



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAMIRA

ELC NO. 89 OF 2021

**{Formerly at Environment and Land Court at Kisii Case No. 196 of 2015}**

**BISHOP HARUN OMURUNGA EMALI.....1<sup>ST</sup> PLAINTIFF**

**ROMANUS JANGAYA.....2<sup>ND</sup> PLAINTIFF**

**WYCLIFFE BOSIRE (Trustees of Zion Revival Church Ministries International).....3<sup>RD</sup> PLAINTIFF**

**-VERSUS-**

**CHRISTOPHER ONDIEKI.....1<sup>ST</sup> DEFENDANT**

**THOMAS NYAIRO.....2<sup>ND</sup> DEFENDANT**

### **JUDGMENT**

The Plaintiff is a church organization and is represented by 3 Trustees in this case. The same is registered the proprietor of the parcel of land known as Title No. WEST MUGIRANGO/NYAMAIYA/3517 measuring 0.115 Hectares to be used by her Nyansabakwa church branch. The Plaintiff in her Plaint dated 2/6/15 claims that on 10/5/15 the Defendants wrongfully and unlawfully trespassed therein and destroyed the fence, the church toilet and laid a claim over the suit land. Consequently, the Plaintiff is seeking a permanent injunction against such future interference, peaceful possession and occupation of the suit land and an order of eviction against the Defendants. The Plaintiff has also sought un-computed special damages which are unspecified.

The Plaintiff claims to have bought the suit property from the 1<sup>st</sup> Defendant and the late Marita Nyakoe in 1994. The 1<sup>st</sup> Trustee bishop Harun Omurunga avers in his statement that the church was initially under the cover of Kenya Mennonite Church before she was registered as a fully-fledged church. He also states that initially Mennonite Church was being managed by the Happy Church. The church has always occupied the suit property since she purchased it until May 2015 when the Defendants moved into the suit premises and started destroying the trees thereon, the fence and toilets besides threatening the members of the Plaintiff. The 2<sup>nd</sup> Trustee John Bosco Kibore in his statement said he joined the pastoral duties of the Plaintiff in 2009. He says that on the suit property there is also a house that serves as a kitchen and a church sanctuary.

When on 10/05/15 he got a call from a church member informing him of the aforementioned destruction, he ran to the suit property and witnessed that some trees had been felled down and taken away and the pit latrine destroyed. He further stated that the Defendants have been denying the Plaintiff's members access to the church premises after fencing it off claiming ownership.

Peter Kamanda Marita, a brother to the Defendants, filed a statement averring that he is the one who brought the Plaintiff on board after introducing her officials to the 1<sup>st</sup> Defendant who had expressed his willingness to sell part of his land. This was sometime in 1993. He also states that the 1<sup>st</sup> Defendant's family and him were the first to become members of the Plaintiff. He further states that the purchase price was agreed in his presence at Kshs. 60,000/= and that, though the land belonged to the 1<sup>st</sup> Defendant's father, the 1<sup>st</sup> Defendant was given a go ahead to sell the portion in question. An agreement was reduced in writing the following year, 1994 and the contract was completed in 1999 after the purchase price was paid in full and a cow, sufuria and blanket were given to the 1<sup>st</sup> Defendant by the church as a gift. To complete the transaction, their late father executed transfer documents and the church fenced off the suit land. The witness also states that it was Bishop Harun Omurunga Emali who conducted his father's (Marita's) burial ceremony and that the Defendants have their respective residence on their parcels of land intact. He concludes that the Defendants claim over the suit land is unfounded since the Plaintiff has not gone beyond her boundaries nor has she encroached into the Defendants' land.

