



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL SUIT NO. 40 OF 2005

JECINTA NYAKINYUA MAU.....1<sup>ST</sup> PLAINTIFF

DAMARIS NYAMBURA KAMUYU.....2<sup>ND</sup> PLAINTIFF

GRACE WANGECI NGATIA.....3<sup>RD</sup> PLAINTIFF

(Suing on behalf of Shamba Ndogo Agricultural Extension Services Self-Help Group)

VERSUS

PRESBYTARIAN CHURCH MEN

FELLOWSHIP MWEIGA PARISH.....1<sup>ST</sup> DEFENDANT

THE PRESBYTARIAN FOUNDATION.....2<sup>ND</sup> DEFENDANT

JUDGMENT

### INTRODUCTION

1. The Plaintiffs herein instituted a representative suit on their behalf and on behalf of a self-help group by way of a Complaint and an Amended Complaint dated the 6<sup>th</sup> May, 2005 and 14<sup>th</sup> May, 2007 respectively claiming that the Defendant illegally took agricultural machinery donated to them by a Finnish donor; they sought a declaration that the agricultural machinery was their property; an order for the delivering up of the machinery to the plaintiffs; plus damages for wrongful detention, conversion and mesne profits; together with costs and interest thereon;

2. The defendants filed its defence in which both denied the Plaintiffs entire claim; the matter thereafter proceeded to a very long and protracted hearing;

### THE PLAINTIFFS CASE

3. **PW1** a Finnish national by the name Merikallio Mikko Veikko Anterd was the Plaintiffs' key witness; he testified that he was known to the donor Likka Alakortes who was a successful businessman who dealt with agricultural machinery; that the donor was from a humble background and sought to assist people from a similar background; the donor consulted **PW1** because the witness had a good knowledge of Kenya to assist him in sourcing and identifying a suitable group; the witness produced a Power of Attorney dated 10/03/05 in which the donor assigned **PW1** the power to act on his behalf;

4. **PW1** then approached Gabriel Ndumia Wachiuri who was a member of the Plaintiffs' group and also a member of the 1<sup>st</sup> Defendants' men's fellowship group to help him search for a suitable group;

5. **PW1** stated the donor whilst visiting Kenya attended a function organized by the defendants at which he disclosed his noble intentions; the Plaintiffs and the group members happened to be attendees at this function; the donor also visited other groups who sought to benefit from his assistance but he found the Plaintiffs to be the most suitable and thus decided to make his donation to them and thus proceeded to ship a container full of agricultural machinery to them;

6. **PW1** produced a letter dated 22/12/03 (**PEXh.1**) written by the donor to the Plaintiffs' group itemizing and setting down the machinery donated and the activities of interest to the group members were to engage in; which were potato production by the male members of the

group and wheat and fodder preservation by the women group members; in a letter to Gabriel dated the same date the donor indicated that the machinery belonged to the Plaintiff group and intimated therein that the machinery should not be used for any other purposes and should not be transferred to other persons without his (the donor's) consent;

7. **PW1** also produced an Import Declaration Form dated the 7/03/03 which bore the Plaintiff group's name and the value of the donated machinery was valued at 3670 Euros; a Bill of Lading dated 25/09/03 which had the name of the plaintiff group as the consignee was produced in evidence; and Mweiga was listed as the place for delivery;

8. He made reference to an Agreement dated the 26/12/2003 that the Plaintiff group had purportedly entered into with the church members in which they transferred the machinery to the 1<sup>st</sup> defendant; but the group members denied having consented to such an arrangement; the witness went on to state that on the 24/11/2003 the machinery arrived at Mweiga and was to be offloaded at Babito Shopping Centre but the Defendants colluded with the help of the OCS Mweiga to have the lorry carrying the machinery intercepted and redirected for offloading at the PCEA Church in Mweiga under the pretext that the church had better security; once in the church compound it was kept there illegally and through the use of the Provincial Administration and a powerful cabinet minister the Plaintiffs were denied access;

