



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT VIHIGA

ELC APPEAL NO. 11 OF 2021

(FORMERLY KAKAMEGA ELCA NO. E022 OF 2021)

JEREMIAH OTEMO OKONYO.....APPELLANT

VERSUS

REGISTERED TRUSTEES AFRICAN DIVINE CHURCH...1<sup>ST</sup> RESPONDENT

JAMES MULONGO SILEKA.....2<sup>ND</sup> RESPONDENT

(Being an appeal from the judgement of the lower court, S.O. ONGERI(SPM) dated 31/05/2021 in the original VIHIGA SPM'S COURT ELC CASE NO. 56 OF 2018)

JEREMIAH OTEMO OKONYO.....PLAINTIFF

VERSUS

REGISTERED TRUSTEES AFRICAN DIVINE CHURCH...1<sup>ST</sup> DEFENDANT

JAMES MULONGO SILEKA.....2<sup>ND</sup> DEFENDANT

JUDGEMENT

**Background.**

1. The Appellant, JEREMIAH OTEMO OKONYO, was the Plaintiff in KISUMU ELC CASE NO.236 of 2016 which was later transferred to Vihiga Senior Principal Magistrate's court as VIHIGA SPMC EL CASE NO. 56 OF 2018. Vide the Further Amended Plaintiff dated 10<sup>th</sup> February 2020 the Appellant sought the following relief:

1. A declaration that the 1<sup>st</sup> Defendant herein is a trespasser and therefore be evicted from the plaintiff's parcel of land.
2. An order of permanent injunction to issue against the Respondent herein, its employees or adherents, agents, leaders, representatives, assigns or any other person acting through its directions from fencing off, selling, taking possession of, continuing to erect any structures thereupon, destroying property thereupon, continuing to trespass thereupon or in any way interfering with or benefitting from the land parcel number E/BUNYORE/EBUSAMIA/1027.
3. Costs of the suit and interest thereon at court rates.
4. Any other or further remedy this court deems just and expedient to grant.

2. His case was that he was at all material times the owner and registered proprietor of a parcel of land known as E/BUNYORE/EBUSAMIA/1027 (the suit land). His complaint was that the 1<sup>st</sup> Respondent had trespassed onto the suit land with illegal and unlawful intention of taking possession of a portion thereof and that the Defendant had forced him to unwillingly sign certain documents. He sought the court to intervene and grant him the above-stated relief.

3. The 1<sup>st</sup> Respondent, REGISTERED TRUSTEES AFRICAN DIVINE CHURCH, filed a Defence and Counterclaim, denying the

Appellant's claim and praying for the following relief by way of counterclaim: -

**1. The Plaintiff's suit be dismissed.**

**2. Judgement be entered in favour of the Defendant on counterclaim for a portion measuring 0.03 Hectares as shown on the mutation form to be curved out of land parcel E. BUNYORE/EBUSAMIA/1027 and be transferred to the Defendant and in case the plaintiff declines to sign documents to effect this, the Deputy Registrar proceeds to sign on his behalf.**

**3. The plaintiff be compelled to surrender the Original title to E. BUNYORE/EBUSAMIA/1027 to the Land Registrar Vihiga for cancelling failing of which the title be treated as cancelled.**

**4. Costs of this suit and incidental thereto be recovered from the Defendant.**

4. The case of the 1<sup>st</sup> Respondent was that it bought a portion of the suit land measuring 0.03Ha (the disputed portion) from Jackson Bulimo Amwazo who was the original owner of the suit land in 1986, constructed a church house thereon where its members were worshipping. Thereafter the suit land was transferred to one Alexander Ofwale and later to the 2<sup>nd</sup> Respondent. That the 2<sup>nd</sup> Respondent was willing to transfer the disputed portion to the 1<sup>st</sup> Respondents but somehow transferred the entire portion of the suit land to the Appellant herein. That they have acquired title to the disputed portion of land by adverse possession.

5. The 2<sup>nd</sup> Respondent, JAMES MULONGO SILEKA, filed a defence dated 29<sup>th</sup> March, 2021 in which he denied the Appellant's claim and stated that it is only part of the suit land he sold to the Appellant as the disputed portion belongs to the 1<sup>st</sup> Respondent. That as at the time the Appellant was buying the land from him, the 1<sup>st</sup> Respondent had been on the land for over 30 years.

6. The suit was heard by the senior Principal Magistrate Vihiga who, delivered judgement dated 31<sup>st</sup> May 2021 (herein "the judgement") the subject matter of this Appeal.

