



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.197 OF 2014

NANCY ATIENO OUMA.....**PLAINTIFF**

=VERSUS=

JOSEPH KALOKI t/a ROYAL ASSEMBLY.....**DEFENDANT**

R U L I N G

Introduction:

1. Before me is the Application by the Plaintiff dated 27th October 2014 seeking for the following order:

That pending the hearing and determination of this suit, a temporary injunction does issue against the Defendants either by himself, servants, agents, employees and assigns from trespassing, entering upon, remaining thereon, passing through and to cease any or any further construction or undertaking or any development on the Plaintiff's portions of land more particularly known as Plot Nos 5050 and 5053 Malindi

The Plaintiff's/Applicant's case:

2. The Plaintiff/Applicant has deponed that he is the registered owner of land known as portion number 5053 and 5050; that he engaged the services of Nairobi Homes (Mombasa) Limited to exercise the general management of the suit properties and that through the said agents, and by way of a letter of offer to lease dated 5th September 2012, the Defendant unequivocally took up possession of the suit properties with instructions not to erect any permanent structures thereon.
3. It is the Plaintiff's case that despite the arrangement, the Respondent unilaterally commenced construction of a stored building on the suit land and that the Defendant should be restrained from continuing with the construction of the said permanent building on the suit land.

The Defendant's/Respondent's case:

4. The Defendant has stated in his affidavit that he operates a church on six plots measuring about ½ acres belonging to the Plaintiff; that he indicated to the Plaintiff the nature of the development he wanted to undertake on the suit property which she agreed to and that thereafter he signed a letter of offer.
5. It is the Defendant's deposition that although he wanted to erect a tented church, the Plaintiff

- informed him he should put up a permanent church and that the Plaintiff made suggestions on the designs of the church.
6. It is the Defendant's case that the Plaintiff donated seats to the church and even became a frequent worshiper in the church and that she consented to the connection of the water and electricity in the premises.
 7. The Defendant deponed that everything that has been done in the church was pursuant to the knowledge, authority and consent of the Plaintiff and her agents and that the church, through donors, friends and well wishers including the Plaintiff have invested heavily on the church project.

Submissions:

8. The Plaintiff's counsel submitted that the Plaintiff has a prima facie case with chances of success having shown that the lease between himself and the Defendant did not authorise the Defendant to put up a permanent building on the land and that the said permanent building will occasion the Plaintiff irreparable loss because no one will be willing to buy the said land.
9. The Plaintiff's counsel relied on the case of **Murtahar Ahmed Dehman & Another Vs Athuman Sudi, Malindi ELC Civil Case Number 24 of 2012.**
10. The Defendant's counsel submitted that the Plaintiff is estopped from making this Application; that the Plaintiff supported the construction of the Plaintiff's church and that the Plaintiff is bound by her conduct.
11. Counsel submitted that if the orders prayed by the Plaintiff are granted, it would amount to granting final orders without hearing the parties on the merit of the suit.
12. The Defendant's counsel finally submitted that the plaintiff is guilty of unreasonable delay in bringing the Application and that the Application should have been filed immediately the construction commenced and not when it is almost complete. Counsel relied on the case of **Fankiwa Limited Vs Joseph Kamau & 5 others (2013) e KLR.**

Analysis and findings:

13. It is not disputed that the Plaintiff is the registered proprietor of portion number 5050 and 5053 Malindi. It is also not in dispute that on 5th September 2012, the Plaintiff allowed the Defendant to lease the suit property for a period of five years and three months with effect from 1st October 2012.
14. According to the Plaintiff's deposition, the Defendant was only allowed to put up a temporary church on the suit property and not a permanent structure. On the other hand, the Defendant has claimed that it is the Plaintiff who encouraged him to put up a permanent building on the suit property.
15. According to the letter of offer to lease, the Plaintiff let to the Defendant the suit property for the purposes of putting up a church. The lease of offer does not describe the kind of structures that the Defendant is supposed to put up.
16. In the absence of the kind of structure that the parties agreed upon, I am unable, at this stage, to determine whether indeed the Defendant was only required to put up a temporary structure and not a permanent building on the leased land.
17. The construction that the Plaintiff is seeking to stop is almost complete. According to the pictures annexed on the Defendant's affidavit, the whole structure has been built and is only awaiting roofing.
18. The Plaintiff has not explained in which circumstances he allowed the Defendant to put up the structure to the level that it is in now. Stopping the completion of a structure, or the usage of the same at this stage will be inequitable considering that the Plaintiff allowed the Defendant to put up the structure without any hindrance.
19. Considering that the Plaintiff entered into a written agreement with the Defendant in which he allowed the Defendant to put up a church on the suit premises, and having allowed the Defendant to put up a permanent structure which is almost complete, I find and hold that pending the hearing and determination of the suit the Plaintiff is estopped from demanding that the Defendant should not use the said property. I am in agreement with the case of **Fanikiwa Ltd Vs Joseph Kamau &**

5 others (2013) e KLR in which the court quoted **Hansbury and Maudslay, Modern Equity, 10th Edition at page 92** where it is stated as follows:-

“As we have seen, the Plaintiff must come promptly in the case of an ex parte injunction, as any delay illustrates that his case is not urgent. Where the Plaintiff has voluntarily delayed in his motion for an interlocutory injunction, he is unlikely to establish that his case is such that it would be unreasonable to make him wait until trial.”

- 20.The Plaintiff herein has acquiesced for a great length of time and the order of injunction cannot issue. Indeed, the order that the Plaintiff is seeking is mandatory in nature and the same cannot be granted at this stage.
- 21.My only concern is the magnitude of the investment the Defendant has put in the construction of a church on a property that does not belong to him considering that the permission to use the suit property shall expire in the year 2017, I am not sure if the said investment was well thought of.
- 22.However, and for the reasons I have stated above, the status quo that should be maintained is that the Defendant is in occupation of the suit property and he should be allowed to utilize it pending the hearing of the suit.
- 23.Consequently, I dismiss the Application dated 27th October 2014 with costs.

Dated and delivered in Malindi this **12th** day of **June**, 2015.

O. A. Angote

Judge