



REPUBLIC OF KENYA



KENYA LAW
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Yulu & 3 others v Nzuki & 2 others (Officials and Representatives of Independent Faith Baptist Churches of Kenya) (Environment & Land Case 192 of 2018) [2025] KEELC 1185 (KLR) (12 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1185 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 192 OF 2018
SM KIBUNJA, J
MARCH 12, 2025

BETWEEN

JAMES YULU 1ST PLAINTIFF
JOHN K CHACHA 2ND PLAINTIFF
SAMUEL MAKAU 3RD PLAINTIFF
JAMES D HORNE 4TH PLAINTIFF

AND

SAMSON NZUKI 1ST DEFENDANT
DANIEL CHARO 2ND DEFENDANT
VINCENT MUNYOBI 3RD DEFENDANT
OFFICIALS AND REPRESENTATIVES OF INDEPENDENT FAITH BAPTIST CHURCHES OF KENYA

JUDGMENT

1. Vide the amended plaint dated 15th May 2023, the 1st to 3rd plaintiffs, who were the Chairman, Secretary and Treasurer respectively, of the Tiwi Independent Faith Baptist church, hereafter referred to as the church, which is a member of the Independent Faith Baptist Churches of Kenya, hereafter referred to as the organization, and the 4th plaintiff, founding trustee of the church and Tiwi Academy, sued the defendants, who are the Chairman, Secretary and Treasurer of the said organization, seeking for the following orders:
 - a. A declaration that the Independent Faith Baptist Churches of Kenya was holding Land Parcel No. Kwale/Tiwi/1428 under trust for Tiwi Independent Faith Baptist Church, its beneficial



owner and/or a declaration that the title of the Independent Faith Baptist Churches of Kenya has been extinguished by the Plaintiffs' adverse possession and occupation of Land Parcel No. Kwale/Tiwi/1428 for a period not exceeding twelve years.

- b. An order that the Land Registrar Kwale registers the plaintiffs as the absolute proprietors of Land Parcel no. Kwale/Tiwi/1428 and that the Land Registrar Kwale be directed that the Order herein shall be an instrument of transfer of ownership of the whole suit land from the defendants to Tiwi Baptist Church and/or its nominee(s).
- c. Costs of the suit and any other order that the court may deem just and expedient.

They inter alia averred that the church was founded by the 4th plaintiff and Robert R. Williams in 1979 and that they purchased a parcel of land Kwale/Tiwi/1428 in 1982, that was registered in the name of the organization, to hold in trust for the church since it had not been registered under the Societies Act at that material time. They further averred that the church was a voluntary member of the organization and its membership was regulated by the organization's constitution which had provisions for withdrawal of members and release of land held in trust. The said provision was article 10 of their constitution which they exercised and members voted for resolution for the withdrawal of the church from the organization. The defendants were notified of the resolution and requested for surrender of title of the suit property but they declined, and as the plaintiffs have been in adverse possession of the suit property for more than twelve years, they filed this suit.

2. The defendants opposed the plaintiffs' claim through their amended statement of defence and counterclaim dated 20th May 2024 and inter alia averring as follows: that the plaintiffs are non-entities to both the church and organization, as the defendants are the elected chairman, secretary and treasurer respectively of the organization, that is the lawful and or bonafide proprietor of the suit property, measuring 4.6 hectares at Tiwi, and their counterclaim should be allowed. They prayed for orders that:
 - a. The Plaintiff amended plaint be struck out and dismissed with costs and judgment be entered for the defendants against the plaintiff.
 - b. A declaration be made to the effect that the Independent Faith Baptist Churches is the lawful owner of plot number Kwale/Tiwi/1428.
 - c. General damages.
 - d. Costs of the suit.
 - e. Any other relief the Honourable court may deem fit and just to award.

There was no reply or defence to the amended defence and counterclaim filed by the plaintiffs.

