Board of Trustees, Good News Church of Africa v Board of Management, Eldoret Secondary School (Environment & Land Case 18 of 2019) [2024] KEELC 4664 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4664 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 18 OF 2019

EO OBAGA, J

JUNE 13, 2024

BETWEEN

BOARD OF TRUSTEES, GOOD NEWS CHURCH OF AFRICA .... PLAINTIFF

AND

BOARD OF MANAGEMENT, ELDORET SECONDARY SCHOOL .... DEFENDANT

RULING

1. This is a ruling in respect of a Notice of motion dated 16.1.2024 in which the plaintiff/Applicant seeks the following orders:-

    1. Spent

    2. Spent

    3. That pending the hearing and determination of this suit the court do issue; a permanent injunction restraining the Defendant/Respondent by themselves, their agents or servants from encroaching, trespassing, constructing and/or in any manner from interfering with suit land being land parcel known as Eldoret Municpality Block 11/20.

    4. That pending the hearing and determination of this suit, the court do issue an order directing the Defendant/Respondent to demolish any structures erected and/or constructed by themselves, their agents or servants on the land parcel known as Eldoret Municpality Block 11/20.

    5. Cost of this application be provided for.

2. The Applicant depones that it is the registered owner of LR No. Eldoret Municipality Block 11/20 (suit property). The suit property was transferred to it by the Board of Trustees of Gospel Furthering

Fellowship via a resolution passed on 25.4.2014. The Applicant proceeded to process title which it obtained on 23.3.2018.

3. The Defendant/Respondent has encroached into a portion of the suit property and constructed structures without the consent of the Applicant. It is on this basis that the Applicant is seeking the orders in paragraph one herein above.

4. The Respondent opposed the Applicant's application through a replying affidavit sworn on 23.1.2024. The Respondent denies the Applicant's allegations that it has encroached on to the Applicant's property. The Respondent contends that it has been in occupation since 1978 when it was granted a licence to operate a school on part of the suit property.

5. On the issue that it has put up permanent structures on the suit property, the Respondent denies that it is the one putting up the permanent structures exhibited in the photographs annexed to the Applicant's application. The Respondent further states that the Applicant's prayers are seeking final orders and that the Applicant's application is intended to evict it from the suit property. It states that investigations carried out have attributed the constructions on the suit property to the Applicant.

6. The Respondent contends that the constructions were put up while its officials were out of the Country during school closure for the December 2023 holidays. It states that the Applicant is playing victim with a view to securing an eviction.

7. The parties agreed to file written submissions. The Applicant filed undated submissions on 24.4.2024. The Respondent filed its submissions dated 24.3.2024.

8. The Applicant submits that it has met the threshold set out in the case of *Giella v Cassman Brown Co. Limited* (1973) EA 358 which stated that an Applicant must demonstrate that he has a prima facie case with probability of success; that he cannot be adequately compensated by an award of damages and that in case the court is in doubt, the matter has to be decided on a balance of probabilities.

9. The Applicant also relied on the case of *Mrao Limited v American Bank of Kenya Limited & 2 others* (2003) KLR 125 Civil Appeal No. 39 of 2002 where the Court stated as follows:-

> " ...in Civil cases it is a case in which on the material presented to the court a tribunal property directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

10. The Applicant submits that it has established that it has a prima facie case with probability of success as it has title to the suit property. On whether the Applicant will suffer irreparable loss which will not be compensated in damages, the Applicant submits that the mere fact that a Respondent is capable of paying damages is no bar to it being granted an injunction. For this proposition the Applicant relied on the cases of *Said Ahmed v Manasseh Benga & another* (2019) eKLR, *Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 others* (2008) eKLR and *Niaz Mohammed Jan Mohammed v The Commissioner for Lands & 4 others* (1996) eKLR where in this case, the court stated as follows:-

> " It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought".

11. On the issue of balance of convenience, the Applicant submits that it is not possible for the Respondent to claim that they are not responsible for construction of the new buildings on the suit property yet they

are not willing to have the same buildings demolished as the Applicant prays. The Applicant submits that if an injunction is not issued, it will suffer great injustice.

12. The Respondent submitted that the Applicant cannot be granted an injunction in the manner sought because the Respondent has been in occupation of the suit property for 49 years and therefore the issue of encroachment does not arise. The Respondent further submits that the Applicant has not met the threshold set out in the cases of *Giella v Cassman Brown & Co. Limited* and *Mrao Limited v First American Bank of Kenya & 2 others* (*Supra*).

13. The Respondent relied on the case of *Simon Kimemia Muthondu v Moses Mugo Maringa* (2017) eKLR where the Court stated as follows:-

> " ...as indicated above, the defendant's occupation of the suit land is not really in doubt. If an order for temporary injunction is granted, it will have the effect of evicting the defendant from the suit land where he has lived and developed since 1973. It is not the policy of the court to issue such orders at an interlocutory stage. Guided by the principle laid down in the Films Rover International case (*Supra*), it is my finding that the lower risk of injustice demands that I decline to issue an order of temporary injunction. After all, though he is the registered proprietor of the suit land, the Plaintiff, unlike the defendant, has not been in occupation of the land. It would therefore be in the interest of justice that the status quo now obtaining in the suit land remains until this case is heard and final orders issued. The prayer for a temporary injunction is therefore not appropriate in the circumstances of this case and must be rejected..."

14. On the issue of irreparable loss, the Respondent submits that the price of an acre where the suit property is situate is ascertainable and the Applicant can be compensated. The Respondent therefore submits that the Applicant has not met this condition.

15. On the issue of balance of convenience, the Respondent submits that it has been in occupation since 1978 and has been running a school on the suit property. The balance of convenience therefore tils in its favour.

16. I have carefully considered the Applicant's application as well as the submissions by the parties. The only issue for determination in this matter is whether the Applicant has met the threshold for grant of the orders sought.

17. As was stated in the case of *Giella v Cassman Brown & Co. limited* (*Supra*), an applicant has to demonstrate that he had a prima facie case with probability of success. A prima facie case was defined in the case of *Mrao Limited* (*Supra*). I have gone through the materials placed before me. There is no contention that the Applicant is the registered owner of the suit property. There is also no contention that the Respondent has been on the suit property since 1978. It has established a school on it which has been running since then.

18. If the court were to issue a temporary injunction in the manner sought, it would amount to evicting the Respondent before this suit is determined. The court has to interrogate the circumstance under which the Respondent has been in occupation for this long. This being the case, this is not a clear case where a mandatory injunction can be given in the manner prayed for in prayer 4. I therefore find that the Applicant has not established a prima facie case with probability of success.

19. On whether the Applicant will suffer irreparable loss should an injunction be denied, I find that the Applicant will not suffer any irreparable loss which will not be compensated in damages. The Applicant has lived on a distinct portion of the suit property for decades. The Applicant has never occupied that

portion on which there is a school. If the Applicant finally succeeds, the distinct portion can be valued and there will be compensation.

20. On the issue of balance of convenience, there is no contention that the Respondent has been in possession for 49 years. The Applicant only came to claim the portion upon obtaining title in 2018. The balance of convenience therefore tilts in favour of the Respondent. I therefore find that the Applicant's application is devoid of merit. The same is dismissed with costs to the Respondent.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 13TH DAY OF JUNE, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

M/s Nasongo for Mr. Yego for Applicant.

M/s Wahome for M/s Odwa for Respondent.

Court Assistant –Laban