



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**CIVIL APPEAL NO. 24 OF 2019.**

JOHN MAKOKHA ..... 1<sup>ST</sup> APPELLANT

GEORGE WANJALA ..... 2<sup>ND</sup> APPELLANT

JAMES SIMIYU MABUKHA ..... 3<sup>RD</sup> APPELLANT

KENNEDY SIBAMI ..... 4<sup>TH</sup> APPELLANT

JOHN MUKHWANA (Suing on behalf of KAMUSINGA YEARLY MEETING  
OF FRIENDS QUAKERS ..... 5<sup>TH</sup> APPELLANT

**VERSUS**

TIMOTHY WANYONYI NASINGA ..... 1<sup>ST</sup> RESPONDENT

ZABLON WALIAULA ..... 2<sup>ND</sup> RESPONDENT

MARGRET NAULA WANYONYI ..... 3<sup>RD</sup> RESPONDENT

CHRISPINUA WANASWA ..... 4<sup>TH</sup> RESPONDENT

JOSEPH WASIKE WALELA ..... 5<sup>TH</sup> RESPONDENT

GABRIEL KHAEMBA ..... 6<sup>TH</sup> RESPONDENT

BENANIAH SISUNGO (Suing as the officials  
of ELGON RELIGIOUS SOCIETY OF FRIENDS) ..... 7<sup>TH</sup> RESPONDENT

THE LANDS REGISTRAR BUNGOMA ..... 8<sup>TH</sup> RESPONDENT

*(Being an application for temporary injunction pending appeal from the ruling of HON. D. O. ONYANGO (CHIEF MAGISTRATE)  
delivered on 24<sup>th</sup> May 2019 in KIMILILI SPMCC No 10 of 2019)*

**R U L I N G**

What calls for my determination is the Appellant's Notice of Motion dated 3<sup>rd</sup> May 2021 seeking the following orders: -

1. Spent

2. Spent

### 3. Spent

**4. That a temporary injunction be and is hereby issued to restrain the 1<sup>st</sup> Respondents acting either by themselves and/or through their agents or servants from entering, utilizing interfering with the Appellants possession of and/or otherwise dealing with the land parcel NO KIMILILI/KIBINGEI/1125 pending the hearing and determination of this appeal.**

**5. That costs of this application be provided for and be borne by the Respondents.**

The application is predicated on the grounds set out therein and is also supported by the affidavit of **JOHN MAKOKHA** the 1<sup>st</sup> Appellant herein dated 3<sup>rd</sup> May 2021 and also sworn on behalf of the other Appellants all litigating on behalf of **KAMUSINGA YEARLY MEETING OF FRIENDS QUAKERS**.

The gravamen of the application is that whereas the Appellants were previously the absolute registered proprietors of the land parcel **NO KIMILILI/ KIBINGEI/1125** (the suit land), their title was illegally transferred to the 1<sup>st</sup> to 7<sup>th</sup> Respondents by the 8<sup>th</sup> Respondent. The 1<sup>st</sup> to 7<sup>th</sup> Respondent have now gone ahead and removed steel shutters from the Appellants' premises which is their headquarters. That the Appellants have been issued with a title deed to the suit land since 4<sup>th</sup> October 2017. However, without any justification, the 8<sup>th</sup> Respondent has illegally cancelled the said title and transferred it to the **COUNTY COUNCIL OF BUNGOMA** without giving them an opportunity to be heard. By so doing, the 8<sup>th</sup> Respondent usurped the power of the **COUNTY GOVERNMENT OF BUNGOMA**, the **COURT** and the **REGISTRAR OF SOCIETIES**. When the Appellants confronted the 8<sup>th</sup> Respondent, they were shown a letter dated 14<sup>th</sup> November 2017 purportedly addressed to them but which the Appellants consider to be a ploy. That the Appellants have utilized the suit land on which they have constructed their Headquarters with the knowledge, participation and blessings of the Respondents yet it has now been destroyed and the steel doors and windows carried away to an unknown place hence this application.

The application is opposed and the 1<sup>st</sup> to 7<sup>th</sup> Respondents filed grounds of opposition as follows: -

**1. That the Appellants have no capacity to institute the appeal or application.**

**2. That the Appellant have not satisfied the condition for the grant of an interlocutory injunction.**

**3. That the Appellants have not complied with the procedure for instituting an appeal from the Subordinate Court and this application is an abuse of the Court process.**

**4. That the Appellants have not made a full and frank disclosure of material facts and have come to Court with un – clean hands.**

**5. That if the application is allowed, it will cause prejudice or grave injustice to the Respondents and members of the Elgon Religious Society of Friends.**

