



Board of Trustees, Mission to the Fatherless v Mung'asia & 5 others (Environment & Land Case 293 of 2015) [2024] KEELC 1188 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1188 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 293 OF 2015**

DO OHUNGO, J

MARCH 6, 2024

BETWEEN

THE BOARD OF TRUSTEES, MISSION TO THE FATHERLESS PLAINTIFF

AND

BRIAN MUNG'ASIA 1ST DEFENDANT
CONSOLATA JALUO WAJIA 2ND DEFENDANT
DENNIS DESTERIO BARAZA 3RD DEFENDANT
LOYCE WACEKE MWANGI 4TH DEFENDANT
DOUGLAS OGOLLAH OKUMU 5TH DEFENDANT
BEATRICE OGOLLAH 6TH DEFENDANT

JUDGMENT

1. The Plaintiff moved the court through plaint dated 16th November 2015 wherein it averred that it was the registered proprietor of the parcels of land known as Kakamega Municipality/Block I/547 and West Kasipul/Kasimba/457 (the suit properties) wherein it constructed orphanages. That the Defendants were working for it in the management of the orphanages and that it dismissed the First to Fourth Defendants on 2nd September 2014 and the Fifth and Sixth Defendants on 30th October 2015 owing to mismanagement, unlawful and fraudulent activities. That the Defendants refused to vacate the suit properties despite being directed to do so and instead continued to mismanage the orphanages.
2. The Plaintiff therefore prayed for judgment against the Defendants jointly and severally for:
 - a. An order of eviction be issued against the defendants either by themselves, their servants, employees, agents and or relatives and or anybody claiming through them from land parcel Nos. Kakamega Municipality/Block I/547 and LR. No. West Kasipul/Kasimba/457 and they



be ordered to account for all the funds and property of the plaintiff that has been in their possession.

- b. An order of injunction do issue permanently and perpetually restraining the defendants either by themselves, their servants, employees, agents and or relatives and or anybody claiming through them from entering or remaining on, trespassing on, utilising developing, carrying out any works on or in any other manner dealing with land parcels Nos. Kakamega/Municipality/Block I/547 and L.R No. West Kasipul/Kasimba/457 and or withdrawing funds from or dealing with the bank accounts and or any other property of the plaintiff and or in any other manner interfering with the plaintiff's ownership, possession and or use of the aforesaid parcels of land and or any of its other property.
 - c. Costs of this suit and interest
 - d. Any other or further relief deemed fit and just.
3. The Defendants filed a statement of defence in which they denied that the Plaintiff was the registered proprietor of the suit properties and generally denied the Plaintiff's allegations. They further averred that this suit was incompetent since another suit being Kakamega High Court Petition No. 27 of 2015 was pending. They therefore urged the court to dismiss the suit with costs.
 4. The matter then proceeded to hearing, at which Kennedy Joseph Makanji testified as PW1 and adopted his witness statement filed on 30th November 2015. He stated that he was a member of the Board of Directors of Mission to the Fatherless - Kenya which was incorporated in the State of Ohio in the United States of America on 20th November 2000 and subsequently registered in Kenya. That the Plaintiff was the registered proprietor of the suit properties wherein orphanages are situated and that purchase of the suit properties, construction thereon and furnishing were all done with funds from donors.
 5. PW1 went on to state that the Defendants who had been temporarily engaged by the Plaintiff in the two orphanages were dismissed as averred in the plaint, banned from any future engagement with the two orphanages due to misappropriation of funds and required to vacate the two orphanages immediately but they refused to vacate. That instead, they continued to misappropriate funds and to unlawfully mismanage the orphanages despite the plaintiff's demands and notices. He produced the documents listed as item numbers 1 to 9 in the Plaintiff's List of Documents dated 16th November 2015, the documents listed as item numbers 3 to 5 in the Plaintiff's Further List of Documents dated 30th November 2020 and the documents listed as item numbers 1 to 10 in the Plaintiff's Further List of Documents dated 12th May 2021, as Plaintiff's exhibits. He further testified that he was a witness in Kakamega CM Criminal Case Number 2798 of 2015 wherein the accused persons were acquitted and wherein similar allegations as those in this case were raised.
 6. Next on the stand was Kennedy Kirui Bomji who testified as PW2 and adopted his witness statement filed on 16th November 2015. He further stated that the Plaintiff was not the registered proprietor of the suit properties and that as of the date of his testimony, the Defendants were in charge of operations in the orphanages.
 7. Charles Shikuku Ofwamba testified next as PW3 and adopted his witness statement filed on 30th September 2020. He produced the documents listed as item numbers 1 and 2 in the Plaintiff's Further List of Documents dated 30th September 2020, as Plaintiff's exhibits. He stated that he was a director of the Plaintiff from the year 2003 and that he was involved in the purchase of Kakamega/Town Block I/547 in the year 2006 from William Shimanyula at a consideration of KShs 1,750,000 and that the said parcel was transferred to his name since the plaintiff was yet to be formally registered in Kenya. That he



