Holy Spirit Church of East Africa Registered Trustees v Friends Church in Kenya (Quakers) Nairobi Yearly Meeting Trustees (Environment & Land Case E405 of 2024) [2024] KEELC 13479 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13479 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E405 OF 2024

JO MBOYA, J

NOVEMBER 7, 2024

BETWEEN

HOLY SPIRIT CHURCH OF EAST AFRICA REGISTERED TRUSTEES ..... PLAINTIFF

AND

FRIENDS CHURCH IN KENYA (QUAKERS) NAIROBI YEARLY MEETING TRUSTEES ..... DEFENDANT

RULING

Introduction And Background

1. The Plaintiff/Applicant herein has approached this honourable court vide Notice of Motion Application dated the 1st October 2024, brought pursuant to Sections 1A,1B,3A, & 63(c) & (e) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; and Order 40 Rules 1,2, & 3 of the Civil Procedure Rules, 2010; and in respect of which same [Applicant] has sought for the following reliefs;

    i. That the Honourable Court be pleased to certify this Application urgent and to hear the Application Ex-parte in the first instance due to the said urgency.

    ii. That the Honourable Court be pleased to order the Defendant through its trustees. Pastors. servants, agents or howsoever.to immediately vacate from or stop occupying; or possessing; or developing; or using or being on; or wasting; or in any other way dealing with the Plaintiff's land parcel No. L.R. 209/18222- Makadara. Nairobi; pending the inter-partes hearing of this Application.

    iii. That the Honourable Court be pleased to order the Defendant through its trustees, Pastors, servants, agents or howsoever, to forthwith vacate from; or stop possessing; or developing, or

using; or being on; or wasting, or in any other manner dealing with the Plaintiff's land parcel L.R. No. 209/18222 pending the hearing and determination of this suit.

iv. That the costs of this Application be provided for.

2. The subject Application is anchored on various grounds which have been enumerated at the foot of this Application. Furthermore, the Application is supported by the affidavit of one Bernard Mugazia Adeka, sworn on even date, namely, 1st October 2024. Besides, the Application is supported by a supplementary affidavit sworn by the said deponent on 23rd October 2024. Suffice it to point out that the deponent has annexed various documents to both the supporting affidavit and the supplementary affidavit.

3. Upon being served with the instant Application, the Defendant/Respondent filed a Replying affidavit sworn by one Abisayi Ambenge Oigo on 18th October 2024; and also filed a notice of preliminary objection dated 18th October 2024. Pertinently, the preliminary objection adverts to the question that the Plaintiff herein is non-existent and thus same [Plaintiff] is incapable of originating and maintaining the instant suit.

4. The Application beforehand came up for hearing on 28th October 2024 whereupon the advocates for the respective parties covenanted to canvass and dispose the Application and the preliminary objection simultaneously. In addition, the advocates also agreed that the Application and the Preliminary Objection be heard orally.

5. Arising from the foregoing, the court issued directions pertaining to the hearing and disposal of the Application and the preliminary objection. Suffice it to point out that the court ordered that both the Application and the preliminary objection be canvassed orally.

Parties' Submissions:

Applicant's Submissions:

6. The Applicant herein adopted and reiterated the grounds contained in the body of the Application as well as the averments in the supporting affidavit. Furthermore, the Applicant has also highlighted and reiterated the contents of the supporting affidavit.

7. Other than the foregoing, learned counsel for the Applicant proceeded to and highlighted five [5] salient issues for consideration and determination by the court. Firstly, learned counsel for the Applicant submitted that the Applicant herein is the registered trustees of the Holy Spirit Church of East Africa and that by virtue of being the registered trustees, the Plaintiff is thus seized of the requisite locus standi to commence and maintain the instant suit. To this end, learned counsel for the Plaintiff has cited and referenced the provisions of Section 3 of the Trustees [Perpetual Succession] Act. Chapter 167 Laws of Kenya.

8. Arising from the foregoing, learned counsel has submitted that on the basis of the Act [supra] the Plaintiff has the requisite locus standi and hence the preliminary objection raised by the Defendant is not only misconceived but same is legally untenable.

9. Secondly, learned counsel for the Plaintiff has submitted that the Plaintiff herein is the lawful and legitimate proprietor of L.R No. 209/182022 [the suit property]. In this regard, learned counsel for the Plaintiff has cited and referenced a copy of the certificate of title which was issued and registered in the name of the trustees of the church on 3rd August 2009.

10. To the extent that the Plaintiff/Applicant is the lawful and registered proprietor of the suit property, learned counsel for the Plaintiff/Applicant has therefore submitted that the Plaintiff/Applicant is entitled to partake of and benefit from the privilege's attendant to the ownership of the suit property. In particular, learned counsel has highlighted that the Plaintiff is entitled to exclusive possession, occupation and use of the suit property.

