



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CIVIL SUIT NO. 60 OF 2006**

**WILSON CHELULE KIPYEGON.....PLAINTIFF**

**=VERSUS=**

**BISHOP JOSEPH GITHINJI (Being sued in his**

**representative capacity as trustee of a church**

**organization known as JESUS GOSPEL CENTRE)....DEFENDANT**

**AND**

**ISAAC KIGET.....INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. By a Plaint dated 3<sup>rd</sup> January 2006, the Plaintiff filed suit against the Defendant alleging that the Defendant had unlawfully trespassed onto the Plaintiff's land parcel number KERICHO/SOTIK TOWNSHIP/246 and constructed permanent structures thereon. In his Plaint the Plaintiff seeks the following reliefs:

*a) An eviction order.*

*b) Mesne profits from 1999 to the judgement.(sic).*

*c) Permanent injunction to restrain the defendant by himself, servants, agents or followers from trespassing on his Plot No. 246 Sotik.*

*d) Costs.*

*e) Any other relief deem fit to grant by this court.*

2. The Defendant filed a Defence on 10<sup>th</sup> August 2006 which was later amended on 26<sup>th</sup> February 2018. In the Amended Defence in which the Defendant enjoined the Interested Party, the Defendant denies that the Plaintiff is the registered owner of the suit property and states that if he is then he acquired it through unscrupulous means. He further states that the Defendant bought the suit property from the interested party at a consideration of Kshs. 250,000 which was donated by one of their church members. He states that after receiving the full purchase price the Interested Party colluded with the Plaintiff to defraud the church and transferred the suit property to the Plaintiff.

3. The suit was set down for hearing on various dates between 21.3.2018 and 6.2.2019 when the Plaintiff and the Interested Party testified. The Defendant also testified and called one witness.

**Plaintiff's case**

4. The Plaintiff testified that he purchased the suit property from Isaac Kiget, the interested party herein through a sale agreement dated 16<sup>th</sup> May 1998 for a consideration of Kshs. 250,000. He stated that the said sale agreement was witnessed by the Defendant and one Gilbert Mutai.

5. According to his testimony, the money he used to buy the suit property was proceeds from the sale of his land parcel number KERICHO/CHEMAGEL/1951 to one Emily Yator whom he had sold his land to at a consideration of Kshs. 260,000. He first paid Kshs. 150,000 while the balance of Kshs 100,000 was paid by the Defendant who owed him a similar amount. He produced a copy of the sale agreement, letter of allotment in the name of the original allottee and certificate of official search as his exhibits.

6. He stated that after buying the plot he allowed Faith Church to put up a tent and use his property for their church services as he was a member of the said church. He testified that a disagreement arose and the Defendant later left Faith church and set up his own church known as Jesus Gospel Centre. He requested Faith Church to vacate the suit property but after they left the Defendant started constructing a permanent structure on the suit property and later put up a perimeter wall.

7. Upon cross examination, he stated that he had not been in occupation of the suit property since 1999. He clarified that the balance of Kshs 100,00 being the purchase price for the suit property was paid by the Defendant and one Gilbert Mutai. He stated that he did not have any written agreement to show that he had lent the Defendant Kshs. 100,000. He stated that he did not have any sale agreement for the property he sold to Emily Yator. He denied that his land parcel no. KERICHO/CHEMAGEL/1951 was charged to Kenya Commercial bank by the said Emily Yator.

8. Isaac Kiget, the Interested Party, testified as PW2. It was his testimony that he was approached by the Plaintiff and one Gilbert Mutai to find out if he was willing to sell his land. He later entered into a sale agreement dated 16.5.1998 with the Plaintiff for the sale of the suit property at an agreed purchase price of Kshs. 250,000. He stated that he was paid by instalments as follows: A cash payment of Kshs. 150,000 by the Plaintiff, then Kshs, 77,000 paid by the Defendant and Kshs. 20,000 paid by Gilbert Mutai.