later transferred the parcel to the plaintiff in 2009 after it was registered and that the First and Second Defendants were some of the orphaned children who were being helped in the Kakamega orphanage. That he left the Kakamega orphanage in 2011 and that at that time, the management board of the Plaintiff comprised PW1, PW2 and David Ikunza, among others.

8. Lastly, David Murilla Ikunza testified as PW4 and adopted his witness statement filed on 30th September 2020. He stated that he is a former head teacher of Kakamega Primary School and that Mission to the Fatherless USA visited his said school around the year 1993 and requested for a room to host their children. That he gave them a classroom which they used for about two years after which he assisted them to get a home in Milimani. That he then became a member of the Institution, and they formed a Kenyan Board for the Mission to the Fatherless. After establishing the children's home in Milimani, they enrolled more children and elections were held whereupon he was elected the Chairman of the Board of Directors, Mission to the Fatherless in Kenya. That operations started and children were admitted to the home and then to his school for their education. That the children included the First to Third Defendants herein and that upon being asked by the USA board to look for a permanent home for the children, they purchased Kakamega/Municipality/Block I/547 from William Shimanyula at a consideration of KShs 1,750,000 which was raised by donors and well-wishers.
9. PW4 further stated that the children were transferred from Milimani to Kakamega/Municipality/Block I/547 after dormitories, an administration block and a Church were constructed. That the number of children going to the institution started increasing and they had to open a temporary home in Oyugis to cater for children from other regions beyond Kakamega. That they then purchased West Kasipul/Kasimba/457. That the Defendants engaged in fraud and other malpractices and their services were terminated and they were instructed to vacate the orphanages and barred from any future engagement with them, but they refused to comply.
10. The Plaintiff's case was then closed.
11. The First Defendant testified as the sole defence witness and adopted his witness statement dated 30th November 2020. He stated that the Defendants were initially hired by the founder members of Mission to the Fatherless and later ratified by the Board of Management of the Mission to the Fatherless as Directors or Assistant Directors of the homes in Kakamega and Oyugis. He added that the Plaintiff had never been the registered proprietor of the suit properties and that the said parcels were the property of the Mission to the Fatherless Children Homes duly registered in Kenya. That the suit properties were acquired and developed using donor funds from various people and institutions to the exclusion of the Plaintiff. He further stated that the Defendants were not answerable to the Plaintiff herein regarding the management of Mission to the Fatherless Institutions in Kenya and the dismissal was both unlawful and inconsequential. That the Fourth Defendant had never been an employee of the Kenya Mission to the Fatherless Board, and she did not reside in any of the homes hence the eviction orders sought against her are an academic exercise. He went on to state that the Defendants had not misappropriated any funds and that in any case, any complaint of loss of funds could only come from Kenyan Board of Management of the Mission to the Fatherless Institutions in Kenya and not the United States Board of Mission to the Fatherless Inc.
12. The First Defendant produced the documents listed as item numbers 1 to 3 in the Defendants' List of Documents dated 30th November 2020 and further testified that they had 107 children in the two orphanages as of the date of his testimony and that they have nowhere to take them if they were evicted. That PW1 and PW2 ceased to be members of the board in the year 2014 following expulsion by the board. He also stated that Kakamega High Court Petition No. 27 of 2015 was dismissed.



