



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO. 68 OF 2017

(FORMERLY NAKURU 278 OF 2013)

ARCHBISHOP ELIJAH B. WAMBURI

SIMON KAMAU

SAMWEL GITHINJI

(Being the Registered Trustees of Israel Assemblies of God and suing for and on behalf of the aforesaid Society).....PLAINTIFFS

VERSUS

ARCHBISHOP JOSHUA WILSON MUTHIOMA

JOHANA MOSES CHEGE

JOSEPH KIMANI GITAMAKA

SILA MACHARIA

MICHAH KIRAGU

ELIZABETH NYAMBURA

JACOB KIMANI

(Sued as the Registered Trustees of Israel Assembly of Kenya for and on behalf of the aforesaid Society).....DEFENDANTS

JUDGEMENT

1. Before me for determination is a matter dated the 28th July 2009 and filed on the 29th July 2009, vide a Complaint wherein the Plaintiffs herein sought for the following orders:

i. A declaration that the Plaintiffs are the true successors in title to Israel Assemblies of Kenya registered trustees who were the lawful, original and the rightful leaseholders of parcel of land number North Kinangop Township/34 (new number Nyandarua/North Kinangop Township/34) and consequently to be declared that the aforesaid plot truly and rightfully belongs to the Plaintiffs.

ii. An order cancelling the registration and the certificate of lease dated 12th March 2007 issued to the Defendants and the subsequent rectification of the register by the entry of the Plaintiffs as the rightful and lawful proprietors of Nyandarua/North Kinangop Township/34 with issuance of a certificate of lease thereof.

iii. A permanent injunction to issue restraining the Defendants either by themselves, their servants and or agents from entering, occupying, conducting services, using and or, in any other manner interfering with the Plaintiffs' church and the premises situate at parcel of land number Nyandarua/North Kinangop Township/34.

iv. Costs of this suit

v. Interest on (a) (b) and (c) above at court rates are.

2. Alongside the said plaint the Plaintiffs herein had sought for interim orders vide their application by Notice of Motion of the same date. Interim ex-parte orders in terms of prayers 2 and 3 of the application for a period of 14 days were granted and the Application was set down for hearing inter-parties during the vacation on 5th August 2009 on which day parties were not ready to proceed with the hearing of the Application. The matter was rescheduled for hearing on the 22nd October 2009 wherein pending the hearing and determination of the application parties were ordered to maintain the status quo obtaining then to the effect that:

i. The Respondents shall remain in control of the ownership and use of the suit premises and also the conduct of church services therein without interruption

ii. Peace shall be maintained for the interests of the worshippers and also in public interest

3. On the 27th January 2012, Counsel for the Plaintiff withdrew their application dated 28th July 2009 so as to pave way for hearing of the case wherein the application was marked as withdrawn.

4. A Notice of motion dated 22nd May 2012 under a Certificate of urgency was then filed seeking to have the status quo maintaining before the application dated the 28th July 2009 and the withdrawal of the said application be maintained.

5. On the 18th September 2013, by consent parties agreed that the application dated 22nd May 2012 be disposed of by way of written submissions. Parties filed their written submission as is noted on the record, however before a ruling could be delivered, another application dated the 19th March 2015 was filed wherein on the 20th March 2015 the court directed that the said application be served.

6. On the 11th May 2015, the court held that since it had established from a representative of the Defendant that the status on the ground was that the Plaintiffs were the ones who were using and occupying the disputed premises. In the court's discretion, and in lieu of hearing the application dated 19th March 2015, the court ordered that the status quo be maintained pending hearing and determination of the main suit and that the application dated 19th March 2015 be held in abeyance. The Plaintiff was given 30 days to ensure that it had filed and served all its statements and documents. Corresponding leave was also granted to the Defendant do its part within 30 days thereafter.

7. On the 24th September 2015, after the matter had been certified ready for hearing, it had been transferred to this court upon its establishment wherein on the 30th January 2019 the same proceeded for hearing.

Plaintiff's case.

