



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**ELC NO. 18 OF 2017**

CARE MISSION KENYA.....1<sup>ST</sup> PLAINTIFF

ODDVA STEN LINKAS.....2<sup>ND</sup> PLAINTIFF

RITA WAHLBERG.....3<sup>RD</sup> PLAINTIFF

WENCHE LUDVISGEN.....4<sup>TH</sup> PLAINTIFF

HAKON BORGEN.....5<sup>TH</sup> PLAINTIFF

= VERSUS =

BENTA AKINYI OTIENO.....1<sup>ST</sup> DEFENDANT

REVEREND PETER OGOLA.....2<sup>ND</sup> DEFENDANT

**(T/A DEITY ECD PRIMARY SCHOOL BUSIA (K) AND EMMANUEL CHILDREN HOME BUSIA (K))**

**J U D G M E N T**

1. Vide an amended Plaintiff dated 15<sup>th</sup> August, 2018 and filed on the 20<sup>th</sup> August, 2018, the Plaintiffs brought this suit against the Defendants jointly and severally for prayers that:

- a) **There be made an order of accounts of the operations of the school and Emmanuel's Children's Home from 2008 to date;**
- b) **An order directing the dissolution of management board of DEITY ECD PRIMARY SCHOOL BUSIA (K) AND EMMANUEL CHILDREN HOME BUSIA forthwith and immediate institution of an all-inclusive Board of Management;**
- c) **An order directing the Defendants to execute the lease agreement herein with the Plaintiff and pay rent with effect from 2008 to date;**
- d) **An order removing the restriction or caution on Land Reference BUKHAYO/MUNDIKA/9903 immediately;**
- e) **A permanent injunction directed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their workers, relatives, representatives or any person acting for them from claiming ownership, transferring, mortgaging, selling and subleasing or dealing in any manner whatsoever with Land Reference Number BUKHAYO/MUNDIKA/9903 forthwith; and**
- f) **Costs of this suit.**

2. The Plaintiffs' contend that they are the absolute owner of parcel of land known as **Land Reference Number BUKHAYO/MUNDIKA/9903** measuring approximately 0.45Ha and on which the Defendants have unlawfully and without any legitimate cause registered a caveat/restriction on and without the Plaintiff's consent. That the said parcel **Land Reference Number BUKHAYO/MUNDIKA/9903** is as a result of an amalgamation of land parcels Nos. BUKHAYO/MUNDIKA/8268, 8369, 8270, 8271, 8272, 8273, 8374, 8275 and 8276 which were transferred to the 2<sup>nd</sup> Plaintiff by STEPHEN OKUMU HANDA (deceased).

3. The Defendants filed their Defence and Counterclaim on the 19<sup>th</sup> of December, 2019 denying the contents of the Plaintiff and in particular;

a) That although Plaintiffs had previously associated with the school and the children's home as sponsors, they only recently and fraudulently caused the school and the children's home plots of land be transferred to them and later started demanding rent from the Defendants without the backing of a lease agreement or a tenancy relationship;

b) The particulars of fraud alleged by the Defendants are:

i) Forging the land control board application forms and the land transfer documents;

ii) Forging signatures of the Defendants;

iii) Impersonating the Defendants;

iv) Obtaining consents of the land control board without the signature of the defendants and their personal attendance.

c) That the Plaintiffs who are Norwegian citizens lack capacity under Article 65 of the Constitution of Kenya to hold freehold titles and consequently lack the capacity to sustain and prosecute the present suit and it ought to be struck out with cost.

4. The Defendants in their counter claim pray for;

**a) An order directing the County Land Registrar to cancel the mutation forms that were used to combine land parcels Nos. Bukhayo/Mundika/8268 to 8276 into Bukhayo/Mundika/9903 and cancel the created register of the said land parcel and revert the subject plots of land to their original status that preceded the unlawful combination exercise;**

**b) An order redirecting the rectification of the register of land parcel No. Bukhayo/Mundika/9903 by cancelling the entries from entry no. 2 dated 17/5/2011 to entry No. 7 dated 29/3/2018 thereby reverting the ownership of the subject land parcel to the name of DEITY ECD/PRIMARY SCHOOL (CARE MISSION NORWAY);**

**c) An order directing the rectification of the register of land parcel No. Bukhayo/Mundika/7812, 7813, 10244 and 10245 by cancelling all the entries vide which the plaintiffs became owners in respect thereof;**

