



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CIVIL SUIT NO. 2 OF 2015**

**BETWEEN**

**COUNTY GOVERNMENT OF MIGORI.....PLAINTIFF**

**AND**

**BISHOP PHILIP ANYOLO.....1<sup>ST</sup> DEFENDANT**

**CATHOLIC DIOCESE OF HOMA BAY.....2<sup>ND</sup> DEFENDANT**

**REV. FR RICHARD ODHIAMBO.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. This case concerns the control and management of Kitere Youth Polytechnic (“Kitere”) which is situated in Migori County. The plaintiff, the Migori County Government (“the County”) asserts that it owns and has the constitutional and statutory authority to control and manage the institution as it is a public institution. The Catholic Diocese of Homa Bay (“the Diocese”) also asserts it owns Kitere and contends that it is a private and not a public institution.

**Plaintiff’s Case**

2. The County avers that by a letter dated 24<sup>th</sup> April 2009 the Diocese, through its mission at Rakwaro Parish, applied for the registration of Kitere as a public institution. Following the application, Kitere was registered as a public youth polytechnic on 20<sup>th</sup> May 2010 by the then Ministry of Youth Affairs and Sports vide registration number *MOYAS/DY/NYZ/RNG/PC/04* and registration certificate number *0483* issued.

3. The County further avers that following registration, Kitere has operated as a public institution and has been funded, assisted, managed and run as a public institution using resources from the County Department of Education, Culture and Sports including the posting of qualified staff, instructors, purchase of equipment and tools.

4. The County avers that by a letter dated 2<sup>nd</sup> February 2013, the 1<sup>st</sup> defendant wrote to the 3<sup>rd</sup> defendant appointing him Manager of Kitere which he described as St Martin Technical Institute. Thereafter on 23<sup>rd</sup> February 2013, the 3<sup>rd</sup> defendant with a view to taking over the management of Kitere, visited the institution, demanded for and held a meeting with the County appointed Manager and the Management

Board of Kitere where he demanded that the manager and staff posted by the County do vacate the institution on or before 24<sup>th</sup> February 2015. Thereafter, the County alleges that the 3<sup>rd</sup> defendant, in the company of Diocesan officials, invaded Kitere, took over and closed the institution.

5. The County avers that since 24<sup>th</sup> February 2014, the normal learning activities at Kitere have been disrupted. Following the action of the defendants, the County decided to file suit. By a plaint dated 10<sup>th</sup> March 2015, the County sought the following reliefs against the defendants;

1. *A declaration that Kitere Youth Polytechnic is a village polytechnic whose management falls under the plaintiffs devolved function as contemplated by Article 186(1) as read with Fourth Schedule Part 2, 9 of the Constitution of Kenya.*
2. *A Declaration that Kitere Youth Polytechnic is a public village polytechnic and not a private institution owned by the 2<sup>nd</sup> defendant, Catholic Diocese of Homa Bay.*
3. *A Declaration that the actions of the Defendants as complained of in this suit are illegal, unlawful, unconstitutional and amounts to criminal offences contemplated under section 92 of the Basic Education Act.*
4. *An order of permanent injunction restraining the 1<sup>st</sup> Defendant, Bishop A. Anyolo, 2<sup>nd</sup> Defendant, Catholic Diocese of Homa Bay and 3<sup>rd</sup> Defendant Rev. Fr. Richard Odhiambo, either by themselves, their agents and servants, acting jointly and severally, and or any other person or body acting and claiming under them from in any way interfering with the plaintiff's statutory and constitutional role in the management, control, running and affairs of Kitere Youth Polytechnic except to the limited extend and manner contemplated by section 27 of the Basic Education Act, No. 14 of 2013,*
5. *Punitive damages and compensation for willful acts of lawlessness, impunity, trespass, unlawful interference with the plaintiff's statutory and constitutional role in the management, control, running and affairs of Kitere Youth Polytechnic.*
6. *Costs of these proceedings.*
7. *Any other relied that the court may grant.*

6. Mr Kanyangi, counsel for the plaintiff, stated that Kitere belongs to and is to be administered by the County. He submitted that the County's case was supported by the fact that there was a certificate of registration issued pursuant to a request made by a representative of the Diocese and it was issued under the **Basic Education Act, Act No. 14 of 2013** ("the Act"). He contended that the effect of the certificate of registration was that Kitere became a public institution and as such, it fell under ambit of the County Education Board.

