



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ELC DIVISION CASE NO.1473 OF 2014

**AFRICAN INLAND CHURCH [AIC KOMAROCK LOCAL CHURCH COUNCIL]
.....1ST PLAINTIFF**

**REVEREND SILAS MISOI
YEGO**

REVEREND GEOFFREY GICHURE

JOHN KITALA [Suing as the Trustee

**of the AFRICA INLAND CHURCH].....
.....PLAINTIFFS**

**SENATOR MIKE GIDEON MBUVI KIOKO “SONKO”
.....2ND PLAINTIFF**

**HON.JOHN NDIRANGU.....
3RD PLAINTIFF**

-VERSUS-

**KENYA POWER & LIGHTING COMPANY.....
.....1ST DEFENDANT**

**COUNTY GOVERNMENT OF NAIROBI.....
2ND DEFENDANT**

RULING

The matter coming up for determination is the Plaintiff/Applicant’s Notice of Motion dated **20th November,2014** brought under **Order 40 Rule 1 & 4 of the Civil Procedure Rules , Sections 1A & 1B, 3A and 63(e)**of the **Civil Procedure Act** and all the other enabling provisions of law seeking for orders against the Defendants. The applicants have sought for the following orders.

- a. *Spent*
- b. *Spent*
- c. *That the Court be pleased to grant a temporary injunction restraining the Defendants by themselves, their employees, servants, agents, or anybody claiming through them from entering into, trespassing demolishing or in any other way interfering with the 1st Plaintiff's quiet possession of the parcel of land known as Plot B measuring approximately 0.136 ha allocated to Plaintiffs by the 2nd Defendant (therein known as the Nairobi city Council) under allocation letter Ref. No. CP & Arch /002103 dated 15th September 1996 pending the hearing and determination of this suit.*
- d. *That cost of this application be provided for.*

The application is supported by the grounds stated on the face of the application and on the annexed affidavit of **Simon Wario Kihereko**.

These grounds are:-

- i. *That the Plaintiffs are the beneficial owners of a parcel of land known as plot B that was allocated to it by the Defunct Nairobi City Council vide an allocation letter No. CP & Arch /002103 dated 15th September 1996, whereupon they erected several buildings including its main sanctuary, offices, washrooms and Sunday school classes.*
- ii. *Further that the Plaintiff has promptly and consistently paid all land rents, rates, and fees as required of it by the 2nd Defendant for the continued occupation of the said portion of land.*
- iii. *That the 1st Defendant without any prior notice and/or any colour of right instructed agent of the second Defendant to carrying out demolitions of all the buildings, erected on Plot B.*
- iv. *Further that on 12th November, 2014, the 2nd Defendant's agents, demolished most of the structures on plot B leaving only the baptismal pool, old washrooms and the gate.*
- v. *That the Plaintiffs lost property worth millions of shillings and they are apprehensive that they will incur more losses since all its buildings will be demolished and its constitutional rights to own property will be grossly infringed.*
- vi. *That no prejudice would be occasioned to the Defendant's if the orders sought are granted.*

The deponent herein **Simon Wario Kihereko** who is the chairman of the local Church Council averred that the church was allocated the suit property in 1996 by the 2nd Defendant and built a Church thereon. However, the same was demolished on **12th November 2014**, by the agents of 2nd Defendant and the Plaintiffs incurred substantial loss. It was his contention that the Plaintiffs were never issued with a Notice to vacate the said plot and neither were any of the buildings marked with "X" to signify imminent demolition. He further contended that the said demolition was unlawful, improper and illegal since the Plaintiffs occupied the said land with the knowledge and approval of both defendants. He urged the court to intervene and issue conservatory orders in favour of the plaintiffs to prevent further demolitions.

The application is denied by both Defendants. **Julius Kinywa Marete** an employee of the 1st Defendant as a wayleave officer swore a replying affidavit and averred that he is a stranger to the averments raised by the Plaintiffs herein. He further averred that indeed the Plaintiffs did inquire from the 1st Defendant whether the Plaintiffs structures had infringed on any power wayleave. It was his contention that as a wayleave officer, he responded to the Plaintiffs vide letter dated **15th September 2005**, and informed them that the subject plot was not infringing on any power wayleave. He referred to **annextures swk4** [for

plaintiff]. He further stated that he only pointed out that the property was partly on a section of Kangundo Road Reserve. He further contended that he advised the Plaintiffs to seek further clarification from the City Engineer just to ensure that they were not building any structure on the road reserve. He therefore denied that the 1st Defendant ever authorised any person or entity to demolish any buildings on the Plaintiffs premises. He also denied that the 1st Defendant ever demolished the Plaintiffs structures built by the Plaintiffs.

Wilfred Maside, Building Inspector, of the 2nd Defendant swore a Replying Affidavit on behalf of the 2nd Defendant. He denied that the 2nd Defendant did demolish the said structures as alleged by the Plaintiffs. He further averred that for any demolition or removal of any structures from any property, the 2nd Defendant normally follow a mandatory process provided under the City By Laws. That the 2nd Defendant never issued any Enforcement Notice regarding the property described as Plot B owned by the Plaintiffs herein.

