



Ouma & 2 others (Suing on behalf of Abachong’a Community) v Board of Management/Trustees Free Pentecostal Fellowship in Kenya & another (Environment & Land Case 6 of 2022) [2024] KEELC 5198 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5198 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 6 OF 2022**

BN OLAO, J

JULY 10, 2024

(FORMERLY E11/2020 KISUMU)

BETWEEN

**FREDRICK BARASA OUMA 1ST PLAINTIFF
SYLVESTER JOHN OMALA 2ND PLAINTIFF
TUBERIUS ODHIAMBO MALOVA 3RD PLAINTIFF
SUING ON BEHALF OF ABACHONG’A COMMUNITY**

AND

**BOARD OF MANAGEMENT/TRUSTEES FREE PENTECOSTAL FELLOWSHIP
IN KENYA 1ST DEFENDANT
PASTOR JOSEPH OGESA WAFULA 2ND DEFENDANT**

JUDGMENT

1. If you have heard of two bald men fighting over a comb, this dispute is not too dissimilar.
2. While the parties herein were busy brawling, huffing, puffing, punching, kicking and tearing at each other over the title deed of the land parcel No Bunyala/Mudembi/1859 (the suit land), the real owner thereof and who is the Principal Secretary, Treasury on behalf of the Bujuanga Nursery School must have been watching this comic relief with a lot of amusement. I must also confess that I enjoyed the drama as the litigants fought over nothing. It reminded me of National Geographic Wildlife videos where, as lions and other carnivores tear at each other following a successful hunt, the vultures circle in the sky above watching. Then at the right time, they pounce and fly away with the lions’ meal. I think an appropriate name for this, case, if I was to coin one, would be “The Case Of Much Ado About Nothing”.



3. Fredrick Barasa Ouma, Silvester John Omala And Tuberius Odhiambo Malova (the Plaintiffs herein and suing on behalf of the Abachonga Community) moved to this Court vide their plaint dated 23rd October 2020 and filed on 5th November 2020. They impleaded the Board Of Management Of Free Pentecostal Fellowship In Kenya (FPFK) and Pastor Joseph Ogesa Wafula (the 1st and 2nd Defendants respectively) and sought judgment against them in the following terms with respect to the suit land:

1. Eviction against the Defendants.
2. Costs of the suit and interest.
3. Any other relief which this Honourable Court deems fit to grant.

The basis of the Plaintiff's case is that the suit land is Community land which during the Land Adjudication exercise and specifically on 2nd October 1985 was curved out and preserved for the construction and development of an Educational facility namely Bujuanga Nursery School. That on 24th July 2014, the suit land was registered in the name and style of Principal Secretary to the National Treasury of Kenya and reserved for use by the Community of Bujuanga Nursery School who holds the title on behalf of the Abachonga Community (hereinafter the Community) and who are therefore the bona fide owners thereof. That the Defendants have without any colour of right trespassed onto the suit land and erected a permanent meeting hall thereon. That the 2nd Defendant with or without the blessing of the 1st Defendant and without any colour of right operates an academic institution under the name and style Bujuanga Light Academy on the suit land yet they have no evidence, documentary or otherwise, to warrant their continued occupation.

4. The Plaintiffs filed a joint – un-dated statement which is basically a rehash of their plaint.
5. Therein, they have stated that they represent the Community which owned the suit land. That during the Land Adjudication in 1985, the said Community resolved to curve off a parcel of land measuring 0.9 Hectares for the purposes of developing an Educational Institution thereon namely Bujuanga Nursery School. The suit land was then registered under the Trust of the PRincipal Secretary National Treasury for that purpose. However, sometimes back, members of the Church (FPFK) Bujuanga village used to meet for prayers at the home of the late Mzee Blasio Muhando's homestead. Due to the interference with those prayers, the Community allocated the said Church the suit land. However, the said Church went ahead and established an ECD Centre on the suit land and proceeded to damage the indigenous trees thereon led by their Pastor Joseph Ogesa Wafula the 2nd Defendant herein. That the Defendants have no evidence, documentary or otherwise, to support their continued and illegal occupation of the suit land which the Plaintiffs had temporarily offered the Church FPFK for purposes of meeting to conduct prayers in Kenya yet they have now converted it for illegal use. That necessitated this suit.
6. In support of their case, the Plaintiffs filed the following documents vide their list of documents dated 23rd October 2020, 10th September 2021 and 20th January 2023.