8. PW 1, Archbishop Elijah Wamburi testified that he served in the Israel Assemblies of God since 1972. That he became Arch Bishop in 1999. That 1st Defendant had been one of the Bishops of the church. That he also knew Johana Moses Chege and Joseph Kimani who was a church elder. That Sila Macheche was a member, Micah Kiragy was an elder, and Elizabeth was a chairlady while Jacob Kimani was a member of the church.

9. That in the beginning, the church had been registered in the year 1969 as Israel Assemblies of Kenya where they had been issued with a Certificate of Registration herein produced as Pf exhibit 1. That later in the year 1977, they had changed their name to Israel Assembly of Kenya where again they had been issued with a certificate of registration herein produced as Pf exhibit 2.

10. That in 1993 they had once again changed their name back to Israel Assemblies of God where again they had been issued with a certificate herein produced as Pf Exhibit 3.

11. That the suit land in dispute being parcel No. Nyandarua/North Kinangop township/34 was issued by the County Council of Nyandarua on the 1st February 1970 vide a lease for 99 years to the Israel Assemblies of Kenya Registered Trustees because in 1970 the church had trustees. He produced the lease as Pf exhibit 4 and confirmed that the same was in respect to North Kinangop Township/34 which was the suit land.

12. That upon being issued with the lease, the church had embarked on developing the said suit land by building the church buildings therein which was then registered in the name of Trustee.

13. That the allotment showed that the church trustees were registered as per the Certificate of incorporation herein produced as Pf exhibit 5, which certificate had been issued by former Minister Hon. Angaine on the 11th November 1970 to Israel Assemblies of Kenya, Registered Trustees. The persons who had been registered were:-