**d) An order of permanent injunction against the Plaintiffs, restraining the Plaintiffs, their agents, or servants from claiming rent or rent arrears from the Defendants and their ministry, schools and children's home, attaching any of the Defendants' property, forcefully closing the school and children's home, trespassing onto the school and the children's home's premises and plots or in any other way howsoever from interfering with the running of the Defendants' ministry's projects, school and children's home.**

5. The hearing commenced on the 3<sup>rd</sup> of November, 2020 when the 2<sup>nd</sup> Plaintiff **ODDVA STEN LINKAS** testified on behalf of all the plaintiffs as **PW1**. He testified that he is 81 years old and has a mission in Kitengela and Busia in Kenya, under the name Care Mission and which builds schools, evangelises and does social work among children. That in the year 2008 the Mission entered into an agreement for purchase of land and to run the school which agreement PW1 states was signed before an advocate. He continued in evidence that he purchased plots Nos. Bukhayo/Mundika 8268-8276 which were combined to form one plot No. Bukhayo/Mundika 9903. That in the year 2016, the Mission stopped funding to the school because the school failed to provide accounts. **PW1** further confirmed that parcel No. L.R No. 10244 was given to the Defendant as a gift because at the time they had good fellowship. He denied any dealings of fraud as alleged by the Defendants and adopted the Plaintiff's response to the Defence and Counter-claim as their reply to the allegations of fraud. **PW1** stated further that LR No 9903 belongs to Care Mission absolutely. He concluded by stating that since all attempts to settle the matter out of Court had failed the Plaintiffs be granted the prayers in the Plaintiff.

6. **PW1** was put to cross-examination by Wanyama for the Defendants and he stated that the school was housed on Plot No. 9903 which parcel was first registered in the name of Deity ECD and Care Mission Norway. That Care Mission was registered in Norway. **PW1** stated further that the Defendant and her board has the responsibility of running the school while Care Mission owns the school. He stated that he signed the application for the Land Control Board consent. With regard to the Care Mission Kenya registration, he stated the Mission was registered between 2010-2011 and all the trustees are citizens of Norway who do not hold Kenyan citizenship papers. That the suit property was bought in 2008 by which time the 1<sup>st</sup> Plaintiff had not been registered. On the issue of the sale agreement, PW1 stated that the agreement was prepared by Edna Nyaloti advocate who stamped and signed it.

7. **PW1** was further cross-examined by Okutta for the Defendants wherein he reiterated that all the trustees to the 1<sup>st</sup> Plaintiff are foreigners and that Deity ECD is run by the 1<sup>st</sup> Defendant and her board comprised of Margaret, Jane and Benta. That the board was present when the agreement was being drawn but it was only Benta and himself who signed it. He elaborated that although he does not understand the difference between leasehold and freehold, the 1<sup>st</sup> plaintiff holds land as a freehold title.

8. Upon re-examination, **PW1** stated that the 1<sup>st</sup> Plaintiff is registered under Cap 164 of the laws of Kenya and its trustees also include Solonka and his wife. He concluded by stating that he bought the suit properties for Care Mission but it was his name that was used for registration.

9. The defence case opened with the evidence of **PETER KINGS JAMES OGOLA** testifying as **DW1**. He stated that he is a Reverend and Manager BOM of Deity Academy and the 1<sup>st</sup> Defendant is his Bishop at Jesus Mercy Church as well as a director at Deity Academy. **DW1** adopted his witness statements dated 24<sup>th</sup> February, 2020 and 2<sup>nd</sup> February, 2021 where he stated in part:

