



**Eshitemi v Trustees of Emusonga Church of God (Environment & Land Case 291 of 2017) [2022] KEELC 13625 (KLR) (18 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13625 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 291 OF 2017  
DO OHUNGO, J  
OCTOBER 18, 2022**

**BETWEEN**

**DAVID ELEGWA ESHITEMI ..... PLAINTIFF**

**AND**

**TRUSTEES OF EMUSONGA CHURCH OF GOD ..... DEFENDANT**

**JUDGMENT**

1. By an amended plaint dated June 12, 2018, the plaintiff averred that 'the defendants are the Trustees of Church of God, a church registered under the *Societies Act*' and that he was the registered proprietor of the parcel of land known as Butso/4210 (the suit property). That the defendant continued to trespass onto and unlawfully occupy the suit property even after the court granted him the suit property vide Kakamega CMC Misc Award No 215 of 2011.
2. The plaintiff therefore prayed for judgement against the defendant for:
  - a. An order of eviction of the defendants from the plaintiff's land parcel Butso/4210.
  - b. An order of permanent injunction restraining the defendants from entering into the said suit land now and in future.
  - c. Costs of the suit.
3. The defendant filed an amended defence on July 9, 2018 through which it denied the plaintiff's allegations and averred that it shall raise a preliminary objection that it had no capacity to sue or be sued and further stated without prejudice that the tribunal ruling and the adopted judgement of the tribunal ruling in Kakamega CM's Misc Award No 215/2015 did not make reference to the suit property. The defendant averred that it was the legal owner of the suit property in possession and occupation since 1960 and that the plaintiff is not entitled to the reliefs sought. The defendant further stated that no



reasonable cause of action had been disclosed against it and as such the suit ought to be dismissed with costs.

4. The matter then proceeded to hearing. The plaintiff, David Elegwa Eshitemi, testified on February 20, 2019 as PW1 and adopted his witness statement filed on August 7, 2017. He stated that he was the registered proprietor of the suit property which was granted to him through a decree of the court in Kakamega CMC Award No 215 of 2005 and that no appeal had ever been preferred by any aggrieved party. That he was registered as the lawful owner of the suit property and obtained title deed. That despite the defendant being aware of his ownership and despite him issuing notices to the defendant, the defendant had refused to vacate from the suit property.
5. Unfortunately, soon after his testimony, the plaintiff passed away on July 23, 2019. He was substituted by his son George Eyeswa Elegwa, pursuant to an order of the court made on March 10, 2020. The plaint was however not amended following the substitution.
6. George Eyeswa Elegwa testified as PW2. He stated that the suit property is registered in his late father's name and that his late father was awarded the suit property vide Kakamega CMC Award No 215 of 2005. That the defendant had sued his late father and that the court found in his father's favour. That his late father gave the defendant notice to vacate the said land and they refused thus this suit.
7. During cross examination and re-examination, PW2 stated that neither the proceedings of the land disputes tribunal nor the award or even the decree dated March 2, 2011 mention the suit property or Emusonga Church of God. He further stated that he had been to the suit property and that he was aware the church has been in occupation for a while though he did not know whether the church took possession prior to his date of birth 36 years ago. He conceded that he did not have any survey report showing that the church was in the suit property.
8. The plaintiff's case was then closed.
9. During defence hearing, Geoffrey Sambaya Anjela, a director of human resource in Church of God in East Africa, testified as DW1. He stated that Church of God in East Africa is a registered society with a constitution and registered trustees. He adopted his witness statement which he had filed in court on September 25, 2019. He stated that Emusonga Church of God is a constituent church of the Church of God in East Africa and was established in 1964 on land donated by the late former paramount chief Joseph Mutsembi Ndungu for development of a church and a school and that that is why the land was under the custody of the County Council of Kakamega.
10. DW1 added that during the initial land adjudication exercise in 1969 the land was reserved for Church of God by the County Council of Kakamega and that since then the church authority has never authorized any subdivision of the land parcel No Butsotso/Shikoti/250. That the Church of God in East Africa initiated a Nursery School on the land in 1973 which grew into a full-fledged primary school which currently co-exists on the land with the Church. That Emusonga Church of God has no capacity to be sued since it is not registered independently but is under the Church of God in East Africa which has registered trustees. That Emusonga Church of God is not situated on the parcel of land known as Butsotso/Shikoti/4210 and that instead, it is Emusonga Primary School that is situated on the said parcel.
11. During cross examination and re-examination, DW1 testified that the green card for Butsotso/Shikoti/250 shows that Emusonga Church of God became the registered owner on January 22, 1969 and that the title was closed on August 8, 1988 upon subdivision. That he came to the office he held in 1990 by which time Butsotso/Shikoti/250 had been subdivided and that the church had not taken any step to cancel the subdivisions.