Witness number 4, Kennedy Mongare Nyakundi, a pastor with the Plaintiff, in his written statement dated 2/6/15 and as he testified in court,

recalls that in 1997 he went to the suit property in the company of a Surveyor by the name of George and met the Defendants' late father, Sabastian Marita Nyakoe and the 1<sup>st</sup> Defendant and the deceased allowed them to survey the land and carve out the Plaintiff's portion and although it is the deceased who executed all the sub-division and transfer documents, the 1<sup>st</sup> Defendant assisted the Surveyor to survey the suit land by holding the measuring tape for the latter. The deceased also gave the Plaintiffs' representatives a copy of his National Identity Card. The deceased, the 1<sup>st</sup> Defendant and the latter's mother demanded for a suit, a cow and a blanket & sufuria respectively to seal the deal and the same was paid for immediately. A deposit of Kshs. 3,000/= to the deceased for the suit and the balance of Kshs. 2,000/= was paid to his wife after his demise. The blanket and sufuria were also given to the Defendant's mother and a brown cow was given to the 1<sup>st</sup> Defendant. Afterwards the Surveyor, George presented the transfer documents duly filled to the Land Control Board for approval and eventually the Title Deed in favour of the church was issued. Besides all the 4 written statements adopted by their makers in their evidence in chief, the 1<sup>st</sup> witness produced copies of official search and a green card showing that WEST MUGIRANGO/NYAMAIYA/3517 became the properties of the Plaintiff on 20/1/2003 and Title Deed issued, a certificate of registration from the Registrar of societies showing that the plan was registered under Section 10 of the Societies Act (Cap 108) on 18/5/0, copies of the sale agreement and acknowledgement thereof. Mutation forms dated 4/6/97, a Title Deed dated 20/01/2003 in the name of the Plaintiff and finally a demand letter. On their part the Defendants in their statement of defence dated 10/5/17 aver that the registration of WEST MUGIRANGO/NYAMAIYA/3517 was fraudulent since it was done without probate in respect to the Estate of their late father, Sabastian Marita Nyakoe just as the mutation forms were executed without the said grant and that the Plaintiff is not entitled to the suit property.

In his statement, the 2<sup>nd</sup> Defendant says that he has never transacted with the Plaintiff and that the acquisition of the suit property was fraudulent and that his late father dislocated his right leg and knee in 1993 and since then was bed ridden until his death. He could therefore not effect any transfer to the Plaintiff since the suit property was not in existence by then. He also claims that the Plaintiff has fraudulently acquired Title to his identifiable portion given to him by the late father. He therefore prays that the suit be dismissed with costs. On his part, the 1<sup>st</sup> Defendant in his written statement of even date claims that his late father, Sabastian Marita Nyakoe was the registered owner of land parcel No. WEST MUGIRANGO / NYAMAIYA/346 which he had apportioned to his 7 sons on the ground. But the same was and has never been sub-divided nor transferred. He further states that the family has never taken out the letters of administration in respect to the Estate thereof. He later in 1993 allowed the Happy Church headed by Bishop Joseph Kamau to come and occupy his portion measuring 25 by 100 feet. He later agreed to sell the same to the church in 1994 at Kshs. 60,000/=. The church paid part of the price but has never paid a balance of Kshs. 28,100/=. He claims that in May 2015 both Defendants discovered that the Plaintiffs had been registered as the proprietor of part of their father's land which had now been sub-divided into 2. This was done on 20/1/13. The thumb prints on the documents of sub-division are not his father's and the same are strange and that the land carved out is more than what had been agreed upon. He claims that in 1999 he was given a cow by the Happy Church as an appreciation and was told to wait for the balance.

Finally, a dispute arose between Happy church and its branch at Nyansabakwa as a result of which the latter converted into Zion Revival Church Ministries International "wrongfully and unlawfully and without my knowledge." He later in 2003 removed the sign post with the signage of the Plaintiff at the entrance of the suit property and due to the threats of death to him, injury to his mother and the chasing away of his mother he fled to Kericho District until 2006 and when he came back he led a quiet life for the sake of his life. He seeks to have the court dismiss this suit because the Plaintiff is a stranger to him. No counterclaim was lodged.

When the 2<sup>nd</sup> Defendant, Thomas Nyairo Marita stood on the witness box and adopted his written statement, besides stating that he was aware that an agreement was reached at between his Co-Defendant and Happy Church, he said that he was not there when the negotiations were taking place nor was he aware whether the same was finalized or not. Further, that he doesn't know when the Plaintiffs took possession and that his brother, 1<sup>st</sup> Defendant did not involve him in the transaction but he only started seeing the church building coming up in 1993. But he said that only his brothers parcel of land was encroached and not his.

