



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 24 OF 2012**

THE REGISTERED TRUSTEE OF AFRICA

INDEPENDENT PENTECOSTAL CHURCH OF AFRICA .....  
.....PLAINTIFFS

VERSUS

JAMLICK MURAYA GATINDI .....1<sup>ST</sup> DEFENDANT

DOUGLAS NJAGE MURIITHI .....2<sup>ND</sup> DEFENDANT

DAVID MUNENE WAMWATI .....3<sup>RD</sup> DEFENDANT

SAMUEL MBURU NDUNG'U .....4<sup>TH</sup> DEFENDANT

CONSTANTUS WAMBU MIGWI .....5<sup>TH</sup> DEFENDANT

JOB KARANI NGARI.....6<sup>TH</sup> DEFENDANT

SAMUEL MAINA MUGO .....7<sup>TH</sup> DEFENDANT

DAVID MURIMI MUTHII .....8<sup>TH</sup> DEFENDANT

**JUDGMENT**

By a plaint filed herein on 13th November 2012, the plaintiffs sought judgment against the defendants in the following terms:

***(a) A permanent injunction restraining the defendants from selling, registering, alienating, entering or in other way dealing with all those parcels of land emanating from the sub-division of land parcel No. KABARE/NYANGATI/42.***

***(b) A declaration that all the titles issued to the defendants pursuant to the sub-division of land parcel No. KABARE/NYANGATI/42 are of no legal consequences and the same be cancelled forthwith and the land register be rectified to that effect.***

***(c) Costs of this suit.***

***((d) Any other relief that this Honourable Court deems fit to grant.***

The claim is premised upon pleadings that on or about the year 1984, the plaintiffs together with the **ANGLICAN CHURCH OF KENYA (ACK), THE PRESBYTERIAN CHURCH OF EAST AFRICA, THE FULL GOSPEL CHURCH, THE REVIVAL CENTRE CHURCH AND THE SEVENTH DAY ADVENTIST (E.A)** jointly received an allocation of land parcel No. KABARE/NYANGATI/42 (the suit land) measuring approximately 5.13 Hectares from the **KERUGOYA-KUTUS MUNICIPAL COUCIL** formerly **KIRINYAGA COUNTY COUNCIL** to construct their respective churches and have since then been in occupation of their respective portions where they have constructed several church buildings and other buildings as well as planting trees. On or about October 2012, they received information that the defendants had gone around spreading word that they will soon evict the plaintiffs from the suit land and demolish the buildings thereon since they (defendants) had acquired legal ownership of the suit land. Upon checking at the Lands office, the plaintiffs discovered that the suit land had been sub-divided into several portions and registered in the names of the defendants herein as follows:

1. KABARE/NYANGATI/5995 - JAMLICK MURAYA GATINDI
2. KABARE/NYANGATI/5994 - JAMLICK MURAYA GATINDI
3. KABARE/NYANGATI/5991 - DOUGLAS NJAGE MURIITHI
4. KABARE/NYANGATI/5986 - DOUGLAS NJAGE MURIITHI
5. KABARE/NYANGATI/5985 - DOUGLAS NJAGE MURIITHI
6. KABARE/NYANGATI/5758 -DAVID MUNENE WAMWAYI
7. KABARE/NYANGATI/5992 - SAMUEL MBURU NDUNGU
8. KABARE/NYANGATI/5993 - SAMUEL MBURU NDUNGU
9. KABARE/NYANGATI/5988 - DOUGLAS NJAGE & DAVID MURIMI MUTHII
10. KABARE/NYANGATI/5989 - DOUGLAS NJAGE & DAVID MURIMI MUTHII
11. KABARE/NYANGATI/5987 - DOUGLAS NJAGE & DAVID MURIMI MUTHII
12. KABARE/NYANGATI/5990- DOUGLAS NJAGE & DAVID MURIMI MUTHII
13. KABARE/NYANGATI/5757 – CONSTANTIUS W. MIGWI & DAVID WAMWAYI
14. KABARE/NYANGATI/5756- CONSTANTIUS WAMBU MIGWI
15. KABARE/NYANGATI/5984 - JOB KARANI NGARI & SAMUEL M. MUGO