7. Counsel further submitted that under **section 27** of the **Act**, the Catholic Church through the Diocese is a sponsor of Kitere and its role is limited to that outlined in the **Act**. He argued that the role of a sponsor does not include management and control of the institution and that therefore the 1<sup>st</sup> defendant had no right to impose any manager on the institution.

8. The County further staked its case on the provisions of **section 17** of the **Act** which establish the County Education Board whose duties as outlined in **section 18(1)** of the **Act** include to, "*Oversee in consultation with the County Government, the operation and management of Youth Polytechnic, Pre-primary Education including Early Childhood care and Education Programs in the County.*"

9. The County argues that its mandate is anchored in the provisions of **Article 189 (1)** of the Constitution as read with the **Fourth Schedule Part 2, 9** which reserves for the County government power and function in respect of, "*Pre-primary education, village polytechnics, homecraft centres and childcare facilities.*"

10. Counsel was of the view that even though the land upon which Kitere is situated is registered in the name of the Diocese, it does not affect the power of the County to manage and administer village polytechnics. Counsel informed the court that there was a dispute over the land pending in the Land and Environment Court at Kisii.

## Defendants' Case

11. The defendants opposed the suit by filing a joint defence dated 30<sup>th</sup> March 2015. The defendants aver that Kitere had been operating as a private youth polytechnic until it was irregularly made a public institution contrary to the internal regulations of the Diocese. The defendants admit that although Kitere was registered as a public youth polytechnic, its registration was irregularly undertaken and that the institution was handed over to the relevant ministry only for purpose of allowing them to be sole signatories to a separate bank account to run the affairs of the Polytechnic and allowing them to post tutors to the institution. The defendant contends that the certificate of registration was valid only for 18 months after its issue and that it lapsed on the expiry of the 18 months.

12. The 1<sup>st</sup> defendant admits the letter dated 24<sup>th</sup> April 2014 in which it demanded that Kitere revert to private status. He avers that apart from the demand, the issue of reverting Kitere to private status had been the subject of previous meetings, correspondence and even proceedings between them before the Land Registrar, Migori County. The defendants aver that on 7<sup>th</sup> May 2014, the Land Registrar, Migori ruled that the land upon which Kitere is situated; **Kamagambo/Kanyajuok/71** is registered in the name of the Diocese.

13. The defendants' position is that their actions to demand that the County restore Kitere to private status were proper and legitimate in view of the fact that the provisional certificate of registration had lapsed. The Diocese was therefore entitled to refer to the institution as St Martin Technical Institute, Kitere in order to assert its legal and lawful status. The defendants further aver that they took over the institution peacefully on 24<sup>th</sup> February 2015, after giving due notice.

14. Mr Ragot, counsel for the defendant, submitted that the defendants case is that the County's cause of action is entirely based on the fact that it can only involve itself in the institution if it is registered as a public institution. In the circumstances, he argued that the registration of Kitere as a public institution was provisional and lapsed after 18 months after the certificate was issued. He submitted that when the registration lapsed on 20<sup>th</sup> November 2011 the public nature of the institution ceased.

## The Proceedings

15. Together with the plaint, the plaintiff filed an application for a mandatory injunction seeking the court to direct the re-opening of Kitere. I declined to grant *ex-parte* mandatory orders and as the matter was filed under the fast track, I dispensed with application and gave directions for an expedited hearing.

16. I was also of the view that since most of the facts pleaded by the parties that were crucial for the determination of key issues were not in dispute, it would be unnecessary to hear oral testimony. I therefore directed the parties to file written submissions and highlight the same.

## Determination

17. As I stated at the opening of this judgment, the matter in issue concerns the management and control of Kitere and whether it is a private or public education institution. In resolving this matter, the two undisputed matters are decisive.