11. Thirdly, learned counsel for the Applicant has submitted that despite being the lawful and registered proprietor of the suit property, the Plaintiff has been denied and deprived of occupation, possession and use by the Defendant/Respondent, who has since encroached upon and fenced the entire of the suit property. However, learned counsel for the Applicant has posited that the actions by and on behalf of the Defendant/Respondent constitutes trespass and infringement of the Applicant's proprietary rights to the suit property.

12. Fourthly, learned counsel for the Applicant has submitted that on the basis of being the registered owner of the suit property, the Plaintiff is entitled to enjoy the suit property. In this regard, learned counsel for the Applicant has submitted that the Applicant has espoused and demonstrated the existence of exceptional circumstances to warrant the grant of an order of mandatory and temporary injunction as against the Defendant/Respondent.

13. Fifthly, learned counsel for the Applicant has submitted that the Defendant/Respondent herein has no lawful rights to and in respect of the suit property or at all. In this regard, it has been contended that the document being espoused by the Respondent namely, a letter of allotment dated the 6th January 1998 does not constitute title to and in respect of the suit property.

14. Additionally, it has been submitted that the impugned letter of allotment also does not relate to the suit property or at all. For good measure, it has been posited that the impugned letter of allotment does not capture the title details of the suit property and hence there is no basis upon which the Defendant/Respondent can stake a claim to ownership of the suit property.

15. Sixthly, learned counsel for the Plaintiff/Applicant has also submitted that even though the Defendant proceeded to and erected a perimeter wall around the suit property, the perimeter wall was never approved by the County Government of Nairobi. In any event, learned counsel for the Plaintiff/Applicant has also submitted that the impugned wall was erected fraudulently and on the basis of an approval which was issued in respect of L.R No. 209/18409; and not otherwise.

16. Based on the foregoing, learned counsel for the Plaintiff/Applicant has submitted that the Application beforehand is meritorious and thus same [Application] ought to be allowed.

Respondent's Submissions:

17. The Respondent adopted the contents of the Replying affidavit sworn on 18th October 2024; as well as the Notice of preliminary objection of even date. Thereafter, the Respondent ventured forward and highlighted six [6] salient issues for consideration and determination by the court.

18. First and foremost, learned counsel for the Defendant/Respondent has submitted that the Plaintiff herein is a non-existent body. In this regard, it has been contended that insofar as the Plaintiff is non-existent in law same [Plaintiff] is devoid of the requisite locus standi to commence and maintain the instant suit.

19. Furthermore, it has been submitted that in the absence of the requisite locus standi, the suit by the Plaintiff/Applicant is therefore premature, misconceived and legally untenable. To this end, the court has been implored to proceed and strike out the Plaintiff's/Applicant's suit.

20. Secondly, learned counsel for the Defendant/Respondent has submitted that even though the Plaintiff/Applicant was served with a notice of preliminary objection which questions its existence, the Plaintiff/Applicant has failed and/or neglected to file and place before the court a copy of the Trust Deed duly registered. In the absence of a copy of the Trust Deed, it has been contended that the natural inference is that the Plaintiff is truly non-existent.

21. Thirdly, learned counsel for the Defendant/Respondent has submitted that the certificate of title which the Plaintiff/Applicant has annexed and placed before the court shows that the suit property is registered in the names of individual persons as trustees and not in the name of the registered trustees. In this respect, it has been posited that there is a disconnect between the Plaintiffs herein and the certificate of title that has been exhibited before the court.

22. To the extent that the certificate of title is issued in the names of individual persons as trustees of the church, Learned counsel for the Defendant/Respondent has contended that it is the officials [if at all], who could file the instant suit and not the Plaintiff.

23. Arising from the foregoing, learned counsel for the Defendant/Respondent has therefore implored the court to find and hold that the Plaintiff/Applicant herein is non-existent and thus incapable of commencing and/or sustaining the instant suit. In short, learned counsel for the Defendant/ Respondent has invited the court to find and hold that the Plaintiff herein is devoid of the requisite locus standi to maintain the suit.

24. Fourthly, learned counsel for the Defendant/Respondent has submitted that the Defendant/ Respondent herein is the lawful and registered owner of L.R No's 209/18409 and 209/1822, respectively.

25. In particular, learned counsel for the Defendant/ Respondent has submitted that the Defendant was issued with a letter of allotment dated 6th January 1998 pertaining to and concerning the suit property. Furthermore, it has been contended that upon being issued with the letter of allotment, the Defendant proceeded to and complied with the terms of the allotment.

26. Additionally, learned counsel for the Respondent has submitted that having complied with the terms of the letter of allotment, the Defendant/Respondent is therefore deemed to be the lawful and legitimate owner of the suit property. In this regard, it has been posited that by virtue of being the owner of the suit property, the Defendant/Respondent is therefore entitled to use the suit property for her own purposes.

