



**Trustees of Kwa Mutu Pentecostal Evangelistic Fellowship of Africa alias PEFA Church v Muthini
(Environment & Land Case 242 of 2010) [2024] KEELC 5279 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5279 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 242 OF 2010**

**A NYUKURI, J
JULY 10, 2024**

BETWEEN

**THE TRUSTEES OF KWA MUTU PENTECOSTAL EVANGELISTIC
FELLOWSHIP OF AFRICA ALIAS PEFA CHURCH PLAINTIFF**

AND

PASTOR RAPHAEL MUTHINI DEFENDANT

JUDGMENT

1. By a plaint dated 12th November 2010, the plaintiffs sought against the defendant the following orders;
 - a. A mandatory injunction restraining the defendant from remaining, interfering, trespassing and/or in any other way dealing with the plaintiff's premises Kwa Mutu Pentecostal Evangelistic Fellowship of Africa.
 - b. An order requiring the defendant to return all the church properties he holds including the electric generator, the guitar, the amplifier, twenty seven seats, Box speaker, On speaker, church cloths, battery, five iron sheets, carpet and all other items belonging to the Pentecostal Evangelistic Fellowship of Africa Ministries.
 - c. Damages for trespass.
 - d. The OCS Donyo Sabuk Police Station does ensure compliance of the orders issued.
 - e. Costs of the suit.
2. The plaintiffs averred that they were the owners of all that premises where the Kwa Mutu PEFA Ministry Church is situated, which property was allocated to the church by Muka Mukuu Cooperative Society at Donyo Sabuk Market, Machakos District (suit property).



3. They further stated that on 7th August 2010, the defendant's services as a pastor of PEFA Ministries were terminated by the plaintiffs after the defendant withdrew his pastoral duties. That despite the termination, the defendant has refused to leave the suit property but instead purported to change the name of the church to "Jordan River" and is now purporting to conduct his services unlawfully on the suit property and also unlawfully using the church items including generator, guitars, amplifier, seats, speakers, church cloths, battery, iron sheets and carpet. They stated that the defendant had purported to unlawfully change ownership of the suit property at Muka Mukuu Co-operative Society and has refused to vacate the suit property despite demand to leave.
4. Upon service of summons, the defendant entered appearance on 1st February 2011. Subsequently, on 9th October 2012, the defendant filed a notice of preliminary objection dated 8th October 2012, against the suit, which objection was dismissed by the court's ruling delivered on 19th January 2017. The defendant did not file defence and therefore the suit proceeded undefended. The suit was heard by way of viva voce evidence. The plaintiffs presented three witnesses in support of their case.

Plaintiffs' evidence

5. PW1 was Reverend Peter Mutua. He adopted the contents of his witness statement dated 11th September 2017 as his evidence in chief. It is his testimony that he was a minister of the word of God under the Pentecostal Evangelistic Fellowship of Africa (PEFA) and also an overseer at Machakos PEFA. That they have a District Council of all PEFA pastors and each pastor files monthly church reports. That in 2010, the District Council learnt that the defendant who was a pastor at Kwa Mutu PEFA church had changed the name of the church to Jordan River and stopped attending council meetings and filing church's monthly reports.
6. The witness stated that in the company of Reverend Patrick Kimeu, the District Council Secretary, they visited PEFA Church at Kwa Mutu and confirmed that the defendant had changed the name of the church from PEFA to Jordan River, whereof the council terminated him. He stated that the land upon which the church is situated is the property of PEFA church and that the continued stay of the defendant on the suit property constitutes trespass, and therefore he ought to be evicted and ordered to return PEFA church equipment.
7. He produced seven documents attached to the plaintiff's list of documents dated 11th September 2017. He produced the following documents; PEFA Church's certificate of incorporation; letter dated 6th August 2010 from Muka Mukuu Farmers Cooperative Society Ltd confirming allotment of the suit property; termination letter dated 7th August 2010; demand letter dated 12th August 2010; purchase receipts; supporting claims of plot ownership; receipts for payment of survey fees and monthly PEFA church reports.
8. On cross-examination, he stated that the church at Kwa Mutu was built in the late 90's and when the defendant was sent there, there was already a church there. Further that the land they claim is not registered and that they have built on the land awaiting issuance of title. He averred that the land measures one acre. He claimed that they paid for the survey and the land. He alleged that he had not produced documents to show application for allotment from Muka Mukuu. He stated that the land was given to PEFA church by Muka Mukuu. That the pastor who was there represented the church in the transactions and kept the receipts. He stated that when they reported to Muka Mukuu that their land had been taken by the defendant, the latter wrote a letter and advised them to seek legal redress.
9. PW2 was Reverend Patrick Kimeu. He adopted the contents of his witness statement dated 11th September 2017 as his evidence in chief. His evidence was that he was the Secretary of PEFA Machakos District Council in 2010 and he knew the defendant who was one of PEFA Church pastors but



