



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL CASE NO. 23 OF 2005

MOHAMED JUMA PONDA 1ST PLAINTIFF
MOHAMED AHMED MMADI 2ND PLAINTIFF
MUNIR OMAR SALIM..... 3RD PLAINTIFF
JAMIA MOSQUE COMMITTEE BUNGOMA 4TH PLAINTIFF

VERSUS

SALIM BARASA..... 1ST DEFENDANT
ABDALLA NDALA 2ND DEFENDANT
KASSIM SIMIYU WERUNGA..... 3RD DEFENDANT
SHABAN BARASA 4TH DEFENDANT
ABDI SHARIFF..... 5TH DEFENDANT
ABDULRAZAK MOHAMED 6TH DEFENDANT
BUNGOMA MUSLIM ASSOCIATION 7TH DEFENDANT

JUDGMENT

1. The Plaintiffs have sued the Defendants vide their further amended complaint filed in court on 11th October 2010. In their suit, they are praying for orders;

i. A declaratory order that plot nos. Bungoma municipality/341 and Bungoma municipality/695 were registered in favour of the 4th, 5th, 6th and 7th Defendants and/or its trustees to hold in trust for the 4th Plaintiff and/or its trustees and for an order compelling the Defendants jointly to transfer the said properties to the Plaintiffs and/or their trustees and in default thereof this honourable court to effect the said transfer.

ii. Costs of the suit.

iii. Any other suitable or alternative relief this honourable court may deem just to grant.

2. The 1st & 2nd Defendants filed a joint statement of defence on 26th April 2005 to the plaintiff.

Later on, an amended defence dated 13th May 2008 was filed by the 2nd Defendant – then the only Defendant on 16th May 2008 after the first amendment of the plaint. The Plaintiffs further amended their plaint which was filed on 11th October 2010 introducing 6 new Defendants. There seems to have been no further amendments done by the Defendants. Other than introducing new Defendants, the cause of action remained the same.

3. The hearing commenced on 19th July 2013 with the 1st Plaintiff testifying as PW1. He told court that he is a businessman as well as chairman to the 4th Plaintiff. The 2nd and 3rd Plaintiffs are Secretary and Treasurer respectively to the 4th Plaintiff. PW1 identified the 1 – 6th Defendants as the leaders of Bungoma Muslim Association sued as the 7th Defendant. The 4th Plaintiff is registered under the Societies Act (pex. 1). In his testimony, PW1 says the 1st, 2nd & 3rd Plaintiffs were elected in 2002 as officials of the 4th Plaintiff and later re- elected in 2009. (pex. 2 & 4).

4. Jamia Mosque (the 4th Plaintiff) has a Constitution which gives rules governing their affairs (pex.5). The suit land Bungoma municipality/341 in which Jamia Mosque is built as at 1987 was in the name of Bungoma County Council. The Council had no objection to the suit land being registered in the name of the trustees of Bungoma muslim community (pex.6).

5. The witness gave further evidence that there exists the National Supreme Council of Kenya with branches at the District levels. He was once the chairman of the Supreme Council, Bungoma District. As at 1993, the 4th Plaintiff was not registered as a legal entity. Therefore on 21st February 2002 when the register for Bungoma municipality 341 was opened, the title was registered first into name of Bungoma County Council before being transferred into the joint names of Bungoma muslim Association (7th Defendant) and Jamia mosque as shown in the green cards produced as pex. 8 (a) & (b).

6. According to the 1st Plaintiff (PW1), the current registered trustees are not representatives of Jamia Mosque. That Jamia Mosque Committee and Bungoma muslim Association are two separate institutions. The 1st chairman of 4th Plaintiff Hassan Juma was also the chairman of the 7th Defendant at the same time in the early years. That the 7th Defendant did a mistake to have the suit land be registered in their name.

7. PW1 also narrated to court how L.R. No. Bungoma Municipality/695 was acquired as exhibited in the letters produced as Pex. 9, 10, 11 and 12. Once the register for the land parcel was opened, it was first registered in the name of Bungoma County Council on 15th January 1996 who on the same day transferred the plot to the 7th Defendant as shown by certified copy of the register produced as pex. 13 (a) & (b). The witness said there was no permission given to the Defendants to register the land in their names. A Mr. Hassan Juma (first chairman of both bodies) had agreed to return this land to the 4th Plaintiff which statement was not reduced into writing.