27. Fifthly, learned counsel for the Defendant/Respondent has submitted that other than being the beneficiary of the letter of allotment issued on 6th January 1998, the Defendant/Respondent herein has also been in occupation of the suit property. At any rate, the learned counsel for the Defendant has posited that on the basis of being in occupation, the Defendant proceeded to and procured development approval from Nairobi City County Government, which development approval enabled the Defendant/Respondent to construct a perimeter wall round the suit property.

28. On the contrary, learned counsel for the Defendant/Respondent has submitted that the Plaintiff/ Applicant herein has never been in occupation and possession of the suit property. In any event, learned counsel has contended that no evidence has been placed before the court by the Plaintiff/Applicant to demonstrate that same [Plaintiff] has ever been in possession of the suit property.

29. Sixthly, learned counsel for the Defendant/Respondent has submitted that the Plaintiff/Applicant herein has neither placed before the court nor demonstrated the existence of a prima facie case with probability of success. In this regard, it has been contended that in the absence of a prima facie case,

the Plaintiff/Applicant cannot partake of and/or benefit from a mandatory and temporary order of injunction.

30. On the other hand, learned counsel for the Defendant/Respondent has also submitted that the Plaintiff/Applicant has also failed to establish the existence of peculiar and exceptional circumstances to warrant the grant of an order of mandatory injunction. In any event, it has been contended that the grant of such an order will culminate into the demolition of the wall which was constructed by the Defendant at huge costs.

31. Suffice it to point out, that learned counsel for the Defendant has thereafter invited the court to take cognizance of the extent and nature of prejudice that the Defendant/ Respondent would be exposed to, if the orders of mandatory injunction are granted as prayed.

32. Finally, and upon the enquiry by the court as to whether the commissioner of oaths who administered oath at the foot of the replying affidavit works at the Defendant's Advocates law firm, learned counsel conceded and acknowledged that the commissioner for oaths indeed works in the said law firm. Furthermore, learned counsel posited that the commissioner for oaths is an associate in the firm, namely, M/S Tito and Associates Advocates.

33. When prodded further, learned counsel for the Defendant conceded that the provisions of Section 4 of the Oaths & Statutory Declaration Act prohibit a commissioner of oaths who works in the same law firm from administering oath in a matter where the Firm is acting for a Party; or commissioning an affidavit in respect of a matter where the law firm is either a party or acting for a party.

34. Notwithstanding the foregoing, learned counsel for the Defendant/Respondent implored the court to find and hold that the Application beforehand is devoid of merits and thus same ought to be dismissed with costs.

Issues For Determination:

35. Having reviewed the Application beforehand; the response thereto and the Notice of preliminary objection and upon taking into consideration the oral submissions on behalf of the respective parties, the following issues do arise and are thus worthy of determination;

    i. Whether the Plaintiff/Applicant is seized of the requisite Locus standi to commence, mount and/or sustain the suit and the instant Application.

    ii. Whether the Replying affidavit sworn on the 18th October 2024 accords with the provisions of Section 4 of the Oaths and Statutory Declaration Act or otherwise.

    iii. Whether the Applicant herein has established and demonstrated the requisite ingredients to warrant the grant of temporary injunction or otherwise.

    iv. Whether the Plaintiff/Applicant has met and or satisfied Ingredients for the grant of the order of mandatory injunction or otherwise.

Analysis And Determination

Issue Number 1 Whether the Plaintiff/Applicant is seized of the requisite locus standi to commence, mount and/or sustain the suit and the instant Application.

36. Learned counsel for the Defendant/Respondent filed a Notice of Preliminary Objection dated 18th October 2024 and in respect of which learned counsel for the Defendant has contended that the Plaintiff/Applicant is divested of the requisite locus standi to commence and/or maintain the instant

suit. In this regard, learned counsel for the Defendant has therefore invited the court to non-suit the Plaintiff/Applicant and thereafter strike out the entire suit.

37. Learned counsel for the Defendant/Respondent submits that the Plaintiff herein does not exist in law, same [Plaintiff] cannot therefore approach the court and seek legal remedies or otherwise.

38. Additionally, learned counsel for the Defendant/Respondent has also submitted that even though the Plaintiff/Applicant was served with a Notice of Preliminary Objection, the Plaintiff/Applicant has failed to produce and place before the court a copy of the deed of trust [if any] that was registered in accordance with the law. In this regard, it has been contended that having failed to tender and produce before the court a copy of the deed of trust, the only logical inference is that the Plaintiff is non-existent.

39. Other than the foregoing, the Defendant/Respondent has also posited that even a copy of the certificate of title which has been annexed and exhibited by the Plaintiff/Applicant shows that the same [certificate of title] is in the name of three individual persons, albeit indicated to be trustees of the church. In this regard, learned counsel for the Defendant/Respondent has submitted that it is the said individuals who ought to have filed the instant suit and not the non-existent Plaintiff.