#### **The Appeal.**

7. Aggrieved by the Judgement, the Appellant appeals to this court seeking that the judgement be set aside and be substituted with an order granting his claim.

8. Directions on the Appeal were taken on 15<sup>th</sup> February 2022 that the Appeal be argued by way of written submissions. Pursuant to this, written submissions dated 24.2.2022 were filed by firm of Omondi, Abande & Company Advocates on behalf of the Appellant. Similarly, written submissions dated 14<sup>th</sup> March 2022 were filed by the firm of ABL Musiega & Co. Advocates on behalf of the Respondents.

9. The appeal is premised on the grounds of appeal contained in the Memorandum of Appeal dated 16<sup>th</sup> June 2021 which are:

**i. THAT the learned Magistrate erred both in law and in fact in completely ignoring written land agreement between the Appellant and the 2<sup>nd</sup> Respondent thereby reverting a contract by parties contrary to law.**

**ii. THAT the Learned Magistrate erred in law by ignoring the evidence adduced by the Appellant herein thereby deciding the case before him against the weight of the evidence adduced.**

**iii. THAT the Learned Magistrate erred in law by failing to find that in any event, the counter-claim by the 1<sup>st</sup> Defendant was time barred.**

**iv. THAT the Learned Magistrate erred in law and in fact in ordering cancellation of the Appellant title without any cause whatsoever relying on extrinsic issues that were never the substance of the suit.**

**v. THAT the learned magistrate erred in law and fact in ignoring and totally disregarding the proprietary right of the Appellant herein as provided for under section 26 of the Land Registration Act No.3 of 2012.**

**vi. THAT the learned Magistrate erred in law and fact in relying on alleged verbal agreement in a land transaction which agreement was never proved in court.**

**vii. THAT in totality, the Appellant herein was never accorded fair hearing.**

#### **Analysis and determination.**

10. I have considered the Record of Appeal, the submissions and the cited authorities. The main issue for decision in this appeal is whether the trial court erred in not making orders that the appellant was entitled to the entire of the suit land and that the 1<sup>st</sup> Respondent was a trespasser thereon.

11. This is a first appeal and as such the court has a role to reconsider the evidence adduced and re-analyze it so as to be able to reach its own independent conclusion in the matter thereby determine whether the decision reached by the trial court is consistent with the evidence adduced. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court held that:

**“this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”**

See also in the case of *Selle and another vs Associated Motor Boat Company Ltd and others 1968 E.A 123* and *South Nyanza Sugar Company Ltd vs Simeona A. Opala[2020]eKLR*

12. The evidence placed before the trial court was the witness statements of the parties, their respective testimonies in court and the exhibits produced.

13. It was the Appellant’s case that he bought the entire of the suit land from the 2<sup>nd</sup> Respondent, paid the entire purchase price and took possession thereof. That in the same land there was a structure which was being used as a place of worship and that the structure is still on the land. That the seller had sold to him the entire land and when he fenced the land, the fence was destroyed by the worshippers. He produced a copy of sale agreement dated 28<sup>th</sup> day of January, 2016 as exhibit 6. He submitted that the sale agreement was clear that the parcel of land the subject of the agreement was E. BUNYORE/EBUSAMIA/1027 measuring 0.2 Ha and that the land was being sold free from any encumbrances. That the parties confirmed that they were entering into the agreement voluntarily and without any coercion whatsoever. He therefore faults the trial court for proceeding to ignore all of the above and choosing to believe hearsay that the Appellant was aware that the portion measuring 0.03 Ha was to be transferred to the 1<sup>st</sup> Respondent.

He relied on the decided case of *National Bank of Kenya Ltd –vs- Pipeline Samkolit (K) and another [2002] EA 503* and the case of *Hasan Zubedi –vs- Patrick Mwangangi Kibaiya & Another (2014) e KLR* to support the argument that court cannot rewrite a contract for parties. That there was no proof of coercion, fraud and/or undue influence as the same was never pleaded or proved. That the decision by the court to allude to a verbal agreement was therefore an unwarranted overreach.

14. The 1<sup>st</sup> Respondent’s witness one Elijah Olemba Ukiru testified that the church had bought a portion of the suit land in the year 1986 from the then registered owner one Jackson Bulimo Amwanzo and built a church there known as Emakacha ADC church. That since purchase, African Divine Church (the 1<sup>st</sup> Respondent) retained the portion it bought without interference. That the church has been on the land for 35 years. That the process of sub-division begun but that the Appellant claimed to have bought the entire land.

