



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NO. 112 OF 2016

SAVERIO ENYANG OKELLO

**MELINA ITINO OKELLO (suing as the administrators of the Estate of
FEDERIKO OKELLO)PLAINTIFFS**

= VERSUS =

THE CHAIRMAN ALUPE A.C.K. CHURCH.....1ST DEFENDANT

THE SECRETARY ALUPE A.C.K. CHURCH.....2ND DEFENDANT

ALUPE A.C.K. CHURCH.....3RD DEFENDANT

CHURCH COMMISSIONERS FOR KENYA.....4TH DEFENDANT

J U D G M E N T

1. The plaintiffs via a plaint dated 8th September 2016 brought a suit against the defendant praying for judgment against the defendants for;
 - a) **An order of permanent injunction restraining the defendants, their agents, servants and or any other person claiming through them from interfering with L.R NO. SOUTH TESO/ANGOROMO/240.**
 - b) **An order of eviction from L.R.NO. SOUTH TESO/ANGOROMO/240.**
 - c) **An order of mense profit for the time the defendants have been occupying the suit land.**
 - d) **Costs and interest.**
 - e) **Any other relief this Honourable Court deems fit to grant.**

2. The plaintiffs pleaded that they are the administrators of the Estate of FEDERIKO OKELLO, the registered owner of L.R. NO. SOUTH TESO/ANGOROMO/240, and that the defendants have invaded and are using the suit land without any justification or consent, which action is illegal and violates both the Constitution and the Registered Land Act. The plaintiffs also claim that they have suffered significant losses as a result of the defendants' actions in invading the suit land and that they will seek monetary compensation for the defendants' actions.

3. The defendants entered appearance and filed their defense on October 24, 2016, denying the averments in the plaint and stating that the suit property was owned by the then Busia County Council. They claim that in 1973, the county was approached by missionaries who were looking for land to conduct missionary work. In 1973, the Busia County Council offered the suit property to missionaries for the purpose of conducting church work in the Alupe region. On August 5, 2014, the title deed to the suit property was issued to Church Commissioners for Kenya, and the suit property was reserved for Alupe A.C.K Church. They asked for the plaintiff's lawsuit to be dismissed with costs.

4. The case was scheduled for hearing on February 15, 2021, with the first plaintiff testified as **PW1**. He used his witness statement dated 24/3/2017 as his primary evidence, testifying that L.R. SOUTH TESO/ANGOROMO/240 belonged to his grandfather but was never registered as his father's land despite the fact that they used it. According to **PW1**, his grandfather, a tax collector, built Alexander Papa (the then Chief) a house on suit land for the Chief to use whenever he visited the DC's office. Later that year, while the chief was away, Pastor Ekolot of ACK requested to use the same house. That the pastor continued to use the house (the church was not built on L.R.NO.240) until Dr. Olude a worshipper of the ACK decided to improve the house built for the chief from grass-thatched to iron roofed one. Pastor Ekolot later built another house out of Olenge because he wanted his own home now that he had a family. **PW1** stated that they attempted to follow

up on the land title and discovered that it was issued in the name of the defendants. He requested that the land be subdivided so that they could keep their portion and the defendants can keep the portion occupied by the church. He produced the documents listed in his document list as *PEX 1-11*.

5. During cross examination, the first plaintiff stated that he was an adult by 1975, the church was built in 1978, and his father and grandfather had died by then. That L.R. NO. 240 was not registered in the names of his father or grandfather. He stated that the documents he used as exhibits are for parcel No. 239. However, he has a letter from the assistant chief confirming that parcel 240 is theirs. He admitted that he did not live on parcel 240, but he did cultivate it until he was barred from farming for about 5 years. That he had been using the suit land because he knew it belonged to his grandfather.

6. The second plaintiff, testifying as **PW2**, stated that the first plaintiff is her son, and her husband's name is Federiko Okello (deceased). She stated that they have a dispute with the defendants because they took her land. That when the church came to build, she inquired from her son, who had granted them permission, because she had never interacted with the defendants. That the defendants fenced in and built a church on her property, and their fence surrounded her house on the inside. It is **PW2's** further evidence that the land on which the church was built belonged to her and her husband. She wants the entire property registered in their names. During cross-examination, **PW2** stated that her husband was buried near the church on land owned by her brother-in-law. She denied that the defendants had received the land from the defunct Busia County Council.