i) Joel Muturi Ndogo former Arch Bishop

ii) Ezekiel Sila Gitau – one of their members

iii) Joseph Mwangi Kariuki

iv) Paul Joshua Gachomo

v) Haron Ndungu

14. That the 1st Defendant had belonged to their church and had been the general secretary and also a trustee of the church as at 5th April 1976. That as a general secretary and trustee, he had been the custodian of the church documents and instruments of the church. That at the moment he was not a member of their church.
15. That the 1st Defendant had left their church on 4th August 1987 together with Kingori after a letter had been served upon them by the Arch Bishop Joel Ndogo expelling them from the church. That at the time, the church had been known as Israel Assemblies of Kenya.
16. The 1st Defendant had wanted to register his church known as All Nation Israel Assembly of Kenya which was not registered wherein he had later registered Israel Assembly of Kenya on 26th July 2005 and had been issued with a certificate herein produced as Pf exhibit 6. That the said church had been registered using the Plaintiffs' church documents.
17. When the Plaintiff was referred to a letter dated the 26th August 2008 herein produced as PF exhibit 7, he responded that the same was a list of members of Israel Assembly of Kenya which names had been listed by Tom Ogwen, the Assistant Deputy Registrar of Societies.
18. That after the 1st Defendant had registered the new church, they had had issues with him because he had taken their church documents. That the Plaintiffs had complained to the office of the Hon Attorney General wherein the Assistant Registrar of Societies had written a letter dated 7th February 2011 to the Secretary Israel Assembly of Kenya which letter had been forwarded to the District Officer Kinangop and which letter was to the effect that the 1st Defendant's church had registered a church that had a name that was identical to Plaintiff's church.
19. The Defendants had been advised to change the name of their society to avoid the confusion and to desist from interfering with the property registered under the former name of Israel Assemblies of God. He produced that said letter as Pf exhibit 8 and proceeded to testify that the Defendants had neither changed their name, nor stopped interfering with the Plaintiff's church property.
20. He was referred to another letter dated the 16th March 2011 wherein he testified that the same had been addressed to the District Commissioner- Nyandarua South District- Engineer which letter was in reference to societies Act and Israel Assembly of Kenya and had been written by Joseph Onyango of the Department of Registrar of Societies. Copies had also been issued to the District Officer Engineer, the Officer Commanding Station- Engineer Police, Chief Engineer location and the Arch Bishop/chairman Israel Assemblies of God as well as Israel Assembly of Kenya. The said letter had confirmed their complaint. It had also confirmed that the Defendant had been the secretary in their church, as well as the fact that the church had changed its name way before the 1st Defendant had registered his church. It had also confirmed the fact that the Defendant had taken the name of the Plaintiff's church and changed properties of the said church.
21. That by the time the letter was written, the Plaintiffs had already filed suit which had not taken off. The letter had asked the District Commissioner to assist with the tussle between the two parties.
22. That the suit land was one of the properties of their church wherein the tussle involved the closing of the church thus locking out the worshippers and preventing them from praying therein.
23. He produced the letter dated 16th March 2011 as Pf exhibit 9 and went on to testify that they had gone to the police many times. That the suit land No. 34 was the Israel Assemblies of God's property. That when he had conducted a search on the 8th December 2008, he found that the certificate of lease had been issued on the 12th March 2007 and was in the name of the Defendant's church.
24. That another search of 14th February 2011 in reference to No. Nyandarua North Kinangop Township/34 revealed that on the 23rd October 1972, the Israel Assemblies of Kenya had been the registered trustee wherein on the 12th March 2007 the certificate of lease had been issued. He produced the official search certificate as Pf exhibit 10 and testified that the lease had been issued to the Defendants without their knowledge.
25. He also testified that the suit land was the only property that they had been sure of and not others. He was categorical that the 1st Defendant's church was registered in the year 2005 but that he did not know how they got their title. That he had the original lease which he had never been asked to surrender. That the Defendant could claim proprietorship to the suit land because he had the custody of the Plaintiff Church's documents by virtue of the fact that he had been the secretary and trustee in the Plaintiff's church and therefore had access to their documents.
26. That currently, they were in possession of the suit land under the leadership of its Bishop Simon Kamau. That sometimes the 1st Defendant also went to the church. That all they had wanted was for the 1st Defendant to return their title documents, to be restrained from interfering with their church and to change the registration of their name. That the 1st Defendant had registered their church in the Plaintiff's name so that they could take their properties. The Plaintiff sought for costs of the suit.
27. In cross examination, it was the Plaintiff's evidence that their church had been registered in 1969. At the time, the Plaintiff and Defendant had been one and the same Church that went by the name of Israel Assemblies of Kenya from wherein the Defendants had broken away. He reiterated his evidence in chief and added that due to the hostility between the two factors, sometimes the police would be called in to quell them because both groups wanted to be leaders.

The Plaintiff closed its case.

Defendants' case

28. DW1, Harun Maina Kigoro testified that he was one of the Defendants and that he wished for the court to consider his statement alongside his evidence. That he was a Bishop of the church in charge of Central Diocese. That the original Church was founded in the year 1969. When the church started, he was not a member then. That the church had its buildings built on plot No. 34 Engineer after one Daniel Wakaba had applied for the plot. That the church had then been given the plot by the Nyandarua Council and an allotment letter issued. That he had joined the church in 1972 wherein it had been one church.

29. That in the year 1977, the leaders had a difference between them. There had been an election conducted by Isaac Mutota and Joel Muturi wherein Joel Muturi had defeated Isaac by Mutota. That at the time of the election, Isaac had had already changed the name of the church wherein after the election, the two leaders had a division.

30. The followers of **Israel Assemblies of Kenya** followed Joel while the followers of **Israel Assembly of Kenya** followed Isaac. That Isaac's group had left the church while Joel and his group had remained with the church.

31. That after some time in 1993, Joel had changed the name of the church from Israel Assembly of Kenya and had called it **Israel Assemblies of God**. That there had been another election done at Naivasha because Joel had few followers wherein he had looked for other followers from a church called A.K. Israel. That at that time the 1st Defendant Wilson Mujomba who had left with Joel Muturi had quarreled with Joel because Wilson had wanted the original name to be maintained.