18. The first issue is that the property where Kitere is situated is known as **Kamagambo/Kanyajuok/71** and is currently registered in the name of the Diocese. This issue of ownership was the subject of a determination by the Land Registrar, Migori who confirmed the position. Mr Kanyangi, counsel for the plaintiff, stated that the ownership of the land is being challenged in a petition filed in the Environment and Land Court at Kisii namely ***Petition No. 36 of 2014 (The County Government of Migori v The Registered Trustees of Catholic Diocese of Homa Bay and Others)***. On 20<sup>th</sup> March 2015, the court in that case, issued an injunction, "*restraining the 2<sup>nd</sup> defendant from selling, transferring, leasing (save for the hostel), creating a further charge or mortgage, carrying out construction of new buildings (save for ongoing construction of a hostel) or cutting down any trees on the suit property pending hearing and*

*determination of this petition.”*

19. Although, there is a challenge on the issue of ownership, the property as it stands is still in the name of the Diocese. I cannot comment further on the same at it clearly *sub-judice*.

20. The second issue concerns the registration of the Kitere as a public institution. The Ministry of Youth Affairs and Sports issued a, “*Certificate of Registration of Public and Private Youth Polytechnics*” on 20<sup>th</sup> May 2010 referring to the Youth Polytechnic as Kitere Youth Polytechnic with the Catholic Diocese of Homa Bay as the Sponsor. The certificate states that, “*This is a provisional certificate. A permanent certificate MUST be obtained eighteen (18) months from the date of registration when this Provisional Certificate becomes invalid.*”

21. I think these two uncontested facts are decisive in resolution of this case. First, ownership of the property to the extent that it is in the name of the Catholic Diocese of Homa Bay means that the 2<sup>nd</sup> defendant is entitled to all the attendant benefits that come with absolute and indefeasible ownership of the property. It has the right to control the manner in which activities, including educational activities are carried on the property subject to the applicable law and regulations governing the running of an educational institution.

22. The fact that the school is on private land does not necessarily mean that such a school cannot be public institution. Any person operating or running a private institution may apply to the relevant Government authority, for the institution to be considered a public institution. The proprietor of such institution becomes a sponsor as envisaged under the **Act**. I therefore find that the 2<sup>nd</sup> defendant applied for Kitere to become a public institution. I reject the argument that the person who applied for Kitere to become a public institution had no capacity and if he did not, such an action was ratified when the institution continued to receive public assistance during the currency of its provisional registration. I therefore find that the said agent had ostensible authority to bind the 2<sup>nd</sup> defendant.

23. But that is not the end of the matter as the legal character of the registration must be determined by the terms of registration. The certificate issued by the Ministry of Youth and Sports lapsed on its terms and the institution which remained on private land reverted to private status. It is within the realm of the Diocese, as a proprietor, if it wishes, to make an application to make the institution a public institution and revert to the status of a sponsor.

24. The provisions of **Part 2** of the **Fourth Schedule** to the Constitution relied upon by the County only vest the County Government with the regulatory Authority for village polytechnics, public or private. Under **section 26** of the **Act**, the County government may provide funds required for the development of the necessary infrastructure for institutions of basic education and training. It may, through the County Education Board, license institutions and ensure compliance with standards enacted for that purpose. It may also own and run youth polytechnics. I do not read that power to encompass taking over what are otherwise private institutions and make them public. A private institution can only become public at the option of the owner or proprietor. In any other case there are in place due processes of law for acquisition of private property for a public purpose.

25. In the present matter, although there was a clear intention to convert Kitere to a public institution, which intention was evinced by application for the same and a provisional certificate issued, the certification became invalid once the stipulated period lapsed. Since the certification lapsed, I am constrained to find and I hereby find that the ownership and management of Kitere reverted to the hands of the Diocese.

### **Disposition**

26. The foregoing reasons are sufficient to dismiss this suit. The suit be and is hereby dismissed with costs to the defendants.

**DATED** and **DELIVERED** at **HOMA BAY** this **26<sup>th</sup>** day of **May** 2015.

**D.S. MAJANJA**

**JUDGE**

Mr Kanyangi instructed by Okong'o Wandago & Company Advocates for the plaintiff.

Mr Ragot instructed by Otieno Ragot and Company Advocates for the defendant.