



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. APPEAL NO. 53 OF 2019**

**REV. ANDREW NZEKI (*Being sued as Chairman of***

**ALL IN CHRIST CHURCH TALA REGION).....1<sup>ST</sup> APPELLANT**

**PASTOR CHARLES KITUKU KITHUSI.....2<sup>ND</sup> APPELLANT**

**RONALD MUTUA KUTU.....3<sup>RD</sup> APPELLANT**

**DANIEL AGILA.....4<sup>TH</sup> APPELLANT**

**ABEDNEGO KYALO MUNYAO.....5<sup>TH</sup> APPELLANT**

**ROBERT NZUKI MWANIA.....6<sup>TH</sup> APPELLANT**

**PETER KIMEU MUTULILI.....7<sup>TH</sup> APPELLANT**

**VERSUS**

**BISHOP PAUL MUEMA MWANGANGI (*Trustee and Chairman of***

**GOSPEL COMMUNITY CHURCH & MINISTRIES).....RESPONDENT**

***(Being an Appeal against the Judgment and Decree of the Senior Principal Magistrate's Court at Kangundo in SPM ELC No. 126 of 2019 by Senior Principal Magistrate D. ORIMBA dated and delivered on 2<sup>nd</sup> October 2019)***

**BETWEEN**

**BISHOP PAUL MUEMA MWANGANGI (*Trustee and Chairman of***

**GOSPEL COMMUNITY CHURCH & MINISTRIES).....PLAINTIFF**

**VERSUS**

**REV. ANDREW NZEKI (*Being sued as Chairman of***

**ALL IN CHRIST CHURCH TALA REGION).....1<sup>ST</sup> DEFENDANT**

**PASTOR CHARLES KITUKU KITHUSI.....2<sup>ND</sup> DEFENDANT**

**RONALD MUTUA KUTU.....3<sup>RD</sup> DEFENDANT**

**DANIEL AGILA.....4<sup>TH</sup> DEFENDANT**

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ROBERT NZUKI MWANIA.....6<sup>TH</sup> DEFENDANT

PETER KIMEU MUTULILI.....7<sup>TH</sup> DEFENDANT

### JUDGMENT

1. This Appeal is against the Judgment delivered on 2<sup>nd</sup> October, 2019 at Kangundo Senior Principal Magistrate's Court by the trial Magistrate, Hon. D. Orimba SPM. The Respondent had sued the Appellants by way of Plaint dated 18<sup>th</sup> April, 2018 seeking for:

***a) A permanent injunction to restrain the Appellants and/or other persons claiming under them from interfering with the Respondent's access, quiet, occupation, selling, using, accessing or removing anything from the church known as Mukunike Gospel Community Church now Christ Church (AICC) Kwale-Mukunike.***

***b) An order compelling the Appellants jointly and severally to reinstate the name Gospel Community Church Mukunike and remove the name All in Christ Church Mukunike(AICC-Mukunike).***

***c) Kshs. 8,000 being rent and deposit of 3 months plus costs and interest of the suit.***

2. In his Judgment delivered on 2<sup>nd</sup> October, 2019, the trial Magistrate found as follows

*"Having considered the evidence and the pleadings, it is my finding that the Plaintiff has proved his case against the Defendants on a balance of probabilities and enters Judgment for the plaintiff in the following terms;*

*a) An order of permanent Injunction restraining the defendants and/or any other person claiming under them from interfering with the plaintiff's access, quiet occupation, selling, using, accessing or removing anything from the church Known as Mukunike Gospel community church which has now been replaced with the name All in Christ church(AICC) KWALE-MUKUNIKE.*

*b) An order compelling the Defendants Jointly and severally to reinstate the name of Gospel Community church Mukunike and remove the name All in Christ church Mukunike(AICC-Mukunike).*

*c) Costs of the suit.*

3. The Appellants, dissatisfied with the trial Magistrate's Judgment, filed this Appeal vide the Memorandum of Appeal dated 31<sup>st</sup> October, 2019. The appeal has 15 grounds which have been enumerated as follows:-

*a) That the learned trial magistrate erred in law and in fact in failing to consider that the Respondent never had a branch of his Gospel Community Church in Mukunike.*

*b) That the learned trial magistrate erred in law and in fact in failing to consider that the property under the Land Parcel No. Matungulu/Kawethei/5004 is registered in the name of the Applicant's church being All in Christ Church through its trustees being Daniel Mutuku Ngila and Abednego Kyalo Munyaoa and not the Respondent.*

*c) That the learned trial magistrate erred in law and in fact in granting prayers that were never sought by the Respondent prayer that the property of All in Christ Church registered under the title No. Matungulu/Kawethei/5004 be cancelled and the said land parcel No. Matungulu/Kawethei be registered in the name of Gospel Community Church.*

