



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CASE NO. 135 OF 2015

ERNEST PANGRAS NYANGWESO.....1ST PLAINTIFF

FRANK OMWAZO.....2ND PLAINTIFF

-VERSUS-

SILVESTER IFIRE ODINGA.....1ST DEFENDANT

CHRISTIAN OUTREACH MINISTRIES WORLDWIDE TRUSTEE.....2ND DEFENDANT

JUDGEMENT

1) The Plaintiffs vide a plaint filed 27th of November, 2015 impleaded the Defendant in this suit and pray for judgement against the Defendants for ORDERS:

a) That the transfer of LR No. MARACHI/BUKHALALIRE/1717 from the 1st Defendant to the 2nd Defendant was fraudulent hence null and void ab initio;

b) That the title deed to LR No. MARACHI/BUKHALALIRE/1717 currently in the names of CHRISTIAN OUTREACH MINISTRIES WORLDWIDE TRUSTEES be cancelled and a fresh title issued in the names of ERNEST PANGRAS NYANGWESO and FRANK OMWARO;

c) Costs of this cause.

2) The Plaintiffs aver that on or about the 9th of February, 1996 they bought a plot measuring 50 x 100 feet from Cosmas Ochieng' Twala and Alati Osuru for a sum of KShs. 40,000 which plot they intended to transfer to their ministry OUTREACH BROTHERS CHURCH. That they even went to the Land Control Board and it was only when the transaction was ongoing that the 1st Defendant moved with speed and duped the seller into transferring the land to himself on the 7th of September, 2005. That the 1st Defendant then fraudulently and maliciously caused the plot LR No. MARACHI/BUKHALALIRE/1717 to be hastily transferred to the 2nd Defendant unlawfully thus denying the Plaintiffs their rightfully purchased land.

3) They enumerated the particulars of fraud on the 1st Defendant's part as:

a) Coercing the sellers to transfer to him the plot when he knew it was wrong/unlawful;

b) Failing to inform the 1st and 2nd Plaintiffs about his moves'

c) Concealing the fact that the land was to be transferred to OUTREACH BROTHERS CHURCH and not the 2nd Defendant thus enriching himself unfairly;

d) Selling plot LR No. MARACHI/BUKHALALIRE/1717 to the 2nd Defendant thus enriching himself unfairly;

e) Conspiring with the 2nd Defendant to defraud the Plaintiff notwithstanding that he had notice of the Plaintiff's claim over the land as purchaser;

4) The particulars of fraud on the part of the 2nd Defendant were:

- a) *Procuring registration of plot No. MARACHI/BUKHALALIRE/1717 into her names without giving consideration to the 1st & 2nd Defendants;*
- b) *Conspiring with the 1st Defendant to deny the Plaintiffs of their land;*
- c) *Failing to disclose that she was not a beneficiary of the plot;*
- d) *Accepting registration as owner of the title yet she had actual notice of the plaintiffs claim over the same;*
- e) *Being fraudulent perse.*

5) The Defendants filed their statement of defence on the 3rd of February, 2016 pleading that the Outreach Brethren Church is a splinter group of 2nd Defendant that was formed in 2015. That the 2nd Defendant bought a plot measuring 0.05Ha portion of Marachi/Bukhalalire/843 from Cosmas Ochieng' Twala in the 1990 and that the said portion now Marachi/Bukhalalire/1717 was duly transferred by the deceased to the 1st Defendant who later transferred it to the 2nd Defendant on a very clear understanding arrangement and consent of parties. The Defendants stated further that the documents relied upon by the Plaintiffs are altered and forged and that the Plaintiffs are out to defraud the 2nd Defendant.

6) The Defendants listed the particulars of fraud and illegality on the part of the Plaintiffs as:

The hearing commenced on the 10th of March, 2020. The Plaintiff, **ERNEST PANGRAS NYANGWESO** testified as **PW1**. He stated that he hails from Murumba and is a pastor with Outreach Church Brethren Murumba. That the 2nd Plaintiff was one of the church elders while the 1st Defendant was one of the church members. He confirmed knowing the 2nd Defendant. That he started a church in 1989 and later he bought land on behalf of the church from Cosmas Twala. The original land was L.R No. 843 which was subdivided into L.R No. 1526 and 1525. **PW1** continued that they began developing the land by constructing a semi-permanent church and later building of a permanent structure was put up which is yet to be completed. That they did survey and began the process of acquiring the title and went to the Land Board Control and subsequently acquired the letter of consent.