- purported to change the name to Jordan River by placing a sign board indicating the name of the PEFA church as “Jordan River”. He claimed that this led to the termination of the defendant by the church as the suit property belongs to PEFA church. He stated that the defendants continued occupation of the suit property amounted to trespass.
10. On cross-examination, it was his testimony that he began being a pastor in the year 2000 and that PEFA church was built on the suit property in the 1990s, as per the records held by the church, which include monthly remittances. He alleged that the letter by Muka Mukuu done in 2010 was only confirmed that the suit property belonged to PEFA church as the land was allocated earlier. He informed court that Muka Mukuu showed that they allocated plot to PEFA church. He stated that the defendant maintained that he is no longer working for PEFA church and that the church claims the plot, not the worshipers.
 11. PW3 was Michael Nzioka Kithumbi, who stated that he comes from Kwa Mutu Market. He adopted his witness statement dated 11th September 2012 as his evidence in dispute. His testimony was that he was a businessman and farmer at Kwa Mutu and a founding member of PEFA church Kwa Mutu with pastor Stephen Ngumbau. According to him, the church used to be at a shop and that they later approached Muka Mukuu who donated a plot to PEFA church. That they paid for survey and built a church. Further that the expenses were borne by PEFA church. He alleged that he later became the chairman of the church and that later the defendant began changing the church to “Jordan River” which he objected to and informed the overseers. That they tried to resolve the matter in vain and that they went to Muka Mukuu who confirmed that the suit property belong to PEFA church. He averred that the defendant was terminated but refused to vacate. That even upon being served with a court order, he disobeyed the same.
 12. On cross-examination, he stated that he began being a member of PEFA church in 1993 and that they started the church in a shop in 1993 and later built the church in 1998. He stated that their pastor had been Ngumbao, later Mulei and subsequently the defendant. That the defendant used to be a member of the PEFA church before he became a pastor. He also stated that they went to the offices of Muka Mukuu and asked for a plot, which they were given. It was also his averment that other churches were also given different plots and that they requested for land from Muka Mukuu orally.
 13. He also stated that they paid some money and Muka Mukuu surveyed the land in 1998. Further that all plots given to churches were not registered and that pastor Ngumbao is the one who paid for the survey. He stated that when the defendant changed the church to Jordan, he was forced to leave the church. That marked the close of the plaintiffs’ case. As there was no defence nor defence statements on record, the court marked the defence case as closed, having dismissed an application for leave to file defence, made upon close of the plaintiffs’ case.
 14. Parties filed submissions. On record are the defendant’s submissions filed on 1st December 2023. No submissions were filed by the plaintiffs.

Defendant’s submissions

15. The defendant’s counsel submitted that the suit raised three issues, namely;
 - a. Who is the rightful owner of the suit property?
 - b. Whether the plaintiffs are entitled to the orders sought in the plaint against the defendant; and
 - c. Who bears the costs and interest of the suit?



16. On their first issue, counsel submitted that the suit property belongs to the defendant's church and not the plaintiffs. Counsel argued that the defendant was never employed by PEFA. Counsel submitted that the defendant was a pastor at Gospel Victory Church at Kwa Mutu since 1992. Counsel gave many allegations concerning the defendant's work as a pastor between 1992 and 2003.
17. It was further submitted that the allocation of land from a cooperative society must be demonstrated by minutes of the society duly signed by officials thereof and that the plaintiffs have not provided such minutes. He stated that the defendant presented evidence of a letter dated 13th June 2011 from the Ministry of Interior and Coordination of National Government Matungulu Sub-County showing that members of the defendant's church sought an allotment from Muka Mukuu. Again, counsel gave a narration of allegations concerning what the called the defendant's evidence.
18. Counsel relied on Sections 107, 108 and 109 of the Evidence Act and the case of Daniel Toroitich Arap Moi v Mwangi Stephen & another for the proposition that where a defence is not filed, the plaintiff bears the burden of proving their claim.
19. On whether the plaintiff is entitled to the orders sought, counsel contended that as the suit property belongs to Gospel Victory Church and not PEFA church, and that it is clear that the plaintiffs had not proved their case to the required threshold. Reliance was placed on the case of Malier Unisca Karim v Edward Oluoch Odumba [2015] eKLR on the test for granting mandatory injunction.
20. Regarding costs, counsel referred to Section 27 of the Civil Procedure Act and argued that costs follow the event and therefore the defendant should be awarded costs.

