



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT KISUMU

LAND CASE NO. 3 OF 2014

GEORGE OTIENO GACHE.....1ST PLAINTIFF

COVENANT OF PEACE CHURCH.....2ND PLAINTIFF

-VERSUS-

JUDITH AKINYI BONYO.....1ST DEFENDANT

JOSHUA OMOLLO.....2ND DEFENDANT

RICHARD OTIENO.....3RD DEFENDANT

JAMES OTIENO.....4TH DEFENDANT

THE CHIEF LAND REGISTRAR.....5TH DEFENDANT

THE NATIONAL LAND COMMISSION.....6TH DEFENDANT

RULING

INTRODUCTION

(a) These proceedings were commenced by **George Otieno Gache** and **Covenant of Peace Church**, hereinafter referred to as the 1st and 2nd plaintiff respectively, against **Judith Akinyi Bonyo, Joshua Omollo, Richard Otieno, James Otieno, the Chief Land Registrar and the National Land Commission**, hereinafter referred to as 1st to 6th defendants respectively. The plaintiff in paragraph 1 of the plaint describes the plaintiff as “**a church registered under the Societies Rules**” and in paragraph 8 of the said plaint states that the plaintiff “**is the current registered owner and proprietor of all that parcel of land known as Plot No. 15155 Kisumu**”

At Paragraph 10 to the plaint, the plaintiff avers that;

“**On or about 15th May, 1991 the plaintiff was issued with a letter of allotment by the then Commissioner of Lands in respect of the above mentioned parcel of land .....**”

At paragraph 13 of the plant the plaintiff set out the particulars of breach of duty attributed to 5th and 6th Defendants and particulars of fraud on the part of the 1st and 2nd defendants.

The prayers sought under the plaint are for a declaratory orders that the plaintiff is the legal registered

owner of plot No. 15155 Kisumu, orders to rectify the registers, permanent injunction against 1st to 4th Defendants from interfering with the said land and costs.

(b) The plaintiff also filed the Notice of Motion dated 13th January, 2014 seeking for leave for 1st plaintiff to be allowed “ to file and prosecute this suit on behalf of the 2nd plaintiff and its members” , temporary injunction against 1st to 4th Defendants, mandatory injunction against 5th to 6th Defendants and costs. The application was heard on 13th January, 2014 and prayers 1,2 and 3 granted ex parte awaiting interparte hearing. The interpartes hearing is yet to take place.

c. The 1st to 4th Defendant filed their replying affidavit sworn by Judith Atieno Bonyo, the 1st Defendant, on 20th February, 2015. Then the 1st plaintiff filed a further affidavit sworn on 20th March, 2015. the 1st to 4th Defendant then filed the Notice of Motion under Certificate of Urgency dated 18th March, 2015 seeking for temporary injunction against the plaintiffs from dealing with L.R.No. 15155 Kanyakwar-Kisumu and the discharge of the ex parte orders of 13th January, 2014. They also contemporaneously filed the notice to raise a preliminary Objection dated 18th March, 2015 seeking to have the suit struck out on five grounds.

When the counsel appeared before the court on 23rd March, 2015 the court declined to grant any interim orders on the application dated 18th March, 2015 except certifying it urgent. The court extended the interim orders of 13th January, 2014. The Counsel for 1st to 4th Defendants applied for and was granted leave to file an appeal. The matter was then set for hearing of the Preliminary Objection on 5th May, 2014. The plaintiffs then filed a replying affidavit which is undated but date stamped 27th April, 2015 to the 1st to 4th Defendants application.

The 1st to 4th Defendant then filed the Notice of Motion under Certificate of Urgency Kanyakwar-Kisumu and for the Notice of Motion dated 18th March, 2015 to be heard urgently. The counsel appeared before the court on 4th May, 2015 and the court declined to issue any other orders ex parte except certifying the application urgent observing that the application dated 18th March 2015 was still pending. The court directed the matter to be mentioned on 5th May, 2015 which was the date set for the hearing of the preliminary objection. On the 5th May, 2015 Counsel for the plaintiffs filed ground of opposition and notice of preliminary objection of the same date. Both documents contain one ground that the application is an abuse of the process of the court.