7) It is the Plaintiffs' case that while the process was still ongoing, the 1st Defendant duped the seller who then went ahead to subdivide the land into four portions on 21st of September, 2004 being LR Nos. 1714 – 1717. That on 7th of September, 2005 the 1st Defendant was registered as the owner of LR No. 1717. That the 1st Defendant was well aware that they had transferred the land to Outreach Brethren Church. That the Defendants' actions have made them not to have their parcel of land and in turn a place of worship. He prayed for cancellation of the title deed of LR No. 1717 so that the same can be transferred to their names and costs. **PW1** produced the sale agreement as PEx 1, Land Control Board consent as P2, the letter of consent as P3 and mutation as P4.

8) Upon cross-examination, **PW1** reiterated that the purchasers were Ernest and Frank buying from Cosmas Twala and Albert, which land they were buying on behalf of a church called Outreach Brethren. That Outreach Brethren is not registered but it was affiliated to Christian Outreach Ministries Worldwide as at 1996. He confirmed that as at 1996 he was a partner with the 2nd Defendant so he was under the 2nd Defendant where his bishop was Jona Bedan. He continued further that the 2nd Defendant was registered in 1985 as per the certificate on record.

9) Pw1 admitted that in the year 2002 while in Mombasa, he was associated with Redeemed Church and Voice of God. That he was suspended from Outreach church and was never readmitted. That he did not form Outreach Brethren Church after his suspension. He confirmed that the 1st Defendant was one of the pastors of the 2nd Defendant although they were serving in different centres. PW1 stated that he was not aware that the 1st Defendant was registered on behalf of 2nd Defendant while awaiting appointment of 2nd Defendant's trustees. That in the letter dated 27th January, 2015 indicates that the 1st Defendant is holding the land on behalf of the 2nd Defendant. He confirmed that the agreement is dated 9th February, 1996.

10) That the consent is in respect of Marachi/Bukhalalire/1526 while the mutation is in respect of Marachi/Bukhalalire/843. PW1 confirmed that his plaint deals with Bukhalalire/1717. He stated that he has not presented any documentation to show that the said land was to be transferred to them. PW1 confirmed that he learned of the fraud in the year 2014 and that although he did not know what a transfer looked like he understood the particulars of fraud that he had pleaded. He concluded by stating that according to his documents, he had no dealings with the seller of L.R No. 1717.

11) On re-examination, PW1 stated that he has not been shown any documents that he was buying the land on behalf of anyone. That the land that was sold to him was 843 which was later subdivided to 1526 and 1525 and while they were processing their title, the 1st Defendant went behind his back and got parcel no. 1717.

12) The 2nd Plaintiff, **FRANK OTIENO OMWARO** testified as **PW2**. He stated that he was a retired civil servant. He adopted his witness statement made on the 18th of March, 2019 as his evidence in chief. In his statement, **PW2** merely adopted **PW1's** statement as his own.

13) In cross-exam, **PW2** stated that they belonged to the 2nd Defendant in 1996 under cover. That the members of the church contributed the money for buying the land. That the land bought should therefore go to Outreach Brethren not to the 2nd Defendant. He stated that a cover is given by a registered Ministry as one awaits to receive their certificate. That Outreach Brethren has not been registered to date and as such

legally there is no church. On re-examination, **PW2** stated that there was nothing stopping them from registering it now. The Plaintiffs closed their case at this point.