15. It was submitted on behalf of the Respondents that the court never interfered with what the parties agreed to. That it was what was not included in the agreement that the court had to determine, which is the portion occupied by the 1<sup>st</sup> Respondent. That there was no written agreement that the 1<sup>st</sup> Respondent would be evicted from the suit property yet the Appellant acknowledges that he was aware they were already utilizing the portion.

That courts are only invited to intervene with contract where there are disputes arising and a party involves the court’s jurisdiction to determine the dispute.

16. DW 2, (the 2<sup>nd</sup> Respondent) supported the claim of the 1<sup>st</sup> Respondent by stating in his evidence in chief that: -

**“ that at time I was buying the land, there was a designated portion for African Divine Church with a church and they were worshipping there duly marked on the ground. That the African Divine Church had earlier purchased the said portion and was to be hived from L. P E.BUNYORE/EBUSAMIA/1027. That I later on sold the parcel to Jeremiah Otemo Okonyo in the year 2016 and I duly explained to him that the portion of African Divine Church was to be hived from the original title deed E.BUNYORE/EBUSAMIA/1027 as marked on the ground measuring 0.03 Ha and the reminder of 0.17 Ha to go to him upon sub-division. That the plaintiff herein Jeremiah Otemo Okongo is aware that the African divine Church has been on a portion of L.P E.BUNYORE/EBUSAMIA/1027 for over 30 years but for him is only using the advantage of having the title deed to frustrate the church. That Jeremiah Otemo Okonyo wants only to fraudulently steal the church portion of land. That I support the church claim over the suit land and the ADC Church is entitled to a portion of land comprised in title L. P E. BUNYORE/EBUSAMIA/1027 measuring 0.03 Ha”.**

The 2<sup>nd</sup> Respondent did not however explain why he signed the agreement with the Appellant for sale of the entire land.

17. None theless it is clear that as at the time when the land was transferred to the 2<sup>nd</sup> Respondent on 1<sup>st</sup> October 2004, the 1<sup>st</sup> Respondent had been in possession of the disputed portion for a period in excess of 12 years. Under the provisions of the Land Registration Act, the 1<sup>st</sup> Respondent had acquired or was in the process of acquiring an overriding interest in terms of section 28 (h) of the land registration Act. Section 28 of the land registration Act provides:-

**‘Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted in the register-**

- a. ....
- b. ....
- c. ....

d. ....

e. ....

f. ....

**g. Rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of actions or by prescription.**

18. Change of ownership does not extinguish the prescriptive rights of the adverse possessor and does not stop time from running in favour of the adverse possessor. In the case of *Karuntimi Rayi –vs- M'Makinya M'Itunga [2013] e KLR* the court held that a claim of adverse possession survives the registered owner and as an overriding interest it is not extinguished by change of ownership of title.

Also in the case of *Merironi Nyakinyua Multi-purpose Co-operative Society Ltd vs Gituamba Holding Limited [2020] eKLR* the court held that:

**“Rights acquired through adverse possession are overriding rights that affect registered land and need not be noted in the register.”**

Similarly, in the case of *Nyoro Kimwe vs anderson Githinji the court relying on Githu vs Ndeete [1984] KLR 776* held that

**“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession.”**

19. In my view the 2<sup>nd</sup> Respondent did not have the 0.03 Ha to sell to the Appellant. His title to that portion had been extinguished under the provisions of section 7 of the Limitation of Actions Act. What was available for sell was only 0.17 Ha. If the purchase price of kshs.1.2 million was for 0.20 Ha, then the Appellant will have recourse to the 2<sup>nd</sup> Respondent.

20. This court has considered the exhibits produced before the trial court, the testimonies and submissions. The court finds that the learned Magistrate did not ignore the written land agreement between the Appellant and the 2<sup>nd</sup> Respondent nor did he rewrite contract contrary to law. That the evidence adduced supported the decision arrived at by the trial court

21. The counterclaim was for title to the portion occupied by the 1<sup>st</sup> Respondent. The Appellant submitted that under section 7 of the Limitation of Actions Act the counter claim was time barred. The Appellant relied on the case of *Schanlaladurgadass Rajput & Another vs Division Integrated Development Programmes Co. Ltd [2021] eKLR* to demonstrate that the 1<sup>st</sup> Respondent’s claim based on the land sale agreement was time barred. A reading of the counterclaim shows that the same is based on the doctrine of adverse possession. Paragraphs 16 and 17 state as follows:

**“16. That the defendant has been in occupation of the land from 1980s to July 2016 without any disruption which period translate to more than 30years.**

**17. That by reason of adverse possession and the documents signed by the plaintiff and his own wife and witnesses, the Defendant is entitled to the disputed portion.”**

The Appellant in the suit sought for *inter alia* a declaration that the 1<sup>st</sup> Respondent was a trespasser onto the suit land and an order of eviction. The Appellant was seeking these orders because the 1<sup>st</sup> Respondent was on the suit land as at the time of institution of the suit and as at February 2020 when the Further Amended Plaint was filed.