9. Duncan Ndegwa (**PW2**) stated that he was a member of the Plaintiffs group and produced a list of the membership; he corroborated the evidence of **PW1** that the machinery was destined to Babito which was the designated destination but it was redirected and offloaded at the PCEA church in Mweiga under the pretext that the church compound was a more secure place; thereafter the church claimed ownership;

10. The Plaintiffs had intended to use the agricultural machinery to plough land on a commercial basis; the Plaintiffs' prayer was for the delivery of the machinery but the same had been put to use by some members of the church and as such it had depreciated and was now a mere useless scrap; in the circumstance they prayed that the defendants be ordered to pay the current value of the machinery based on the original price which was 3670 Euros based on the import declaration documents as at November 2003 and they therefore sought that the Defendants be ordered to pay the same amount at the current exchange rate being Ksh122 x 3670 Euros = Kshs.447,740/-; and they sought interest on this sum from the date of filing suit;

11. The Plaintiffs also sought a claim for loss of user; using the Ministry Assessment they would have been earning a daily sum of Kshs.8,334/- from the tractor for ploughing and during the months January- April and July-September and Kshs.12,334/- for the harrow; which when totaled amounted to Kshs.20,668/- per day;

12. This quantification for loss of user per day due to the Defendants conversion of the farm machinery at Kshs.20,668/- when multiplied with the 14 years the Defendants held onto the machinery the total amount stands at to Kshs.81,763,000/-; and the Plaintiffs seek for costs and interest thereon;

13. Under cross-examination he stated that the group commenced its activities in 2002 and was later registered on the 29/08/03 and he produced the groups Certificate of Registration;

14. Grace Wangeci (**PW3**) told the court that she was a member of the Plaintiff group and was also its secretary; that the group had sued the Defendants for the machinery sent to the group as a donation and refuted the claims that there was an agreement to transfer the machinery to the defendants as deponed by Gabriel Wachiuri (now deceased) in his affidavit; her evidence was that the group did not have such a resolution;

## **DEFENDANTS RESPONSE**

15. In response the Defendants called one witness Michael Waibochi (**DW1**) who was the chairperson of the 1<sup>st</sup> Defendant which was in 2002; his evidence was that Gabriel Wachiuri (deceased) was an Agricultural Extension Officer and had been the coordinator of the initiative; the said Gabriel also doubled up as a treasurer for the 1<sup>st</sup> Defendant; he had told their group members that there was someone who was ready and willing to donate farm machinery; the group then gave him fare as the coordinator to go to Nairobi to pursue this donor;

16. In January, 2003 the donor visited the Mweiga parish and met with the members of the 1<sup>st</sup> defendant and promised to donate to them the same farm machinery as promised to the Plaintiffs' together with a fax machine; the donor was accompanied by **PW1** who doubled up as the interpreter; this promise was communicated to them in Finnish with **PW1** acting as the interpreter;

17. His evidence was that after the donor's visit Gabriel stopped attending their meetings and when the machinery arrived the church got wind that Gabriel wanted to acquire control of the same and without the church being involved and wanted the machinery delivered at his place; a dispute then arose between the plaintiffs and the defendants and when the parties failed to reach a consensus with the assistance of the police the machinery was off-loaded at the church compound;

18. The witness stated at the time the machinery was being delivered the Plaintiffs were not in existence as they had not even been registered; and stated that the machinery was imported in the name of Gabriel and that the Defendants had even given him money to enable the clearance of the goods at the port; that on the 8/12/2003 a meeting was held between the Defendants and the Plaintiffs' group and Gabriel gave them a letter and a signed affidavit (**DExh.6**) stating that the machinery belonged to the 1<sup>st</sup> defendant;

19. The witness reiterated that the Plaintiffs were not in existence at the time the donor visited and even at the time the machinery was dispatched which was on the 7/08/2003; whereas the Defendants were already a registered entity by then; he contended that the Plaintiffs hurriedly registered themselves on the 29/08/2003 with the sole aim of defrauding the defendants and to divert the machinery for their own selfish use;

20. That the machinery has never been utilized by the church; that even though the plaintiffs pleaded and prayed for loss of user and mesne

profits no expert report was tendered to prove such loss of user and how the figures were arrived at; the plaintiffs also failed to set out in their pleadings a prayer for compensation for the machinery at the current value; that this claim was an afterthought and ought to be disregarded as parties are bound by their pleadings;

