



No. 102/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 216 OF 2010

REDEEMED GOSPEL CHURCH INC

REGISTERED TRUSTEESAPPLICANT

VERSUS

ALBERT MBITHI MUTINDA.....1ST RESPONDENT

MUTINDI MBITHI.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. **Redeemed Gospel Church Inc Registered Trustees** hereinafter "*the applicant*" by an application dated 25th October, 2010 seeks orders restraining **Albert Mbithi Mutinda, Mutinda Mbithi** and the **Attorney General**; hereinafter "*the Respondents*", their agents or any other person claiming under them from alienating, constructing, disposing of, entering into, wasting, developing, constructing or in any other manner whatsoever interfering or dealing with the Applicant's land Parcel No. Emali Township Block 1/126 hereinafter "*the suit premises*" or any portion thereof or in any other manner whatsoever interfering with the applicant's quiet use of the same pending hearing and determination of the suit. Secondly, that the OCS Sultan Hamud do enforce the orders made.
2. The application is premised on grounds that the Applicant is the sole registered and lawful proprietor of the suit premises; the Respondent have unlawfully grabbed a portion of the suit premises, fenced it off, dumped building materials thereon and are erecting permanent structures thereon; the respondent have no legal rights to the suit premises; the respondents activities are unlawful tortious, unjustified and proactive; unless injunctive orders sought are granted the applicant will suffer irreparable damage.
3. In an affidavit in support of the application, **Bishop Paul Mutua** a **Registered Trustee** of the Applicant deponed that the applicant is a lawful and registered proprietor of the suit premises. They have built a church on the suit premises and wish to carry out further development thereon in accordance with their constitutional objectives; the respondents have been interfering with the suit premises with intention to alienate and grab portions thereof and have started to interfere with the applicant's quiet enjoyment of the suit premises. In November, 1999 the 1st and 2nd Respondents intruded the suit premises, fenced off a portion measuring approximately 0.3

hectares purported to have been allocated the portion by the Commissioner of Lands; on 21st February, 2010, they trespassed upon the suit premises and allocated three (3) portions. In March, 2010, the respondents embarked upon construction of permanent structures on the premises prompting the applicant to report the matter to the police. Despite being warned by the police, construction continued. This culminated into the applicant filing Chief Magistrate's Civil Suit NO. 380 of 2010. The construction stopped after the respondents received a court order. Unless the court grants injunctive orders the respondents will suffer irreparable damages that will not be compensated.

4. The 1st and 2nd respondents in their replying affidavit stated that the application was a misconception, bad in law, fatally defective and an abuse of the court since issues relating to the subject matter are directly and substantially the same as in Machakos CMCC No. 380/2010.
5. They averred that the suit (CMCC No. 380/2010) was irregularly withdrawn, a withdrawal that has been challenged.
6. Further, that the applicant cannot be entitled to orders sought since Machakos High Court Civil Appeal No.

140 of 2009 originating from Makindu PM Civil Suit No. 239 of 2009 has not yet been admitted to hearing and he (1st respondent) is one of the appellants. That the 1st respondent is deemed to be the lawful occupant of the suit premises since 1968 whereafter he got a letter of allotment in December 1999.

7. The 1st and 2nd respondents filed a preliminary objection to the application on the grounds that the application is incurably defective as it offends Order XXIV of the Civil Procedure Act as Machakos CMCC No. 380 of 2010 was irregularly withdrawn and there is an application for review before the same court pending hearing and challenging the same as well as an earlier ruling relating to jurisdiction of the same court.
8. Further, that there is a Civil Appeal No. 140 of 2009 filed in this court where the 1st Respondent is one of the appellants and the appeal has not been admitted to hearing. The main suit upon which this application is premised is time barred under the Limitations of Actions Act; and that the alleged fraud on part of the respondent is scandalous and an abuse of the process of this court and as such cannot be one of the grounds to grant the application.
9. An order was made by **H.P.G. Waweru, J** on 16th November, 2010, that the application be disposed of together with the Preliminary Objection.
10. In the preliminary objection raised by the 1st and 2nd defendants, they stated that the application filed was incurably defective as it offends provisions of Order XXIV of the Civil Procedure Rules, in that Machakos CMCC No. 380 of 2010 was irregularly withdrawn and there is an application for review before the same court that is pending hearing. The application for review also seeks to challenge an earlier ruling relating to jurisdiction of the same court as the parcel of land in issue is valued at over Kshs. 1,000,000/= and there being separate copies of complaints filed in the same suit without any explanation.
11. Secondly, the 1st defendant is one of the appellants in High Court Appeal No. 140/2009 which is pending admission for hearing.
12. Thirdly, the main suit is time barred under the Limitation of Action Act.
13. Procedurally, I will first deal with the Preliminary Objection.
14. In an amended complaint, dated 20th July 2010 in Machakos Chief Magistrate's Court Civil Suit No. 380 of 2010 parties in the suit are the applicants herein as the plaintiff, while the 1st and 2nd respondents are the defendants. The subject matter therein, land parcel Emali Township Block 1/126 is indeed the suit premises in this case. It was pleaded that the respondents had trespassed onto the suit premises, excised a portion thereof, fenced it and dumped therein building materials which included sand, ballast and bricks.
15. According to the record, in CMCC 380 of 2010 the applicant filed an application under certificate