40. On his part, learned counsel for the Plaintiff/Applicant has submitted that the Plaintiff/Applicant is a body corporate duly registered under the Trustees [Perpetual Succession] Act, Chapter 167 Laws of Kenya and hence seized of the requisite capacity to file and maintain the instant suit.

41. In addition, learned counsel for the Plaintiff has cited and referenced the provisions of Section 3 of the Trustees [Perpetual Succession] Act [supra] and invited the court to find and hold that under the said provisions, the Plaintiff herein [which is the registered trustees] is bestowed with the requisite legal capacity to sue in its own name.

42. Having considered the rival submissions, I beg to take the following position. Firstly, there is no gainsaying that what has been filed by the Defendant/Respondent is a notice of preliminary objection which questions the legal capacity of the Plaintiff to file and maintain the instant suit.

43. To the extent that what has been filed and canvassed is a notice of preliminary objection, it is imperative to state and outline that same [notice of preliminary objection] can only be canvassed and argued on the assumption that the pleadings and averments filed by the adverse party are deemed to be correct and not otherwise. For good measure, if the proponent of the preliminary objection is disputing or contesting any aspect of the pleadings and averments by the adverse party [Plaintiff herein], then the preliminary objection is negated.

44. Put differently, where the proponent of a preliminary objection disputes the facts raised by the adverse party, then it is deemed that the facts are in contest and in this respect, a preliminary objection cannot be canvassed. Simply put, a preliminary objection cannot suffice where the facts underpinning the contest are in controversy and thus require investigations and ascertainment by the court in the usual manner.

45. To buttress the foregoing exposition of the law, it suffices to cite and reference the decision of the Supreme Court of Kenya in the case of Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014) [2015] KESC 2 (KLR) (15 December 2015) (Ruling), where the court held thus;

> 14. As to whether a preliminary objection is one of merit, this Court has already pronounced itself on the threshold to be met. The Court endorsed the principle in Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696, in the case of Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]:"To restate the relevant principle from the precedent-setting case, Mukisa

Biscuit Manufacturing Co. Ltd –vs.- West End Distributors (1969) EA 696:'a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion'."

15. The Joho decision has been subsequently cited by this Court in *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014*, [2014] eKLR; and in *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others, Application No. 50 of 2014*, [2015] eKLR, in which the Court further stated [paragraph 15]:"Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."

16. It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its Application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (see *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014*, [2014] eKLR).

46. The legal position that a preliminary objection cannot be canvassed and raised where facts are in contest was also highlighted in the case of Oraro v Mbaja [2005] eKLR, where the court stated and held thus;

> I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence.
>
> Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo , that "where a Court needs to investigate facts, a matter cannot be raised as a preliminary point." This legal principle is beyond dispute, as there are divers weighty authorities carrying the message. In addition to the ones I have cited, Mr. Ougo drew my attention to yet others. In El-Busaidy v. Commissioner of Lands & 2 Others [2002] 1KLR 508

47. Flowing from the decisions [supra], it is now apposite to revert to the instant matter and to consider whether the preliminary objection by the Defendant/Respondent fits within the circumscription of the law or otherwise.

48. To start with, there is no gainsaying that the Plaintiff has described herself as a body corporate with perpetual succession. Furthermore, the Plaintiff has contended that same is duly registered under the Trustees [Perpetual Succession] Act, Cap 196 Laws of Kenya. For ease of reference, it is imperative to reproduce the contents of paragraph One [1] of the Plaint filed and/lodged by the Plaintiff/Applicant.

49. Same are reproduced as hereunder;

1. The Plaintiff is the Registered Trustees of the Holy Spirit church of East Africa. a body corporate with perpetual succession. which owns and manages the properties of the Holy Spirit Church of East Africa and whose address of service for the purposes of this case is care of Masore Nyang'au & Co. Advocates, Agip House, 3rd Floor,haile Selassie Avenue, Room 327, P.O. BOX 51313-00200, Nairobi;Email: masorenyangau a vahoo.com.

50. To my mind, the Plaintiff herein has adverted to her legal capacity and posited that same [Plaintiff] is a body corporate with perpetual succession. This is a clear averment that is contained in the body of the Plaint filed.

51. The contention by and on behalf of the Plaintiff may or may not be true. However, if the Defendant is to canvass a preliminary objection disputing the capacity of the Plaintiff, then that preliminary objection must proceed on the assumption that paragraph 1 of the Plaint is correct.

52. Suffice it to point out that the moment the Defendant/Respondent contests and disputes the said pleading, then the preliminary objection cannot be canvassed. To this end, it shall be deemed that the Defendant has admitted the pleadings by the adverse party. [See Mukisa Biscuits Ltd v West End Distributors Ltd [1989] EA 696].