The Respondents similarly filed a replying affidavit sworn by **TIMOTHY WANYONYI NASINGA** the Presiding Clerk of the **ELGON RELIGIOUS SOCIETY OF FRIENDS** wherein it is averred, inter alia, that a similar application was dismissed by the Subordinate Court. That the Appellants are not officials of the **KAMUSINGA YEARLY MEETING OF FRIENDS** and therefore have no authority to appear or plead in this matter hence lack legal capacity. That the **KAMUSINGA YEARLY MEETING OF FRIENDS (QUAKERS)** was not in existence in 2012 and could not have applied for ownership of the suit land which is in the possession and occupation and is the property of the **CHURCH** under **KAMUSINGA FRIENDS CHURCH** and not the property of **KAMUSINGA YEARLY MEETING OF FRIENDS QUAKERS**. That the Registration of **KAMUSINGA YEARLY MEETING OF FRIENDS (QUAKERS)** as the proprietor of the suit land was fraudulent and was cancelled by the Registrar following the laid down procedure and after due notice. Thereafter, the title to the suit land was issued to the **ELGON RELIGIOUS SOCIETY OF FRIENDS**. The registration of **KAMUSINGA YEARLY MEETING OF FRIENDS (QUAKERS)** was subsequently cancelled following a decree issued in **KITALE HIGH COURT CIVIL SUIT No 10 of 2014** and an application to challenge that order was dismissed on 17<sup>th</sup> July 2019 vide a Judgment delivered in **BUNGOMA HIGH COURT MISCELLANEOUS CIVIL APPLCIATION No 14 of 2015**. That the 1<sup>st</sup> to 7<sup>th</sup> Respondents have been in exclusive and continuous management of the suit land where they hold their meetings.

That this application is an afterthought following the Appellants' failure to get orders in the subordinate Courts and also **BUNGOMA HIGH COURT CIVIL CASE No 12 of 2016**. That the Appellants registration having been cancelled, they are not entitled to any equitable relief which they now seek. That the Appellants have not demonstrated what substantial or irreparable damage they will suffer nor given any undertaking as to compensation and this application should be dismissed with costs.

The application has been canvassed by way of written submissions which have been filed by **MR D. WERE** instructed by the firm of **WERE & COMPANY ADVOCATES** for the Appellants and by **MR D. INGOSI** instructed by the firm of **DAVID INGOSI & COMPANY ADVOCATES** for the 1<sup>st</sup> to 7<sup>th</sup> Respondents. The 8<sup>th</sup> Respondent did not file any response to the application.

I have considered the application, the rival affidavits and annexures thereto, the grounds of opposition and the submissions by Counsel.

In my view, the determination of this application is hinged on the following two principal issues: -

**1. Whether the Appellants have the legal capacity to file this appeal and application, and if so;**

## 2. Whether the Appellants have met the threshold for the grant of orders of an injunction pending appeal.

It is common ground that the registration of the Appellants was cancelled by the Registrar of Societies vide his letter dated 6<sup>th</sup> February 2015 and addressed to the **KAMUSINGA YEARLY MEETING OF FRIENDS CHURCH – QUAKERS**. For avoidance of doubt, the last paragraph of that letter reads: -

***“That further pursuant Section 12(1) (b) of the Societies Act Cap 108 Laws of Kenya, the Registrar resolved that due to the interest of peace, welfare or good order in Kenya likely to be prejudiced by the continued registration of your Society, the registration of your Society be CANCELLED FORTHWITH.***

*Yours sincerely*

**JOSEPH L ONYANGO**

***Deputy Registrar of Societies.”***

Therefore, for all practical purposes, the **KAMUSINGA YEARLY MEETING OF FRIENDS CHURCH (QUAKERS)** on whose behalf this application has been instituted ceased to exist as a legal entity on 6<sup>th</sup> February 2015. That explains why in paragraph 9 of his replying affidavit dated 21<sup>st</sup> May 2021, **TIMOTHY WANYONYI NASINGA** has averred that the Appellants have no legal capacity to institute this application or the appeal. The Respondents, in an attempt to challenge the decision of the Registrar of Societies as contained in his letter dated 6<sup>th</sup> February 2015 decided to seek redress in Court. They filed **BUNGOMA JUDICIAL REVIEW APPLICATION No 14 of 2015** seeking the main order that the Court quashes that decision on the basis, inter alia, that they were not heard. However, by a Judgment delivered on 17<sup>th</sup> July 2019, **RIECHI J** dismissed that application.

A Notice of Appeal was filed against that Judgment but given the scarcity of Judges in the Court of Appeal which has only recently been addressed, it is unlikely that the appeal has been heard if filed.

Counsel for the Appellants has tried to circumvent that fact by making the following submission: -

***“The replying affidavit raised several issues but evade the elephant in the house i.e. whether the Respondents legally obtained transfer of title from the Appellant to themselves. The illegal transfer of title which is the gist of these proceedings is so glaring and flagrant that the Respondents can hardly address the issue on oath. The Respondents have once (sic) as they did in the Subordinate Court found refuge in a plethora of technicalities.***

***We invite the Court to invoke the provisions of Article 159 (1) (d) of the Constitution of Kenya and direct that the status prevailing on land parcel number KIMILILI/KIBINGEI/1125 before the fraudulent change of title be maintained until the appeal is heard and determined.”***