It is the plaintiffs' case that the suit land was rightfully allocated to them and they have been in occupation thereof and the defendants activities amount to fraud and infact the 3rd and 5th defendants together with one **JAMES NDAMBIRI MUKURIA** had earlier attempted to get ownership of the suit land by filing **KERUGOYA PRINCIPAL MAGISTRATE'S COURT CIVIL CASE No. 353 of 2010** where a consent was recorded awarding ownership thereof to the 3rd and 5th defendants but it was later set aside by the Court. The defendants have also been issuing threats to evict the plaintiffs and hiring goons to fence the suit land hence this suit.

The defendants filed a joint defence and counter-claim on 15th October 2015 denying that the plaintiffs and other parties were ever allocated land parcel No. KABARE/NYANGATI/42 and put them to strict proof thereof adding that if such allocation was done, it was not proper because the suit land did not belong to the Local Authority. The defendants pleaded further that the plaintiffs only occupy ½ acre of

the suit land being KABARE/NYANGATI/5756 which the defendants have not interfered with and the plaintiffs are therefore trespassers if they have occupied more than ½ acre. The defendants pleaded that the suit land belonged to one **ELIUD MUKURIA** and was distributed legally following **KERUGOYA SUCCESSION CAUSE No. 43 of 2006** to which there was no challenge. The resultant sub-divisions of the suit land were then distributed to the beneficiaries and the defendants are bonafide purchasers for value having followed the requisite procedures for sub-division and transfer and have also openly put the beacons. The defendants pleaded further that the plaintiffs have no cause of action against them and their case is misplaced since no particulars of fraud have been indicated and a Preliminary Objection would be raised at the hearing. It was the defendants' further averment that the plaintiffs' recourse is to follow the Local Authority that allocated them the land belonging to a private individual.

The defendants pleaded a counter-claim of their own in which they stated that the plaintiffs are in wrongful occupation of land parcels No. KABARE/NYANGATI/5995, 5994, 5991, 5986, 5985, 5758, 5992, 5993, 5988, 5989, 5987, 5990, 5757, 5756 and 5984 and should therefore be ordered to vacate forthwith and in any event, within seven (7) days after judgment and in default, they be forcefully evicted. They also sought costs of the plaintiffs' suit and the counter-claim.

The trial commenced on 31st October 2013 when **HENRY MBURU MARUNGO** (PW1) a surveyor and registered trustee of the plaintiffs told the Court that the Kirinyaga County Council allocated part of the suit land to the plaintiffs around 1980 and not 1984 as indicated in the plaint. The entire suit land was 12.5 acres in size and the plaintiffs were allocated 4 acres and the other churches named in the plaint were given the rest. He produced the letter dated 17th December 1981 from the Kirinyaga County Council to that effect (Plaintiff's Exhibit 2) and another letter dated 8th February 1982 (Plaintiff's Exhibit 4) from the Provincial Physical Planner confirming that the suit land had been allocated to the plaintiffs. He also produced a letter (Plaintiffs Exhibit 5) dated 8th July 1988 showing that the original owner of the suit land had been compensated in the sum of Ksh. 6, 810.00 for properties that were on that land. He produced certificate of search for the fifteen (15) portions following the sub-division of the suit land which are now registered in the names of the defendants yet plaintiffs have been in occupation thereof for over thirty (30) years.

Following changes in the leadership of the plaintiffs, this particular witness was not able to complete his testimony and it was not until September 2016 that counsel for the plaintiffs, **MR. OMBONGI**, was able to file witness statements for new witnesses and called **KARANGA NJIRU KIURA** (PW2) the plaintiffs Treasurer who reiterated the earlier evidence of **HENRY MBURU MARUNGO** (PW1) and adopted his statement filed together with the plaint. He said the suit land was allocated to the plaintiffs by the Kirinyaga County Council in the 1970s and a church has been put up thereon together with other developments after the owner was given land elsewhere. He produced as the plaintiffs' documentary evidence, the list of exhibits filed in Court.