That the Plaintiffs had not obtained approval from the 2nd Defendant to put up such developments as described at paragraph 7 of the amended **Plaint**. Further that the 2nd defendant did not receive any instructions on **12th November, 2014** to demolish ,remove or clear any structures at the subject property as alleged by the Plaintiffs herein. He therefore denied that the 2nd Defendant agents demolished the suit property as none of the agents were disclosed. He urged the Court to dismiss the Plaintiffs suit and instant application.

The application was canvassed by way of written submissions. Though it was alleged that the 2nd Defendant had filed a preliminary objection and the Court directed that both the preliminary objection and the instant Notice of Motion be canvassed together by way of written submissions, the 2nd Defendant did not pursue the said preliminary objection and I will not delve on it.

Both Defendants have denied that they ever demolished the Plaintiffs structures on the property described in Plot B allegedly owned by African Inland Church Komarock. However, from the attached photographs to the application, it is evident that some portions of the church buildings had been demolished. The question that begs answers is who demolished the said structures?.

It is evident from the annexures attached to the affidavit in support of the application that the suit property was allocated to the Plaintiffs applicants in 1996, by the Defunct Nairobi City Council. It is also evident that the plaintiffs did put up a church structure and various other structures on the said plot B . It is also evident that there was a communication between the Plaintiffs and the 1st Defendant on **15th September 2005**, on the status of the said plot and the power wayleave. The 1st Defendant through **J K Marete** confirmed that the 5 metre clearance from the nearest conductor of powerline to the edge of the building was acceptable to them. He only advised the Plaintiffs to clarify with the City Engineer Department on whether the plot was partially a section of Kangundo Road Reserve.

The Court has carefully considered the Written Submissions and the referred authorities therein. The Applicants have sought for injunctive reliefs which are equitable remedies issued at the discretion of the Court. However such discretion must be exercised judicially. See the case of **Hasmukh Khetshi Shah vs. Tinga Tranders Ltd, Civil Appeal No. 326 of 2002 (2002) KLR 4628**, where the court held that:

“It must be stated at the outset that the granting of the interim injunction is an exercise of judicial discretion”.

For the applicants to succeed in this kind of an application, they needed to establish the threshold that was well elucidated in the case of **Giella Vs Cassman Brown and Co .Ltd (1973) EA 358**. The Court held that the applicant must show that :-

- a. ***He has a prima facie case with probability of success.***

- b. ***That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c. ***When the court is in doubt, to decide the case on a balance of convenience.***

So has the applicants established that they have a prima facie case with probability of success?.

There is no doubt that the applicants were allotted the suit property in 1996 by the Defunct Nairobi City Council. There is also no doubt that they have built various structures on the said suit property. None of the Defendants have denied that the plaintiffs herein are the beneficial owner of the suit property where they use it for religious purpose. Though the Plaintiffs have no title deed to the property, they are in possession of a letter of allotment dated 15th September 1996, issued to them by the then Nairobi City Council.

The Plaintiffs are indeed allottees of the said suit property and they have therefore established that they have a prima facie case with probability of success.

The second principle is whether the applicants will suffer loss and damages which cannot be compensated by an award of damages. It is evident that the Plaintiffs structures were demolished on **12th November 2014**. The demolition caused loss and damages to the Plaintiffs. Though the Defendants have denied that they did participate in the said demolition, the Plaintiffs did allege that the demolition was carried out by the agents of the 2nd Defendant. In fact **Wilfred Maside**, the deponent who swore an Affidavit on behalf of the 2nd Defendant did aver that the kind of structures that the Plaintiffs had erected on the suit property were permanent structures which required approval from the Physical Planning Department of the Nairobi City Council and plaintiffs had none. From that averments , it is highly probable that the agents of the 2nd Defendant did demolish the said structures because the Plaintiffs did not have development approvals or because the structures were partially on the Kangundo Road Reserve as pointed out by the **J.K Marete** in his letter dated **15th September 2005**.

The demolition of the Plaintiffs church meant that the worshippers would have no place to worship. Though there was monetary loss, the lack of place for worship cannot be quantified. The Plaintiffs would indeed suffer irreparable loss which would not adequately be compensated with an award of damages. See **J M Gichanga Vs Co-operative Bank of Kenya Ltd (203) eklr.**

On the 3rd principle of if the court is in doubt, the court finds that it is not in any doubt at all. The Plaintiffs owns the suit property which was allocated to it by the predecessor of the 2nd Defendant. The structures thereon have been demolished and though the Defendants have denied demolishing the same, there is a high possibility that the Defendants did demolish the structures herein. The Court finds that the balance of convenience would definitely tilt in favour of the Plaintiffs herein. Since there was no clear cut evidence of who between the Defendants herein did actually authorize the other to demolish the Plaintiffs structures, the Court finds that the costs herein should be in the cause.

Having now carefully considered the Notice of Motion dated **19th November 2014**, brought by the Plaintiffs/Applicants, the Court finds it merited and it is allowed in terms of **prayer No. 3** with costs being in the cause.

It is so ordered.

Dated, Signed and Delivered this 5th day of November, 2015

L.GACHERU

JUDGE

In the presence of

Mr Mukua holding brief holding brief for Kibate for 1st Defendant and Mr Mogaka for 2nd Defendant/Respondents

M/s Jakaila holding brief for Mrs Mwandubo for the Plaintiffs/Applicants.

L.GACHERU

JUDGE

Court :

Ruling read in open Court in the presence of the above advocates.

L.GACHERU

JUDGE