8. PW1 stated that it is wrong for the 7th Defendant to say they hold the two parcels of land on behalf of all muslims in Bungoma. That the 7th Defendant was registered in 1988, while the 4th Plaintiff has been in existence since 1957. That according to the Islamic law, mosque land should be registered in the name of the mosque while other projects are registered in the name of people who initiate them. Finally, he said their role is to conduct prayers and administer projects undertaken on the mosque land. He urged the court to order return of L.R. nos 341 and 695 to the Jamia mosque committee. He also prayed for costs of the suit.

9. In cross-examination, PW1 said he is aware membership to 7th Defendant is charged but denied he was a member. He also said there are some people who are both members of the 4th Plaintiff and 7th Defendant. He admitted that all documents produced as Pex. 6,9,10 & 11 were issued before 1988. He was also not aware that the 7th Defendant had been dissolved, neither had he seen/read their

Constitution. He admitted the membership of the 7th Defendant is larger than that of the 4th Plaintiff.

10. That their Constitution does not provide on how they recover land previously acquired. The trustees in whose name the titles are registered are also members of Jamia mosque committee (4th Plaintiff). PW1 admitted there were no particulars of fraud pleaded in the plaint. He maintained that registration of the two suit parcels into 4th-7th Defendants' name was not proper.

11. RASHID SAGAN testified as PW2. He said he previously worked with Bungoma County Council but currently he is a farmer. He confirmed the 1st, 2nd and 3rd Plaintiffs as duly elected officials of the 4th Plaintiff. He adopted his statement that was filed as his evidence.

12. In cross-examination, he said he is the assistant secretary elected in 2002. From 2002 to date they have not held any other elections. He is also not a member of the 7th Defendant. He said their (4th Plaintiff) Constitution provides for trustees to hold property on behalf of the Mosque. At this point, the Plaintiffs' case was closed.

13. The Defendant thereafter called their first witness Kassim Simiyu Werunga. He is a member of the 7th Defendant and sued as the 3rd defendant. He is also the treasurer of the 7th Defendant. He said they charged a monthly subscription of Kshs. 20/=. According to him, he issued receipt No.3707 (dex. 1 (b) to someone called Mohamed Juma who he assumed is the 1st Plaintiff. DW1 had been an official of the 4th Plaintiff before 2002. He also produced a copy of the Constitution and certificate of registration of the 7th Defendant as Dex. 2 and 3.

14. DW1 said the 4th plaintiff is concerned with affairs of muslims of Bungoma Township while the 7th Defendant is concerned with the affairs of muslims within the then Bungoma District. He's the current chairman of the Supreme Council - Bungoma District and secretary to the 7th Defendant.

15. The suit parcels of land were registered in the name of 7th Defendant because Jamia Mosque Committee was not a legal entity. DW1 denied that the 4th Plaintiff was fore runner to the 7th Defendant. Nor was the 7th Defendant registered as owner of the suit properties for onward transfer to 4th Plaintiff as by then the 4th Plaintiff was not registered. That muslims have made contributions from within and outside Bungoma as a result of which they have built a mall and mosque. If the property is transferred to the 4th plaintiff, it will exclude some Muslims. He concluded by saying the registration of the suit parcels were done with knowledge of the muslim faithfuls. He urged the court to dismiss the suit with costs to them.

16. During cross-examination, he said he was not the one who issued dex. 1 (a) & (b). He also did not know whether Mohamed Juma and Mohamed Juma Ponda refer to one and the same person. As per

their Constitution, if a member defaults in paying subscription, he ceased to be a member. He also said that none of the correspondences, produced by the Plaintiffs referred to the 7th Defendant as it had not been registered. He said L.R. no. 341 was a donation from a resident of Bungoma while L.R. 695 was given to muslims by the former Chief Kadhi. He said since he became an official he keeps records and books of accounts. The 7th Defendant is not a profit making organization. The Defendant then closed their case.

17. The Plaintiffs submitted that they had proved their case on a balance of probability. The reason being both plots were allocated to Jamia mosque committee (4th Plaintiff) for the benefit of the muslim society without any conditions. And that their evidence was in tandem with their pleadings.