7. Jane Otieno testified as the first defense witness in the defendant's case. She adopted her witness statement dated March 26, 2018, adding that the suit land is owned entirely by the ACK Alupe Church and registered in the name of the Church Commissioners for Kenya, who hold all property owned by the ACK Churches nationwide in trust for those churches. That the land was owned by the now-defunct Busia County Council from when it was adjudicated and registered in the early 1970s. That the defunct Busia County Council bequeathed the land to the ACK Church Missionaries to live on, own, and conduct church missionary work.

8. **DW1** continued in evidence, stating that in November 1973, the defunct Busia County Council had the land registered in its name after adjudication in trust for the ACK Church, and the church became the beneficial owner. That the suit land was transferred in August 2014 by the successor of the defunct Busia County Council to the Church Commissioners for Kenya, who hold it in trust for the ACK Alupe Church. She concluded by stating that the church and parish have had quiet possession of the land since the 1960s, while Federiko Okello owned the adjacent piece of land. The defense claims that the plaintiffs began trespassing on this suit land after the suit was filed in court.

9. In cross-examination, **DW1** stated that L.R.240 has been their land since 1973 although the green card shows the church was registered on 20/8/2014. That the plaintiffs were cultivating part of the land until they were issued with an order of injunction. The witness stated that she has been a member of the ACK church since 1983 and denied that the plaintiffs had been using the land.

10. The defendant filed their submissions on 1/4/2021 which the court has read and considered together with the applicable laws and evidence adduced at the hearing. The defendants submitted that the suit land was never registered in the name of the late Federiko Okello and therefore cannot form part of his estate. They submitted that the plaintiffs have failed to prove their case on a balance of probability and urged the court to dismiss the suit with costs.

11. The issues I frame for determination are;

a) Whether or not the defendants illegally registered themselves as owners of the suit land.

b) Whether the plaintiffs are entitled to the prayers sought.

c) Who should pay costs?

12. The plaintiffs claimed that the suit land belonged to their grandfather/husband who had even built a house on the suit land for their area chief in the 1960s. That they had been using the land and were surprised to find that the land was registered in the name of the defendant adding that the defendants have even fenced it off including the house their grandfather built. The plaintiffs relied on several documents in support of their case with *Pex 1 to 11* which documents are referring to parcel No. 239. For instance, *Pex 10 and 11* are minutes from the Town Clerk Municipal Council of Busia which concerned parcel number 239. One of the resolutions of that meeting was to transfer the said parcel number 239 to the original owner Federiko Okello. However, the plaintiffs have not shown why they did not follow the same procedure in respect to claiming the ownership of parcel number 240 which was also registered in the name of the defunct Busia county Council.

13. The defunct Council was the first registered owner of the land but they were not joined to these proceedings yet the Plaintiffs are disputing the transfer from the County Council to the defendant. Under the provisions of section 28 of the Registered Land Act (repealed), a first registration or ownership subsequently for valuable consideration cannot be invalidated except as provided in the Act. However, a party can challenge such registration on account of rights and interest set forth in section 30 one of which is trusts. It is an established principle of the law that the question of trust must be specifically pleaded and proved by facts. Order 2 rule 10 states thus;

“10. (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing -

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies.”

14. Further section 26 of the Land Registration Act provides that;

(1) 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 all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that 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.

15. The defendant stated that they approached the defunct Busia County Council in 1973 for land to conduct their missionary works and were allocated the suit parcel. The green card shows that the defunct Busia County Council was the first registered owner of the suit land in 1973 before they later transferred the same to the defendant on 5/8/2014. The plaintiffs in their evidence admitted that one of the pastors of the defendant resided on the suit land as early as 1978. The plaintiffs have also not denied the presence and use of the land by the church. Further, the plaintiffs' did not prove any fraud committed by the defendant in causing the registration of the suit title either in the name of the defunct council or the subsequent transfer to the defendants.

16. The defendants, as the title holder, is entitled to quiet possession and enjoyment of the suit land to the exclusion of all others, unless it was proven that their title was obtained through fraud or unprocedurally. In this case, I see nothing that calls the defendants' ownership of the suit title or possession thereof. As a result, I conclude that the plaintiffs have failed to prove their case on a balance of probabilities, and their suit fails on all counts. Consequently, the suit is dismissed, with costs to the defendants.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 29TH DAY OF SEPTEMBER, 2021.

A. OMOLLO

JUDGE