



**International Pentecostal Holiness Church & 2 others v Ali (Environment and Land Appeal E020 of 2023) [2024] KEELC 5258 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5258 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E020 OF 2023**

**SM KIBUNJA, J  
JULY 10, 2024**

**BETWEEN**

**INTERNATIONAL PENTECOSTAL HOLINESS CHURCH ..... 1<sup>ST</sup> APPELLANT  
BISHOP PHILOMEN NJAGI (REPORTEDLY DECEASED) ..... 2<sup>ND</sup> APPELLANT  
REVEREND MOSES MASIGA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**ABDULWAHAB MWINYI ALI ..... RESPONDENT**

*(Being an appeal from the judgement delivered by Hon. D. W. Mburu,  
S.P.M on 28th July 2023, in Mombasa CM ELC No. E033 of 2020)*

**JUDGMENT**

1. Through the memorandum of appeal dated the 21<sup>st</sup> August 2023, the appellants filed this appeal raising ten (10) grounds summarised as follows:
  - a. That the learned trial magistrate erred in law and in fact in finding that the 1<sup>st</sup> appellant had not acquired the suit property despite having legally purchased it, and was in possession.
  - b. That the learned trial magistrate erred in fact and in law by failing to appreciate that the respondent title had been obtained through fraud and or misrepresentation; had purchased the suit property from a person without capacity to sell to him, and was therefore not an innocent purchaser for value; and had not paid the entire purchase price.
  - c. That the learned trial magistrate erred in law and in fact by failing to appreciate the 1<sup>st</sup> and 2<sup>nd</sup> appellants evidence and submissions and in dismissing their counterclaim'



The appellants therefore prays for inter alia that the appeal to be allowed; judgement delivered by the trial magistrate be set aside, and judgement be entered as per the 1<sup>st</sup> and 2<sup>nd</sup> appellants' counterclaim, and for costs of the appeal.

2. On the 8<sup>th</sup> February 2024 the court admitted the appeal and directed for the submissions to be filed and exchanged. The learned counsel for the appellants and respondent filed their submissions dated the 5<sup>th</sup> March 2024 and 22<sup>nd</sup> April 2024 respectively, which the court has considered.
3. The issues for determinations by the court in this appeal is as follows:
  - a. Who between the appellants and the respondent had proved ownership of, or entitlement to the suit property.
  - b. Whether there was evidence presented before the trial court, to prove that the respondent title to the suit property had been obtained through fraud or misrepresentation.
  - c. Whether the learned trial magistrate had misdirected himself in finding for the respondent and against the appellants.
  - d. Who pays the costs?
4. The court has carefully considered the grounds on the memorandum of appeal, the record of appeal, submissions by the parties' learned counsel, superior courts decisions cited thereon and come to the following determinations:
  - a. This being a first appeal, the court is required to reconsider the evidence tendered before the trial court, evaluate it itself and come to its own conclusions on whether or not it would have come to different conclusions, bearing in mind it did not see or hear the witnesses testify. In the case of *Mursal & another versus Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021)* [2022] KEHC 282 (KLR) (6 April 2022) (Judgment), the court held as follows:

“A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* {1968} EA 123 and in *Peters v Sunday Post Limited* {1958} E.A. page 424.”

The court further stated as follows:

“A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. See *Kurian Chacko vs. Varkey Ouseph* AIR 1969 Kerala 316. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, Cap 21 Laws of Kenya, a court of first appeal can appreciate the entire evidence and come to a different conclusion.”

- b. The appellants have submitted that they adduced evidence that they acquired the suit properties in 1998 and 1999 through funds raised through harambee, and produced



documentary evidence including sale agreements, receipt for payment of stamp duty, valuation requisition for stamp duty and transfers. That they have been in possession unlike the respondent and it was an error for the learned trial magistrate to find as he did, that the appellants had not established acquisition of the property, and there was no need to consider whether the property had been fraudulently sold to the respondent. That the property was owned by a registered entity and not by Laban who sold it to the respondent. That though the respondent produced a sale agreement, he failed to prove that he had paid the entire purchase price. The learned counsel cited the cases of *Mbiiri Kamau Munyagia Njoka (2021) eKLR*, and *Munyu Maina versus Hiram Gatbiha Maina Civil Appeal No. 239 of 2009*, on the challenge of a title, and submitted that the respondent had not proved the legality of his title. On their part, the respondent submitted that he had established before the trial court that he was the lawful registered owner of the suit property, and had produced the certificate of title issued by the Registrar. That the appellants failed to meet the threshold to the proviso to section 26 of the *Land Registration Act* No. 3 of 2012 for the respondent's title to the suit property to be impugned. That contrary to the appellants' claim that their evidence and counterclaim were disregarded, the respondent submitted the learned trial magistrate considered and analysed their defence and counterclaim at paragraphs 7 to 11 of the judgement before ruling at paragraph 22 in favour of the respondent. The learned counsel relied on the case of *Margaret Njeri Wachira versus Eliud Waweru Njenga* [2018] eKLR, and *Kiplangat Mutarakwa versus Joseph Kones* [2018] eKLR, on inter alia, the sanctity of title.