18. The Defendants submitted the Plaintiffs haven't proved their case. Their submissions highlighted 8 issues which in their view are for determination. Amongst which is that the Plaintiffs pleaded trust but in their evidence, they alleged fraud and unlawfulness. The decision to register the suit property into the

7th Defendant's name was arrived by the Jamia mosque Committee which decision bound the Plaintiffs and other Muslims. They urged the court to dismiss the case with costs.

19. After summarizing the evidence and submissions supra, this court finds that there are two key issues for determination;

i). Whether the Plaintiffs evidence digressed from the pleadings

ii). Whether the Plaintiffs established the Defendants hold the titles for the two suit parcels in trust for them.

iii). Who bears the costs of the suit.

20. Mr. Ocharo for the Defendants submitted that the Plaintiffs have alleged fraud vide the testimony of PW1, a fact which was not captured in their plaint filed in court. In paragraph 10 of the Plaint, the following is pleaded;

“On or about the 15th day of January 1996 and the 21st day of February 2002, Title No. BUNGOMA MUNICIPALITY/695 and title Number BUNGOMA MUNICIPALITY/341 respectively was registered in the names of, the 2nd -7th Defendants and its trustees respectively without the knowledge, consent and/or authority of the plaintiffs and the entire Muslim fraternity in Bungoma of which the said plots were meant for their use and benefit.”

In paragraph 12 thus;

“It is further the Plaintiffs case that the said properties were duly registered in favour of the 2nd Defendant to hold in trust for the 4th Plaintiff awaiting its formalization of the registration requirements.”

21. In my analysis of the evidence vis-a-vi the pleadings I do make a finding that the Plaintiffs did not drift from their pleadings while testifying before the court. Their evidence is that the registration of the 7th Defendant was procured without the consent (illegal) of the plaintiffs and therefore the said registration ought to be declared to have been done in trust for them. PW1 said;

“The association did a mistake because as per Muslims, land cannot be registered in the name of an individual. Later on he said, the association is wrong in saying they are holding title on behalf of all Muslims in Bungoma.”

The Plaintiffs have not alleged fraud but said registration into Defendants' names was a mistake which mistake ought to be rectified by the declaration orders sought.

22. The 2nd issue is to find out if the Plaintiffs have established a trust relationship. In **Wambugu vs. Kimani [1992] 2 KAR 58** and **Muiruri vs. Kimemia [2002] 2 KLR 677** the Court of Appeal held that trust must be proved by evidence. In the case of **Kiruga vs Kiruga & Another (1988) KLR 348** at page 368, Apaloo JA said *“The word Proof as a legal concept is not pre-ordained and has no objective existence, discoverable either by logic or analysis. It is merely the conclusion that the tribunal draws on any given set of facts or evidence”* My understanding therefore is that trust relies on proof by a set of facts or evidence unique to each case and in this instant, the burden of proving those facts lay on the plaintiffs. From the evidence, the Jamia mosque was built on L.R. BUNGOMA MUNICIPALITY/341 long before the certificate of title for the said parcel was acquired. The 7th Defendant was registered under the Societies Act on 30th June 1988 while the 4th Plaintiff was registered on 29th April 2004. The Jamia mosque existed before the registration of both entities. The Plaintiffs must show therefore the distinction of membership of Jamia Mosque which existed before their

registration and the membership after 2004.

23. It is also not disputed that the L.R. No. BUNGOMA MUNICIPALITY/341 was donated by a muslim faithful in about 1957 for the benefit of muslims of Bungoma. The process of acquiring this title was commenced in 1987 (pex.6) by the Trustees of the muslim community property. None of the parties herein were members of the Committee (trusteeship) that commenced this process. The L.R. No. 341 was registered on 21.2.2002 in the names of SHABAN BARASA (4th Defendant), ABDI SHARIFF (5th Defendant), ABDUL RAZAK MOHAMED (6th Defendant) as trustees of Bungoma Muslim Association (Jamia Mosque).

24. PW1 set out their objectives as per their Constitution (pex.5), inter alia 2(f) *to acquire and own properties for the purpose of generating funds for running of the institutions (paragraph 3 of the Constitution)*. PW1 said that their membership is limited to Bungoma municipality while the 7th Defendant includes membership from Bungoma District (as it was then) which is wider. PW1 said the mosque is open to all who profess the muslim faith to conduct prayers and their membership is free. I find this a contradiction. The 4th Plaintiff cannot say it is open to all who profess muslim faith yet at the same time restricting membership to muslims within Bungoma municipality only.