On behalf of the defendants, the 8th defendant **DAVID MURIMI MUTHII** (DW1) who is a surveyor, told the Court that the suit land was originally registered in the names of one **MUKURIA KARUIRU** who died on 31st October 2003 after which the family filled **KERUGOYA COURT SUCCESSION CAUSE No. 43 of 2006**. He then sub-divided the suit land into seventeen (17) portions four (4) of which are registered in his names and the 2nd defendant following the necessary Land Control Board consent. During that sub-division, there was nothing on this land except an incomplete building. He and the 2nd defendant later sold their portion and remained with ½ acre each which they started ploughing. He added that the church occupies only ½ acre on land parcel No. KABARE/NYANGATI/5758 which is registered in the names of the 5th defendant. He told the Court that the suit land was sub-divided procedurally and it was never the property of the **KERUGOYA-KUTUS COUNTY COUNCIL** and therefore the said Council could not allocate it to any person. He produced the list of the defendants' documents as defence Exhibits 1 to 28.

**DAVID MUNENE WAMWATI** (DW3) testified that he owns three (3) portions out of the sub-division of the suit land and asked the Court to evict the plaintiffs.

At the end of the trial, both **MR. OMBONGI** counsel for the plaintiffs and **MS THUNGU** counsel for

the defendants filed submissions.

I have considered the evidence by both parties including the documents filed as well as the submissions by counsel.

Before I delve into the evidence, counsel for the defendants has submitted that the plaintiffs have no capacity to bring this suit since none of the Registered Trustees testified and that **HENRY MBURU MARUNGO** (PW1) did not finish testifying and the evidence of **KARANJA NJIRU KIURA** (PW3) should be expunged because he is an incompetent witness. Nothing really turns on that because, the plaint is filed in the names of the Registered Trustees of the plaintiffs church and **HENRY MBURU MARUNGO** previously swore a supporting affidavit dated 13th November 2012 in an application for the issuance of temporary orders of injunction and described himself as “*a member of the Board of Trustees of The African Independent Pentecostal Church of Africa Kirinyaga Diocese and with full authority from the Kirinyaga Diocese Board*”. It matters not that this witness did not complete his testimony. What is important is that the suit as filed is competent.

The following are not in dispute:

1. That the suit land was originally registered in the names of one **ELIUD MUKURIA KARUIRU** who died on 31st October 2003.
2. That after the death of the said **ELIUD MUKURIA KARUIRU**, his wife **SALOME WAMUTIRA MUKURIA** filed **KERUGOYA SENIOR RESIDENT MAGISTRATE SUCCESSION CAUSE No. 43 of 2006** where his Estate comprised only of land parcels No. KIRINYAGA/MARURUMO/161 and Plot No. 563 KUTUS as per the Certificate of Confirmation of Grant dated 20th March 2008.
3. By a consent order dated 19th August 2010, the suit land was included in the amended grant and distributed as follows:
  1. DAVID MUNENE WAMWATI - 2.33 Acres
  2. CONSTANTIUS WAMBU MIGWI- 2.33 Acres
  3. JAMES NDAMBIRI MUKURIA - 8.00 Acres
4. The suit land was subsequently sub-divided into the fifteen (15) portions registered in the names of the defendants as per paragraph seven (7) of the plaint.
5. That there are churches and other buildings on some portions of the suit land while other portions were being cultivated by some of the defendants herein.

I notice from the record that an application dated 1st February 2011 and filed herein on 15th November 2012 by which the other churches sought to be enjoined in these proceedings appears not to have been prosecuted.