- a) That the Defendants purchased 9 plots for the school from CHARLES MAKOKHA and these were properly processed into the school's name;
- b) That the Plaintiffs' fraudulent scheme started with Oddva and his advocate who prepared transfer forms for the 9 plots which they filed and attested and presented to the Land's office for registration but the same never succeeded in effecting the intended transfer of the 9 plots from the school to Oddva;
- c) That to carry through with their illegal and fraudulent scheme, Oddva and his advocate applied for consolidation of the 9 titles through a forged application to the Land Control Board and obtained consent to combine the 9 titles which they completed with a mutation form and they affixed thereon a forged signature purporting the same to belong to BENTA;
- d) That they (defendants) never signed the application to the Land Control Board and never appeared before the Land Control Board to ask for consent and never signed the mutation form to combine the 9 titles;
- e) That after Oddva created land parcel No. Bukhayo/Mundika/9903 through his unlawful and unauthorized combination exercise, he proceeded to prepare and execute the application to the Land Control Board both as owner and purchaser with assistance of his advocate and obtained an illegal consent from the Land Control Board and also drew an illegal forged transfer form which was used to transfer parcel No. Bukhayo/Mundika/9903 from Deity to Oddva;
- f) That the Defendants purchased plot No. Bukhayo/Mundika/7812 & 7813 which were registered in the name of Deity ECD/Primary;
- g) That using an application form to the Land Control Board and without any transfer form, Oddva caused land parcel Nos. Bukhayo/Mundika/7812 & 7813 to be transferred to him and then caused the copies of the registers for the said two plots to transfer the plots directly from Stephen Okumu Banda to Oddva Sten Linkas;
- h) That as per the unlawfully imposed registers for plots Nos. Bukhayo/Mundika/7812 & 7813 there are no proper documents to support the unlawful transfer that is complained about;
- i) That as part of the school project we also purchased plot No. Bukhayo/Mundika/10245 that was properly transferred to Benta and a title deed issued;
- j) That subsequently Oddva prepared an application for consent, obtained a letter of consent and prepared a transfer form on which they scribbled a forged signature purporting to be transferred from Benta to Oddva;
- k) That we never participated at any stage of seeking consent or transferring plots Nos. Bukhayo Mundika 7812, 7813 & 10245 and never signed any document as purportedly indicated by Oddva and his advocate;
- l) That when Oddva came to participate in the Defendant's ministry's activities he came to convey sponsorship money from Norway to Kenya, which money was held in trust for the Defendants and they were never personal funds for his personal benefits;
- m) That Care Mission Kenya is an entity that was only recently created with an aim of meddling in the ownership of the school plots and they unlawfully acquired the ownership of the plots when they had no legal capacity to own land property in Kenya.

10. Upon cross-examination by the Plaintiff, **DW1** stated that he is not aware of the agreement dated 28<sup>th</sup> November, 2009 as he was not a witness to it neither was, he involved in the purchase of the properties stated therein.

11. **BENTER AKINYI OTIENO** gave evidence as **DW2** stating that she is the proprietor of Deity Academy, a bishop at Jesus Mercy Church and a director of Emmanuel Children's home. She adopted the joint statement she made together with DW1 as her evidence in this case.

12. Upon cross-examination **DW2** stated that she did not sign the agreement as no such agreement existed between herself and Oddva. She stated that she introduced Oddva to Raphael for purposes of buying the school land and the transfer was done later without their consent. That she disagreed with Oddva because he was collecting money from donors using the school's name but converting the money for his personal use. In re-examination, **DW2** stated that Oddva was buying the plots for the school as shown in the introductory of the agreements.

13. **MARGARET SYLVIA OUMA** who is an associate Pastor at Jesus Mercy Ministry Centre and a member of the Board of Management (BOM) at Deity Academy and Children's Home gave her evidence as DW3. She adopted the joint witness statement signed alongside DW2 and DW1. She concluded by stating that she did not sign any land control board form and neither did she give her signature for examination by the handwriting expert. On cross-examination **DW3** stated that she knows Edna Ameyo & Co Advocates as they appeared before her for signing during the purchase of the suit land. On re-examination, the witness said that she signed the sale agreements as a witness.

14. The parties consented to having the reports of the Forensic Examination Expert, Emmanuel Karisa Kenga dated 3<sup>rd</sup> February, 2021 and 24<sup>th</sup> Feb, 2021 as admitted in evidence without calling the examiner for cross-examination. This marked the close of the Defendants' case.

15. Thereafter parties exchanged written submissions within fourteen days each. In the Plaintiffs' submission filed on the 7<sup>th</sup> of May, 2021 the plaintiff submitted that their case is based on an agreement dated 28<sup>th</sup> day of November, 2008 between them and Benta Akinyi Otiemo of Deity ECD/Primary School where both parties acknowledge that Oddva Sten Linkas bought plots No. Bukhayo/Mundika/ 8268 to 8272 and

that he was be the owner of Deity ECD/Primary School and the buildings standing on the said plots. The Plaintiffs submitted on the following issues which they raised for the court's determination;

