



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 133 OF 2005

ALFRED MAKONGO

LUKE WAMALWA WANYAMA

HENRY KIRINGOL Suing as Chairman, Secretary and Treasurer respectively of

AFRICAN RURAL MISSION PLAINTIFF

VERSUS

REGISTERED TRUSTEE OF METHODIST CHURCHDEFENDANT

RULING

There have been applications and counter – applications for restraining and counter-restraining orders since the filing of this case. However, on 19.04.05 counsel for the parties agreed to argue chamber summons application dated 08.02.05 which they reckoned would lay subsequent chamber summons applications to rest. The court record shows that the original suit was brought against Prof. Bishop Zablon Nthamburi and Dr. Rev. Stephen Kinyaru M’ Impwii as registered trustees of the Methodist Church of Kenya but that on 10.03.05 the parties recorded a consent that the plaint be amended and the defendants were given leave to file amended defence and an amended defence was filed in which, inter alia, the defendant was described as shown in the title hereinabove. The reliefs sought in the amended plaint are:- A) That an injunction do issue against and restraining the defendant either by itself, servants, employees and/or agents whomsoever from in any way removing signposts of the plaintiff situate on plot No.3/436 (sic)/Mathare North/Nairobi and disposing and/or using motor vehicles registration numbers KAL 303Y, KAH 836 K and KAK 982 M and act to me (sic) or advertise Bethan Christian College as Kenya Methodist University Betyhany Campus or manage Bethany Christian College.

B) That an injunction be issued against the defendant restraining it from in any way interfere, cause nuisance, disrupt the plaintiff’s peaceful employment and possession of all that parcel of land known as plot No.3/463/Mathare North. C) That a declaration that any transfer from African Rural Mission to Methodist Church in Kenya of plot No.3/463/Mathare North/Nairobi is void. D) A declaration that any transfer from African Rural Mission to Methodist Church in Kenya or its affiliate Kenya Methodist University of Bethany Christian College or anybody else is void. E) Damages F) Costs and interest.

The chamber summons application of 08.02.05 now under consideration brought under Order XXXIX rules 1,2, 3 and 4 of the Civil Procedure Rules and section 63 (e) of the Civil Procedure Act (Cap. 21) sought the following orders:- 1. That service of this application be dispensed with due to reasons of urgency.

2. That this honourable court do issue an injunction against and restraining the defendant Methodist

Church in Kenya either by itself, servants, employees and/or agents whomsoever from in any way removing signposts of the plaintiff situate on Plot No.3/463/Mathare North/Nairobi disposing and/or using motor vehicle registration number KAL 303Y, KAH 836 K and KAK 982 M and not to use or advertise Bethany Christian College as Kenya Methodist University Bethan Campus or manage Bethany Christian College and not to operate Bethany Christian College Bank Account No.010 – 20 – 93225900 until full and final determination of this suit.

3. That the costs of this application be provided for. The basic grounds on which the application is brought are:-

A) That a fraud has been perpetuated due to the wrongful acts of the defendant which has resulted in the plaintiff being swindled of plot No.3/463/Mathare North/Nairobi a tenant – purchase scheme and its college known as Bethany Christian College situate in the same suit premises by the Methodist Church in Kenya the defendant herein.

B) That the plaintiff has also as a result lost possession of 3 motor vehicles and valuable musical equipment. C) That interim orders are sought to stave off a conflict and clash between 2 church congregations as tension and anxiety is building up among members of the plaintiff church who contend that their interests and worship is being grossly violated by the defendant.

D) That the defendant purported to execute transfer and conveyance documents and act under a Power of Attorney when it all along knew or ought to have known that the donor and/or grantor was acting illegally and did not have the capacity or authority to transfer the plaintiff's property and interest to the defendant.

E) That interim orders are sought to prevent the ends of justice being defeated.

F) That equity suffers not a right without a remedy. The application is further grounded on the supporting affidavit of Alfred Makongo sworn on 08.02.05.