23rd October 2020:

- 1) Copy of the title deed to the land parcel No Bunyala/Mudembi/1859.
- 2) Certificate of Official Search for the land parcel No Bunyala/Mudembi/1859.
- 3) Copy of Green Card for the land parcel No Bunyala/Mudembi/1859.



- 4) Letter dated 13th August 2020 from the County Chief Officer Education And Vocational Training Busia County Government addressed to the Land Registrar Busia in respect of the land parcel No Bunyala Mudembi/1859.
- 5) Letter dated 26th August 2020 and addressed to the Defendants C/M Consultancy Community Advocacy.

10th September 2021

- 1) Copy of letter dated 29th January 2014 by the Bujanga 'B' Community addressed to the County Government Of Busia requesting for the title deed to the land parcel No Bunyala/Mudembi/1859.
- 2) Copy of letter dated 27th February 2014 from the Chief Bunyala East Location addressed to the Governor Busia County Government requesting that a Public Primary School be started on the land parcel No Bunyala Mudembi/1859.
- 3) Copy of minutes of the meeting held on 29th January 2014 at Odhiambo Maloba's Home.

20th January 2023:

- 1) Copy of Authority to Act signed by 27 members of the Bujwang 'B' Community .
7. The Defendants filed a defence dated 14th December 2020 and denied the existence of any entity called the Board Of Management/trustees Free Pentecostal Fellowship In Kenya capable of being sued and put the Plaintiff to strict proof thereof. They also denied that the Plaintiffs are authorised members of the Community allowed to sue on matters touching on the suit land and further added that there is no entry known as the Abachonga Community capable of suing.
 8. The Defendants pleaded that the 1st Defendant is the bona fide beneficial owner of the suit land of which neither the Plaintiffs nor the Community has any colour of right. The Defendants further denied that the suit land is Community land and put the Plaintiffs to strict proof thereof. They admitted that the suit land is registered in the name of the Principal Secretary to the National Treasury of Kenya but denied that the same was earmarked and reserved for use by the Community as alleged and put the Plaintiffs to strict proof thereof. They added that at all material times since 1965 to-date, the 1st Defendant has been in physical occupation and possession of the suit land running a school thereon in the name of Bujuanga LIGHT ACADEMY under the Ministry Of Education Certificate NO PE/11731/14. The Defendants denied that the Principal Secretary National Treasury Of Kenya holds the title to the suit land as Trustee on behalf of the Community and put the Plaintiffs to strict proof thereof adding that in fact, there is documentary evidence from both the National and County Government showing that the 1st Defendant is the bona fide beneficial owner of the suit land.
 9. The Defendants also pleaded that the Plaintiffs' suit is incompetent, misconceived, fatally and incurably defective and cannot therefore be sustained. Finally, they pleaded that the ELC Kisumu where this suit had originally been filed as Kisumu ELC Case No E11 of 2020 had no jurisdiction since the suit land is situated within the jurisdiction of Busia ELC and a Preliminary Objection would be raised. That is now water under the bridge because when the trial commenced before Ombwayo J at the ELC Kisumu on 21st March 2022, the Judge realised that indeed the suit land is within the jurisdiction of the ELC BUSIA and promptly moved on his own motion to transfer the suit to this Court.