32. That after Joel had changed the name to **Israel Assemblies of God**, he had left the church in Engineer and had gone with his followers. Thereafter a case had been filed in court. The witness confirmed that the allotment letter had been issued in the name of Israel Assemblies of Kenya which allotment letter was in the custody of Daniel Wakaba.

33. That they had then applied for title to the land wherein they had been issued with the same in 2005 which title was registered to the name of Israel Assembly of Kenya. He produced the title deed as Df exh 1 and testified that after they had conducted a search, they had found that the suit land belonged to Israel Assembly of Kenya, the Defendants herein. He produced the search certificate as Df exh 2.

34. That it was not true that they were the ones who had started the fracas but rather it had been Simeon Kamau and Jeremiah Munene who had started the fracas. That at the time, Joseph had been assaulted by Simeon Kamau who belonged to the other group and that it had not been true that leadership had been issued to Simeon Kamau because he had joined the A.K Church. He prayed that the suit be dismissed and the Defendants be paid costs, but that both parties continue to pray together.

35. In Cross-examination, the witness testified that his Archbishop was Wilson Muthoima also known as Joshua Wilson Muthioma whereas the Secretary General was known as Ibrahim Njenga. He corrected that Wilson was not the Archbishop of Assemblies of God.

36. That he joined the church in the year 1972 at which time the church was known as **Israel Assemblies of Kenya**. When he was referred to Plaintiff Exhibit 1, he confirmed that Israel Assemblies of Kenya was registered on 23rd January 1969 vide certificate No. 5234. That the name of the church had been changed by Isaac Mutota and renamed **Israel Assembly of Kenya** wherein it had been issued with a certificate dated 10th May 1977 ref No. 5234. He also confirmed that the certificate numbers were the same.

37. That Joel Muturi Ndogo was the Archbishop of Israel Assembly of Kenya but had changed the name to Israel Assemblies of God where he had been issued with a certificate dated the 8th July 1993 which had the same number like the other two certificates being No. 5234.

38. That in 1993 he had been in the Israel Assembly of God as a member and when Joel changed the name, he had remained in Israel Assembly of Kenya. His Bishop was Joshua Muthioma, whereas Wilson was Secretary General of Israel Assembly of Kenya.

39. He also testified that he could not remember when Joel had died although it could have been in the year 2011. That at the time of his death, the Secretary General was not Joshua Muthioma.

40. He confirmed that Israel Assembly of Kenya was registered on 26th July 2005 vide a certificate of registration No. 25178, whereas the original Israel Assembly of Kenya registration certificate was No. 5234 dated 10th May 1977 and that the certificates were different certificates.

41. When referred to Plaintiff Exhibit 5 being a lease dated the 1st February 1970 he confirmed that it was in relation to North Kinangop No. 34, the subject suit herein and was issued to the Israel Assemblies of Kenya.

42. That whereas their church was the singular one (Assembly), the church built on Plot 34 was built in the year 1972 wherein no other church had been built on that plot. That the lease of 1970 was for the church that was registered in the year 1970 and not the one registered in the year 2005. That the title was registered to the Assembly Church of Kenya in 1972 and that the property therein belongs to Israel Assembly of Kenya. That he knew Archbishop Kimani Gitamaka who was not a trustee in Israel Assembly of Kenya in 1972.

43. When he was referred to his witness statement, he testified that before Joel died, he had appointed Elijah Wamburi as the leader of the church and that it was not true that Wamburi had appointed Simeon Kamau as the leader of Church. That Simeon, who was seated in court, was the leader at the Engineer Church.

44. The witness disowned the greed card attached to the official search certificate which he had produced as Df exhibit 2 and testified that he had the original title of the land No. 34 which was in the name of Israel Assembly of Kenya Registered trustees had that it had a lease of 99 years from the year 1970.

45. He also confirmed that he belonged to Israel Assembly of Kenya which was registered in the year 2005. That the same was different from Israel Assemblies of God. That the church on the suit land was built by the older church who are the owners of Df exhibit 2 and that the Plaintiffs have filed suit claiming this title herein produced as Df exh 2.