of urgency seeking injunctive orders against the respondents. The orders sought were similar to the ones in the application dated 28th October, 2010.

16. When the matter came up before **Jaden, CM** (as she then was) on the 13th October, 2010. **Mr. Mukhouli** holding brief for **O.N. Makau** for the Plaintiff/ Respondent sought time to respond to the application. **Mr. Konya** for the Defendant/Applicant had filed an application for review of the order of the court. He wanted an order made directing the plaintiff to regularise its case. **Mr Mukhouli** also stated that they had filed a notice to discontinue the suit on 23rd July, 2010, a notice that had not been served on the defendant's counsel.
17. In that regard the court stated thus:-

“The period given to the plaintiff/respondent to respond to the application dated 30th July, 2010 is rather short. Noted that a notice of discontinuance/withdrawal under Section XXXIV Civil Procedure Act was filed herein on 23/7/2010. plaintiff/respondent given time to file a reply to the application. Defendant in the meantime to file whatever application he deems necessary in relation to the discontinuance/withdrawal notice”.

18. Thereafter, the matter was mentioned on the 17th November, 2010, when **Mr Konya** was instructed to take a date at the registry. It is clear from CMCC 380 of 2010 that the matter is still pending before the court. Though the plaintiff/respondent filed a notice to withdraw the suit, the defendant claimed he was not in receipt of the same and he had further filed an application for review that is yet to be heard.
19. Section 6 of the Civil Procedure Act addresses the instant situation, it provides thus:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they are any of them claim, litigating under the same title, where such suit or proceedings is pending in the same or any court having jurisdiction in Kenya to grant the relief claimed.”

20. By virtue of the above mentioned provision, a court is barred from entertaining a matter in circumstances mentioned. The court would have no discretion to entertain such a case. The only option it would have is to stay the subsequent suit or suits. Needless to add that the court is also seized of the jurisdiction to strike out proceedings it finds to be an abuse of the process of the court. Therefore where a party decides to file numerous suits between same parties arising out of the same cause of action with an intention of annoying the other party, having failed to pursue the first suit to a logical conclusion, such an action may be interpreted to mean an abuse of the process of the court.
21. In the case of **Stephen Samok Takwenyi & Another versus David Mbutia Githare & 2 others Nairobi (Milimani) HCC No. 363 of 2009**. **Kimaru, J**, dealing with the issue of abuse of the process of the Court stated as follows:

“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the

process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.

22. From the foregoing it is quite clear that in CMCC 380 of 2010, the cause of action per the amended plaint is trespass on land parcel Emali Township Block 1/126 which is the suit premises in the instant suit, the orders sought were injunctive orders that would restrain the applicants from interfering with the suit premises just like in the instant suit. The injunctive orders sought are against the respondent. It is obvious that after the court directed the applicants to respond to the application for review in CMCC 380 of 2010, instead of complying with the directions of the court they moved to this court. The claim sought herein can still be litigated in the previously instituted suit. There would be absolutely no jurisdiction in allowing both suits to run parallel to each other.
23. With regard to the 2nd limb of the Preliminary Objection, HCCA 149 of 2009 is an appeal from an order made in Makindu Principal Magistrate’s Court Civil Suit No. 239 of 2008. The 5th Plaintiff and the 1st Plaintiff and the 2nd Defendant are parties in the case. The cause of action is trespass on land parcel Emali Township Block 1/126
24. Following an order made by the Lower Court an appeal was preferred by the defendants herein. The Memorandum of Appeal was filed on the 13th August, 2009. Prior to the appeal being admitted to hearing, the applicants herein moved to court to file another suit. This is tantamount to abuse of the due process of the court.
25. The upshot of the above is that the Preliminary raised by the respondent is meritorious. Consequently the orders sought in the application dated 25th October, 2010 cannot be granted. In the interest of justice, I will use my discretion under Section 6 of the Civil Procedure Act to stay this suit pending hearing and determination of CMCC 380 of 2010.
26. The applicant is condemned to pay costs of the application.
27. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 4TH day of OCTOBER, 2013.

L.N. MUTENDE

JUDGE



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