- a) Whether or not the suit property Land Reference Number Bukhayo/Mundika/9903 housing Deity ECD Primary School Busia and Emmanuel Children Home belong to the Plaintiffs absolutely as they own, occupy and are in possession;**
- b) Whether the Plaintiffs have established a prima facie case with a probability of success;**
- c) Whether the various agreements between the Plaintiffs and the Respondents have been violated and or broken since 2008 to date;**
- d) Whether the Plaintiffs stand to suffer irreparable injury which would not adequately be compensated by an award of damages.**

16. That the issue of the plaintiff's ownership of the suit titles were already ascertained by the Court of Appeal sitting at Kisumu in Civil Appeal No. 12 of 2019 involving the same parties, which decision is at page 46 of the plaintiffs documents. Consequently as the owners, the plaintiffs are entitled to use and own the land as provided under section 25 and 26 of the Land Registration Act. The plaintiffs submitted further that the report by the forensic examiner confirms that the signatures on the sale agreement between Oddva Linkas and Benta Akinyi were true signatures. They prayed that this Court grant them the prayers sought in the Plaintiff and the Defendants' counterclaim be dismissed with costs.

17. The Defendants filed their submissions on the 21<sup>st</sup> June, 2021 and submitted inter alia that the 1<sup>st</sup> plaintiff obtained the suit properties illegally and fraudulently. The 1<sup>st</sup> Defendant denied having executed the agreement of 28/11/2008 and even if the same was executed as alleged, the Plaintiffs are time-barred from claiming under the impugned agreement because this suit was filed after more than six years from the date of 28/11/2008 when the agreement was executed. The Defendants submitted further that this Court lacks jurisdiction to deal with the rent issue as the same is within the purview of the Business Rent Tribunal. They concluded their submissions by stating that the Plaintiffs being non-citizens are barred by Article 65 of the Constitution from owning freehold titles in Kenya.

18. With regards to their Counterclaim, the Defendants submitted that they are the absolute owners of the school and children's home projects and that the 2<sup>nd</sup> Plaintiff only came in to assist as a missionary and his support remained philanthropic because the Defendants never gave him any proprietary interests in the properties. That as such the transfer of the titles of the properties from Care Mission to Oddva, even if legitimate, are totally impeachable because they were obtained fraudulently. They urged this Court to order that the suit properties registered in the names of the Defendants.

19. I have considered the parties' pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are as follows:

- a) Whether the Plaintiffs have the legal capacity to hold land in Kenya?*
- b) Whether Plaintiffs acquired Land Reference Number BUKHAYO/MUNDIKA/9903 fraudulently?*
- c) Whether or not the defendants are entitled to be registered as the owner of the suit title Bukhayo/Mundika/9903.*
- d) Whether or not this court can compel the signing of a lease agreement between the parties.*
- e) Whether an order of permanent injunction should issue and against which party?*
- f) Who bears the costs of the suit?*

20. Beginning with the first issue, the Defendants have pleaded that the Plaintiffs have no capacity to own freehold land in Kenya. This is an uncontested fact, as PW1 in his testimony, confirmed that all the Plaintiffs are Norwegian citizens including the 1<sup>st</sup> Plaintiff which is an organisation with its headquarters in Norway. From its certificate of registration, produced by PW1, the 1<sup>st</sup> Plaintiff was registered as a society in Kenya under section 10 of the Societies Act on the 8<sup>th</sup> day of June, 2012. PW1's evidence stated that the 2<sup>nd</sup> to 4<sup>th</sup> Plaintiffs are all trustees of the 1<sup>st</sup> Plaintiff and none of them are citizens of the Republic of Kenya.

21. The law on holding of land in Kenya by non-citizens is embedded in the Constitution of Kenya, 2010 at Article 65 where it provides as follows:

- 1) A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years.**
- 2) If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine-year lease, the provision shall be regarded as conferring on the person a ninety-nine-year leasehold interest, and no more.**
- 3) For purposes of this Article –**

**(a) A body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens; and**

**(b) Property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizens.**

22. The Constitution does not exclude foreigners from holding land in Kenya except that they can own land under lease of 99 years, and any instrument conferring any other rights apart from leasehold will in-turn be converted to a 99-year leasehold term. Consequently, the plaintiff's title although registered as freehold by virtue of the physical location of the land is deemed in law as leasehold which lease runs from the date of the plaintiff's registration for a period of 99 years.