3. The hearing of the Preliminary Objection dated 18th March, 2015 commenced on the 5th May, 2015 with Mr. Muyare for the 1st to 4th Defendants presenting his submissions. The submissions by counsel for plaintiffs was set for 9th June, 2015 and then rescheduled to 6th October, 2015 when Mr. Mwamu advocate for the plaintiff made his submissions and Mr. Nyamweya for Miyare for 1st to 4th Defendant replied. The summary of the submissions are as follows:-

(a) The counsel for the 1st to 4th Defendant submitted that the suit land is registered in the name of 1st to 4th Defendants. That the 2nd Plaintiff got registered on 21st September, 2010 and it was therefore impossible for it to have been given the allotment to the land dated 15th May, 1991. That the claim is based on a deed plan No. 356108 dated 19th July, 2012 while the plaintiff's claim is based on deed plan No. 379848 dated 20th February, 2015 which date is over one year after the filing of this suit. The Counsel further submitted that the suit offends sections 24 to 26 and 35 of the Land Registered Act as the title to the land issued to 1st to 4th Defendant has not been challenged Successfully. The counsel referred the court to the following decided Cases Lazarus Estates Ltd -vs- Beasley {1956} 1 ALL E.R 341 at 345 where Lord Denniwa said that “ **No Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no Order of a Minister can be allowed to stand, if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved, but once it is proved, it vitiates judgments, contracts and all transactions.....**”. The counsel submitted that as the 2nd plaintiff did not exist until the 21st September 2010 when it was registered, it was impossible for it to have been the beneficiary of the letter of allotment dated 15th May, 1991 unless by fraud. The counsel further submitted fraud is shown by the letters dated 30th April, 2015 by the surveyor explaining how the deed plan in favour of the plaintiff was prepared in error as there existed another title and that the matter was being investigated by

the National Land Commission. That due to the foregoing the plaintiffs suit has not disclosed a reasonable cause of action against the 1st to 4th Defendant who are the registered proprietor. Secondly that the plaintiffs cannot be allowed to base or sustain their case on an illegality or be allowed to have it from an illegality or be allowed to benefit from an illegality. That the 1st to 4th Defendants are non-suited for reasons that the the plaintiffs claim is illegal. That the 1st to 4th Defendants title is indefeasible and referred and referred to the case of **John K.S. Limo & Arthur -V- Bernard Wesonga Ochieng and 2 others {2014} eKLR** where the court was dealing with parties basing their claim on a letter of allotment and the other on a title. In that case Justice Chitebwe while ruling on an all interlocutory application stated as follows:-

**“.....the court cannot uphold the allotment letter against the title deed at this interlocutory stage.....sections 24 and 25 of the Land Registration Act No. 3 of 2012 protects the rights of registered proprietors. Section 26 states that a certificate of title is conclusive evidence of proprietorship. It is therefore evident that until when the ownership of the 1st Defendant of the suit property is proved to have been unlawfully procured, the 1st Defendant is entitled to enjoy the rights of a registered proprietor before that is established.”**

The Counsel submitted that as the plaintiff claim is based on an allotment letter issued before the 2nd plaintiff was registered, and the 1st to 4th Defendant claim is based on certificate of title, then the plaintiffs claim must fail. This court is aware the above decision coming from a court of equal jurisdiction is not binding but has persuasive value. The court however concurs with the position taken by the court that the person registered with the land in the certificate of title enjoys the rights and privileges set out under Sections 24 and 25 of the Land Registration Act and the court to obligated under section 26 of the said Act to take the person so registered in the certificate as the prima facie registered owner or proprietor until the title is successfully challenged in accordance with that section. The main basis of the plaintiff's claim to the suit letter is the letter of allotment dated 15th may, 1991 addressed to Covenant of Peace Church, the 2nd plaintiff. It gives the size of the land as 1.0 hectare. The basis of the 1st to 4th Defendants claim is the certificate of lease issued under the Registration of Title Act Chapter 281 of Laws of Kenya (repealed under Section 109 of Land Registration Act No. 3 of 2012 on 2nd May, 2012). The lease is in favour of Judith A. Bonyo , Joshua Omollo, Richard Omondi and James Otieno, the 1st to 4th Defendants herein. It also gives the size of the land as 1.0 hectare. The term is indicated as 99 years from 1st march, 1996 and was issued in 2013. Flowing from the decision of Justice Chitebwe above which this court concurs with and the provisions of section 26 of the Land Registration Act, the 1st to 4th Defendants are entitled to the rights and privileges under section 24 and 25 of the said Act.