10. Together with their defence, the Defendants filed the statements of Pastor Joseph Ogesa Wafula (dw1) And Reverend Samuel Gichane (DW2) both dated 14th December 2020.
11. In his statement Pastor Joseph Ogesa Wafula (DW1) states that he is a Senior PASTOR with the Free Pentecostal Fellowship In Kenya (FPFK) which is a society duly registered under the Societies Act and which is the bona fide owner of the suit land and has been in physical possession thereof since 1965. That the FPFK has carried out extensive developments on the suit land including Bujwanga Light Academy School and a Church. The school is registered with the Ministry of Education vide Certificate NO PE/11731/14 and that on 9th January 2013 vide the minutes NO TPW & M/CC/04/2013, the then County Council Of Busia approved FPFK as the owner of the suit land and the same was confirmed by the County Government Of Busia through a letter dated 26th November 2020. This ownership has also been confirmed by the Assistant Chief Mudembi sub-location who, vide his letter dated 3rd December 2020 has described the 2nd Plaintiff Silvester John Omala as a person of bad character with a myriad of theft cases hanging over him. That the Plaintiffs are not representing any Community but their intention is to grab the Church land so as to sell it. That the Community is actually happy with the FPFK's projects on the suit land and the Plaintiffs have not adduced any documentary evidence to support their claim to the suit land and their suit should be dismissed with costs.
12. In his statement Reverend Samuel Gichane (DW2) confirms that he is one of the registered Trustees of the FPFK and knows that the said FPFK is the bona fide owner of the suit land and has been in actual possession thereof since 1965. That the FPFK has carried out extensive developments on the suit land since then including Bujwanga Light Academy and a Church where it's members congregate to worship. The said school is registered with the Ministry of Education vide certificate NO PE/11731/14. Further, that the defunct County Council Of Busia vide it's minutes NO TPW & M/CC/04/2013 approved the FPFK as the owner of the suit land on 9th January 2013 and this was further confirmed by the County Government Of Busia vide it's letter dated 26th November 2020 and there are no records showing that the Community is the owner of the suit land. The Local Administration through the Assistant Chief Mudembi sub-location has confirmed that the FPFK is the truly bona fide owner of the suit land and in his letter dated 3rd December 2020 he has described Silvester John Omala the 2nd Plaintiff herein as a person of bad character with a myriad of cases hanging over him. That the Plaintiffs' intentions are not to represent the Community but rather, to grab the Church land and sell it. That the Community is happy with the FPFK's projects on the suit land having benefited therefrom any interference with the smooth running of the school will adversely affect the pupils and the Community at large. The Plaintiffs have not adduced any documentary evidence to support their claim of the suit land and this suit should be dismissed with costs.
13. In support of their case, the Defendants filed three (3) lists of documents dated 14th December 2020, 1st February 2023 and 30th June 2023 to which they annexed the following documents:
 - 14TH December 2020:
 - 1) Certificate of registration of the FPFK.
 - 2) Certificate of Incorporation of the FPFK.
 - 3) Minutes of the County Council of Busia Town Planning, Works and Markets Committee meeting held on 9th January 2013.
 - 4) Certificate of registration of Bujwanga Light Academy.



- 5) Letter dated 3rd December 2020 from the Assistant Chief Mudembi sub-location addressed to whom it may concern titled “Brief History of Bujwanga Nursery School.”
- 6) Letter dated 26th November 2020 from the County Government of Busia addressed to whom it may concern under the reference; “Land Parcel No Bunyala/Mudembi/1859.”
- 7) Photographs of buildings, children and parents.
- 8) Letter dated 5th January 2021 from the Busia sub-County Director of Education addressed to whom it may concern under the reference; “FPFK Bujwanga Light Academy”.

1ST February 2023:

- 1) Letter dated 23rd October 2020 from the Chief Officer Lands and Housing County Government of Busia addressed to the Free Pentecostal Church under reference “title Deed Bunyala/Mudembi/1859”.
- 2) Letter dated 17th March 2021 from the sub-County Administrator Bunyala addressed to the Department of Education and Vocational Training Busia under reference; “Removal Of Restriction On Parcel No Bunyala/Mudembi/1859.”
- 3) Certified copy of Green Card to the land parcel No Bunyala/Mudembi/1859.

30TH June 2023:

- 1) Letter dated 5th June 2023 from the Chief Bunyala sub-location addressed to the County Land Registrar Busia under reference; “Application To Remove Caution Bunyala/Mudembi/1859.”
- 2) Minutes of meeting held on 22nd January 2021 at Bujwanga Poultry Park Site.

14. The hearing commenced on 9th November 2022 and Fredrick Barasa Ouma (pw1), Silvester John Omala (pw2) And Tuberius Odhiambo Malova (PW3) testified on behalf of the Plaintiffs. They adopted as their oral evidence their statements filed herein and contents of which I have already summarised above. They also produced as their documentary evidence the documents already filed herein.
15. The Defendants testified on 31st October 2023. They too adopted as their oral evidence the contents of their statements and produced the documentary evidence the documents filed as per the lists above.
16. Submissions were thereafter filed both by Ms Omedo instructed by the firm of Nyatundo & Company Advocates For The Plaintiffs And By Mr Kanyoro instructed by the firm of Solonka & Company Advocates for the Defendants.
17. I have considered the evidence by the parties and the submissions by counsel.
18. There are only two issues that call for my determination in this dispute:
 - 1) Whether the suit land is Community Land belonging to the ABACHONGA Community or if it belongs to the Free Pentecostal Fellowship In Kenya FPFK.
 - 2) Who bears the costs of this suit?



1. Whether the suit land is community land belonging to the Abachonga community the plaintiffs or it belongs to the FPFK the defendants:

19. It is the Plaintiffs' case that the suit land is Community land upon which the Defendants have trespassed and constructed a permanent building. The Plaintiffs have pleaded in paragraphs 9 and 10 of their plaint as follows:

9: "At all material times to this suit, the Plaintiffs Abachonga Community is the bona fide claimer owner of all this parcel of land known as Bunyala/Mudembi/1859."