Analysis and determination

21. The court has carefully considered the plaint, the plaintiffs' evidence and the defendant's submissions. The only issue that arise for determination is whether the plaintiff proved that the suit property belongs to them. In this case, the defendant did not file defence or tender evidence.
22. Section 107 of the Evidence Act place the burden of proof in a case on the plaintiff, and the same provides as follows;

107

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

23. Therefore, whether or not a suit is defended, the plaintiff is legally duty bound to prove their claim as the lack of a defence does not shift the burden of proof to the defendant. In the case of Kirugi & another v Kabiya & 3 others [1987] KLR 347, the Court of Appeal stated as follows;

The burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the defendant to contest the case does not absolve the plaintiff of the duty to prove the case to the required standard.



24. Similarly, in the case of *Mercy Wanjiru Nyaga v Josphat Kiura & another* [2020] eKLR, the court held that;

In my opinion a suit cannot be allowed as prayed just by the mere fact that it was not opposed. The plaintiff in a suit has a duty to tender sufficient evidence in support of his case. Otherwise, the could would end up allowing even frivolous claims just because the evidence was uncontroverted.

25. Although in the defendant's submissions, the defendant's counsel raised many purported factual matters referring to them as the "defendant's evidence" the same are, in my view are irrelevant as no pleading or evidence was filed or tendered by the defendant. Therefore, those allegations in the submissions including allegations that the defendant's church, being Gospel Victory Church owned the suit property and narrations of what happened to the defendant between 1995 and 2003, have no basis as they are not anchored on any pleading or evidence.

26. The defendant's submissions, in that regard were meant to mislead this court and even the issues raised therein do not reflect the pleadings and evidence on record. This is because the defendant did not plead anywhere that he owned the suit property and therefore the issue of who between the plaintiff and defendant owns the suit property does not arise. The only issue that arises is whether the plaintiffs have proved that they own the suit property. I take the view that submissions cannot be a substitute for pleadings or evidence. Submissions are mere persuasive arguments meant to sway the court's perspective. In the case of *Daniel Toroitich Arap Moi v Stephen Mwangi*, the court held that submissions are not pleadings or evidence but mere marketing strategies.

27. On whether the plaintiffs proved their case, they stated that the suit property was allocated to them by Muka Mukuu Cooperative Society. They presented a letter dated 6th August 2010 from Muka Mukuu, confirming that indeed the suit property was allocated to them vide allotment letter dated 28th September 1995. They also produced receipts from Muka Mukuu issued to PEFA Church Kwa Mutu dated 15th April 1998 and 27th March 2000 for payments made for survey fees for a church plot. PW3, Michael Nzioka Kithumbi testified that he was a founder member of PEFA church Kwa Mutu and that the church asked Muka Mukuu Farmers Cooperative Society to allocate them a church plot which they later did. This evidence of acquisition of the suit property from Muka Mukuu was not shaken on cross-examination.

28. Article 40 of the *Constitution* protects lawfully acquired property. The defendant did not avail any evidence and or pleading to show that the acquisition by the plaintiffs of the suit property from Muka Mukuu was in any manner unlawful. Therefore, I am satisfied that the suit property was allocated by Muka Mukuu to the plaintiffs.

29. There is no doubt that the plaintiffs are a church, and it is common knowledge that churches are run by pastors. The plaintiffs produced monthly PEFA church report from 1998 upto 2003, showing different pastors submitted monthly reports to PEFA Church in regard to PEFA church at Kwa Mutu. There are several monthly reports submitted by the defendant in his position as a PEFA Church pastor at Kwa Mutu. I am therefore satisfied that the defendant's presence on the suit property was due to his role as a pastor with PEFA Church and therefore his change to Jordan River Church and continued occupation thereof is unlawful and amounts to trespass.