The 1<sup>st</sup> defendant insists that the Plaintiffs took more land than had been sold to Happy Church which even encroached onto the 2<sup>nd</sup> Defendant's land. He also said that he was excommunicated by the Plaintiffs' church and this made him very bitter with the church which forced him to convert into Seventh Day Adventist of which he is a member to date. He also stated that Happy Church has never complained of the registration of the suit property in the name of the Plaintiff Church.

The predominant issue before the court is, as between the Plaintiff and the Defendant who has a better Title to the suit property. There is no doubt that an Agreement was arrived at between the 1<sup>st</sup> Defendant on one hand on 9/4/94 and the Happy Church on the other. The church was being represented by one Pastor Harun Emali, (the 1<sup>st</sup> Trustee). The consideration for the plot was Kshs. 60,000/= and kshs. 2,000/= was the first payment which payment was duly acknowledged. There followed Kshs. 1,000/= on 16/7/94, Kshs. 500/=, 1,000/=, 1,000/=, 1,000/= and 1,000/= was paid on 10/8/94, 24/10/94, 27/11/94 & 28/11/94 respectively. Then on 12/2/94 Kshs. 1,000/= was paid, Kshs. Kshs. 500/= on 14/5/95 and 6/10/95 a further Kshs. 500/= was paid. This is all contained on the first page of the Agreement dated 9/4/94. The total comes to Kshs. 6,500/=. Prior to that Pastor Harun Emali had been introduced as the pastor in charge of Nyamira Church with authority to represent the Nakuru Happy Church (Kenya Mennonite church) in a letter dated 6/6/90. On 3/3/96 the 1<sup>st</sup> Defendant acknowledged receipt of Kshs. 3,000/= with a balance of Kshs. 28,130/= being due. On 12/10/99 the 1<sup>st</sup> Defendant acknowledged in writing his receipt of a brown cow from the Happy Church mission as an appreciation for the sale of the plot to the church. He also admits having received payment in full for the "plot". He also further states that he had given them the Title Deed and had given them liberty to develop the property. This was in the presence of Peter Kenunda, Mama Hellen Bonachi Pascal and Pascal Marita who were described as from the family of Mzee Marita, the Defendants' father. Also attached and dated 3/6/97 is a copy of the mutation form for the parcel of land WEST MUGIRANGO/NYAMAIYA/346 with WEST MUGIRANGO/NYAMAIYA/3517 as one of the resultant sub-divisions measuring 21Mx36Mx22Mx32 metres. A Title Deed was later issued in the name of Nyansabakwa Zion Revival Church International of P.O. Box 105, NYAMIRA on 20/1/03 with Harun Emali, Evans Mongare and Julius K. Andayi as the Trustees. Since then, there was no communication in writing between the parties. The 1<sup>st</sup> Defendant has never demanded what he calls the balance of the purchase price. Even when this suit was filed, no counterclaim was filed to demand the alleged balance of the purchase price save saying that if any registration in favour of the Plaintiff was ever effected in respect to L.R. NO. WEST MUGIRANGO/ NYAMAIYA/3517, then the same was fraudulent and never sanctioned by him. He also claims that the same was done without obtaining the letters of administration in respect of the Defendants' father who had died prior to the execution of the mutation form in June 1997. He also stated in his evidence that one of the particulars of fraud on the part of the Plaintiff was that the Plaintiff purported to have purchased the suit land from the 1<sup>st</sup> Defendant when the latter had no land to sell. Nothing can be as dishonest since in his written statement, the 1<sup>st</sup> Defendant states: -

**“Sometime in the year 1993 after being given my identifiable portion on the ground. I invited a church known as “Happy Church” headed by Bishop Joseph Kamau. I allowed them to use and occupy the portion of my identifiable land on the ground with the knowledge of my late father measuring approximately 25 feet by 100 feet. Later sometimes in the year 1994, I agreed with the church to sale the said portion to them at a consideration of Kenya shillings Sixty Thousand and was to be paid by instalments, as the Lord shall provide to the church thereafter I was ti do all acts and manner of things necessary to effect transfer to the said” Happy Church”. The said church continued to pay the installments towards the purchase price until 3<sup>rd</sup> March, 1996 when they remained with a balance of Kshs. 28,130/= which they have failed and neglected to pay to date.....”**

