Survey Plan number 401352.

22. In that suit, the 1st Defendant sought for the eviction of Pastor Paul Mutunga, the 6th Plaintiff.

23. Together with the Complaint, the 1st Defendant herein filed an Application dated 23rd January, 2012 in which he sought for a prohibitory injunction restraining the 6th Plaintiff herein from entering or remaining in possession of portion number **10840**.

24. However, in his grounds in support of the Application, the 1st Defendant herein deposed that he was the registered proprietor of portion number 14034. Indeed, it is the grant in respect of land portion number 14034 that was attached on the Affidavit.

25. It is therefore obvious that the suit property in Malindi ELC No. 2 of 2012 is land portion number 14034.

26. When the 6th Plaintiff was served with the Complaint and the Application in Malindi ELC No. 2 of 2012, he appointed the current advocate to represent him.

27. In his Defence, the 6th Plaintiff herein averred that the Plaintiff (the 1st Defendant herein) is not the registered proprietor of land known as portion number 14023. The 6th Plaintiff herein further averred as follows:-

“9 The Defendant in answer to paragraphs 6 and 7 of the Complaint states that:-

(a) He is a trustee of the Deliverance Church of Kenya, together with five others, and that the Church was allowed by the Municipal Council of Malindi to erect a place of worship in the unsurveyed plot known as Plot NO. 4, 5, 7, 8, 10 and 11 Sabaki Squatters Upgrading Scheme.

(b) That the church has occupied the plot for the last fifteen (15) years.

(c) That the plot is a public land.

(d) That the Plaintiff on or about the year 2010 erected a temporary structure on the plot without approval by the Municipal Council of Malindi.

(e) That the Plaintiff has since fenced off the plot and denied the Defendant access to the Defendant's place of worship.

28. When the Application for injunction in Malindi ELC No. 2 of 2012 came up for hearing on 16th June, 2015, Mr. Otara, counsel for the 1st Defendant herein informed the court that indeed it was the Reverend Paul Mutunga, the 6th Plaintiff herein who was in possession of the suit property. On the same day, the parties entered into the following consent:

“The status quo pertaining now be maintained until the hearing of the suit.”

29. It is therefore true, as submitted by Mr. Otara, the 1st Defendant's counsel, that the issues that have been raised by the Plaintiffs herein are the same issues that were raised in the Defence that the 6th Plaintiff filed in Malindi ELC No. 2 of 2012.

30. Indeed, the suit premises that have been pleaded by the Plaintiffs herein, to wit, Plot numbers 4, 5, 7, 8, 10 and 11 are the same plots that were pleaded in the Defence in ELC No. 2 of 2012.

31. In the circumstances, I find and hold that this suit is sub-judice Malindi ELC No. 2 of 2012.

32. In any event, having agreed to maintain the status quo that was prevailing as at 16th June, 2015 pending the hearing of Malindi ELC No. 2 of 2012, I find and hold that the current Application by the Plaintiffs is superfluous. The Plaintiffs should have sought to enforce the order of 16th June, 2015 instead of filing the current suit and Application.

33. For those reasons, I strike out the Plaintiffs' Application dated 28th October, 2015 with costs.

Dated, signed and delivered in Malindi this 20th day of May, 2016.

O. A. Angote

Judge