22. On cancellation of title the Appellant submitted that the court failed to stick to the pleadings and issues raised by the parties and proceeded to rely on innuendos thereby misdirecting itself. That the court assumed that the 1<sup>st</sup> Respondent was in occupation yet the court had earlier issued interim orders barring the 1<sup>st</sup> Respondent from accessing the suit property which order the 1<sup>st</sup> Respondent had obeyed and kept off the suit land. He therefore faulted the court for ordering for cancellation of his title without any cause whatsoever.

23. The law in respect of cancellation of titles is partly contained in Section 80 of the Land Registration Act. It empowers court to rectify the register by directing that any registration be cancelled or amended. The condition for cancellation is that the court has to be satisfied that any registration was obtained, made or omitted by fraud or mistake. Secondly, that the register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

24. The evidence on record shows that the Appellant bought land that was not vacant. It had a structure that was being used for worship. The structure had been there for over thirty years. The owners thereof had acquired prescriptive rights to the portion on which the structure stood. The Appellant as a purchaser had an obligation to do due diligence by probably consulting the owners of the structure, or demanding that the land be made vacant before committing himself to purchasing it. There is evidence that he is a neighbor and as such knew of the 1<sup>st</sup> Respondents claim over the suit land. The 2<sup>nd</sup> respondent insists that he informed the Appellant of the 1<sup>st</sup> Respondent’s claim. In the case of *Esther ndegei Niiru & Another vs Leonard Gatei [2014] eKLR* the court held that

**“Section 261(a) and (b), in my view places a responsibility to purchasers of titled properties to ascertain the status beyond carrying out an official search. In this era when there are many cases of what has been described as grabbed lands, it is essential to endeavour to ascertain the history and/or root of the title.”**

The same position was echoed in *Daniel Kipruto Metto vs Chase bank [Kenya] Limited [2016] eKLR* where the court observed that **“the Defendant should have done due diligence and get the history of the land not just from the lands registry but from the neighbours.”**

25. This court finds that in the circumstances of the case an order for cancellation of the title was lawful.

26. The 1<sup>st</sup> Respondent’s evidence was that the process of sub-dividing the suit land so as to transfer the disputed portion to it had begun when the land was still registered in the name of the 2<sup>nd</sup> Respondent. That it paid kshs 11,500 for survey. He produced the receipt and mutation as exhibits 4 and 5 respectively. The mutation is duly signed by the 2<sup>nd</sup> Respondent

27. The 2<sup>nd</sup> Respondent was not forthright in his dealings with the Appellant and the 1<sup>st</sup> Respondent. This is because, while acknowledging that a portion of the suit land belonged to the 1<sup>st</sup> Respondent, he proceeded to sell the entire land to the Appellant.

28. In the case of *Farah Awad Gullet vs CMC Motors Group Limited [2018] eKLR* the court stated that

**“We are also reminded that we should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence or based on a misrepresentation of the evidence or the judge had been shown demonstrably to have acted on a wrong principle in reaching the finding he/she did.”**

Also see *Mwanasokoni vs Kenya Bus service Limited (1982-88) 1KAR 278* and *Kiruga vs Kiruga & Another (1988) KLR 348*.

In the present case the court finds no reason to interfere with the findings and decision of the trial court. The Appellant can find recourse in the indemnity clauses in the agreement as against the 2<sup>nd</sup> Respondent.

### **Conclusion**

29. The court finds that the grounds of appeal have not been proved. The appeal is dismissed. Costs of the Appeal to the 1<sup>st</sup> Respondent, the same to be borne by the 2<sup>nd</sup> Respondent.

Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT VIHIGA THIS 24<sup>TH</sup>**

**DAY OF MARCH, 2022**

**E. ASATI,**

**JUDGE, ELC.**

In the presence of:

Abande Advocate for Appellant

N/A for the Respondents

Ajevi-- Court Assistant.

E. ASATI,

JUDGE, ELC