23. On whether the Plaintiffs fraudulently acquired the title to the suit parcel, the defence have pleaded and submitted that the Plaintiffs fraudulently orchestrated the registration of the suit titles into the 1<sup>st</sup> Plaintiff's name and subsequently the 2<sup>nd</sup> Plaintiff's names. An allegation of fraud has to be followed by sufficient evidentiary proof. In the case of **Paul Muira & Another vs. Jane Kendi Ikinyua & 2 others (2014) eKLR** the court cited with approval the Court of Appeal decision in the case of **Musonga vs. Nyati (1984) KLR 425** and in **Koinange and 13 Others (1986) eKLR 23** where it was observed that:

***"Allegation of fraud must strictly be proved, and though the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than a balance of probabilities. The onus of discharging this burden is on the party alleging the fraud."***

24. At page 427 in **Bullen, Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> Edition** quoting with approval the cases of **Wallingford v Mutual Society (1880) 5 App. Cas. 685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308, Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 ch.D. 473 at 489** which stated that: -

*"Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved. "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice"*

25. The Defendants in paragraph 14 of their Statement of Defence and Counterclaim lists *inter alia* as particulars of fraud the following;

- a) Applying for combination of the titles without any proper consent of the area's land Control Board or that of the Defendants;***
- b) Applying for consent through impersonation and without securing the attendance of the Defendants and other properly authorised persons;***
- c) Obtaining consents through unlawful and untraceable official land control board channels;***
- d) Stealing the defendants and their officials' photographs in order to attach to the illegal documents;***
- e) Forging the Defendants' signatures;***
- f) Attesting documents without the presence or consents of the Defendants and other officials;***
- g) Obtaining consents vide the unsigned, undated and unregistered applications to the area's Land Control Board;***

26. All the Defence witnesses testified that the signatures on the agreements are fake. They supported their evidence with the production of a forensic examination report dated 3<sup>rd</sup> February, 2021 prepared by EMMANUEL KARISA KENGA, a forensic documents examiner. In his findings the forensic examiner stated in verbatim that:

*"I have examined and compared the questioned signatures indicated by red arrows on exhibit marked 'A1', 'B1', 'B2', 'B3', 'C1', 'D1-D2' with the specimen signatures on exhibit marked G2 and the known signature also indicated by red arrow on exhibit marked 'E1-E2'. I can find no agreement between the signatures. The questioned signatures were written by a different author.*

*I have examined the questioned handwriting indicated by red arrow on exhibit marked 'A2' with the specimen handwriting on exhibit marked 'G1'. I can find no agreement between the handwriting. The questioned handwriting was written by a different author.*

*I have examined and compared the questioned handwriting indicated by blue arrows on exhibit marked A2 with specimen handwriting on exhibit marked G3. I can find no agreement between the handwriting. The questioned handwriting was written by a different author.*

*I have examined and compared the questioned signatures indicated by blue arrows on exhibits marked B2 and B3 with specimen signatures on exhibit marked G6 and the known signatures indicated by red arrows on exhibits marked "F1-F2". I can find no agreement between the signatures. The questioned signatures were by a different author."*

27. The Forensic document examiner also made a report for the Plaintiffs on the 16<sup>th</sup> of February, 2021 where he found that:

*“I have examined and compared the questioned signature indicated by red arrows on exhibit marked Q1-Q2 with the known signature also indicated by a red arrow on exhibit marked K1. In my opinion there are similarities on the signatures indicating that they are the same authors.*

*I have examined and compared the questioned signatures enclosed in red ink on exhibits marked Q1-Q2 with known signature also enclosed in red ink on exhibit marked K1. In my opinion, there are similarities on the signature indicating that they are the same authors.*

*I have examined and compared the questioned signatures indicated by blue arrow on exhibit marked Q with the known signature also indicated by blue arrow on exhibit marked K1. In my opinion, there are similarities on the signatures indicating that they are from common origin. They are from the same author.”*

28. The documents relied on by the forensic document examination on the two reports are different save for two of them. In the report dated 16<sup>th</sup> February, 2021 the forensic expert relies on a sale of land agreement date 24<sup>th</sup> July, 2008 and the agreement dated 28<sup>th</sup> November, 2008 between Oddva Sten Linkas and Rev. Benta Akinyi Otieno. In the report dated 3<sup>rd</sup> February, 2021 the expert relied on the application for consent of land control board, transfer of land, land transfer forms for Bukhayo/Mundika/7812 & 7813, agreement dated 28<sup>th</sup> November, 2008 and agreement dated 16<sup>th</sup> March, 2008. The expert’s reports in regard to the impugned agreement dated 28/11/2008 was contradictory as in the plaintiffs report he said the agreement was extended by the 1<sup>st</sup> defendant while in the report for the defendants, the examiner states it was not signed by the 1<sup>st</sup> defendant.