3. During the hearing, James D. Horne and John K. Chacha, the 4th and 2nd plaintiffs, testified as PW1 and PW2 respectively. PW1 adopted his witness statement dated 17th August 2018, and testified that he has been a missionary from the USA since March 1977. He narrated to the court how he came with his family and started the church at Tiwi on rented property at Kshs. 4,000 per month. In 1981, he together with his father in law had raised funds totalling around Kshs. 60,000 from the USA under Independent Faith Mission Carolina USA, and bought the suit land at Kshs. 80,000 in Tiwi, and took possession in 1982. He stated that the suit property was registered with Independent Faith Church and Bible College (IFBCK), which had other properties in Ukambani, Tiwi and Nyali at the material time. They built classrooms, dormitories, cafeteria, and church and houses, and were assisted by one Stephen Mackamar in the constructions. The funds raised were deposited in Wackhoya Bank, which later became Wells Fargo. That the funds would be released when needed through Standard Chartered Bank, Mombasa. Both his father-in-law and himself were in charge of the accounts and would account to



Independent Faith Mission USA. He denied that the organization made contributions in acquisition of the suit land. He told the court that he was the overseer of the Bible Institute and later handed it over to his father-in-law, who later handed it over back to him and went back to the USA in 1984. He operated the college until 1996 when he moved his family to the USA to settle his children, and had custody of the title from 1982 until then, and he handed it over to the 2nd defendant. that he returned to Kenya in October 1999. He stated that during the period he was away, he would send funds to Kenneth Karanja the chairman at that time. He calculated the total amount used in purchasing and developing the suit property at Kshs. 400,000 and operational costs in excess of USD. 1,000,000. Furthermore, he stated that currently there is a church, primary school upto class 9, Bible Institute and a Clinic that is not operational. The Tiwi academy has close to 400 students who are sponsored at a sum of Kshs. 1,400,000 by Operation Life Hope of USA. He claimed to have raised Kshs. Two million for the organization, and disputed that the 3rd defendant, Christine and another lady were missionaries, adding that they were assisting in construction. He produced the organization constitution, and the transfer document with his signature and his father-in-law's signature. He also produced minutes where it was resolved that the 3rd defendant would hand over the suit property to him and also produced a handover letter signed by the 3rd defendant where he was resigning from being assistant director. He testified that the electricity bills are in his name as he had connected power even before the school was registered. He also admitted that there is a pending case in Kwale CM No. 105 of 2017 filed by the 3rd defendant. He added that he has been on the suit property since he came back to Kenya in 1999, and the organization has not been making any contributions for its operations. On cross-examination he stated that they had a sale agreement made after buying the suit property although he did not produce it in court. He was also not sure whether they registered a trust deed. He admitted that the church withdrew its membership from IFBCK but could not tell from when. He stated that he is not a trustee of the church but a trustee of the suit property. PW2 adopted his witness statement dated 23rd May 2024 and testified that he works at the church as a security guard, and is also a member and secretary to the church. He testified that the 3rd defendant, who was the pastor of the church, had been suspended and replaced by a new pastor named Kalama. That after the church was registered, they were allowed to hold elections and they chose pastor Masha on the 22nd May 2016.

4. Samson Kilonzo Nzuki, Daniel Charo and Vincent Munyobi, the 1st to 3rd defendants testified as DW1 to DW3 respectively. DW1 adopted his witness statement dated 20th May 2024 as well as the list of documents of even date and a supplementary list of documents dated 27th May 2024 specifically exhibit 17 and 20. He informed the court that he was the chairman and that Kwale Civil Suit No.105 of 2017 is still pending. He insisted that the organization's constitution in use was the amended version. During cross-examination, DW1 could not remember which year *the constitution* was amended, and pegged the amendment to be in 2015 after an AGM. He stated that the amended constitution does not have a date but he had the Registrar's letter authorising the amendment, which he did not produce in court. He stated that his church is in Mwingi, and that it owns the land it is situated on. That they bought the land in 1985 after fundraising and thereafter registered the land with the organization. He further testified that *the constitution* indicates that the headquarters is at Tiwi. DW1 admitted that the church was operated by the 3rd defendant, and that all churches in the organization are expected to deposit 10% of their collections in a KCB Ukunda account, and the rest is used by the pastors. He further admitted not being at Tiwi when the suit land was bought, and agreed that the suit land was bought by the father of the 4th plaintiff. He added that the suit land was bought with donations from abroad through Williams. He stated that a church writes to the General Secretary when it wants to be separated from the organization. DW2 relied on his statement dated 20th May 2024 and the list of documents of even date producing exhibit 1 to 5, 9, 16 and 18 respectively. He spoke of procedures of leaving the organization and how the new constitution was passed in 2019. He quoted article 12 of the old constitution stating that the local church owned the land where it is registered with the