9. Upon cross- examination he stated that he sold the suit property to the Plaintiff.

#### **Defendant's case**

10. Emily Yator who testified as DW1 stated that she was an employee of Kenya Commercial Bank and in 1998 she was based at Sotik. During this period, she was a member of Jesus Gospel Church where the Defendant was a pastor. She testified that having fellowshiped with the church for about a year she felt the need to bless the church with a piece of land. She explained to the Defendant that she was willing to take a loan of Kshs. 260,000 but she lacked a title deed which she could offer as security for the loan. She informed the Defendant of her intention and he made an announcement in church for anyone who could offer his title to do so. The Plaintiff Wilson Chelule offered to give his title to act as security for the loan. In order to facilitate the process of charging the title, Emily suggested that the same be transferred to her name on the condition that she would transfer it back upon to Mr. Chelule upon completion of payment of the loan. The Plaintiff agreed and transferred his title to her after which she charged it to the bank. The loan of Kshs.260,000/= was disbursed to Emily and she gave the same to the Defendant and the Plaintiff in the presence of another church elder called Gilbert Mutai. This amount was then used to pay for the suit property. Emily testified that even after she was transferred from Sotik, she diligently repaid the loan for a period of 8 years. She stated that once the plaintiff realized that she had been transferred he started demanding his title back and wrote her numerous demand letters through her employer. Her attempts to produce these letters were successfully resisted by counsel for the Plaintiff. She stated that after the lapse of the 8 years, she had the title discharged and she was willing to have it transferred back to the but he had refused to take his title.

11. Upon cross-examination, she stated that the Plaintiff accompanied her to the Lands office and gave his consent to transfer the title to her name. She states that the Plaintiff had the option to take the loan but he did not offer to do so. Asked why she wrote to the bank stating that she had bought the Plaintiff's land, she said she was advised to write the later in lieu of a sale agreement.

12. The Defendant who testified as DW 2 corroborated the evidence of DW1 with regard to how the suit property was acquired. He stated that sometime in the year 1998, when he was a pastor of Jesus Gospel Centre at Sotik, he and other church elders including the Plaintiff came up with an agenda of raising funds to acquire land for construction of the church. This agenda was accomplished through DW1 who was one of their church members and a banker at Kenya Commercial Bank-Sotik Branch as she offered to buy the church a plot by taking a loan from her employer. Since she did not have title deed which was required as security for the loan, the plaintiff offered her his title to land parcel number: KERICHO/CHEMAGEL/1951. DW1 transferred the title to her name and charged the same for a loan facility of Kshs. 260,000/= to be repaid in 8 years under verbal agreement with the plaintiff that upon the full repayment of the loan she would transfer the title back to his name.

13. He stated that since the Plaintiff was worried that his land had been transferred to Emily without any formal agreement, they decided to write the sale agreement for the suit property between the Plaintiff and the third party so as to protect the plaintiff who had given out his land as security for the loan that was taken by Emily Yator. He stated that after they had paid the purchase price in full, they were surprised to learn that the Plaintiff had gone behind their back and had the suit property transferred to his name. He produced an agreement signed by the third party showing that the church had paid him a sum of Kshs. 250,000 for the suit property.

14. Upon cross examination he stated that there was no written agreement between the Plaintiff and Emily Yator with regard to land parcel number KERICHO/CHEMAGEL/1951 and the oral agreement was based on trust. He stated that they were cautious in their dealings with the Plaintiff because he had sacrificed his title as security for the loan that was used to buy the suit property. He said that they tried to have the suit property transferred to the church in vain. He stated that they did not file suit against the Plaintiff as there was another case in respect to the suit property.