25. The Plaintiff did not explain how the registration of the 4th – 7th Defendants as owners of the disputed parcels interfered with the day to day operations of the 4th Plaintiff. They also have not distinguished that Bungoma moslem community referred to in Pex. 6 did not include muslims in the entire Bungoma district then. If we agree with their Constitution which restricts membership to moslems within Bungoma municipality, the question then is, was this land donated to muslim faithfuls of Bungoma municipality or Bungoma district? The witnesses did not lead any oral/documentary evidence to show that the donation was specific to Bungoma municipality muslims. This is important because it would reveal a trust relationship that the 7th Defendant did hold the suit title on behalf of the muslims of Bungoma municipality and not Bungoma County. The documentary evidence shows the contrary and it is in the interest of moslem faithfuls if the land were to be in name of an all-inclusive entity and not restrictive one. This limb of the plaintiffs claim fails.

26. The acquisition of L.R no 695 commenced sometime in 1985 when PW2 as secretary of SUPKEM, Bungoma wrote a letter to the Town Clerk Bungoma requesting for a plot (pex 9) and the responses thereto (pex 10, 11 and 12). The correspondences requested for a plot generally. None of the exhibits refer to the 4th Plaintiff. In paragraph 4 of PW2's statement I quote, *"With regard to plot no BGM MUN/695, the said plot was also allocated to the muslim community and not a private association. Bungoma muslim Association holds the said plot in trust for Jamia mosque Committee which is the umbrella body for all muslims. The plots should be transferred back to the 4th Plaintiff for the benefit of all muslims"*(underline mine for emphasis). The witness says the land was for the benefit of all muslims and not for a private association. This is yet another contradiction as the 4th Plaintiff is a private association by virtue of its Constitution limiting membership to muslims within Bungoma municipality. There is no iota of oral/documentary evidence to show the plot was being acquired for Jamia Mosque. In pex 12, the letter is addressed to *"Bungoma township mosque, madrass & affairs."* The Plaintiffs did also not say what activities they undertake on this plot which links the 4th Plaintiff to the suit property.

27. The upshot is, I find from the evidence that there are no facts proved to establish the creation or existence of trust relationship between the Plaintiffs and the Defendants. PW1 stated that one Hassan Juma who was the chairman of both the 4th Plaintiff and the 7th Defendant must have caused the property L.R no 341 to be registered in name of the 4th -7th Defendant as trustees for the 4th Plaintiff. However as at the time of registration of the land, the 4th Plaintiff as a legal entity had not been registered. It is wrong for Pw1 to state it was in existence from 1957 when registration was only done in 2004. PW1 also did not produce any minutes expressing the intentions of the said Hassan Juma. They have also not produced minutes (resolution) of the Bungoma moslem fraternity authorizing them to demand transfer the suit properties from the Defendants name. They could have procured the resolution of an

annual general meeting which would then form a basis to their present claim.

28. The Defendants have said they hold the two parcels of land in trust for the benefit, and with knowledge of all the muslim faithfuls. Although the 1st Plaintiff denied membership to the 7th Defendant, yet the fact of his none membership notwithstanding, he has not been denied access to facilities available to muslims on the two suit parcels. If he was denied or any muslim has been denied such services for their none membership, he would have told this court. The Plaintiffs are also not in use of the two suits parcels to the exclusion of the Defendants or their members. There exist an inter-relationship between the two parties and their members. In comparison, in the case of **Phillicery N. Mumo vs Nzuki Makau (2002) 1 EA 170**, the court of appeal said *that where there is ample evidence that the disputed plot was owned by the appellant's father-deceased and the entire family lived on it but was registered in the name of deceased 1st wife, the 1st wife was to hold the suitland in trust for the entire family of the deceased.* The Plaintiffs have not proved such evidence that would make me find in their favour.

29. In conclusion therefore, I find the Plaintiffs have failed to prove their case within the required standards of the law. The same is dismissed with costs to the Defendants.

DATED, SIGNED and DELIVERED this 13th day of May 2014

A. OMOLLO

JUDGE.