14) The trial proceeded for defence hearing on the 22nd of June, 2021 with the 1st Defendant, **SILVESTER IFIRE ODUNGA** testifying as **DW1**. He is a worshipper at the 2nd Defendant since 1990 and he became a pastor and later a District Overseer. That when he joined the church, the 1st Plaintiff was the pastor and district overseer until 1999. That the 2nd Plaintiff was also a worshipper of the 2nd Defendant. **DW1** stated that LR No. Marachi/Bukhalalire/1717 was purchased using the members' contributions of the 2nd Defendant. The land was first registered in his name before he transferred it to the 2nd Defendant. That the transfer was done in his name first because the trustees of the 2nd Defendant did not have a certificate of registration then. That the land was not bought by the Plaintiffs so he denied the fraud allegations contending that the 1st Plaintiff signed the agreement on behalf of the church.

15) **DW1** stated further that the 2nd Defendant purchased a plot measuring 0.05Ha, a portion of Marachi/Bukhalalire/843 from Cosmas Ochieng' Twila and the agreed purchase price was paid. That the 1st Plaintiff carried out the transactions in his capacity as the overseer and on behalf of the 2nd Defendant. That the 1st Plaintiff was expelled and/or excommunicated from the 2nd Defendant's church. That **DW1** was then promoted to take over the 1st Plaintiff's role and one of the assignments he inherited was to have the suit registered in the name of the 2nd Defendant.

16) That in 2015, the 1st Plaintiff re-joined the church and when he was unable to regain leadership he left and formed a splinter church, Outreach Brethren Church. That this church was never in existence in the 1990s and in any event, it is not a legal entity. That the documents filed by the Plaintiffs have been forged to suit the Plaintiff's claim and the Plaintiffs are out to defraud the 2nd Defendant. That the acquisition, registration and ownership of the 2nd Defendant in respect to LR No. Marachi/Bukhalalire/1717 part of Marachi/Bukhalalire/843 was procedurally and legally done. **DW1** urged the Court to allow the land to remain in the name of the 2nd Defendant and the suit dismissed with costs. **DW1** concluded by producing the documents in the Defendants' list of documents dated 1st February, 2016.

17) During cross-examination, **DW1** stated that he neither had a sale agreement for the purchase of land nor a letter of consent. He stated that the certificate of registration of the 2nd Defendant was there even before he became a pastor. He reiterated that the money was raised by the members of the church. That the 1st Plaintiff was a pastor whose role was to oversee the operations of the church. That he also contributed to the purchase of the land and the process began during his tenure. That he regularly obtained the title in his name. That the decision to stop the Plaintiff from being pastor was made by the headquarters.

18) On re-examination, **DW1** stated that he was among those who contributed to the purchase money. That although he does not have an agreement of sale, the agreement the Plaintiffs have was made on behalf of the church and the 1st Plaintiff was also a member of the 2nd Defendant.

19) **ROBERT AURA WASIKE** testifying as **DW2** stated that he is in charge of the 2nd Defendant's Kitale Diocese which includes Busia churches. That he became a Bishop in 1995. He confirmed knowing the Plaintiffs who were previous members of the church. He confirmed that he participated during the transfer from the 1st Defendant to the 2nd Defendant and that before the said transfer, the trustees had not been registered. That the 2nd Defendant authorised the 1st Defendant to have the land registered in his name on behalf of the church and there was no fraud during this process. **DW2** confirmed that the church gives the pastors permission to do development in their area and as such the sale agreement was done on behalf of the 2nd Defendant. That he did not know Outreach Brethren Church but when they were trying to transfer the land into Odunga's name, the Plaintiffs tried to stop them and the D.O referred the matter to the Chief who resolved that the land belonged to them.

20) Upon cross-examination, **DW2** stated that the specific church commenced in the early 1990s under a tree. That the 1st Plaintiff came to their headquarters seeking for permission to operate under their cover and they did not have an agreement on the terms of their cover. That the 1st Plaintiff joined the ministry and they gave him authority to buy, develop land and even conduct weddings. That the Church recognized the agreement knowing that it was done on behalf of the ministry. That he did not know the agreement between the 1st Defendant and the Vendor. That the procedures followed were: obtaining the Land Control Board Consent. He concluded by stating that he did not have the minutes of the meetings held at the Chief's office.