21. There was no documentary evidence produced in the form of title or lease to demonstrate that the plaintiffs had leased 211 acres of land; nor was there any evidence of the existence of a revolving fund to show that the plaintiffs had engagements so as to justify the alleged profit margin and the loss of income;

22. In cross-examination he stated that he was not aware as to whether the donor had visited other groups and likewise given these other groups such a promise; he confirmed that there was nowhere that the donor had signed that he had given the machinery to the defendants and that they did not have a similar letter sent to the Plaintiffs by the donor like the Plaintiffs' dated 21/03/03 out-lining the items donated;

23. That the Plaintiff had failed to prove their case on a balance of probability and prayed that the same be dismissed with costs to the Defendants.

### **ISSUES FOR DETERMINATION**

24. This court did not have the benefit of hearing the witnesses in this long and protracted matter; **PW1** had testified before Hon. Kasango J; then two of the plaintiffs' witnesses were heard by Hon.Sergon J; Hon.Matavo J heard the defence witness before being transferred to another station; this court was left with the onus of writing the judgment based on the evidence already on record; the parties were thus directed to file and exchange written submissions;

25. The respective counsel for the parties canvassed the issues in their written submissions; and upon reading the same these are the issues framed for determination;

- (i) Whether the plaintiffs are the legal owners of the donated farm machinery;
- (ii) Whether the defendants committed the tort of conversion;
- (iii) Whether the plaintiffs are entitled to damages.

### **ANALYSIS**

#### **Whether the plaintiffs are the legal owners of the donated farm machinery:**

26. The matter indeed has been long and protracted having commenced in 2003 to date; the plaintiffs filed this case claiming that the defendants converted the donated farm machinery to their own use; and the defendants rebutted the plaintiffs claim on ownership of the farm machinery and stated that the donation had been made to them by the donor; that the plaintiffs had also signed an agreement transferring the donation to the defendants; and even at that point in time of the donation the plaintiffs group was not even registered and the donation was made in the name of Gabriel; therefore to wit the plaintiffs had adduced evidence that did not meet the threshold required to prove ownership; and without ownership the Plaintiffs could not prove conversion;

27. From the evidence adduced this person by the name Gabriel (now deceased) was a member in both groups and it is apparent that he was not only a resourceful person but also the genesis of the conflict between the parties; unfortunately, he has since passed on and cannot be of any assistance to the court;

28. The plaintiffs through their witness PW1 produced several letters as documentary evidence to prove that the machinery was donated to them by the donor; it is noted that the letters indeed indicate that the addressee was the plaintiffs and therein the donor clarified that the machinery was a donation to the plaintiffs;

But the defendants fate on its claim to ownership is sealed by the Bill of Lading (**PExh.12**) dated the 25/09/2003; it was produced by the plaintiffs as their evidence and it indicates that the plaintiffs were the consignees; this court is guided by the Court of Appeal decision in **PIL Kenya Ltd –vs- Joseph Oppong (2009) eKLR** where the court held that a Bill of Lading is evidence of who should take delivery of the shipped items; the court cited the case of **Mason vs Lickbarrow 1BI.H.359** in which Loughborough CJ said;

***“A bill of lading is the written evidence of a contract of carriage and delivery of goods, sent by sea for certain freight. The contract, in legal language, is a contract of bailment.....in the usual form of the contract, the undertaking is to deliver to the order, or assigns, of the shipper.....The endorsement of the bill of lading is simply a direction of delivery of the goods.”***

30. The fact that the plaintiffs may have registered their group after shipment was done does not affect the plaintiffs claim to ownership; the bill of lading clearly stated that delivery was to the plaintiffs;

31. The defendants alluded to the affidavit and agreement made by Gabriel transferring the machinery to them; **PW3's** evidence was that even if he had signed the documents it was not done in consultation with the plaintiffs; there is sufficient evidence on record to show that Gabriel was not the owner of the machinery but merely a go-between; it is trite law that one can only transfer that which they own; therefore Gabriel is found to have had no capacity in law to transfer what he did not own;