10: "The Plaintiffs aver that the 1st and 2nd Defendants have either jointly or severally and without any colour of right trespassed onto converted/continued occupation of the Plaintiffs' parcel of land and have erected a permanent meeting hall on the parcel of land Bunyala/Mudembi/1859".

In paragraph 5 of their defence however, the Defendants have pleaded thus;

5: "In further answer to paragraph 4 of the plaint, the 1st and 2nd Defendants shall contend that the 1st Defendant is the bona-fide beneficial owner of the property known as L.R No Bunyala/Mudembi/1859 and further aver that neither the Plaintiffs nor the so called Abachong'a Community has any colour of right whatsoever over the suit property and Plaintiffs are put to strict proof thereof."

It is clear, therefore, that both parties claim ownership of the suit land.

20. Section 2 of the *Community LAND ACT* defines Community Land to mean:

- "a) Land declared as such under Article 63 (2) of *the Constitution*;
- b) Land converted into Community land under any law."

Article 63 (1) and (2) of *the Constitution* provides as follows;

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- (1) "Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar Community of interest.
- (2) Community land consists of -
 - (a) land lawfully registered in the name of group representatives under the provisions of any law;
 - (b) land lawfully transferred to a specific Community by any process of law;
 - (c) any other land declared to be Community land by an Act of Parliament; and
 - (d) land that is-
 - (i) lawfully held, managed or used by specific communities as Community forests, grazing areas or shrines;
 - (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
 - (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the County government."



21. Although both parties claim ownership of the suit land, it is clear from the Green Card produced by the Defendants that the said land was first registered in the name of the then Busia County Council on 2nd October 1985. There is no evidence that the suit land was registered in the name of the said Busia County Council to hold in trust for the Abachong'a Community or for any other institution or Community for that matter. The suit land has since 24th July 2014 been registered in the name of the Principal Secretary to the National Treasury of Kenya and reserved for use as Bujwang'a Nursery School . It is not clear, therefore, why the Plaintiffs have pleaded in paragraph 9 of their plaint that the "Abachong'a Community is the bona fide claimer/owner of all this parcel of land known as Bunyala/Mudembi/1859." Neither is it clear why the Defendants have also pleaded in paragraph 5 of their defence "that the 1st Defendant is the bona fide beneficial owner of the property known as L.R No Bunyala/Mudembi/1859." The term bona fide is defined in Black's Law Dictionary 10th Edition as:

"Latin 'in good faith.' Made in good faith; without fraud or deceit. Sincere; genuine."

The term beneficial owner is defined in the same Dictionary as;

"One recognized in equity as the owner of something because use and title belong to that person even though legal title may belong to someone else esp, one for whom property is held in trust."

An owner is defined in the same Dictionary as:

"Someone who has the right to possess, use and convey something; a person in whom one or more interest are vested."

In view of the un-controverted contents of the Green Card to the suit land, it is difficult to see how either the Plaintiffs or the Defendants can lay any claim to the suit land. Indeed if the Defendants had any title to the suit land, and which has not been proved, that title was surrendered to the Busia County Government as is clear from the letter dated 23rd October 2020 and filed by the Defendants herein. It is addressed to the Defendant and reads:

"Free Pentecostal Church

RE: Title Deed Bunyala, Mudembi 1859.

Following our meeting held on 6th October 2020 in the office of the Chief Officer Department of Lands and Housing, I confirm that Pastor Joseph Ogesa surrendered to me the original title deed for land parcel Bunyala/Mudembi/1859 reserved for Bujwang'a Nursery School .

Everlyne T. Mbingi

Chief Officer Lands And Housing".

If the Defendants had an original title deed to the suit land which they later surrendered to the Busia County Government, it can only mean that they relinquished whatever interests which they had in the suit land way back on 23rd October 2020.



22. The Plaintiffs on their part produced as part of their documentary evidence a copy of the letter dated 13th August 2020 from the Busia County Government Department of Education and Vocational Training and addressed to the Land Registrar Busia. It reads:

“Dear Sir

RE: Bunyala/Mudembi/1859

The above named land and measuring approximately 0.9Ha is held as property of the Principal Secretary to the National Treasury of Kenya on behalf of Bujwang’a Nursery School.

The said land has been encroached by a Church. We hereby pray that no transaction takes place without our knowledge.