21) On re-examination, **DW2** stated that the Chief heard the complaint on behalf of the D.O. That this was after the application for the Land Control Board consent. That the chief then filed his report and gave his consent to have the land transferred to the 2nd Defendant. That the 1st Plaintiff was looking for a ministry to work with and after joining the 2nd Defendant and was operating under them so anything he did was done on behalf of the 2nd Defendant. That this was in the early 1990s. That they followed due process in getting the title and we have not been shown anything that they did not follow due process.

22) **CHRISTINE KANINI MUSEBE** said she joined the 2nd Defendant in 1996 and is still a member to date. The 1st Plaintiff was a pastor and overseer of the 2nd Defendant and he left in 1996 to go to Mombasa. He then came back in 2015 with another church called Brothers Outreach. That Brothers Outreach and the 2nd Defendant are different entities and they have not merged. That the suit land was bought using church members' contributions and the 1st Plaintiff was in charge before being suspended from the church. That she is aware that an agreement was done and the same was done on behalf of the church by Mwalo. That the 1st Defendant was registered as the owner because the trustees were not around but he later transferred it to the church. That the land belongs to the church and not the Plaintiffs.

23) On cross-examination, **DW3** stated that she has known the Plaintiff since 1996. That Brothers Outreach belongs to the 1st Plaintiff and she is not aware when the church began. That she did not sign the sale agreement but she saw the agreement in favour of the 2nd Defendant.

That the Brethren Outreach did not exist. On re-examination, **DW3** stated that she was present when the agreement was drawn but was not amongst those who signed it.

24) The Plaintiff filed their submissions on the 28th of July, 2021 submitting that there exists an agreement between the Plaintiff and the sellers while there is no agreement between the sellers and the Defendants. That the 2nd Defendant was registered on 9th April, 1985 and they could have registered the land in their legal capacity as a church. That the Defendants have not proved that they gave the Plaintiffs any authority to buy the land on their behalf and later transfer it to the 2nd Defendant. That the Plaintiffs have proved their case on a balance of probabilities and are entitled to the orders sought in the Plaintiff plus costs.

25) The Defendant filed their submissions on the 10th of August, 2021. They submitted that all the defence witnesses confirmed that the land was bought by the Christians on behalf of the 2nd Defendant. That all parties confirmed that Christian Outreach Ministries Worldwide legally exists. That the Plaintiffs tried to bring on board a confusing name Outreach Brethren church which both Plaintiffs confirmed it was not registered. That the documents produced by the Plaintiffs are undated in particular the LCB application form. That the consent is in respect to LR No. 1526 while the mutation form is in respect to 843 creating 1525 and 1526. That the mutation and the LCB application form and the LCB consents are therefore irrelevant as they refer to a different matter and are therefore of no consequence. The Plaintiffs did not seek to challenge the registration of the 1st Defendant and as such even if the court were to grant their reliefs, the land would revert to the 1st Defendant who would do with it as he pleases. They concluded by stating that the Plaintiffs had failed to prove the particulars of fraud in the Plaintiff and as such failed to prove their case. They urged this Court to dismiss the suit with costs.

DETERMINATION

26) I have considered the parties' pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are as follows:

a. Whether the Plaintiffs acquired a portion of L.R. MARACHI/BUKHALALIRE/843 now 1717 on behalf of Outreach Brethren Church:

b. Whether the Defendants acquired Land Reference No. MARACHI/BUKHALALIRE/1717 fraudulently;

c. Whether the 2nd Defendant's title to the Suit Land should be cancelled and the same registered in the name of Outreach Brethren; and

d. Who bears the costs of this suit?

27) The first issue on whether the Plaintiffs were buying the property on their own behalf or for the 2nd Defendant forms the gist of this dispute. The issue not in dispute is that the money used to purchase the suit property was contributed by the church members. What is not agreed is which church, Outreach Brethren or is members of the 2nd Defendant? According to the Plaintiffs, their church Outreach Brethren was affiliated to but they were not part and parcel of the 2nd Defendant. This arrangement was however verbal as the Plaintiffs have no documents to support the averment. The Plaintiffs admitted that Outreach Brethren is yet to acquire a registration. The Defendants contend that the Plaintiffs were their members until in 1999 when the 1st Plaintiff was ex-communicated. That there no such arrangement as alleged by the Plaintiff.