*d) That the learned trial magistrate erred in law and in fact in granting prayers that were never sought by the Respondent prayer that the Appellants names with respect to land parcel No. Matungulu/Kawethei/5004 be deleted from the register of lands.*

*e) That the learned trial magistrate erred in law and in fact by failing to take into account evidence that the Respondent does run his church service in different premises and not in premises under the Land parcel No. Matungulu/Kawethei/5004.*

*f) That the learned trial magistrate erred in law and in fact in failing to consider that the Appellants and a group of Christians had only been granted a temporary cover upon paying the Respondent money as consideration thereto for the same as earlier demanded by him, only for the Respondent to withdraw the temporary cover and start Gospel Community Church Mukunike branch in another area but within Mukunike, and instructing the Applicants to seek another cover, a branch or register its own society.*

*g) That the learned trial magistrate erred in law and in facts in failing to consider the question as to why the Respondent would start a church in the name of Gospel Community Church, Mukunike sometimes in 2018 located in other rented premises if indeed they owned the structure and the church constructed in land parcel No. Matungulu/Kawethei/5004.*

*h) That the learned trial magistrate erred in law and in fact in failing to consider that the withdrawal of the temporary cover and the Respondent starting his branch in Mukunike was implicit for the Appellants and their Christians seek another cover lest their gathering be rendered an illegal one.*

i) That the learned trial magistrate erred in law and in fact by failing to consider that All in Christ Church started operational way after the Respondent had started his branch in Mukunike upon withdrawing its temporary cover.

j) That the learned trial magistrate erred in law and in fact in failing to consider that fact that the Respondent did not produce any document to confirm the registration and existence of a branch in Mukunike called Gospel Community Church Mukunike.

k) That the learned trial magistrate erred in law and in fact in considering a handwritten document by the Respondent purported to be dated 20<sup>th</sup> July 2007 at the same time 19<sup>th</sup> July 2007 at its lower end as to be the document of authority for starting the Mukunike branch of its church.

l) That the learned trial magistrate erred in law and in fact in failing to take into account that the handwritten under para.11 above only purported to give a one Justus Muasya powers to start a church in Mukunike and the same even if authentic is completely outside the provisions of the Respondent's own Constitution.

m) That the learned trial magistrate erred in law and in fact in failing to consider the fact that the Respondent's constitutional provisions on establishment of a branch as evidence that indeed the Respondent never had its branch in Mukunike until one was established in 2018.

n) That the learned trial magistrate erred in law and in fact in failing to consider that the funds for the construction of the church and purchase of land parcel No. Matungulu/Kawethei/5004 was never from, the Respondent but the officials and the Christians who remained intact and currently with All in Christ Church Mukunike, the Applicants operated independently from the Respondent.

o) That the learned trial magistrate erred in law and in fact in failing to consider that upon the Respondent withdrawing its cover's and starting its branch elsewhere, the Christians remained intact with its leaders and later getting being incorporated in the All in Christ Church.

4. The Appellants' prayers are that the trial court's Judgement dated 2<sup>nd</sup> October 2019 be set aside. The Appeal proceeded by way of written submissions. The Appellants, while placing reliance on the case of **Caltex Oil(Kenya) Ltd vs Rono Ltd [2016] eKLR**, submitted that some of the orders that were issued by the trial court were never pleaded and prayed for in the Plaint.

5. It is urged by the Appellants that the Land Registrar was not a party to the suit to warrant the issuance of the orders by the trial Magistrate; that the Respondent ought to have prayed for the orders of cancellation of Title Deeds or amend the Plaint to include the orders that were eventually granted; that the ownership of Matungulu/Kawethei/5004 was never a subject matter in the suit before the trial court and that what was in issue was ownership of the temporary church structure constructed on the said parcel of land.

6. It was submitted by the Appellants that the Respondent was litigating in piece meal rather than bringing the case in whole for the court's consideration and determination. The Appellants relied on the decisions of **Housing Finance of Kenya vs J.N Wafubwa [2014]eKLR** and **Town Council of Awendo vs Nelson Oduor Onyango & 13 Ors (2013)eKLR (Galxy Paints Co.Ltd vs Falcon Guards Ltd(2000) EA 885**.

7. Further, it is urged by the Appellants that the 4<sup>th</sup> to 7<sup>th</sup> Appellants had sought and obtained a temporary cover from the Respondent to use his name in anticipation of starting their own society in future and that upon the withdrawal of the cover by the Respondent, the Appellants and other Christians sought and incorporated All in Christ Church Mukunike with all properties donated by Gospel Community Church.