(b) The counsel also submitted that the plaintiffs case is irregular, incompetent and fatally defective as the plaintiff cannot sue in its name as any suit filed in the name of a society is a nullity. Further counsel submitted that the 1st plaintiff has no business being in the suit if the suit property belongs to the 2nd plaintiff. He submitted that the 1st plaintiff could only be a plaintiff if he was in the suit in a representative capacity which is not the case in this matter. The counsel referred the court to section 3 of the societies Act and the case of **African Orthodox Church of Kenya -V- Charles Omurioka & Another {2014} eKLR** and **Living Water Church International -V- City Council of Nairobi (2008) eKLR** to support the submission that the 2nd plaintiff has no capacity to sue and therefore the 1st plaintiff cannot sue on its behalf as no list of registered trustees of the 2nd plaintiff has been availed since the filling of the suit. The counsel asked that the plaintiffs suit and application be struck out with costs.

(c) In reply Mr. Mwamu for the plaintiffs submitted that the Preliminary Objection can only be raised on pure points of law and that it cannot be raised where there are issues of facts to be determined. The counsel referred the court to the case of **Mukisa Biscuits Manufacturing Co. Ltd -V- West End Distributors Ltd {1969} E.A. 696**. He submitted that the submission on the particulars of fraud and the order granting 1st plaintiff authority to represent the 2nd plaintiff cannot be raised during a Preliminary Objection. The latter matter can only be dealt with through an appeal. That for a Preliminary Objection to be raised, it must be grounded on a defence. That in this case the defence had not been filed when the notice for the preliminary objection was filed. Counsel submitted that the defence was filed on 9th September 2015 while the Preliminary Objection had been filed and the submissions on it started on

May, 2015. The counsel further submitted that even if the court was to take it that the defence has been filed, the Preliminary Objection cannot be said to be based on the filed defence which he termed a general denial with no specifics on irregularities and defects. Counsel referred the court to the case of **Stephen Onyango Ochola & Another -vs- Edward Sule Hongo and Another Nairobi C.A.C.A. No. 209 of 2001** where the court allowed the appeal and dismissed the Preliminary Objection as it had been based on an issue not in the defence. Mr. Mwamu therefore submitted that the issue the counsel for 1st to 4th defendant raised that was not covered in the defence should be struck out. The counsel submitted that the suit as filed offends sections 24 to 26 and 35 of the Land Registration Act. He submitted that the plaintiffs have contested the title issued to 1st to 4th defendant and pleaded fraud on 1st to 3rd Defendant for the allotment letter had been issued to two people but the lease was issued to four persons. He submitted that this court guided by the principles in section 18 has powers under Section 19 of the Environment and Land Court Act to inquire on the suit land's ownership. He submitted that the deed plan the defendant title was based on has since been canceled and the Defendants are challenging it in the another suit and therefore the Preliminary Objection should be rejected and matter do proceed to main hearing. The counsel further submitted that Article 159 of the Constitution encourages substantive justice to be considered without undue regard to technicalities and the plaintiffs suit should be allowed to be heard and decided on merit. The counsel submitted that even if the court was to find that the plaintiff did not disclose a cause of action, the Preliminary objection would still not be allowed. The counsel referred the court to the case of **D.T. Dobie and Company (Kenya Ltd -V- Joseph Mbaria Muchiria & Another Nairobi C.A. NO. 37 of 1978** where the court said it is better to allow the plaintiff case to go to main hearing and allowed some amendment to be made on the plaint as the case was not hopeless. He further submitted that the 1st to 4th defendant are properly sued and that the 1st plaintiff was on 13th January 2015 allowed to represent the others. The counsel referred the court to the case of **Nanjibhai Prabhudas & Co. Ltd -vs- Standard Bank Limited {1968} E.A 670** which differentiated an irregularity from a nullity and submitted that a suit can only be struck out for an irregularity which is proved to have caused failure of justice. The counsel also referred to the case of **Mpaka road Development Co. Ltd -V – Gafur Kana t/a Anil Kapuri Pan Coffee House Nairobi Milimani, HCC.No. 318 of 2000** where the defence and Counterclaim were struck out.

c. Mr. Nyamweya in reply submitted that Article 159 of the Constitution which he described as the father of the Oxygen Principle that allows parties to breathe life to cases does not allow a case that is already dead to come back to life. He submitted that the Preliminary Objection was an issue of pure law and Article 159 of the Constitution does not apply in this case. He agreed with the decision in the **Mukisa Biscuits** case and submitted that as the plaintiff in this case is the Church (2nd plaintiff which is a society and that societies can only sue through the trustees and not by its names, then there is no plaintiff before the court capable to prosecute the claim against the Defendants. The counsel also submitted that the Defendants could not have filed their defence until after they were served with the plaint. That the Defendants were served with the application and interim orders first and only got the plaint after coming to court. He further submitted that the case of **Stephen Onyango Ochola** does not deal with preliminary objections.