organization and it would be returned to the church upon 2/3 members voting to separate. During cross-examination, DW2 stated that he has never been informed of the church's resolve to separate from the organization. DW3 relied on his statement dated 20th May 2024 and the list of documents of even date specifically exhibit 6 to 8, 10 to 15 and 19 respectively. He testified that he is a pastor at the church, and has been working there since 1997. That he has been living on church collections and not on salary. He further testified that the school therein was built by the Diani Baptist Church, and that he was trained by the 4th plaintiff and reverend Kalama from 1994 to 1996. Further that in 1997, there were chaos in the area and he had to start the school again in the same year with a nursery school, and agreed to record the title of the suit land with the donors so that they can use it to solicit for funds, but he had no documentary to confirm that. He then changed to state that the suit land was registered in the name of the 4th plaintiff, and that he was operating the school as a school manager on behalf of the organization. He stated that the suit land was bought by the time he formed the church, and he could not tell who bought the suit land. He explained that he filed the Kwale case because the church members wanted to remove him from the church as well as the school.

5. The learned counsel for the plaintiffs and the defendants filed their submissions dated 6th January 2025 and 31st October 2024 respectively, which the court has considered.
6. The issues for determinations by the court are as follows:
 - a. Who between the plaintiffs and defendants is the real, lawful and beneficial owner of the suit property.
 - b. What orders to issue.
 - c. Who bears the costs?
7. The court has carefully considered the pleadings, the oral and documentary evidence tendered, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following findings:
 - a. The first step of determining ownership starts with section 26 of the *Land Registration Act* chapter 300 of Laws of Kenya, which bestows ownership on a holder of title, which can only be challenged where there is evidence of fraud or unprocedurality or illegalities or corrupt scheme involving that person. In this case, the holder of title to the suit property is the organization, Independent Faith Baptist Churches of Kenya. That title is challenged by the plaintiffs, with PW1 testifying that Mr Robert Williams and himself are the ones who bought the suit property with funding from Independent Faith Mission in Carolina USA for the church. That by then, the church had not been registered, and he decided to register the suit property in the name of Independent Faith and Bible College Kenya, organization, to hold it in trust for the church.
 - b. Trust is an overriding interest under section 28 of the *Land Registration Act*. Under the section, registration of trusts is not necessary, but it is trite law that it has to be proved. From the testimony of PW1, he believed there was constructive trust and that the organization would return the suit property back to the church once it was registered, and relied on the provisions of article 12 of the undated old constitution. The Supreme Court of Kenya in the case of *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment) cited with approval the Canadian Supreme Court in *Soulos v Korkontzilas*, [1997] 2 SCR 217 where the court held:

“The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to



high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.”

The defendants have disputed the old constitution insisting that it is the new constitution applies, even though they were not sure of the date it was amended, pegging it at sometimes, in 2015.