The application first came up for ex-parte hearing before me on 22.03.05 whereat the plaintiff was represented by learned counsel, Mr. A.S. Kuloba. Plaintiff's counsel complained that whereas the parties had on 10.03.05 recorded a consent that the plaint be amended within 14 days and the defendant given leave to file amended defence within 7 days of service of the amended plaint, the defendant did within 5 days, i.e. on 15.03.05, appear before the Duty Judge (Ransley, J) and obtained an injunction ex-parte against the plaintiff to the effect that the plaintiff should not interfere with the running and management of Bethany Christian College. Plaintiff's counsel informed this court that the plaintiffs have been running the college since 1993 to date and sought the setting aside of the ex-parte order of 15.03.05 until 19.04.05 when chambers summons of 18.03.05 would come up for inter-partes hearing for setting aside of the ex-parte order of 15.03.05.

I stayed the temporary injunction obtained by defendant on 15.03.05 pending inter-partes hearing and determination of the plaintiff's application of 18.03.05. When the parties appeared before me on 19.04.05, the plaintiff was represented by learned counsel, Mr. A.S. Kuloba while the defendant was represented by learned counsel, Mr. N. Kamundi. Plaintiff's counsel said he had come to prosecute his application of 18.03.05 while defendant's counsel said he had come to prosecute his application of 15.03.05. As noted earlier in this Ruling, the parties agreed to argue the chamber summons application 08.02.05, which is now the subject of this Ruling.

I shall not go into details of the submissions made by the parties' counsel but shall go straight to the essential points necessary to dispose of the main prayer in the chamber summons of 08.02.05 seeking restraining orders against the defendant until full and final determination of the suit herein. I should, perhaps, point out at the outset that among affidavits relied on by defendant's counsel was the affidavit of Rev. (Dr) Stephen Kanyaru M' Impwii said to have been sworn on 18.04.05. This court pointed out to the parties on 18.05.05 that the affidavit was not in the court file and asked defendant's counsel to furnish the court with a copy of the affidavit but no copy has been furnished.

A letter of Nairobi City Commission of September, 1993 annexed as "AM1" to Alfred Makongo's

supporting affidavit of 08.02.05 shows that Plot No. 3 – 463 – Mathare North site & Service Scheme was allocated to Nomiya Fweny Maler Church. A receipt attached to the allotment letter shows that on 08.11.93 Nomiya Fweny Maler Church paid Kshs.100,000/= on account of development cost and Kshs.250/= on account of rent. The next annexure, “AM2” is a letter from Nomiya Fweny Maler Church dated 20.04.94 whereby the church applied for Plot 30463 Mathare North to be transferred from the Nomiya Fweny Maler to the African Rural Mission (plaintiff herein).

I note that the number of the plot in annexure “AM2” is cited as 30463 while the plot number in the chamber summons is cited as 3/463 while the plot number in the letter of allotment “AM1” is cited as 3 – 463. The overall picture emerging from the totality of the evidence availed so far indicates that the plot in question is one and the same. Annexure “AM7” is an application dated 05.11.91 for registration or exemption from registration of African Rural Mission as a society and it, inter alia, cites Sung Jin Kang as chairman of African Rural Mission then proposed to be registered as a society. Annexure “AM3” is a Certificate of Registration No.15979 of African Rural Mission on 17.01.94. Annexure “AM4” is the Constitution of African Rural Mission, whose objects include:

“(a) To preach the gospel. (b) Training programme for bible and technical institutes.”

It is deponed in Alfred Makongo’s supporting affidavit that on the subject plot, No. 3/463/Mathare North/Nairobi there stood during Sung Jin Kang’s tenure not only a church but also a college known as Bethany Christian College “which is a Bible school established by ourselves and currently awarding diplomas and offering numerous courses.” Makongo’s affidavit adds that Sung Jin Kang, a Korean pastor, was the first chairman of African Rural Mission (plaintiff herein) and that he held the chairmanship from 1994 to 2000 when he informed members that he was returning to South Korea for further studies and recommended one Sung Wan Kim to be the academic dean because on the suit plot there stood not only the church but also Bethany Christian College as stated earlier.

It is Makongo’s deposition that members accepted the outgoing chairman’s recommendation and appointed Sung Wan Kim as the academic dean and that Sung Wan Kim took up the deanship as an employee/servant of African Rural Mission in June, 2000 until June, 2001 when he abruptly announced that he was going to China for a temporary but urgent visit and that he never returned. The next series of events narrated in Alfred Makongo’s supporting affidavit starts with reported discovery by the plaintiff society that Sung Wan Kim had unilaterally obtained a certificate of registration for Bethany Christian College on 20.12.2000 (annexure “AM8”) and that on 05.06.01 he proceeded to give a power of attorney to the trustees of the defendant purportedly authorizing them to transfer Bethany Christian College to the defendant Methodist Church in Kenya.