29. This court takes note that what is contested by the defendants as particularised in their counter-claim is the manner in which the plaintiffs acquired the titles into their names. The plaintiffs did not present the contested documents for expert examination hence the findings of the examiner on the contested signatures on the documents of application for consent of Land Control Board to transfer and the transfer form transferring the suit title from the names of Deity E.C.D./Primary to the 2<sup>nd</sup> plaintiff have not been contradicted.

30. The burden placed on the defendants’ to discharge on proof of the fraud has been discharged. The contents of the agreement of 28/11/2008 expressed the intention of the parties that the lands purchased were specifically for Deity E.C.D./Primary. The plaintiffs particularly the 2<sup>nd</sup> plaintiff ought to have satisfied this Court why there was a turn around to have the titles to these parcels of land would be transferred from the school to himself.

31. Further the 1<sup>st</sup> plaintiff is recorded to have been registered on the 8<sup>th</sup> June 2012. The Constitution of this society was not produced in evidence neither did the plaintiffs’ witness give evidence linking the 1<sup>st</sup> plaintiff and the already existing Deity E.C.D./Primary. In the Application for Consent of Land Control Board to transfer L.R No. Bukhayo/Mundika/7812 & 7813, the 1<sup>st</sup> defendant and DW3 alongside 2<sup>nd</sup> plaintiff are recorded as trustees of Deity E.C.D./Primary School. In his evidence, PW1 stated that all the trustees of the 1<sup>st</sup> plaintiff who are the 2<sup>nd</sup> – 4<sup>th</sup> plaintiff are Norwegians. The impression created apart from the certificate of registration of the 1<sup>st</sup> plaintiff that Deity E.C.D./Primary and the 1<sup>st</sup> plaintiff are distinct entities. Consequently the transfer of the suit parcels which were purchased for the benefit of the institution to the 2<sup>nd</sup> plaintiff and subsequently to the 1<sup>st</sup> plaintiff was both irregular, fraudulent and done in bad faith.

32. Section 26 (1) of the Land Registration Act provides that;

***“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner, subject to encumbrances, easements restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge except:***

***a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***

33. The allegations of fraud have not been substantially proven by the Defendants hence making the Plaintiffs’ title unchallenged as provided under section 26. There was no evidence tendered to demonstrate the Plaintiffs directly participating in the alleged fraud making the Plaintiffs rights absolute under the provisions of section 24 and 25 of the Land Registration Act. The Land Act in section 80 provides the rectification of the register by order of the Court:

***i) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.***

***ii) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.***

34. The claim revolves around the contents of an agreement dated 28<sup>th</sup> November 2008 executed between the 2<sup>nd</sup> plaintiff and the 1<sup>st</sup> defendant. It is trite law that courts do not rewrite contracts between parties. At paragraph one of that agreement, it was clearly stated that the suit land was being purchased for Deity E.C.D. Primary Busia (K). Paragraph 2(1) gave the ownership of Deity E.C.D. /Primary and the

building to the 2<sup>nd</sup> plaintiff while the 2<sup>nd</sup> defendant was to conduct daily operations of Deity E.C.D. Paragraph 2(3) provided that Care Mission was to give financial support for the running of Deity E.C.D./Primary. One of the documents produced by the defendants clearly show that the title was even registered in the name of Deity E.C.D./Care Mission, Norway. There was no provision whatsoever that the defendants or Deity E.C.D./Primary was to a tenant of any of the plaintiffs.