32. The defendants also alluded to a promise made to them by the donor to gift them with the farm machinery; but again the law is not on

their side as a promise for a gift is considered to be incomplete and not enforceable in law; Halsbury's Law of England 3<sup>rd</sup> Edition Vol.18 at page 396 states as follows;

***"...where a gift rests merely on a promise (written or verbal) or unfulfilled intention it is incompetent and imperfect and the court will not compel the intending donor, or those claiming under him, to complete and perfect it....An incomplete gift can be revoked at any time. No question of conscience enters into the matter for there is no consideration and there is nothing dishonest on the part of an intending donor who chooses to change his mind at any time before the gift is complete."***

33. For those reasons from the evidence and documents tendered this court is satisfied that the plaintiffs have been able to prove ownership of the donated farm machinery;

**Whether the defendants committed the tort of conversion:**

34. Indeed the plaintiffs may have satisfied the court on ownership but they still have the burden of proving that the defendants unlawfully interfered with the farm machinery; and the threshold of proof is on a balance of probabilities; in the case of **Peter Ndungu vs Anne Waithera Ndungu and 2 others (2014) eKLR** the court held as follows;

***"To succeed in their claim, the plaintiffs must establish that the defendant unlawfully took possession of their property with the intention of asserting a right inconsistent with theirs as the owners of the property. From the evidence, the plaintiffs accuse the defendant of committing a direct conversion, which is defined in Black's Law Dictionary, 9<sup>th</sup> Ed., as an act of appropriating the property of another to one's own benefit or to the benefit of another."***

35. Conversion exists in three forms; one being that there was a positive wrongful act of dealing with the owner's good in a manner inconsistent with the owner's rights with an intention to denying the owner his rights or to assert a right that is inconsistent thereto;

36. Conversion can also be committed where goods are wrongfully detained; and the claimant makes a demand for the return of the goods and the defendant refuses after a reasonable time to comply with the demand; the third form of conversion lies for the loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor;

37. In an action for conversion liability is strict and fraud or dishonesty are not necessary ingredients; in this instance the evidence of **PW1** and **PW2** was that that the farm machinery was destined to Babito which was the designated destination; but the defendants redirected and offloaded it at the PCEA church in Mweiga under the pretext that the church compound was a more secure place; thereafter the church claimed ownership and **PW1** and **PW2** outlined their frustrations in trying to pursue the recovery of the machinery from the well-connected defendants;

38. The defendants evidence was that they were asserting their proprietary rights to the machinery based on a promise made by the donor; it was also based on the agreement and affidavit made by Gabriel and the monies paid to him to facilitate clearance of the goods; as earlier outlined all the above claims are incapable of vesting any proprietary rights to the defendants;

39. This court reiterates that conversion is committed by wrongfully taking possession of goods, in this instance it was farm machinery; the mere taking can constitute trespass and this act must therefore be coupled with an intention to assert rights over the goods which is inconsistent with the rights of the owner;

40. The evidence of **DW1** was that when the machinery arrived the church got wind that Gabriel wanted to acquire control of the same and without the church being involved and wanted the machinery delivered at his place; a dispute then arose between the plaintiffs and the defendants and when the parties failed to reach a consensus with the assistance of the police the machinery was off-loaded at the church compound;

41. From the defendants own evidence it is abundantly clear that they wrongfully diverted and detained the farm machinery with a misguided intention of asserting proprietary rights over the machinery contrary to the rights of the rightful owners, the plaintiffs;

42. This court is satisfied that the defendants thus committed the tort of conversion against the plaintiffs;

**Whether the plaintiffs are entitled to damages.**

43. **Delivery up:** The plaintiffs had prayed for the delivery of the farm machinery in their pleadings but at the hearing contended that the farm machinery had been used by the defendants and had therefore deteriorated and depreciated to mere scrap; they submitted that instead of delivering up the machinery the defendants be ordered to pay the sum of 3760 Euros at current market value as damages for conversion of the machinery;