- c. It is highly impossible that the organization did not have a constitution in force by the time of the registration of the suit property on 15th June 1982. That as the parties herein have talked of only two constitutions, i.e. the old and amended constitution, and as going by the estimation given by the defendants the amendments took place in 2015, then, it goes without saying, that the old constitution was the one in force by the time the suit property was registered. Be that as it may, section 7 of the new constitution was a verbatim duplication of article 12 of the old constitution. It retained the provision that once a local church withdraws from the organization after majority of 2/3 of its members resolves to do so, the title will be turned over to the local church.
- d. The though the defendants defence to the plaintiffs’ claim was generally mere denials, it is noted DW1, Chairman of the organization, admitted in his testimony that the suit property was bought by Mr. Robert Williams and PW1. DW2 was had no evidence on who bought the suit property, while DW3, the current pastor of the church and treasurer of the organization, stated he is aware the suit property was registered in the name of PW4. The evidence of DW1 and DW3 on who bought the suit property does not challenge in any material way the plaintiffs’ claim of entitlement and therefore existence of a trust, but confirms its probability. Indeed none of the defendants tendered any evidence that would support their claims in the counterclaim.
- e. What comes out from the totality of evidence is that the suit property was bought with donations from USA coordinated through PW1 and his father in law, Mr. Robert Williams. That explains the evidence of DW1 that the land was registered with PW1 and the transfer document having been in the name of PW1. Even though under section 107 of the *Evidence Act* chapter 80 of Laws of Kenya, it would have been better had PW1 availed a copy of the sale agreement and transfer documents to confirm who transacted, the fact that DW1 and DW3 confirmed the pivotal role of PW1 in the raising of funding, purchase and registration of the suit property, leads the court to conclude he was a credible witness, who only want the property to be restored to the intended beneficiary. The court concludes from the admission of all the parties that the suit property was bought with the donations from sourced by PW1 and Mr. Williams through International Faith Mission Carolina, USA.
- f. This suit has been brought on behalf of the church, and as DW1 admitted that the organization was only registered with the suit property in its name, but did not participate in its purchase, then it cannot turn around and claim to own it. That further, the organization cannot deny



that it holds the title in trust for the church as claimed by the plaintiffs, and the court finds a constructive trust has been established in favour of the church.

- g. Parties are bound by pleadings as has been held in several superior courts decisions including *M'Tharanju versus M'Manyara* [2022] KEELC 2900 (KLR), *Daniel Otieno Migore versus South Nyanza Sugar Co Ltd* (2018) eKLR, and *Adetoun Oladeji (NIG) versus Nigeria Breweries PLC SC 91/2002*, but the court retains the discretion to frame the orders it finds appropriate to grant in every suit even if they are not in the form they are phrased so long as such orders or reliefs flow from the parties' pleadings. Among the payers sought was adverse possession. Halsbury Laws of England, 4th Ed Vol 3 paragraph 768 states as follows:

“No right to recover land accrues unless the land in possession of some person in whose favor the period of limitation can run. What constitute such possession is a question of fact and degree. Time begins to run when the true owner ceased to be in possession of his land.”

The court having already pronounced itself that the organization was holding the suit property in constructive trust for the church, then church, that has been the beneficial owner all the time, could not claim to have been in adverse possession of the same land. Furthermore, none of the plaintiffs have proved possession of the suit property.

- h. Though the counterclaim is undefended, the counterclaimants still had the duty in law to prove their claim on a balance of probabilities, which responsibility they failed to carry out from the conclusions above. Further, the holding that the organization was holding title to the suit property in trust for the church, makes their counterclaim a non-starter.
- i. Under section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, costs follow the event, unless where for good reasons, the court directs otherwise. I find no good cause why the successful party should not have costs.
8. From the foregoing, the court finds and orders as follows on the main suit and counterclaim:
- a. The plaintiffs have proved their case against the defendants to the standard required and judgement is entered in their favour and the following orders issued:
- i. A declaration that the Independent Faith Baptist Churches of Kenya was holding Land Parcel No. Kwale/Tiwi/1428 under trust for Tiwi Independent Faith Baptist Church, its beneficial owner.
- ii. That an order is hereby issued that Independent Faith Baptist Churches of Kenya do transfer Land Parcel No. Kwale/Tiwi/1428 to Tiwi Independent Faith Baptist Church of Kenya within ninety (90) days, and in default, the Deputy Registrar of this court to execute all necessary documents to give effect to this order.
- iii. That the plaintiffs are awarded costs of this suit.
- b. That the defendants have failed to prove their counterclaim to the standard required of balance of probabilities and it is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF MARCH 2025.

S. M. KIBUNJA, J.



ELC MOMBASA.

In The Presence Of:

Plaintiffs : Mr Mbogo.

Defendants : M/s Matoke

Shitemi- Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