53. Secondly, learned counsel for the Defendant/Respondent has contended that even though the Plaintiff was served with the notice of preliminary objection same [Plaintiff] has failed to annex and/or exhibit a copy of the trust deed. In this regard, learned counsel for the Defendant has therefore invited the court to make an assumption/ inference that there is no such trust deed and hence the Plaintiff is non-existent.

54. I beg to point out that the production of the trust deed, if at all, is an evidential issue. Being an evidential issue, it can only be gone into in the conventional manner. Suffice it to point out that the time for producing and tendering documents and evidence is yet to accrue/ arrive.

55. Thirdly, it is not lost on this court that the preliminary objection which questions the locus standi of the Plaintiff/Applicant, can also not be canvassed subject to production of documents/evidence. Such an endeavour would take the preliminary objection outside the parameters of the law [See Oraro v Mbaja [2005] eKLR].

56. Finally and on the question of the preliminary objection, learned counsel for the Defendant/ Respondent has also invited the court to examine the certificate of title which has been annexed to the supporting affidavit. In this regard, it has been pointed out that the certificate of title is registered in the names of three [3] individual albeit as trustees of the church. To this end, it has been contended that if a suit were to be filed then same [suit] ought to have been filed by the named individuals in their capacities as trustees.

57. Without belabouring the point, there is no gainsaying that the Defendant/Respondent cannot also not be allowed to agitate the preliminary objection by referencing evidence, either attached to her own Affidavit or otherwise.

58. Notwithstanding the foregoing, I have examined the certificate of title and I have seen that same has been registered in the names of three individuals, but who are clearly indicated to be the trustees of the church. To this end, there is no gainsaying that the church property is being administered by the trustees whose names are clearly spelt out in the certificate of title.

59. Flowing from the foregoing analysis, my answer to issue number one [1] is threefold. Firstly, the Defendant/Respondent cannot be allowed to raise and canvass the preliminary objection if same

[Defendant] is not conceding or admitting the averments contained in the pleadings by the adverse party. In particular, paragraph 1 of the Plaint is pertinent.

60. Secondly, the preliminary objection cannot also be canvassed on the basis of an inference that because the Plaintiff has not placed before the court a copy of the trust deed, then it ought to be implied that the trust deed is non-existent. Unfortunately, such kind of an endeavour is prohibited by Mukisa Biscuit v Westend Distributors Ltd [1969] EA 701.

61. Thirdly, the Defendant/Respondent herein must confine the arguments pertaining to locus standi on the question of law discernible and/or derivable from the pleadings filed. If the Defendant is keen to procure inter-alia the production of the trust deed, then same [Defendant/Respondent] must await the opportune time.

Issue Number 2 Whether the replying affidavit sworn on the 18th October 2024 accords with the provisions of Section 4 of the Oaths and Statutory Declaration Act or otherwise.

62. The Defendant/Respondent filed a replying affidavit sworn by one Abisai Ambenge Oyigo sworn on 18th October 2024. Suffice it to point out that the replying affidavit has been sworn before one Dennis Wameya Masinde of P.O Box No. 75099 -00200, Nairobi.

63. Instructively, the Replying affidavit has been drawn by the law firm of M/s Tito & Associates Advocates and whose address is as hereunder;

M/s Tito & Associates Advocates

Lower Hill Road, Duplex Apartments, 2 Floor, Door 59,

Postal address: P.O. Box 75099 -00200,

Nairobi.

64. It is evident that the postal address contained at the foot of the commissioners for oaths stamp corresponds with the stamp of the law firm on record for the Defendant/Respondent. In this regard, there is an apparent connection between the commissioner for oaths and the law firm for the Defendant/Respondent.

65. Be that as it may, when the issue was brought to the attention of learned counsel for the Defendant/Respondent, Learned Counsel responded in the following terms;

> I do admit and concede that the replying affidavit before the court was commissioned by one of the associates in the law firm of M/s Tito & Associates. However, I beg to clarify that the said associate does not handle litigation and hence same is not conflicted in this matter. However, I also wish to state that I am aware of the provisions of Section 4 of the Oaths and Statutory Declaration Act Chapter 15 Laws of Kenya.

66. From the submissions by learned counsel for the Defendant/Respondent, it is crystal clear that the commissioner for oaths who administered the oath at the foot of the replying affidavit is an associate in the law firm. In this regard, such commissioner for oaths are not authorized to commission any affidavit and/or to administer oath on any statutory declaration, in a matter where the law firm is either a party or acting for a party.

67. To this end, it is instructive to take cognizance of the peremptory provisions of Section 4 of the Oaths & Statutory Declaration Act, Chapter 15 Laws of Kenya.

68. Same stipulates as hereunder;

4. Powers of commissioner for oaths

1. A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

   Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.

2. A commissioner for oaths shall, in the exercise of any of the powers mentioned in subsection (1), be entitled to charge and be paid such fees as may be authorized by any rules of court for the time being.