30. It is trite that trespass is actionable in law per se without need to prove actual loss.

31. In this case, the plaintiffs stated that since 2010 when they terminated the defendant, he has refused to vacate the suit property despite being served with orders to vacate. The plaintiffs stated that the suit



property measures one acre. In view of the size of the land and the duration that the defendant has been in occupation of the suit property which is now 14 years, I award the plaintiffs a sum of Kshs 1,500,000/- as general damages for trespass.

32. The plaintiff sought for orders that the defendant returns the church properties including guitar, amplifier, twenty seven seats, Box speaker, on speaker, church cloths, battery, five iron sheets and carpet. On this prayer, I interrogated the question whether this court has jurisdiction to grant the said prayers.
33. The jurisdiction of this court is to hear and determine matters regarding the environment and use and occupation of and title to land. Article 162 (2) (b) of the Constitutions provides for the jurisdiction of this court as follows;
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
- (b) the environment and the use and occupation of, and title to, land.
34. Section 13 of the *Environment and Land Court Act* delineates the jurisdiction of this court as follows;
1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 2. In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes—
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
 3. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the *Constitution*.
 4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
 5. Deleted by Act No. 12 of 2012, Sch.
 6. Deleted by Act No. 12 of 2012, Sch.
 7. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
 - a. interim or permanent preservation orders including injunctions;



- b. prerogative orders;
- c. award of damages;
- d. compensation;
- e. specific performance;
- f. restitution;
- g. declaration; or
- h. costs

35. Article 260 of the Constitution of Kenya 2010 defines land as follows;

“Land” includes –

- a. The surface of the earth and the subsurface rock;
- b. Anybody of water on or under the surface;
- c. Marine waters in the territorial sea and exclusive economic zone;
- d. Natural resources completely contained on or under the surface; and
- e. The air space above the surface.

36. Section 2 of both the Land Registration Act and the Land Act respectively state that “Land” has the measuring assigned to it in Article 260 of the Constitution.

37. The question therefore that arise is whether the items sought by the plaintiffs from the defendant in prayer 2 of the plaint, fall within the definition of land under Article 260 of the Constitution. These items are guitar, amplifier, seats, speakers, cloths, battery and iron sheets.

38. The above items are not even attachments or fixtures on land. In the premises, I find and hold that the said items do not fall within the definition of land Under Article 260 of the Constitution.

39. It is therefore my view that the guitar, amplifier, seats, speakers, cloths, battery and iron sheets are not land and do not form part of land hence outside the jurisdiction of this court. In the premises, I find and hold that this court lacks jurisdiction to grant orders sought in prayer 2 of the plaint.

40. The plaintiff sought a mandatory injunction to restrain the defendant from interfering with the suit property. A mandatory injunction is an injunction or order requiring or directing a person to perform certain acts. This is an injunction that is different from a prohibitory injunction which require a person not to do certain acts. Therefore a mandatory injunction is not meant to restrain but to direct a party to do certain acts. Hence, the plaintiffs’ prayer is a mix of both mandatory and prohibitory injunction, which if granted as sought, will bring confusion.

41. This court has inherent power to ensure substantive justice is delivered, in its Constitutional mandate of facilitating the Constitutional right to access to justice guaranteed under Article 48 of the Constitution. The notion of access to justice requires that parties are granted effective remedies. In this case, the plaintiffs have proved ownership of the suit property and therefore are entitled to legal protection guaranteed under Article 40 of the Constitution. That protection includes the right to enjoy quiet possession of their property to the exclusion of everyone exclusion of everyone else including



the defendant. In the premises, the effective remedy due to the plaintiffs is a permanent injunction to restrain the defendant from interfering with the suit property.

42. Ultimately, I find and hold that the plaintiffs have proved their case on the required standard and I therefore enter judgment for the plaintiffs against the defendant in the following terms;

- a. An order of permanent injunction is hereby granted restraining the defendant from remaining on, interfering, trespassing or in any way dealing with the plaintiffs' premises Kwa Mutu Pentecostal Evangelistic Fellowship Africa.
- b. Damages for trespass are awarded to the plaintiffs against the defendant in the sum of Kshs 1,500,000/-.
- c. The OCS Donyo Sabuk Police Station does ensure compliance of the orders issued.
- d. The costs of the suit are awarded to the plaintiffs.

43. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10TH DAY OF JULY 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Odhiambo for defendant

Ms. Mutua holding brief for Mr. Mutava for plaintiffs

Court assistant – Josephine