15. With that evidence the Defendant closed his case and thereafter the parties filed their submissions.

#### **Issues for determination.**

16. Having read the pleadings and taking into account the evidence and rival submissions, the following issues fall for determination:

1. Whether the Plaintiff holds the suit property in trust for the church
2. Whether the Defendant is a trespasser on the suit property
3. Whether the Plaintiff is entitled to the reliefs sought

### **Analysis and determination**

17. It is the Defendant's submission that the Plaintiff holds the suit property in trust for the Defendant. This is based on the Plaintiff's testimony that the church came up with the idea of acquiring a piece of land in order to build a church. In order to facilitate the purchase of the said plot, DW1 took a loan which she handed over to the church officials. As security for the loan the plaintiff gave Emily Yator (DW1) his title for land parcel number Kericho/Chemagel/1951 on the understanding that once the loan was paid in full, the said title would revert to him. Emily dutifully repaid the loan in full and when she requested the plaintiff to take back his title for land parcel no. Kericho/Chemagel/1951, he flatly refused. She said she was still willing to transfer the said title back to him. Emily Yator struck me as an honest witness who went out of her way to assist the church acquire a piece of land for purposes of putting up a permanent church. On the other hand, the Plaintiff was inconsistent in his testimony and even denied that his title in respect of land parcel no. Kericho/Chemagel 1951 was charged to KCB yet the title clearly shows that it was charged to the bank on 15/05/98. I am perplexed as to why the Plaintiff refused to take back his title after Emily finished repaying the loan. Could it be because the suit property is developed while his plot is undeveloped? If this is his thinking, that would result to unjust enrichment.

18. The Defendant produced an acknowledgment note for payment of Kshs. 100,000/= to the third party and another one indicating that the church had paid deposit of Kshs. 150,000 as evidence that the purchase price for the suit property was paid by the church. This evidence is corroborated by the Plaintiff though he gives a different explanation for the payment. The Plaintiff's explanation that the payment of Kshs. 100,000 was made by the church as the church owed him some money does not add up as there is nothing to show that the church owed the plaintiff any money. His explanation that he bought the suit property using proceeds of the sale of his land parcel no Kericho/Chemagel/1951 to Emily Yator is also not convincing as he was unable to produce any sale agreement to show that indeed Emily Yator bought the said parcel of land from him. Furthermore, if the transaction was purely between him and the third party, there is no explanation why he involved the defendant and Gilbert Mutai and even made some payments through them. On the other hand, the defendant's version is more credible as it is buttressed by the fact that Emily Yator handed over the sum of Kshs. 260,000 to the Plaintiff and Defendant in the presence of Pastor Gilbert Mutai out of which the third party was paid Kshs. 150,000 and the balance of Kshs. 100,000 was later paid by the defendant and Gilbert Mutai. This is because after they received the amount of Kshs. 260,000 from Emily Yator they used Kshs. 100,000 to buy a tent for the church.

19. Even though the Plaintiff produced a sale agreement showing that he purchased the suit property from the third party, the evidence on record suggests that the church had a beneficial interest in the suit property and that would explain why the Defendant and Gilbert Mutai made some payments towards the purchase price. This would also explain why the plaintiff put the church in possession of the suit property for free without any written agreement and even allowed the church to put up a church on the suit property without obtaining any injunctive orders against them. This leads me to the irresistible inference that there is a constructive trust between the plaintiff and the church and the plaintiff must not be allowed to deprive the church of its interest in the suit property.

20. In the case of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri (2014) eKLR** the Court of Appeal expounded on the meaning of constructive trust as follows:

*“Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.”*

21. Furthermore, in the case of **Godfrey Githere vs. George Kagia & 4 Others [2008] eKLR** cited with approval in **Leah Chelangat Tirop v Joel Kiprono Kering [2018] eKLR** the court adopted the definition of “constructive trust” from **Equity and the Law of Trusts** by Philip H. Pettit, 4th Edition Page 46, thus:-

*“... a constructive trust is one imposed by a Court of equity regardless of the intention of the owner of the property. “In Hussy V Palmer [1972] 3 ALL ER 744, Lord Denning held that a constructive trust; “Is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution.”...(elc no. 80/16)*