69. My reading of the provisions of Section 4 [supra] drives me to the conclusion that a partner or associate in a law firm that is acting in particular matter is not authorized to commission any affidavit or statutory declaration to be used in the same matter. The import and tenor of Section 4 of the Act [supra], are explicit and devoid of any ambiguity.

70. Nevertheless, the associate in the law firm of M/s Tito & Associate, has taken it up upon himself to commission an affidavit in a matter where his employer, namely, M/s Tito & Associates Advocates are acting for a party. Such conduct must not only be frowned upon but must be deprecated at all costs.

71. For good measure, the commissioners for oaths, Mr. Dennis Wameya Masinde not excepted, must take cognizance of the provisions of the *Oaths and Statutory Declarations Act*. Thereafter same [commissioners for oaths] must act in accordance with the law.

72. Suffice it to point out that administration of oaths in terms of the Oaths and Statutory Declaration Act is a solemn act/ exercise. Instructively, if an affidavit is not commissioned in accordance with the law, then the resultant document is not an affidavit. For good measure, the resultant document would stand vitiated and hence become invalid.

73. To this end, it is my finding and holding that the replying affidavit sworn on behalf of the Defendant/ Respondent and which contravenes Section 4 of the Act [supra] is therefore a nullity ab initio. Same therefore courts striking out from the record of the court.

74. To underscore the importance of commissioning of an affidavit and more particularly observance of the provisions of the oaths and statutory declaration Act, it suffices to cite and reference the decision of the Supreme Court of Kenya in the case of *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli,Elijah Mbogo & Independent Electoral and Boundaries Commission (Civil Application 26 of 2018)* [2018] KESC 58 (KLR) (Civ) (7 September 2018) (Ruling), where the court held as hereunder;

(6) As regards the 1st Respondent, upon embarking on consideration of his 'Replying Affidavit', it came to the notice of the Court that the said affidavit is not signed, dated or commissioned. This posed the question to the Court: what is the effect of an affidavit that is not signed by the person who is said to be the deponent, not dated and/or commissioned by a Commissioner for Oaths/or magistrate?

(7) The making of affidavits is governed by the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya. Section 5 of the Act provides, thus:

> "Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."
>
> Further, Section 8 states:
>
> "A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule."
>
> Hence, an affidavit must clearly state the place and date where it was made and it must be made before a Magistrate or a Commissioner for oaths.

75. Furthermore, the defect that has been highlighted and adverted to is not one of form or procedure. To the contrary, commissioning of affidavits is underpinned by express statutory provisions of the law. In this respect, commissioning of affidavits is substantive matter and not a procedural technicality; hence a deficiency in commissioning an affidavit is not curable by the provisions of Article 159 [2] [d] of *the Constitution* 2010.

76. At any rate, there is no gainsaying that the provisions of Article 159[2][d] of *the Constitution* 2010 are not a panacea for every infraction and disregard of the law. Clearly, the infraction of the law beforehand is a serious issue which can even attract criminal sanction or admonition of the concerned commissioner for oaths.

77. Before departing from this issue, I beg to take cognizance of the decision of the Court of Appeal in the case of Kakuta Maimai Hamisi versus Peris Pesi Tobiko & 2 others [2013] eKLR, where the court held and observed as hereunder;

> A five-judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of *Mumo Matemu Vs. Trusted Society Of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012* as follows;
>
> "In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases."

78. Arising from the foregoing, my answer to issue number two is to the effect that the Replying affidavit is invalid and thus a nullity. In this regard, same [replying affidavit] be and is hereby expunged from the record of the court.

Issue Number 3 Whether the Applicant herein has established and demonstrated the requisite ingredients to warrant the grant of temporary injunction or otherwise.

79. The Plaintiff/Applicant has approached the court seeking for an order of temporary injunction to restrain and/or prohibit the Defendant/Respondent from encroaching upon and or remaining on the suit property. For good measure, the Plaintiff/Applicant posits that L.R No. 209/18222 [suit property] lawfully belongs to and is registered in its name.

80. To vindicate the claim that the suit property is lawfully registered in its name, the Plaintiff/Applicant has tendered and produced before the court a copy of the certificate of title. Instructively, the certificate of title is registered in the name of three individuals, but who are shown to be trustees of the Plaintiff's church.

81. On the contrary, the Defendant/Respondent contends that same [Defendant] is the registered owner of the suit property. In this regard, the Defendant/Respondent has adverted to a copy of the letter of allotment dated 6th January 1998.

82. On the other hand, the Defendant/Respondent has further posited that upon being issued with a letter of allotment, same proceeded to comply with the terms of letter of allotment including payment of stand premium. In this regard, the Defendant/Respondent has adverted to a copy of the payment receipt for the sum of Kes.40, 000/= only.

83. Despite the contention by the Defendant/Respondent that same is the lawful owner of the suit property, it is imperative to underscore that the only document being propagated by and on behalf of the Defendant is a letter of allotment. On the other hand, it suffices to state that the letter of allotment does not make reference to the suit property.