13. Defence case was then closed, after which directions were given that parties file and exchange written submissions. The Plaintiff filed submissions, but the Defendants did not file any.
14. The Plaintiff argued that it is the registered proprietor of the suit properties and that the Defendants had trespassed into the properties. Relying on the case of *William Charles Fryda v Assumption Sisters of Nairobi Registered Trustees & another* [2017] eKLR, it argued that the suit properties are held under a charitable trust. That the Defendants failed to prove that they were authorised to be in the suit properties or that they were appointed as directors. It therefore contended that it had proven its case and urged the court to grant it the orders sought.
15. I have considered the parties' pleadings, evidence, and submissions. Although parties have dwelt quite a lot on issues of employment of the Defendants and corporate governance of the orphanages, the issues that fall for determination before me in view of the jurisdiction of this court are whether the Plaintiff is the registered proprietor of the suit properties, whether the Defendants are trespassers in the suit properties and whether the reliefs sought should issue.
16. The Plaintiff's basis for moving the court is that it is the registered proprietor of the suit properties. I have perused the copy of certificate of lease in respect of Kakamega Municipality/Block I/547 which the Plaintiff produced. Entry number 8 dated 29th April 2009 in the proprietorship section thereof states that the registered proprietor of the said parcel is "Mission to the Fatherless" of P O Box 528 Kakamega. I have equally perused the copy of title deed in respect of West Kasipul/Kasimba/457 which the Plaintiff also produced. I note that entry number 7 dated 28th November 2014 in the proprietorship section thereof states that the registered proprietor of the said parcel is "Mission to the Fatherless Childrens Home – Oyugis."
17. The Plaintiff in this case is "The Board of Trustees Mission to the Fatherless." It described itself at paragraph 1 of the plaint that it "is an organisation run by a Board of Trustees and was duly incorporated in the State of Ohio in the United States of America and is also registered in Kenya." While the Plaintiff may indeed have been incorporated as averred, it must establish proprietorship over the suit properties. The Plaintiff did not produce any document to demonstrate local registration in Kenya of any entity known as "The Board of Trustees Mission to the Fatherless" or even "Mission to the Fatherless." Instead, it produced a copy of a document said to have been issued on 20th November 2000 by the Secretary of State in the State of Ohio which states: "It is hereby certified that the Secretary of State of Ohio has custody of the business records for Mission to the Fatherless, Inc ..." The American document does not assist this court since it does not establish who the trustees of the Plaintiff in Kenya are and what their legal status is in Kenya.
18. Simply by reading the title deed in respect of West Kasipul/Kasimba/457, the registered proprietor of the said parcel is certainly not the Plaintiff. No nexus was established between the entity known as "Mission to the Fatherless Childrens Home – Oyugis" and the Plaintiff. Similarly, regarding Kakamega Municipality/Block I/547, in the absence of proof of local registration in Kenya of any entity known as "The Board of Trustees Mission to the Fatherless" or "Mission to the Fatherless", the Plaintiff cannot assert proprietorship rights over the said parcel. In stating so, I do not suggest that the Defendants have a better claim over the suit properties. It simply means that the Plaintiff has failed to demonstrate that it is the registered proprietor of the suit properties.
19. It follows therefore that the Plaintiff has failed to prove that the Defendants are trespassers in the suit properties. Consequently, the reliefs sought by the Plaintiff cannot issue.
20. I find no merit in the Plaintiff's case, and I dismiss it with costs to the Defendants.



DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF MARCH 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Akwala for the Plaintiff

No appearance for the Defendants

Court Assistant: M Nguyayi