Find attached a copy of title Deeds. Our proprietor Friedrich Barasa of 0790 71xxxx of Mudemi Village has details of the Land History.

Morgoria Daniel E. N.

County Chief Officer

Education And Vocational Training.”

That letter recognises that the suit land is the property of the Principal Secretary to the National Treasury of Kenya and it is held on behalf of Bujwang’a Nursery School. It is not the property of the Plaintiffs or the Defendants. It is not, as pleaded by the Plaintiffs in paragraph 8 of their plaint, held on behalf of the Abachong’a Community who is a donor.

In any event, the said Abachong’a Community has never been the owner of the suit land and so it could not have donated what it has never owned. The Plaintiffs have proceeded on to plead in paragraph 11 of their plaint as follows:

- 11) “The Plaintiffs further aver that the 2nd Defendant with/or without the blessings of the 1st Defendant and without any colour of right operates an Academic Institution under the name and style “Bujuang’a Light Academy’ on the parcel of land Bunyala/Mudembi/1859 knowing well that the move is illegal.”

The Defendants have admitted that averment by the Plaintiffs and proceeded to plead in paragraph 9 of their defence that:

- 9: “In further answer to paragraph 7 of the plaint, the 1st and 2nd Defendants shall contend that at all material times since 1965 to date, the 1st Defendant has been in physical occupation and possession of the suit land and running a school thereon in the name of Bujuanga Light Academy under Ministry of Education Certificate number PE/11731/14.”

If, as admitted by the Defendants, they are running a school on the suit land in the name of Bujanga Light Academy, that cannot be the subject of any litigation between the Plaintiffs and the Defendants. It can only be an issue between the Defendant and the Principal Secretary to the National Treasury of Kenya as holder of the title to the suit land on behalf of Bujuang’a Nursery School. The Plaintiffs are essentially busy bodies in so far as the ownership of the suit land is concerned. They have no locus standi, to file any suit seeking orders to evict the Defendants from the suit land. If the Plaintiffs have always occupied the suit land, that in itself does not confer any title or proprietary interest in the suit land. The Plaintiffs have also produced as among their documentary evidence a letter dated 29th January 2014 from the Bujwanga ‘B’ Community addressed to the Busia County Government which



is titled “Request For Title Deed/allotment Letter For Ecde/nursery School On Plot No Bunyala/Mudembi/1859.” The letter reads in paragraph 5 that:

5: “We request your office to help us obtain a title deed/allotment letter in the name of St. Francis Bujwanga ‘B’ School (Public School) as one of key requirements for registration of an education institution in Kenya.”

That is a demonstration that the Plaintiffs have always desired to acquire the title to the suit land. They did not however succeed because on 24th July 2014, that title was issued to the Principal Secretary to the National Treasury of Kenya and was reserved for use as Bujwang’a Nursery School . The Plaintiffs may have been irked by the fact that the Defendants are now running a private institution on the suit land namely Bujwang’a Light Academy but as I have already stated above, that is a matter between the Principal Secretary To The National Treasury and the Defendants.

23. The Defendants have also produced as part of their documentary evidence a copy of the letter dated 26th November 2020 from the Busia County Government Sub-county Administrator Bunyala Sub-county and addressed to Whom It May Concern. It is in reference to the suit land and states in paragraph 7 that:

“There are no records under our custody showing any Community ownership of the said land.”

It must now be clear, beyond peradventure, that the Plaintiffs’ claim to the suit land and the orders to evict the Defendants therefrom can only be described as fanciful. Their claim must be dismissed.

24. On the issue of costs, Section 27 of the *Civil Procedure Act* provides that they follow the event unless the Court, “for good reason” orders otherwise. In the circumstances of this case, I see no “good reasons” to deny the Defendants costs of this suit.

25. Ultimately therefore and having considered all the evidence herein, this Court makes the following disposal orders in this suit:

1. The Plaintiffs’ suit is dismissed.
2. The Plaintiffs shall meet the Defendants’ costs.

BOAZ N. OLAO

JUDGE

10TH JULY 2024

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 10TH DAY OF JULY 2024 WITH NOTICE TO THE PARTIES.

Right of Appeal.

BOAZ N. OLAO

JUDGE

10TH JULY 2024

Explanatory notes:

This judgment was due for delivery on 12th March 2024. However, I was attending to my step mother who unfortunately passed away two days later. I then proceeded on my pre-arranged annual leave which ended on 1st July 2024. That explains the delay in delivery of the judgment. The same is regretted.



BOAZ N. OLAO

JUDGE

10TH JULY 2024