The counsel further submitted that the order of 13th January, 2014 did not give 1st plaintiff capacity that he did not have and that the suit should be struck out with costs for being wrongly suited and incompetent.

#### 4. ISSUES FOR DETERMINATION

- (i) Whether the grounds on the preliminary objection is on issue of law.
- (ii) Whether the preliminary objection was raised prematurely as the notice and its prosecution was done before the filing of the defence.
- (iii) Whether the preliminary Objection should be upheld or rejected.
- (iv) Who pays the costs of the preliminary objection.

5. The court has carefully considered the grounds on the notice of preliminary Objection dated 18th march, 2015, the rival submissions by counsel for the 1st to 4th Defendants and the plaintiffs and the pleadings filed herein by parties and come to the following conclusions:-

(a) That the plaint and all other process filed by the plaintiffs leaves no doubt that the plaintiff is Covenant of Peace Church, the 2nd Defendant George Otieno Gache, the 1st Plaintiff, though indicated as a plaintiff in the heading of the plaint and other processes is not described as a plaintiff in any of the documents filed. The probable role of George Otieno Gache in this proceedings only starts to become clear when one looks at prayer 2 of the Notice of Motion dated 13th January, 2014. The prayer requested for the courts leave for the 1st Applicant (plaintiff) to file and prosecute this suit on behalf of the 2nd plaintiff and its members. The provisions of Order 1 Rule 1 of the Civil Procedure Act, Section 3 of the Societies Act, and many superior court decisions including **Football Kenya Federation -v-s Kenya Premier League Limited & 4 others {2015}** eKLR **living Water Church International -v-s City Council of Nairobi (2008)** eKLR **African Orthodox Church of Kenya -vs- Charles Omuroka & Another{2014}** eKLR shows clearly that societies cannot sue or be sued in their own names. The societies can sue or be sued through their trustees or elected officials. This is obviously a point of law and does not need to be ascertained from any other source except the plaint which describes the plaintiff as “ a Church registered under the Societies Rules”.

(b) That the plaintiff being a church registered under the societies Act has no capacity to commence suit on its names. The law requires such a suit to be commenced or defended in the names of the trustees or elected officials of such a society. Though George Otieno Gache in his affidavit in support of the application dated 13th January, 2014 deponed that he is “an official and pastor of the applicant Church” the plaint and all the other pleadings filed for the plaintiff have not indicated that he was the one filing the suit on behalf of the Covenant of Peace Church. He is named in the heading as the 1st plaintiff/applicant without disclosing any interest in the suit land. At paragraph 2 of the said affidavit, George Otieno Gache deponed that he has “Full authority from the church board of directors to swear this affidavit on behalf of the Applicants” and annexed a copy of an authority document signed by Willis Odongo, Fredrick Mariwa, Rose Adhiambo, Everlyne Akinyi and Mary Atieno. The document indicated that the said five persons being board of directors of Covenant of Peace church had authorized George Otieno Gache “to prosecute this suit on behalf of the said church and to swear affidavit, pleadings and do all that pertains to this suit”. It is however noted that the suit before this court was not instituted in the names of the five persons on behalf of the Church. Had that been the case, then their authority may have counted for some consideration. As it is now the letter of authority does not cloth the Covenant of Peace church with capacity, which it does not have in law, to commence this suit on its name.

c. That evidently the plaintiff claim is based on the letter of allotment dated 15th may 1991 giving the Covenant of Peace church the surveyed L.R. No.15155 Kisumu Municipality. On the other hand the 1st to 4th Defendants were in 2013 issued with a grant of lease for the same land L.R.15155 (I.R 151210) Kisumu Municipality.