8. The Appellants submitted that the Respondent and his co-trustees do not appear anywhere in the sale agreement and did not contribute towards the purchase of the suit land; that the Respondent never produced any official document to confirm that he owns the Appellants' church and that the Respondent has not furnished the court with any document to show that the building on the suit property belongs to the church.

9. It is urged by the Appellants that there was no evidence produced by the Respondent to confirm that the Appellants' Church was its branch pursuant to Section 10,12,13 and 16 of the Gospel Community Church constitution and that the tax returns confirms that the Respondent neither has a branch of his church in Mukunike nor own land in the area.

10. It is submitted by the Appellants that upon delivery of the Judgment on 2<sup>nd</sup> October, 2019 by the trial court in the main suit, the court became *functus officio*; that the court ought not to have entertained the subsequent Application dated 6<sup>th</sup> November, 2019 which led the magistrate to order that the title deed for Matungulu/Kawethei/5004 be deposited in court in favour of the Respondent and that the main suit did not involve the issue of ownership of the said parcel of land.

11. The Respondent submitted that based on the issues framed by the Appellants and the Respondent before the trial court, the trial magistrate was supposed to make a finding of fact as to whom the suit property belongs to and that the suit property was the property of Gospel Community Church.

12. The Respondent asserts that the Appellants were served with the Application dated 3<sup>rd</sup> November 2019 which they never opposed and that he sought for orders that the original title be deposited with court and the 4<sup>th</sup> and 5<sup>th</sup> Appellants be compelled to execute transfer of the suit property in favour of Gospel Community Church Ministry and alternatively, the court to revoke the title.

13. The Respondent submitted that the application for execution of Judgment cannot now be opposed by the Appellants through the instant appeal as they are barred by the doctrine of estoppel. The Respondent has placed reliance on the case of **Nurdin Bandali vs Lombank Tanganyika Ltd [1963] EA 304** for the proposition that the Appellants never opposed the application for execution nor cancellation of the

title hence are estopped from appealing on the said Application.

14. The Respondent submitted that by filing the Application for cancellation of the title deeds that were issued during the pendency of the suit, the decree holder effectively applied section 38 of the Civil Procedure Act and that the court rightly exercised Jurisdiction under the said section and therefore the doctrine of *functus officio* is not available to the appellants.

15. It was urged by the Respondent that the pleadings and evidence tendered before the trial Magistrate showed that Gospel Community Church had since inception in 2007 worshiped on the suit property until 2018 when a small fraction of elders decided to unilaterally change the name of the church. The Respondent submitted that the church had even applied for approvals to construct a permanent church under the name of Gospel Community Church, which was produced in court as exhibits.

16. The Respondent submitted that the whole property belongs to Gospel Community Church. The Respondent has relied on the decisions of ***Dawkins vs. Dawkins, 183 Kan 323(1985)328 P 346 and Church of God in Christ inc vs stone CIV a NO.76-77***. The Respondent submitted that the appeal should be dismissed with costs.

#### **Analysis and findings:**

17. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. It was held in the case of ***Selle vs Associated Motor Boat Co. [1986] EA 123*** as follows:

*“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”*

18. I have read and considered the Memorandum of Appeal, the pleadings and evidence that was produced in the lower court and the written submissions filed by respective parties.

19. Although the appeal is challenging the Judgment of the lower court dated 2<sup>nd</sup> October, 2019, the Appellants have submitted that the Respondent, through an Application dated 6<sup>th</sup> November, 2019, sought and obtained orders to the effect that the Appellants should surrender to the court the title deed for parcel of land known as Matungulu/Kawethei/5004.

20. Counsel submitted that the court was not justified in issuing orders that were not prayed for in the Pleint and that the Respondent ought to have argued his case once and not in piece meal.

21. I have perused the entire Appeal and have not seen the Ruling which ensued from an Application filed on “6<sup>th</sup> November, 2019 and determined on 13<sup>th</sup> November, 2019.” Indeed, the said Ruling of the lower court is not in the Record of Appeal or the Supplementary Record of Appeal, save for an order dated 13<sup>th</sup> November, 2019. Having not included the Ruling of the lower court of 13<sup>th</sup> November, 2019, this court cannot consider that objection.

22. Indeed, the Memorandum of Appeal which was filed before the impugned Ruling of 13<sup>th</sup> November,2019 was filed on 1<sup>st</sup> November, 2019, and is only in respect to the Judgment of the court and not the Ruling of the court of 13<sup>th</sup> Nombor,2019. That being the case, it is my finding that there is no appeal in respect to the Ruling of 13<sup>th</sup> November, 2019.