35. In prayer (b) of the plaint the plaintiffs sought dissolution of the BOM of Deity E.C.D./Primary and Emmanuel Children's Home on the basis that they are excluded from the management of the institution as provided in the Basic Education Act Cap 14. Section 27 of Basic Education Act Cap 14 defines a sponsor as any person or institution who makes a significant contribution and impact on the academic, financial, infrastructural and spiritual development of an institution of basic education. Section 27 provides, *inter alia*;

**“The role of the Sponsor shall be: -**

**27 (b) Representation in the School Management Committees and Board of Management;**

**(c) To provide supervisory and advisory services in matters regarding spiritual development in schools including the appointment of chaplains at their own expense”.**

36. Although the documents produced do not indicate the composition of the board of Management of Deity E.C.D, the evidence adduced does show the 1<sup>st</sup> defendant as one of them. It is further shown that none of the plaintiffs are represented in the BOM. The relationship between the 2<sup>nd</sup> plaintiff and the 1<sup>st</sup> defendant developed on mutual trust. I state so because the plaintiffs' would have not supported the school including buying for it land unless there was some trust with the founders of Deity E.C.D. Due to their financial participation I am persuaded that the 2<sup>nd</sup> plaintiff meet the definition of sponsors as provided in the Act. On the basis of their support and on the basis of the contents of the agreement of 28<sup>th</sup> November 2018, it is just and fair that the plaintiffs or their representatives be included in the Board of Management of Deity E.C.D./Primary School.

37. The plaintiffs want the defendants compelled to sign a lease agreement. The suit parcel was stated to have been purchased for Deity E.C.D./Primary. From the evidence on record, it appears that it is the School that is still in occupation of the land. Paragraph 2(1) of the agreement of 28/11/2008 stated that the 2<sup>nd</sup> plaintiff “*will be the owner of Deity E.C.D./Primary*”. The question posed by this court is, if Deity is in occupation of land purchased on its behalf, how does it become a tenant on the same parcel of land? Secondly, if Deity is owned by the 2<sup>nd</sup> plaintiffs how can the defendants execute a lease on the plaintiffs' behalf? Unless the parties revises the agreement of 28/11/2008 it is impossible to grant prayer (c) of the plaint as pleaded. It also fails. Guided further by the undated agreement executed by the 2<sup>nd</sup> plaintiff and the administrators of Deity E.C.D. Center, it states that “*Care Missions would be the trustee Deity E.C.D. to run the school and own the buildings*”. In my understanding, Deity seemed to have been taken up as part of the missionary work.

38. In view of my observations in the preceding paragraphs 37 above, an order of permanent injunction prayed for by both the plaintiffs and the defendants is granted;

**(i) To restrain both parties from mortgaging, charging or transferring L.R Bukhayo/Mundika/9903.**

**(ii) The plaintiffs are retrained from demanding for rent or attaching any property for recovery of the alleged rent or closing down the school.**

39. Further, the plaintiffs' case succeeds in part in terms of **prayer (b)** specifically for their inclusion in the Board of Management of Deity E.C.D/Primary School and **prayer (e)** Permanent injunction as stated in Paragraph 38 above.

40. The defendants' counter-claim succeeds in part in terms of paragraph 25 of the counter-claim and particularized in paragraph 41 and prayer 20 is allowed partially for rectification of the register of Bukhayo/Mundika/9903 to restore the titles back to the name of Deity E.C.D. Primary School and Care-Mission Norway. I chose not to cancel the mutation for the combination because no prejudice will be occasioned to the school by holding the previous titles into one title.

41. These are the final orders made by this Court:

**(a) The plaintiffs' suit and the defendants' counter-claim have partially succeeded.**

**(b) The plaintiffs' claim is allowed in terms of prayer (b) by way of an order of this Court issued and directed to the defendants to include the 2<sup>nd</sup> plaintiffs and or the trustees of Care Mission Norway in the Board of Management of Deity E.C.D. Primary School.**

**(c) From the date of this Judgment going forward the defendants or BOM Deity E.C.D/Primary shall render statements of accounts to the 2<sup>nd</sup> plaintiff and or the trustees of Care Mission Norway for funds sent in support of the institution from the said trustees and or the 2<sup>nd</sup> plaintiff.**

**(d) The title currently held in the name of the 1<sup>st</sup> plaintiff in respect of L.R No. Bukhayo/Mundika/9903 shall be cancelled forthwith and in its place an order be and is hereby issued directed at the Land Registrar, Busia to rectify the register to restore the name of Deity E.C.D./Primary & Care Mission Norway as the owners thereof. A title deed shall not be issued after rectification until a new Board of Management is constituted to receive it.**

**(e) Each party to bear their respective costs of the suit.**

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 4TH DAY OF NOVEMBER, 2021.**

**A. OMOLLO**

**JUDGE**