12. Defence case was closed. Parties thereafter filed and exchanged written submissions.
13. The plaintiff relied on sections 24 and 26 of the [Land Registration Act](#), a copy of the title deed as well as the case of [Margaret Njeri Wachira v Eliud Waweru Njenga \[2018\] eKLR](#) and argued that he is the registered owner of the suit property and that his title is not under challenge. He further argued that there is evidence that the defendant is on the suit property and that it follows that the defendant is a trespasser and ought to be evicted. In that regard, the plaintiff relied inter alia on [Gusii Mwalimu Investment Co Ltd & 2 Others vs Mwalimu Hotel Kisii Ltd, Civil Appeal No 160 of 1995](#). The plaintiff therefore urged the court to allow his claim as prayed.
14. In response, the defendant argued that the plaintiff did not produce evidence showing that the trustees of Emusonga Church of God was a registered society capable of suing or being sued and urged the court to dismiss the suit on that ground. In that regard, reliance was placed on the cases of [John Ottenyo Amwayi & two others v Rev George Abura & two others – Civil Appeal No 6339/1990 \(Unreported\)](#) and [Andrew Inyolo Abwanza v Board of Trustees of Pentecostal Assemblies of God - Kenya & 3 others \[2009\] eKLR](#).
15. On the issue of whether the plaintiff is the rightful legal registered owner of the suit property, the defendant relied on section 26 (b) of the [Land Registration Act](#) and argued that the church has never subdivided or authorized any subdivision of Butso/250. That the judgement in Kakamega CMC No 215 of 2015 does not refer to land parcel Butso/4210 and that beyond claiming that the defendant is on the suit property, the plaintiff failed to avail any document showing that the defendant is on the suit property. The defendant therefore urged that the suit be dismissed with costs.
16. I have considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether the defendant has the capacity to sue or be sued, whether the plaintiff is the registered proprietor of the suit property and whether the reliefs sought should issue.
17. As noted in the opening paragraph of this judgment, the plaintiff described the defendant in the amended plaint dated June 12, 2018 as 'the Trustees of Church of God, a church registered under the [Societies Act](#)'. The defendant named in the said plaint is 'The Trustees of Emusonga Church of God' which is in turn described at paragraph 2A of the amended plaint as 'the Trustees of Church of God, a church registered under the [Societies Act](#)'. Thus, the plaintiff's case is that the defendant is registered under [Societies Act](#). Beyond its averment in the amended plaint, the plaintiff did not exhibit any document to demonstrate that Emusonga Church of God is actually registered under [Societies Act](#) or any other law. No specific persons have been named in the amended plaint as officials of Emusonga Church of God.
18. It is trite law that a society registered under the [Societies Act](#) is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due office holders. In [African Orthodox Church of Kenya v Charles Omuroka & another \[2014\] eKLR](#) court held that:

There is no doubt therefore, that both the plaintiff and the 2<sup>nd</sup> defendant as societies or associations registered under the [Societies Act](#) are not legal entities capable of suing and being sued in their own names. They have no legal capacity to institute proceedings in any court in their own names and cannot maintain such proceedings. They can only sue through trustees, if they have one, or in the names of their officials in a representative capacity.
19. The defendant has insisted that there is no registered society by the name of Emusonga Church of God. To drive its point home, it has produced a copy of a certificate of registration issued by the registrar of societies on November 13, 2001 to the Church of God in East Africa (Kenya). The two cannot



be said to be one and the same entity in the absence of unambiguous evidence to that effect. The burden was always upon the plaintiff to demonstrate the existence and legal capacity of the entity he sued. Although the defendant raised the issue from the moment it filed its initial defence way back on September 20, 2017, the plaintiff did not exhaustively address the issue.

20. The question of identification of the correct defendant is not an idle one in this case: the plaintiff seeks among others an order of eviction. It is thus crucial for the plaintiff to identify who he wishes to evict. I find that the named defendant lacks the capacity to sue or be sued. That alone is sufficient to dispose of the plaintiff's entire suit.
21. On the second issue, as to whether the plaintiff is the registered proprietor of the suit property, I note that the plaintiff produced a copy of a title deed showing that Eshitemi David Elegwa was registered as proprietor of the suit property on April 28, 2014. That much is corroborated by the certified copy of the register in respect of the suit property which the defendant produced in evidence, and which is on all fours with the position adopted by the plaintiff. I am thus satisfied that the deceased plaintiff, David Elegwa Eshitemi, was the registered owner of the suit property. The defendant's claims that the suit property was not procedurally transferred to the deceased plaintiff remain mere allegations, unless pleaded in a case and proven in court. The defendant did not mount any counterclaim in this case.
22. As to whether the reliefs sought by the plaintiff should issue, in view of the plaintiff's failure to properly identify and join the correct defendant, I am unable to issue an eviction order or a permanent injunction without ascertaining who those orders target. There would otherwise be risk of making orders against persons who have not been given a hearing.
23. The upshot is that the plaintiff has failed to prove his case and I therefore dismiss it. In view of the facts and circumstances of this case, I make no order as to costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF OCTOBER 2022.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the plaintiff

Ms Nafuye holding brief for Mr Mbiyu for the defendant

Court Assistant: E. Juma