22. It has been submitted on behalf of the defendant that trusts in land need not be registered but the same can be implied by looking at the circumstances surrounding the case. The Court of Appeal in **Paul Muthuita v Wanoe [1982] eKLR** stated as follows:

*“In Gatimu Kinguru v Muya Gathangi[1976] KLR 253, Madan J (as he then was) ...the absence of any reference to a trust in the instrument of acquisition of the land does not affect the enforceability of the trust as the provisions of Section 126(1) (now section 66(3) of the Land Registration Act 2012) of the Registered Land Act as to the reference to the capacity as trustee in the instrument of acquisition are not mandatory but merely permissive. That decision has been followed and in my respectful opinion it is correct...”*

23. Furthermore, the **Land Registration Act (2012) No. 3 of 2012 Laws of Kenya** protects beneficiaries of land held under trusts in **sections 25(2)** by providing as follows:

***25.(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.***

*Section 28 of the same Act provides that unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without being noted on the register-*

a) .....

b) *Trusts including customary trusts.*

c)

From the foregoing it is my finding that the Plaintiff holds the suit property in trust for the church.

24. I now move on to the second issue which is whether the Defendant is a trespasser. It is common ground that the Plaintiff is the registered proprietor of the suit property.

25. In his Plaintiff the Plaintiff avers that between 1998 and 1999 he allowed the Faith church of which he was a member to occupy his plot and conduct their services on the said plot. However, in 1999 the Faith church moved out and the defendant who had since left the church and formed his own church known as Jesus Gospel Centre continued occupying the suit property and constructed a church on the suit property. From the evidence on record, it is clear that at the time the suit property was purchased from the 3<sup>rd</sup> party, the plaintiff and the defendant belonged to the same church known as Jesus Gospel Centre and they were both deeply involved in the purchase of the suit property which was meant for construction of a church. In his testimony, the Plaintiff acknowledged that part of the purchase amounting to Kshs. 100,000 was paid by the defendant and Pastor Gilbert Mutai. The Defendant produced an acknowledgment note dated 26.10.98 signed by the Defendant, Pastor Gilbert Mutai and the third party. Contrary to what the Plaintiff has alleged in his pleadings, it would appear that he is the one who left the church and that is why the dispute over the suit property arose. I have already made a finding that the Plaintiff holds the suit property in trust for Jesus Gospel Church and therefore the question of trespass does not arise.

26. With regard to the third issue, the Plaintiff seeks an order of eviction, mesne profits and a permanent injunction against the Defendant. In view of my findings above, the Plaintiff is not entitled to these reliefs. On the other hand, the Defendant did not raise a counterclaim in respect of the suit property as he should have given the circumstances surrounding the purchase of the suit property. Be that as it may, this court is enjoined to dispense substantive justice in line with the spirit of article 159 of the Constitution as well as the principle of equity which is enshrined in article 10 (2) (b) of the Constitution. The justice of this case would therefore require that the Plaintiff transfers the suit property to the church (Jesus Gospel Centre). However, as I have pointed out the Defendant did not raise any counterclaim in this regard and it is trite law that parties are bound by their pleadings. Moreover, it has been submitted by counsel for the defendant that it is the Board of Trustees of the Jesus Gospel Centre Church that ought to have been sued rather than the defendant, it therefore follows that it is the said Board of Trustees that ought to move the court for appropriate orders. The Defendant has indicated that it is willing to facilitate the release of the plaintiff's title in respect of land parcel no. Kericho/ Chemagel/1951 back to him. The Plaintiff is at liberty to apply for any appropriate orders in this regard if necessary.

27. The upshot is that the Plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs to the Defendant.

**Dated, signed and delivered at Kericho this 13<sup>th</sup> day of June, 2019.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Miss Cheruiyot for Mr. Mutai Joshua for the Plaintiff
2. Mr. Mwita for Mr. Anyoka for the Defendant
3. Court Assistant – Rotich