84. At any rate, even if the letter of allotment were to reference the suit property [which is not the case], it is instructive to underscore that a letter of allotment does not confer title to and in favour of the bearer. Simply put, title to and in respect of a designated parcel of land will accrue upon issuance with a letter of allotment, compliance with the conditions thereof and issuance of certificate of title/lease under the relevant laws.

85. To this end, it suffices to take cognizance of the holding of the Court of Appeal in the case of Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others [1997] eKLR

> It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.

86. Other than the foregoing, there is also another perspective that merits a short mention. Though the Defendant/Respondent contends that same complied with the terms of the letter of allotment dated 6th January 1998, there is no gainsaying that the Defendant/Respondent has not exhibited a copy of the acceptance of the letter of allotment. Furthermore, it is also crystal clear that the payments that were being made in the year 2003 and 2004, fell outside the stipulated 30 days period.

87. In the circumstances, an issue does arise as to whether the letter of allotment dated the 6th January 1998, is still alive and legally tenable. In this respect, the holding of the Supreme Court of Kenya in the case of Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment) is apt and succinct. [See paragraph *para_57 57*, *para_58 58*, *para_61 61*, *para_62 62* and *para_63 63* thereon].

88. To my mind, the Defendant's claim to be the registered owners of the suit property, appear [I repeat, appears] to be anchored on quick sands.

89. On the contrary, the Plaintiff/Applicant has demonstrated that same has a certificate of title to and in respect of the suit property. Prima facie, the certificate of title appears genuine and lawful.

90. To the extent that the certificate of title appears genuine and lawful, it is my finding and holding that the Plaintiff/Applicant herein has therefore established and demonstrated a prima facie case with a probability of success. In this regard, the Plaintiff/Applicant is truly entitled to the protection of the court.

91. As to what constitutes a prima facie case, it suffices to cite and reference the holding in the case of Nguruman Limited v Jan Bonde Nielson and Others [2014]eklr, where the Court of Appeal stated and held thus:

> " Prima facie" is a Latin phrase for "at first sight", whose legal meaning and Application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like "a serious question to be tried", "a question which is not vexatious or frivolous", "an arguable case" have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the American Cyanamid Co. Ethicon Ltd [1975] AC 396 is a case in point. The meaning of "prima facie case", in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in Ramanlal Trambaklal Hatt V. Republic [1957] E.A. 332.
>
> Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:
>
> "In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."
>
> We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely.

92. On the question of irreparable loss, I beg to underscore that a registered owner of a property is entitled to occupation, possession and use. However, where the registered owner is denied and/or deprived of the statutory rights and privileges flowing from ownership of landed properties, such deprivation brings to the fore irreparable loss.

93. Suffice it to point out that the Plaintiff/Applicant herein posited that same [Plaintiff/Applicant] has been using the suit property for worshiping purposes. Nevertheless, following the erection of the impugned boundary wall same [Plaintiff/Applicant] has been deprived of a right to use the property.

94. To my mind, the spiritual benefit derived by the Plaintiff/Applicant and her worshipers who use the suit property, which is now exposed to violation, constitutes irreparable loss. To this end, I am persuaded that the Plaintiff/Applicant has clearly espoused and established the likelihood of irreparable loss accruing.

95. Pertinently, what constitutes irreparable loss has been aptly defined in the case of Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR, where the Court of Appeal held thus:

> Giella V Cassman Brown & Co Ltd (supra) stipulates that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury,

which would not be adequately compensated by an award of damages. In Nguruman Limited V. Jan Bonde Nielsen & 2 Others (supra), this Court stated as follows on irreparable injury or damage:

"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

96. From the foregoing discussion, it is crystal clear that the Plaintiff/Applicant herein has indeed demonstrated and established the existence of irreparable loss. In any event, I have also found that the Plaintiff has established a prima facie case.

97. In a nutshell, my answer to issue number three is that the Plaintiff/Applicant has met the threshold to warrant the grant of temporary injunction to restrain and/or prohibit the Defendant/Respondent from interfering with her [Plaintiff's/Applicant's] rights over the suit property.

Issue Number 4 Whether the Plaintiff/Applicant has met and or satisfied the grant of the order of mandatory injunction or otherwise.

98. Other than the prayer for temporary injunction [which has been discussed in terms of the preceding paragraphs] the Plaintiff/Applicant has also implored the court to grant an order of mandatory injunction to compel the Defendant/Respondent to vacate and hand over vacant possession of the suit property.

99. Barring repetition, I have found and held that the Plaintiff/Applicant herein is the lawful and registered proprietor of the suit property. Furthermore, I have also found and held that by virtue of being the registered proprietor of the suit property, the Plaintiff/Applicant is entitled to the benefits attendant to such ownership.