- c. From the copies of the plaint dated the 7<sup>th</sup> December 2020, amended statement of defence and counterclaim dated the 9<sup>th</sup> December 2021 and reply and defence to the counterclaim dated 4<sup>th</sup> April 2022, the following is apparent:
  - i. That the plaintiff's claim is that he is the registered owner of Subdivision Numbers 8593 and 8594/MN, the suit properties, and seeks for inter alia, eviction and injunction orders against the defendants.
  - ii. The 1<sup>st</sup> and 3<sup>rd</sup> defendants disputed the plaintiff's claim and disclosed that the 2<sup>nd</sup> defendant had passed on in August 2018. They accused the plaintiff of obtaining title to the suit properties through fraud. In their counterclaim, they averred that they purchased the suit properties for the 1<sup>st</sup> defendant, and are therefore the beneficial owners. That in 2014 the plaintiff alleged he had bought the suit properties from Laban Onyango and Joyce Andisi who were members of the 1<sup>st</sup> defendant, but instead of following up on refund of purchase price from the two individuals, he fraudulently registered the said properties in his name. They indicated they would apply to join the said Laban and Joyce in the suit and prayed for inter alia, an order of rectification of the register to reflect the 1<sup>st</sup> defendant as the owner, or alternatively be declared owner by way of adverse possession.
- d. The proceedings in the record of appeal shows that the plaintiff and 3<sup>rd</sup> defendant testified on 6<sup>th</sup> March 2023 as PW1 and DW1 respectively. It is clear from the testimony tendered before the trial court that there was a church structure owned by 1<sup>st</sup> appellant on the suit property by the time the respondent was starting the transactions leading to his registration with the property. It is also clear that Laban, who was one of the two people from whom the respondent bought the suit property, was then the pastor operating the said church. The appellants alleged that they had bought the suit property from one Ismael, and that they had started the process of transferring it to the name of the 1<sup>st</sup> appellant when Laban and Joyce, who had by then left the church, sold it to the respondent without authority.



- e. In his judgement delivered on the 28<sup>th</sup> July 2023, the learned trial magistrate set out the three issues for determinations as whether the suit property was illegally or fraudulently transferred, to the plaintiff; whether the plaintiff was entitled to the reliefs in the plaint and whether the defendants are entitled to the reliefs sought in the counterclaim. As seen at paragraphs 14 to 22, the learned trial magistrate considered the evidence tendered by both sides, against the provision of section 26 of the [Land Registration Act](#) No. 3 of 2012, and came to inter alia, the findings that:
- i. That though the appellants claimed they had a sale agreement over the suit property, and had paid stamp duty, the said documents “are not in the court record. Without the alleged sale agreements and evidence from the defendants of payment of the alleged stamp duty, I find it hard to believe that indeed they had purchased the land, and that it is the plaintiff who failed to do due diligence before purchasing the suit property.” [see paragraph 20 of the judgement].
  - ii. That the appellants’ allegation of fraud in the process of the respondent’s acquisition of the suit property had not been proved. [ see paragraphs 21 and 22 of the judgement].

The trial court then proceeded to find at paragraph 23 that “...the plaintiff’s suit is merited and is for allowing. ....I do hereby find and hold that the defendants’ counterclaim is lacking merit.” At paragraph 24, the court then proceeded to make orders in favour of the respondent and to dismiss the appellants’ counterclaim.

- f. I have perused the proceedings before the trial court and there is no evidence that the appellants actualised the pledge in their defence and counterclaim to apply to have Laban and Joyce, from whom the respondent bought the suit property, joined in the suit. That neither the appellants nor the respondent called the persons they had alleged to have bought the suit properties from as witnesses. It is trite that proof in civil claims is on a balance of probabilities. Having considered the evidence tendered by the parties before the trial court in support of their claims and defence, and being alive to the fact that this court did not observe PW1 and DW1 testifying, I do not find any basis of faulting the findings of the learned trial magistrate in finding for the respondent and against the appellants. The appeal therefore has no merit and is for dismissing. However, as the respondent bought the suit property while well aware that the appellants were in occupation, it is only fair that they be accorded reasonable time to give vacant possession.
- g. I find it necessary, on the court’s own motion to strike out the name of BISHOP PHILOMEN NJAGI, the 2<sup>nd</sup> respondent, as a party in the suit and appeal, as the averment of the appellants that he had died in August 2018, which was before the suit was filed before the trial court, has remained undisputed.
- h. That under section 27 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya, costs follow the events unless where otherwise ordered. In this instance, I find no reason to depart from that edict and the respondent shall have costs.

5. The above being the conclusions of the court in the appeal, I find and order as follows:

- a. The appeal has no merit and is hereby dismissed.
- b. The judgement delivered by the learned trial magistrate on the 28<sup>th</sup> July 2023 is upheld.
- c. The appellants to meet the respondent’s costs in the appeal.

It is so ordered.



**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 10<sup>TH</sup> DAY OF JULY 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Appellants : Mrs. Kyalo

Respondent: Mr. Waweru.

Leakey – Court Assistant

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