It is true that the elephant in the house may be the ownership of the suit land. But now, there is an even bigger elephant in the house and that is whether the appellants have the capacity to file and prosecute this application. Having been de – registered on 6<sup>th</sup> February 2015, the **KAMUSINGA YEARLY MEETING OF FRIENDS (QAKERS)** on whose behalf this application and appeal have been filed lack the legal capacity to sue or be sued. It is now an illegal entity. In the case of **SURYAKANT RAJA SHAH .V. APERIT INVESTMENTS S.A & ANOTHER C.A CIVIL APPEAL No 181 of 2000**, the issue that arose was whether a foreign corporation that had been declared defunct in it’s country of domicile could file proceedings in Kenya. The Court cited the English case of **RUSSIAN and ENGLISH BANK .V. BARING BROTHERS & CO LTD 1932 I. CH 435** to the effect that once an artificial person is destroyed in the country of origin, it is destroyed everywhere. The Judges then proceed to add that: -

***“We think that the same position applies to Kenya. When, as in this case, the Panamanian or any other foreign company has gone into voluntary winding up or has been dissolved or wound up by the law of Panama, it’s domicil, Kenyan Courts do not recognize it as an existing entity and it cannot sue or be sued in Kenya. In the eyes of our law a defunct corporation seeking to maintain an action or suit is no entity at all but a mere name only with no legal existence and a non – existence and a non – existant person cannot sue.”***

The Court may have been dealing with a corporation but the same argument would equally apply in the circumstances of this case. The registration of **KAMUSINGA YEARLY MEETING OF FRIENDS QUAKERS** was cancelled with effect from 6<sup>th</sup> February 2015. It therefore ceased to exist nor can it operate as a society under the relevant laws. It is non existent and therefore it cannot maintain any action in Court. On that ground alone, this application is for dismissal.

Even assuming that the Appellants had the capacity to prosecute this application, they were required to meet the threshold for the grant of an order for injunction pending appeal. In **PATRICIA NJERI .V. NATIONAL MUSEUM OF KENYA 2014 eKLR** those guidelines were set out as follows: -

**1. An order of injunction pending appeal is a discretionary one which will be exercised against an Applicant whose appeal is frivolous.**

**2. The discretion should be refused where it would inflict greater hardship than it would avoid.**

**3. The Applicant must show that to refuse the injunction would render the appeal nugatory.**

**4. The Court should also be guided by the principles set out in GIELLA .V. CASSMAN BROWN LTD 1973 E.A 358.**

It is clear from the Certificate of Official Search produced herein that the suit land has since 13<sup>th</sup> July 2019 been registered in the names of the **COUNTY COUNCIL OF BUNGOMA**. There is also a copy of title deed showing that it was registered in the names of the **ELGON RELIGIOUS SOCIETY OF FRIENDS** on 17<sup>th</sup> May 2018. Either way, the suit land is no longer registered in the names of the **KAMUSINGA YEARLY MEETING OF FRIENDS CHURCH** so they cannot describe themselves as the proprietors thereof. Given those circumstances, I do not see what prima facie case they have established with respect of the suit land to warrant the grant of the orders sought. To grant those orders would inflict great hardship to the registered proprietors than it would avoid. And having found that the Appellants have no capacity to prosecute this application, that renders the appeal frivolous.

In **CHARTER HOUSE INVESTMENTS LTD .V. SIMON K. SANG & 3 OTHERS C.A CIVIL APPEAL No 315 of 2004 [2010 eKLR]**, the Court of Appeal stated thus: -

*“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the Court requires protection and maintenance of the status quo. The award of a temporary injunction by Courts of equity has never been regarded as a matter of right even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the Court balances the convenience of the parties and possible injuries to them and to third parties. In the GIELLA case (supra), the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with a reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”*

Apart from not demonstrating any prima facie case, the Appellants have not demonstrated what irreparable damage they will suffer that cannot be compensated by an award of damages. And even if I was in doubt, which I am not, and was to determine the application on a balance of convenience, it would not tilt in favour of the Appellants.

The Appellants were also required to approach this Court with clean hands because the remedy they seek is an equitable one. But for reasons best known to themselves, they did not disclose that the registration of the **KAMUSINGA YEARLY MEETING OF FRIENDS (QUAKERS)** on whose behalf they have moved to this Court was cancelled on 6<sup>th</sup> February 2015. That was a material fact which they failed to disclose. They cannot be deserving of the exercise of this Court’s equitable discretion in their favour.

The application must therefore also collapse for failure to meet the threshold for the warrant of an injunction pending appeal.

On the issue of costs, the **KAMUSINGA YEARLY MEETING OF FRIENDS (QUAKERS)** is an illegal entity. The costs of this application shall be met personally by the 1<sup>st</sup> to 7<sup>th</sup> Respondents.

The up – shot of the above is that the Notice of Motion dated 3<sup>rd</sup> May 2021 is devoid of any merit having been filed by a non – existent entity. It is accordingly struck out with costs to be met by the 1<sup>st</sup> to 7<sup>th</sup> Respondents personally.

**Boaz N. Olao.**

**J U D G E**

**29<sup>th</sup> June 2021.**

Ruling dated, signed and delivered at **BUNGOMA** this 29<sup>th</sup> day of June 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

**Boaz N. Olao.**

**J U D G E**

**29<sup>th</sup> June 2021.**