100. Additionally, the court has also found and held that the Defendant/Respondent herein do not appear to have any lawful rights to and in respect of the suit property. In any event, the claim by the Defendant/Respondent is debatable taking into account the legal position espoused vide Torino Enterprises case.

101. On the other hand, it is also imperative to point out that the Defendant/Respondent herein proceeded to and constructed a wall around the suit property albeit without the requisite approval by the County Government of Nairobi. Suffice it to point out that the notification of approval which the Defendant/Respondent relied upon was in respect of L.R No. 209/18409 and not the suit property. In this regard, there is no gainsaying that the construction of the wall/ perimeter fence was undertaken without the requisite authorization.

102. Having pointed out the foregoing, I beg to revert to the fact that the suit property prima facie belongs to the Plaintiff/Applicant. In this respect, it is the Plaintiff/Applicant who should in the intervening period be in occupation and possession of the suit property.

103. However, to the extent that the Defendant/Respondent has encroached upon and proceeded to erect [sic] an illegal boundary wall thereon. there is no gainsaying that the Plaintiff/Applicant has established a basis to warrant the grant of orders of mandatory injunction.

104. To mind, the issuance of the orders of mandatory injunction would suffice to avert the summary actions undertaken by the Defendant/ Respondent of fencing a property which [sic] does not appear to belong to same.

105. As pertains to the circumstances under which an order of mandatory injunction would issue, it suffices to cite and reference the decision in the case of *Nation Media Group, Wilfred Kiboro & Wangethi Mwangi versus John Harun Mwau (Civil Appeal 298 of 2005)* [2014] KECA 308 (KLR) (Civ) (17 October 2014) (Judgment).

106. For good measure, the court stated thus;

It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of and special circumstances. See *Kenya Breweries Limited Vs. Washington Okeyo, Civil Application No. 332 of 2000*.

Likewise, in volume 24 Halsbury's Laws of England, 4th Edition paragraph 948, the learned authors state as follows:

> "A mandatory injunction can be granted on an interlocutory Application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff.... a mandatory injunction will be granted on an interlocutory Application."

107. Furthermore, the Court of Appeal ventured forward and stated as hereunder;

> We agree with Mr. Mogere that in an Application for a mandatory injunction the balance of convenience is not the only principle which an applicant has to satisfy as stated by the learned Judge at page 34 of the ruling. A different and higher standard than that in prohibitory injunctions is required before an interlocutory mandatory injunction is granted.
>
> Besides, existence of exceptional and special circumstances must be demonstrated as we have stated, a temporary mandatory injunction caN Only Be Granted In Exceptional And In The Clearest Of Cases. See *Kenya Airports Authority Vs. Paul Njogu Mungai & Others Civil Application No. 29 of 1997* (CA). As the court stated in the case of Locabail International Finance Ltd. Vs. Agroexpert & Others [1986] 1 ALL ER 901, the court has to have "a high degree of assurance that at the trial it would appear that the injunction had rightly been granted.....".

108. My answer to issue number four [4] is to the effect that the Plaintiff/Applicant has placed before the court plausible and cogent material to warrant the grant of the orders of mandatory injunction. In fact, a denial of the orders of mandatory injunction would be tantamount to protecting [sic] the illegal actions perpetrated by the Defendant/Respondent. Such an endeavour would be inimical to the rule of law. [See Thomson Smith Aikman, Alan Malloy & others v Muchoki & others [1982] eKLR].

Final Disposition:

109. Flowing from the discussion [details enumerated in the body of the ruling], it must have become crystal clear that the Plaintiff/Applicant has met and satisfied the requisite conditions [Ingredients] for the grant of the orders sought in the body of the Application dated 1st October 2024.

110. Consequently and in the premises, the orders that commend themselves to the Court are as hereunder;

    i. The Replying Affidavit sworn by Abisayi Ambenge Oigo on 18th October 2024; be and is hereby struck out.

    ii. The Application dated 1st October 2024 be and is hereby allowed in terms of prayer [iii] thereof.

    iii. In particular, an order of mandatory injunction be and is hereby issued directing the Defendant/Respondent either itself, agents, servants and/or employees to vacate and grant vacant possession of L.R No. 209/18222 [suit property] forthwith and in any event within 30 days from the date hereof.

    iv. In default to comply with clause [iii] hereof, the Plaintiff/Applicant shall be at liberty to evict the Defendant/Respondent from L.R No. 209/18222 and to demolish the perimeter wall fence erected on the suit property.

    v. In the event that eviction and demolition is undertaken by the Plaintiff/Applicant, the costs incurred shall be certified by the Deputy Registrar and thereafter be recoverable from the Defendant.

    vi. Costs of the Application shall abide the outcome of the suit.

111. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7 TH DAY OF NOVEMBER 2024

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – court Assistant.

Mr. Masore Nyangau for the Plaintiff/Applicant.

Mr. John Tito for the Defendant/Respondent.