Makongo adds in his affidavit that Sung Wan Kim also purported to act with a church known as Bethany United Methodist Church based in the U.S.A. and that the plaintiff has no idea of the said church in America. I note in the latter regard that plaintiff’s counsel drew attention to the application for registration of African Rural Mission (annexure “AM 7”) and pointed out that there was no disclosure made in the said application that African Rural Mission was affiliated to Bethany United Methodist Church based in the U.S.A. Plaintiff Counsel submitted that the purported transfer of Bethany Christian College to the Methodist Church in Kenya was fraudulent and illegal.

Makongo’s affidavit also depones that within 10 days after giving the power of attorney on 05.06.01, Sung Wan Kim proceeded to execute a conveyance dated 15.06.01 purporting to transfer as a gift the Bethany Christian College plus various items including motor vehicles to the defendant. Plaintiff counsel submitted that the purported conveyance of Bethany Christian College and other items to the defendant in quick succession after the giving of the power of attorney is further evidence of fraud.

The plaintiff has through Makongo’s affidavit complained that since December, 2004 the defendant has refused to communicate with the plaintiff and explain its (defendant’s) illegal acts such as managing the college, removing the plaintiff’s signposts and naming the college as Bethany Christian College to the Methodist University Bethan Campus and using the plaintiff’s motor vehicles. Finally, Makongo deponed that tension is building up among the plaintiff’s members, hence this application for restraining orders,

pending hearing and determination of the suit herein.

On the other hand, defendant's counsel opposed the application and relied on the affidavits of Rev. (Dr.) Stephen Kenyaru M' Impwii sworn on 18.04.05 (missing from court file); his further affidavit sworn on 12.05.05 and enclosing an affidavit of one Tay Bong Lee sworn in New Jersey, U.S.A. on 29.04.05; and Henry Kiringol's further affidavit sworn on 05.05.05.

The affidavit of Tay Bong Lee is to the effect that he is the President of the Board of Trustees of Bethany United Methodist Church in New Jersey, U.S.A; that Bethany United Methodist Church in U.S.A. appointed Rev. Sung Jin Kang as their missionary in Kenya to oversee the objectives of the church and that he worked to establish the African Rural Mission and to operate Bethany Christian College; that Rev. Sung Wan Kim replaced Rev. Sun Jin Kang and to continue to work through the African Rural Mission; that the African Rural Mission was always funded by money from the church; that when construction of the project of the college was completed, Rev. Kang and the students as a tribute to the support and efforts of the church used the name "Bethany" for the college; that the Methodist Church in Kenya has the authority of Bethany United Methodist Church to manage Bethany Christian College; and that the United Methodist Church in U.S.A. has not left any affairs of African Rural Mission to the people who have sued the Methodist Church in Kenya.

Henry Kiringol's further affidavit is to the effect that although he is named in the annual return of African Rural Mission for 2003 as Treasurer, he has never been a member of the African Rural Mission and he was not its treasurer as at 31.12.03 as shown in the said return. I have duly considered the rival submissions of the parties to the application now before me. It is clear from the documents in the court file that there is a fierce dispute between the parties over Bethany Christian College situated on Plot No.3/463/Mathare North/Nairobi, Kenya.

The plot is said to measure approximately 1 hectare. Evidence in the file establishes that the plot was originally allocated to Nomiya Fweny Maler Church which eventually transferred it to African Rural mission. The Constitution of African Rural Mission (annexure "AM 4") states that membership is free but every member shall be expected to pay 10% subscription (the tithing) every month. According to Makongo's affidavit, there are now over 1,000 members. The Constitution also allows African Rural Mission to accept donations from anybody or organization. Clause (c) of the application for registration of African Rural Mission calls for information as follows:

"(c) The name of each organization or group of a political nature established outside Kenya, if any, of which the society is a branch or is affiliated to or connected with :....." The answer filed up in the blank space is "NONE". Plaintiff's counsel submitted in effect that since the United Methodist Church in the U.S.A., which says it was the initial sponsor of African Rural Mission, does not feature anywhere in the application for registration, it is a stranger. I have not been able find in the Kenyan documents availed to court at this stage any reference to the United Methodist Church in the U.S.A as a stakeholder in African Rural Mission.