Obviously between a letter of allotment and a lease document over the same parcel of land, the land holder takes pre-eminence and priority in recognition as the person(s) entitled to the ownership of the land described thereto. The 1st to 4th Defendants are therefore by virtue of the grant entitled to the rights and privileges under Section 24 and 25 of the Land Registered Act No.3 of 2012. The court is under the provision of Section 26 of the said Act obliged to take the 1st to 4th Defendants to be the prima facie registered proprietors until such a time their title is successfully challenged. There is no evidence that their title has been successfully challenged that has been presented before this court. This court is of the considered view that had the existence of the grant in favour of the 1st to 4th Defendants had been disclosed before the exparte injunction order of 13th January 2014 were issued, the court would have declined to issue those order exparte. This state of affairs means that until the title of the 1st to 4th Defendants is successfully challenged in accordance with Section 26 of Land Registration Act, the prayers sought in the plaint, even if commenced by a party with capacity to sue would not issue against them. This is also an issue of law.

(d) That the issue of of capacity to commence an action in court cannot be an issue of procedural

technicality capable of being cured under the substantive Justice Oxygen principle provided for under Section 1A, 1B, 3B of the Civil Procedure Act and Article 159 of the constitution. In the case of **Trusted society of Human rights Alliance – V – Mumo Matemu & 5 others** {2014} eKLR, the court of Appeal held that:

**" 24..... a suit is a " solemn" process, " owned" solely by parties. This is the reason why there are Laws and Rules under the Civil Procedure Act regarding parties to suits and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it...."**

The court had also addressed itself to Article 22 and 258 of the constitution and stated that they apply where a person was acting in the public interest and in instituting proceedings before a court challenging the contravention of the constitution where NGOS or associations would be permitted to institute proceedings as persons as defined in their respective rules. In the case of **Kirinyaga United Bar Owners Organizations – V – County Secretary Kirinyanga County Government & 6 others** {2014} eKLR the court stated that a person named with a capacity to act on his own can bring a representative suit on his behalf and on behalf of others.

**" A person who lacks capacity to institute a suit can also bring an action under Article 22(1) through another person: The person bringing the action should clearly indicate his name in the suit stating that he/she is bringing the action on behalf of another or on his own behalf in addition to others who for purposes of clarity must be named and must give authority or mandate if they wish to benefit or obliged from the relief sought. In absence of a named person, then it becomes difficult to know whether legal capacity is vested or not. Under Article 260 of the constitution a " person" includes a company, association or other body of persons whether incorporated or not. Of course bodies have capacity to sue or be sued as the law vests them with legal capacity. What the constitution addresses here are unincorporated bodies or class of persons such as self help groups. The law does not bestow them with legal capacity per se but the constitution provides for an avenue through which they can competently appear in court and this is through person(s) vested with legal capacity. It is a bit absurd to imagine that the new constitution has opened door to anybody including people of unsound mind, minors, bankrupts etc to institute proceedings without a next friend or a person with legal and sound capacity to represent them. Self help groups or Community based organizations were created by the government to address poverty eradication and other noble causes, but were not clothed with the capacity to sue but can do so through its elected officials whose description should be given to show who they are and who they represent."**

The suit herein is not a public interest matter as it is for private ownership of land between two opposing groups. In any case, George Otieno Gache, who as a person has capacity to institute a suit, has not been named as instituting the suit before the court on his own behalf and or on behalf of the Covenant of Peace church. The suit has also not been commenced through the trustees or officials of Covenant of Peace church.

(e) That a preliminary objection can be raised at any stage of the proceedings as it is based on questions of law emanating from the pleadings filed. All the grounds on the preliminary objection dated 18th march 2015 by the Counsel for 1st to 4th Defendants emanates from the pleadings already filed by the Plaintiff's and the replying affidavit by Judith Atieno Bonyo sworn on 18th March 2015 and cannot be faulted merely because the statement of defence had not been filed then.

4. That from the foregoing the court find merit in the preliminary objection dated 18th March 2015 and the same is upheld. The plaint and notice of motion dated 13th January 2014 are hereby stuck out with costs to the 1st to 4th Defendants and the Exparte orders of 13th January 2014 and severally extended are vacated forthwith.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/11/2015**

Dated and delivered this **12th of November 2015**

In presence of;

Applicants N/A

Respondent s N/A

Counsel M/S Okwengu for Munyare for 1st to 4th Defendants.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/11/2015**

12/11/2015

S.M. Kibunja J

Court clerk Oyugi

Parties absent

M/S Okwengu for Munyare for 1st to 4th Defendants.

Court: Ruling Delivered in open court in presence of M/S Okwengu for Munyare for 1st to 4th Defendants.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/11/2015**