28) From the documents produced by the Defendants, especially the meeting held on the 29th of December, 1993 the 1st Plaintiff attended as a member and the overseer of the Busia branch of the 2nd Defendant. He remained an overseer until the 26th of October, 1999 when he was demoted from being a pastor in the church. The sale agreement for the suit property was drawn in the year 1990 when he was still pastor of the church. At minute 4 the 1st Defendant was given the authority to take over the 1st Plaintiff's role as pastor of Murumba Christian Outreach Ministries Church and for him to continue to figure out a way in which they can obtain the title deed of the land for the church faster.

29) The Plaintiffs contend that they were affiliated to the 2nd Defendant awaiting registration of Outreach Brethren Church. As at the time they gave their testimony, the plaintiffs admit their said church is yet to be registered. The 1st plaintiff did not set out the terms of the affiliation in respect to property ownership. In the absence of documentation to contradict the evidence by the Defendants the 1st Plaintiff was their member and overseer who only left after being ex-communicated for the reasons explained. There is nothing that this Court finds to constitute an act of the Defendants defrauding the plaintiffs of the suit-land.

30) The consents and the mutation forms provided by the Plaintiffs relate to the subdivision of land parcel Marachi/Bukhalalire/843 into parcel numbers 1525 and 1526. The said mutation forms and consents were obtained in the year 1996 while the 1st Defendant received the title in his name in the year 2014. Two inferences are drawn from the plaintiffs' documents, first that they were not used by the defendant to acquire their title Marachi/Bukhalalire/1717 which is the subject matter of the instant suit. Secondly, there is no evidence that these documents were presented for registration in 1996 or thereafter to make the subsequent subdivision of the original number 843 which created title numbers 1714-1717 illegal.

31) In **Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al- Heidy & Others [2015] eKLR**, the Court of Appeal examined and stated the law on trusts as follows:-

According to the Black's Law Dictionary, 9th Edition; a trust is defined as

32) A resulting trust will always arise in the event purchase money is advanced by a different party to the one the property is registered in favour of. All the witnesses including the Plaintiffs confirmed that the money for the purchase of the suit property was raised by the church members. I found that the 1st plaintiff operated as an overseer of the 2nd Defendant as at the time the agreement was drawn so that the church members who contributed the money were deemed to be members of the 2nd Defendant.

33) In answering the second question, the Plaintiffs relied on the particulars of fraud pleaded against both Defendants. They allege that the 1st Defendant deceived the seller to have the land transferred to him and later to the 2nd Defendant. The seller was not sued in these proceedings neither was he called as a witness to ascertain that he signed the transfer documents in favour of the defendants out of deception or that he was coerced to append his signature. The 1st Defendant stated that he did not sell land to the 2nd Defendant as he acquired registration on behalf of the 2nd Defendant. The issue of whether the land was bought for outreach brethren or the 2nd Defendant has been determined herein above.

34) As the Court of Appeal inferred in the case of **Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR**, fraud is a question of fact that must be proved by evidence. Fraud is an allegation that has to be proved as held in the **Paul Muira & Another vs. Jane Kendi Ikinyua & 2 others (2014) eKLR** where the court cited with approval the Court of Appeal case of **Musonga vs. Nyati (1984) KLR 425** and in **Koinange and 13 Others (1986) eKLR 23** thus:

"Allegation of fraud must strictly be proved, and though the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than a balance of probabilities. The onus of discharging this burden is on the party alleging the fraud."

35) On account of the evidence adduced, this court comes to the conclusion that the Plaintiffs did not discharge the burden of proof as stated in section 107(1) of the Evidence Act which provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Consequently, there is no basis laid why the 2nd Defendant's title should be cancelled.

36) In view of the above analysis and observations, I find that the Plaintiffs have failed to prove their case wherefore it is ordered dismissed with costs.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 23RD DAY OF FEB, 2022.

A. OMOLLO

JUDGE