23. The Appellants’ case in the lower court was that the 4<sup>th</sup> to 7<sup>th</sup> Appellants sought and obtained a temporary cover from the Respondent to use his Church’s name in anticipation of starting their own society in future and that upon the withdrawal of the cover by the Respondent, the Appellants and other Christians sought and incorporated their own church known as *All in Christ Church Mukunike* with all properties donated by Gospel Community Church.

24. According to the Appellants, the Respondent and his co-trustees do not appear anywhere in the sale agreement and did not contribute towards the purchase of the suit land; that the Respondent never produced any official document to confirm that he owns the Appellants’ church and that the Respondent did not furnish the court with any document to show that the building on the suit property belongs to the church.

25. While answering this defence by the Appellants, the lower observed as follows:

*“The witnesses who testified confirmed that the land in question was bought under the umbrella of Gospel Community Church. The witnesses who signed, signed on behalf of the Church. Looking at the copies of the agreement, virtually all were witnessed by the pastor of the Gospel Community Church Pastor Justus Muasya...The source of the funds was through fund raised by the Church members. The members contributing were not contributing to buy personal land but land to construct church- Gospel Community Church.”*

26. I have gone through the pleadings and the evidence that was adduced before the trial magistrate. In the Defence that was filed by the

Appellants, the Appellants averred that they requested to use the name Gospel Community Church and that the “the land was bought by the elders.”

27. All the witnesses of the Appellants, most of whom were elders in the Church, testified that in 2007, they bought three plots from the 3<sup>rd</sup> Appellant; that the purchase price was Kshs. 140,000 and that they bought the said land “for purposes of establishing a church.” According to the evidence that was adduced by the Appellants, the deposit of Kshs. 10, 000 was paid on 19<sup>th</sup> September, 2007 while the balance of the purchase price was paid to the 3<sup>rd</sup> Appellant on 13<sup>th</sup> October, 2008.

28. In their evidence, most of the Appellants stated as follows:

*“Ronald Mutua Kutu was selling the property to the church and the elders who had broken away from AIC Kionyweni. The money was raised through fund raisings and pledges of members...the Plaintiff was paid and gave the cover to Justus Muasya. The cover of Gospel Community Church was then brought to us the elders.”*

29. In their documents, the Appellants did not produce evidence to show that they were operating under any other church as at the time of fund raising for the purchase of land and construction of a church. The Appellants admitted that at the material time, they were operating under the Respondent’s church whose head office was in Nakuru. In cross examination, the Appellants’ witness, DW 7 stated as follows:

*“We started buying the land after getting the name. We used GCC Church in printing cards for fund raising. The land was bought when were already at GCC. Agreement shows the land was bought by the church. The name GCC was changed to AICC in 2018.”*

30. The pleadings and evidence tendered before the trial Magistrate showed that Gospel Community Church, which was registered as a society on 25<sup>th</sup> April, 2005 had since the year 2007 worshiped on the suit property until 2018 when a small fraction of elders decided to unilaterally change the name of the church. Indeed, the church had even applied for approvals to construct a permanent structure on the land under the name of Gospel Community Church, which was produced in court as an exhibit.

31. That being the evidence that was adduced, the learned magistrate cannot be faulted for finding that the relationship between the Appellants and the Respondent was that of agent and principal, and that the disputed parcel of land was purchased using the funds raised by the members of the Respondent’s Church and not any other church.

32. Consequently, having evaluated the evidence before the trial court, this court is in agreement with the Judgment of the lower court in which the learned Magistrate found as a fact that the suit land was purchased by the Respondent’s church using the members’ contributions. The change of the name by the Appellants in the year 2018 was therefore unlawful.

33. The issue that was before the trial court was who between the Appellants and the Respondent are entitled not only to the structure but also the ownership of the land where the church was standing. In his Pleint, the Plaintiff averred as follows:

*“10. The church has since bought land and established a semi-permanent structure which his followers under the leadership of his proxy Pastor Justus Muasya have been worshipping until 2017 when the defendants purported to eject his proxy without his sanction or authority.”*

34. Even if the issue of whether that the title deed in respect to the suit property should be registered in favour of the Respondent was not specifically pleaded in the Pleint, it follows that the dispute before the trial court was who between the two protagonists was entitled to the land on which the semi-permanent structure stands.

35. That being so, the learned magistrate was entitled to hold that the title deed that had been issued in favour of the Appellants during the pendency of the suit should be cancelled notwithstanding the failure by the Respondent to specifically pray for that order. Indeed, the court having found that the land was purchased by the Respondent’s Church, it follows that the title deed should be registered in favour of the Respondent.

36. For those reasons, it is my finding that the Appeal is not meritorious. The Appeal is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 18<sup>TH</sup> DAY OF JUNE, 2021.**

**O. A. ANGOTE**

**JUDGE**