In my view, the issues that I need to determine in this suit includes:

1. *Whether the plaintiffs have any proprietary rights in the original land parcel No. KABARE/NYANGATI/42 – the suit land.*
2. *Whether the suit land was fraudulently sub-divided and registered in the names of the defendants.*
3. *Whether the plaintiffs’ occupation of the suit land (together with the other churches) is lawful.*

**4. Whether the plaintiffs are entitled to the orders sought or they are in fact trespassers who should be evicted therefrom as sought in the defendants' counter-claim.**

**5. Who should meet the costs.**

It is clear from my perusal of the documentary exhibits herein that although the suit land was originally registered in the names of one **ELIUD MUKURIA KARUIRU** (deceased), he transferred the land to the **KIRINYAGA COUNTY COUNCIL** in exchange for parcel No. KIRINYAGA/MARURUMO/161 way back on 20th September 1976. This is captured in the **MINUTES OF KIRINYAGA COUNTY COUNCIL HELD ON 30TH DECEMBER 1976** and which is among the documents produced by plaintiffs. A certificate of search in respect to land parcel No. KIRINYAGA/MARURUMO/161 shows that it was subsequently registered in the names of **ELIUD MUKURIA KARUIRU** and the suit land was set aside for "**Churches and Industrial Units established on the land**". The certificate of search in respect of the suit land shows that as at 24th August 2010, it was registered in the names of "**KERUGOYA-KUTUS MUNICIPAL COUNCIL IN EXCHANGE WITH ½ ACRE RESIDENTIAL PLOT AT KUTUS TOWNSHIP**". There is also documentary evidence that the plaintiffs and other churches had applied and been allocated land by the then **MUNICIPAL COUNCIL OF KERUGOYA/KUTUS**. In one such letter dated 6th October 1997 addressed to the Pastor-in-charge Full Gospel Church, the Parish Minister P.C.E.A Church, the Church Secretary Kutus S.D.A Church and the Pastor in Charge Redeemed Church which are some of the churches named in paragraph three (3) of the plaint as having been allocated the suit land, the Town Clerk to the Council writes as follows:

**"RE CHURCH PLOT – KUTUS**

***This is to inform you that the Council, under Minute TPW & H 8/96 resolved that each church retains the area it physically occupies that is half an acre each.***

***You should therefore restrict your development within that given area.***

**B.M. MUGO**

**TOWN CLERK"**

Similarly, there is a letter dated 23rd October 1980 from the Town Clerk addressed to the A.I.P.C.A (plaintiffs herein) which reads in part:

**"APPLICATION FOR BIBLE SITE AT MWEA**

***I am glad to inform you that your application for Bible School Site at Kutus has been approved by the County Council Town Planning Markets and Housing Committee vide its Minutes No. TPM & H 103/79 (b).***

***Before you start construction, you should contact the District Health Inspector for proper plan and advise....."***

The import of all the above documents is that they support the plaintiffs' claim of having been allocated land together with other churches, on which to put up buildings. This Court is satisfied that the land that was subsequently allocated to the said churches including the plaintiffs was the suit land which, as per the minutes dated 30th December 1976 had been set aside for "**churches**" among other developments after that land was acquired from the deceased **ELIUD MUKURIA KARUIRU** in exchange for land parcel No. KIRINYAGA/MARURUMO/161. Infact the deceased **ELIUD MUKURIA KARUIRU** obtained a better deal because, whereas the suit land measured 5.13 Hectares, the land parcel No. KIRINYAGA/MARURUMO/161 which he acquired in exchange was 7.45 Hectares in size!

There is also among the documents produced herein a Report by the Task Force appointed to streamline land matters in Kirinyaga District. That report dated August/September 1994 identifies land that is being

utilized directly by local authorities but is registered in the names of the original owners. Among the land parcels identified is the suit land. It is clear therefore that although the deceased **ELIUD MUKURIA KARUIRU** had in fact acquired other land in exchange for the suit land, he unlawfully retained the title deed thereto which was used to fraudulently sub-divide it into the resultant parcels registered in the names of the defendants. My answer to the issue framed in (1) above is that whereas the registered proprietor of the suit land was the **KERUGOYA-KUTUS MUNICIPAL COUNCIL**, the plaintiffs and other churches have been allocated the same to construct churches and therefore, only the said Council can claim a greater right to the suit land as against the plaintiffs and certainly not the defendants.