44. The defendants countered this by stating that the plaintiffs had failed to set out in their pleadings a prayer for compensation for the machinery at the current value; that this claim was an afterthought and ought to be disregarded as parties are bound by their pleadings;

45. As stated earlier the claim to ownership has been proved by documentary evidence tendered; and the value of the farm machinery is supported by documentary evidence in the form of the import declaration forms; it is unfortunate that the plaintiffs in their prayers had only prayed for delivery up, but this court is not estopped from taking into consideration the prayer for monetary compensation; in the renowned case of *Odd Jobs vs Mubia* (1970) EA 476 the court held;

***“(i) a court may base its decision on an un-pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;***

***(ii) On the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.***

46. The court record reflects that the value of the machinery was properly revealed and although not specifically pleaded in the prayers, there was sufficient evidence adduced on the value of the machinery and the issue was fully canvassed in the written submissions and thus cannot be said to be a new issue or an afterthought;

47. Indeed, it is not disputed by the defendants that the machinery has been in the church compound for the last 14 years and stated it was not being used; it goes without saying that regardless of the conditions of storage the machinery is in a depreciated state;

48. Based on the above and in the circumstances of the case it is this courts considered view that it would not be in the best interest of justice to make an order for delivery up; and instead will make an award based on the current value of the machinery; the original price of the farm machinery is not disputed, which is in the sum of Euros 3670; the importation documents also corroborate the plaintiffs evidence on its value; this court must also take into consideration inflationary trends and the depreciation of the Kenyan Shilling; therefore to cushion the plaintiffs from inflationary trend this court will award the value of the machinery in the sum of Euros 3670 which shall be based on the current exchange rate now applicable and the same shall be subjected to interest from the date of filing suit;

49. **Loss of user:** it is trite law that loss of earnings of profits are claims of special damages and must be specifically pleaded and must also be strictly proved; and loss of user (if proved) must be limited to a reasonable period;

50. The plaintiffs claim that the defendants made them lose out on making profits by the wrongful detention of the farm machinery; this is claimed under the heading **PARTICULARS OF LOSS & MESNE PROFITS** in the amended plaint under paragraphs 7(a), (b) and (c) therein; due to the conversion the plaintiffs were not able to use the plough at the rate of Kshs.8,334/- per day and the harrow at the rate of Kshs.12,334/- per day; and therefore claim for a loss for 14 years in the total sum of Kshs.81,763,000/-;

51. The defendants countered this amount as being remote and speculative; and submitted that the plaintiffs did not produce any search, grant or title to demonstrate that they owned or leased 211 acres of land; that there was need for documentary evidence to be produced by the plaintiffs as proof of this large claim;

52. It is noted that the plaintiffs tendered no evidence to satisfy this court that on a balance of probabilities they were indeed engaged in the business of ploughing and harrowing; in the alternative they also did not call any expert witness to verify the daily rates for the hiring of the plough or the harrow; they also failed to provide any documentary evidence on the 211 acres as to whether it was owned by them or was leased; and the nature of the cultivation carried out and how they mitigated their loss;

53. From the evidence tendered this court finds that the plaintiffs did not satisfactorily prove the daily loss of Kshs.20,668/-; and the total sum of Kshs.81,763,000/- is therefore found to be speculative and the term of 14 years is deemed to be an unreasonable period;

54. This court finds that the loss of user was not proved to the desired threshold.

#### **FINDINGS & DETERMINATION**

55. Therefore, from the foregoing this court makes the following findings;

- (i) This court finds that the plaintiffs proved ownership of the donated farm machinery; and declares them to be the rightful owners;
- (ii) This court finds that the defendants committed the tort of conversion against the plaintiffs;
- (iii) This court makes an award in favour of the plaintiffs in the sum of Euros 3670 which shall be based on the current exchange rate applicable as at the date of this judgment.
- (iv) Interest thereon shall be at court rates from the date of filing suit;
- (v) This court finds that the loss of user was not proved to the desired threshold; and makes a NIL award;
- (vi) The defendants shall bear the costs.

Orders Accordingly.

**Dated, Signed and Delivered at Nyeri this 7<sup>th</sup> day of March, 2019.**

**HON.A.MSHILA**

**JUDGE**