The linkage between the two bodies has not as of now been established to the standard required under Kenyan law. Prof. Henry Stanley Mwaniki swore a supporting affidavit on 15.03.05 to the effect that he is the dean of the college; that the college is situated on the subject plot; that the college was transferred to The Trustee Registered Methodist Church in Kenya vide agreement dated 15.01.01; that the college is currently the campus of the Kenya Methodist University, itself an enterprise of the Methodist Church in Kenya offering diplomas and certificates in theological education; that the college has been run and managed under the Methodist Church in Kenya since 2001 and the plaintiff has no stake in it whatsoever.

Prof. Mwaniki added that on 13.03.05 the plaintiffs in the company of numerous other persons believed to be members of African Rural Mission descended on the college premises and forceably took over and paralysed the operations of the campus; and that the college staff and officials went to the campus on 14.03.05 and were denied entry by the plaintiffs or agents.

In his affidavit sworn on 18.03.05, Alfred Makongo made the following rejoinder to Prof. Mwaniki's

affidavit:- That Bethany Christian College was established on the subject parcel of land in tune with the objectives of African Rural Mission; that the management and administration of the college has been under the African Rural Mission and the defendant has not featured anywhere since 2001; that the plaintiff has been and continues to be in occupation of the premises; that within the compound of the college is a church which plaintiff members attend every Sunday for prayers; that on 13.03.05 plaintiff members were attending prayers as they have done over the years and did not invade the college as alleged.

The claims of the parties over the college are clearly irreconcilable. On the documents availed to court so far, those of the plaintiff show that the plot in question was in 1993 allocated to Nomiya Fweny Maler Church which transferred the plot to the present plaintiff in 1994. On the other hand the defendant's claim traces its origin from Sung Wan Kim's power of attorney dated 05.06.01 appointing Prof. Bishop Zablon Nthamburi and Dr. Rev. Stephen Kanyaru M' Impwii to be his attorneys and generally in relation to his interest and that of Bethany Christian College in respect of the subject parcel of land, to do anything he Sung Wan Kim could do, including transferring the said land to the Methodist Church in Kenya.

And ten days later, i.e. on 15.06.01, the said Sung Wan Kim on behalf of Bethany Christian College of Nairobi, Kenya and Bethany United Methodist Church of New Jersey, U.S.A. signed an agreement granting the title to Bethany Christian College situated on plot No.3/463/Mathare North Tenant-Purchase Scheme to Prof. Zablon Nthamburi (The Presiding Bishop of Methodist Church in Kenya) and Johana Mbogori (The Trustee Registered Methodist Church in Kenya) on behalf of the Methodist Church in Kenya. It is noted that Bethany Christian College in Kenya and Bethany United Methodist Church in U.S.A. were described in the agreement as beneficial owner of the subject plot No. 3/463/Mathare North.

As noted earlier, Bethany United Methodist Church in the U.S.A. does not feature in official Kenyan records availed to court as having a stake in the college or plot in question at this interlocutory stage. Kenyan documents availed show the plaintiff African Rural Mission as allottees of Plot No.3/463/Mathare North/Nairobi and Bethany Christian College to be situated on the plot. The authority of Sung Wan Kim to give the power of attorney has been questioned and subsequent transactions flowing from it have also been called into question by the plaintiff. Fraud has been alleged in the transfer process.

These are weighty matters warranting to go to trial in the main suit. I am persuaded that Plot No. 3/463/Mathare North/Nairobi plus Bethany Christian College standing on it and the motor vehicles and the back account listed in prayer 2 of the chamber summons under consideration ought to be preserved pending the outcome of the main suit. Accordingly, the restraining orders sought vide prayer 2 in the chamber summons application of 08.02.05 are hereby granted pending hearing and determination of the suit herein. Costs shall be in the cause. Orders accordingly.

Delivered at Nairobi this 18th day of July, 2005.

B.P. KUBO

JUDGE