When did the 1<sup>st</sup> Defendant discover that he had no land to sell? On whose behalf was he receiving the aforesaid monies and on whose behalf was he acknowledging receipt? Did he remit the monies he received to “the owner” of the land. More so, the 1<sup>st</sup> Defendant testified that he had heard the 2<sup>nd</sup> Defendant say that he wanted to sell a portion of his land to which he had no objection. This is quite immoral. He and the 1<sup>st</sup> Trustee herein even invoked the name of God by saying that “the full cost of the said plot is Kshs. 60,000/= which will be paid in instalments as the Lord God provides....” Even after making a few accusations against the Plaintiff in his statement such as carving out more land than had been sold to the church, part of which is the 2<sup>nd</sup> Defendant’s who refuted the claim in his evidence, the 1<sup>st</sup> Defendant did not seize this opportunity to file a counterclaim. The 1<sup>st</sup> Defendant even goes to length to testify that the Plaintiffs took a bigger portion than “I had sold to them”. It is also interesting and incredible to witness the 2<sup>nd</sup> Defendant say that he started seeing the church buildings being put up on the suit premises in 1993 and questioning how the church obtained a Title over the land but none of the Defendants did anything to repulse the alleged intrusion.

The 2<sup>nd</sup> Defendant claims that his father Mr. Marita died in 1996. His brother the 1<sup>st</sup> Defendant on the other hand claims that his father died on 2/5/1994. Their 3<sup>rd</sup> brother, PW1 talks of 1998. Unfortunately, no document was produced in court to cure the discrepancy. The man may as well be alive today and if he is indeed dead, then there is no proof that he died before the signing of the mutation forms in respect of the suit premises in 1997 or 20/1/03 when the suit land was transferred. The next question to ask is to who did the 1<sup>st</sup> Defendant sell the suit property? He has admitted that he did sell the portion of land in dispute to one Happy church. And that therefore the Plaintiff herein is a total stranger to him. Where then did the Plaintiff come from? The 1<sup>st</sup> Defendant has testified that then he was a happy member of the Happy Church. The 1<sup>st</sup> Trustee of the Plaintiff herein was also a pastor of the Happy Church. The 1<sup>st</sup> Defendant was later ex-communicated by the Plaintiff because of marrying a second wife concerning which he (in his own words) was very bitter. He then converted to SDA after the latter church persuaded him. He further testified that Happy Church has never complained about the property being registered in the name of the Plaintiff herein. It should also be borne in mind that the 1<sup>st</sup> Defendant testified that Happy Church paid to him the full purchase price, the last bit being a brown cow, at his request.

PW2 Reverend Kennedy Mongare Nyakundi explained that at the time of the sale of the suit property the Plaintiff was affiliated to Happy Church since their church had not been registered and that they bought the land as Trustees of the latter church.

As to how the purchaser metamorphosed from Happy Church to the Plaintiff, Happy Church has never complained of the registration of the property in the name of the Plaintiff. The Defendants seem to be putting up a case for Happy Church without joining the latter as Third Party nor has the 1<sup>st</sup> Defendant filed a claim over the balance of the purchase price to himself. I believe that the bitterness of his ex-communication must be what made the 1<sup>st</sup> Defendant turn around and disown the Plaintiff. All the parties herein were at one time full members of Happy Church, Nyamira. Without any claim from the Happy Church and having heard the explanation that Happy Church was a holding Society for the Plaintiff, whatever arrangements between the 2 churches may have reached is neither here nor there. It is unrealistic that since the last payment in 1999 to date the Happy Church could not have discovered that her land was registered in the name of another person – the Plaintiff herein.

I will therefore, believe the Plaintiffs’ case that the 2 churches had an internal agreement that the Plaintiff operates happily under the cover of Happy Church until the former is registered. In the premises, I give judgment to the Plaintiff as prayed for in terms of prayers (a) and (b) dated 2/6/2015. I also award the costs of this suit and interest on the costs to the Plaintiff against the 1<sup>st</sup> Defendant. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 31<sup>ST</sup> DAY OF JANUARY, 2022**

**MUGO KAMAU**

**JUDGE**

**In the Presence of: -**

**Court Assistant: Sibota**

**Plaintiffs: Mr. Ombachi for the Plaintiffs**

**Defendants: Ms. Nyaenga holding brief for Mr. Gichana for the Defendants**