As to whether the suit land was fraudulently sub-divided and registered in the names of the defendants, the answer is **YES**. The suit land having been acquired by the **KERUGOYA KUTUS MUNICIPAL COUNCIL** as far back as 30th December 1976 in exchange for parcel No. KIRINYAGA/MARURUMO/161, it was no longer part of the Estate of the deceased **ELIUD MUKURIA KARUIRU** and it could not therefore be part of the property that could be distributed in **KERUGOYA SUCCESSION CAUSE No. 43 of 2006**. That explains why the suit land was not among the properties distributed in the first Certificate of Confirmation of Grant dated 20th March 2008 but only surfaced on 19th August 2010 when a consent order was filed to include it in the Confirmed Grant. That is clear evidence of fraud and illegality which, under **Section 26 (1) of the Land Registration Act**, entitles the Court to cancel the resultant sub-divisions and registrations obtained by the defendants. It is instructive to note that the consent order dated 19th August 2010 was at the behest of **SALOME WAMUTIRA MUKURIA** the wife to **ELIUD MUKURIA KARUIRU** and is signed by **JAMES, JOSEPH, BENSON, WILSON, ZAKARIA, HELLEN** and **JUDY MUKURIA** who were all beneficiaries in the original Grant and who obviously knew that the suit land was no longer part of the Estate of the deceased **ELIUD MUKURIA KARUIRU** his rights therein having been extinguished on 30th December 1976. A similar scenario occurred in **GRACE WANJIRA MITAMBO & OTHERS VS NDAMBIRI MUCHINE & ANOTHER C.A CIVIL APPEAL No. 242 of 2000 (NYERI)** where the Court of Appeal held that the Appellant's right to the land in dispute was extinguished as it had been exchanged with another parcel of land during the life time of the original owner and was therefore no longer part of his Estate. See also this Court's judgment in **GRACE WANJIRA MITAMBO VS KIRINYAGA COUNTY COUNCIL & ANOTHER HIGH COURT OF KENYA PETITION No. 3 of 2017 (KERUGOYA)**.

Are the plaintiffs' occupation of the suit land lawful or are they trespassers thereon? The suit land having been acquired by the **MUNICIPAL COUNCIL OF KERUGOYA-KUTUS**, which then allocated it to the plaintiffs, only that Council can allege any trespass by the plaintiffs or any other parties upon that land. The plaintiffs are therefore entitled to the injunctive and declaratory orders sought as they are in occupation thereof with the licence of the registered proprietors. It is the defendants who are trespassers on the suit land as the titles they hold were obtained fraudulently.

Ultimately therefore and upon considering all the evidence herein, I enter judgment for the plaintiffs against the defendants in the following terms:

- 1. A permanent injunction restraining the defendants from selling, registering, alienating, entering or in any other way dealing with all those parcels of land emanating from the sub-division of land parcel No. KABARE/NYANGATI/42.***
- 2. A declaration that all titles issued to the defendants pursuant to the sub-division of land parcel No. KABARE/NYANGATI/42 are of no legal consequences and the same are hereby cancelled forthwith and the land register be rectified to that effect. For avoidance of doubt, the titles to be cancelled are in respect to land parcels No. KABARE/NYANGATI/5995, 5994, 5991, 5986, 5985, 5758, 5992, 5993, 5988, 5989, 5987, 5990, 5757, 5756 and 5984.***
- 3. The defendants counter-claim is dismissed.***
- 4. The plaintiff shall have the costs of this suit.***

**B.N. OLAO**

**JUDGE**

**28<sup>TH</sup> JULY, 2017**

Judgment delivered, dated and signed in open Court this 28<sup>th</sup> day of July 2017

Ms Manyasa for Ms Thungu for Defendants present

Ms Wambui for Mr. Ombongi for Plaintiffs present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**28<sup>TH</sup> JULY, 2017**