46. He confirmed that Pf exh 12 was in the name Israel Assembly of Kenya and was issued on the 17th July 1991.

47. That Pf exh 13 was registered in the name of Israel Assembly of Kenya on the 4th July 1987 and they were not interested in that plot either

48. That Pf Exhibit 14 was registered in the name of Israel Assembly of Kenya registered in 12th December 1995 and they had no issue with the same.

49. In re-examination, the defence witness testified that their church had been registered in 2005 after they had 'returned its name' which had been changed by Joel Muturi who was the Archbishop. That their church was still the 1st Church. That after Joel and group had changed the name of the original church, they had left wherein the Defendants had returned the name to the Original church.

The Defendants closed their case.

50. Parties filed their written submissions to which I shall consider as herein under.

Plaintiff's submissions.

51. After summarizing both the evidence by the Plaintiffs and the Defendant the Plaintiff framed issues for determination as follows;

- i. Are the Plaintiffs and the Defendants one and the same church
- ii. Who is the lawful owner of Nyandarua/North Kinangop Township/34 as between the Plaintiffs and the Defendants
- iii. Who is entitled to the prayers sought and who should bear the costs of the suit

52. On the first issue for determination it was the Plaintiffs' submission that the two entities were different, the Plaintiff having been registered first on the 23rd June of 1969 and a certificate of registration number 5234 having been issued by the Registrar of Societies. That at the time, the Plaintiff was known as Israel Assemblies of Kenya. That indeed on 10th May 1977 Israel Assemblies of Kenya changed its name to Israel Assembly of Kenya where the certificate of registration retained the same numbers being 5234. The church name was further changed on or about the 8th July 1993 to Israel Assemblies of God but still retained the same registration number.

53. That indeed DW1 had also confirmed that the present Israel Assembly of Kenya was registered on 26th July 2005. The parties are therefore in agreement that Israel Assemblies of Kenya was the one that changed its name to Israel Assembly of Kenya and later Israel Assemblies of God, the Plaintiff herein.

54. Indeed the Defendants witness also confirmed that although the Plaintiff and the Defendant initially belonged to one church, the present Defendant the Israel Assembly of Kenya and Israel Assemblies of God were two different churches with different church leadership.

55. It was also clear that while the Plaintiffs had retained their original registration certificate number 5234, the Defendants had registered a new church known as Israel Assembly of Kenya on the 26th July 2005 wherein they had been issued with certificate registration No. 25178.

56. On the second issue for determination, it was the Plaintiffs submission that there was no dispute that at one time in history, the parties herein belonged to one church known as Israel Assemblies of Kenya which church had been allotted the suit land in the year 1970 and a lease, Pf exh 4 was registered in favour of the said Israel Assemblies of Kenya Registered Trustees. That the Defendant herein Rev Joshua Wilson Muthioma was one of the registered trustees in the list of trustees of Israel Assemblies of Kenya as per Pf exh 5. That after the allocation of the suit land, the Israel Assemblies of Kenya put up the present church.

57. That following a dispute between the Defendant and the Plaintiff church, the 1st Defendant herein had left the Plaintiffs' church wherein he had gone and had formed his church on the 26th July 2005, by which time the Plaintiff had been on the suit land for 35 years. That from the time of its registration, the Defendant had never put up any structures on the suit land.

58. That although the Defendant had relied on the certificate of lease issued in its favor on 12th March 2007 as the basis for claiming ownership of the suit land. The Plaintiff contended that the said title deed was fraudulently obtained through fraudulent means. The Plaintiff relied on the case of **Vijay Morjaria arevs Nansingh Madhusingh Darbar & Another [2002] eKLR** to submit that fraudulent conduct must be distinctively alleged and distinctively proved and that it was not allowable to leave fraud to be inferred from the facts.

59. To prove the Defendants fraudulent conduct, the Plaintiff outlined the particulars of fraud as follows;

- i. That the Defendant had changed the name of the lease issued to the Plaintiff from Israel Assemblies of Kenya Registered trustees to Israel Assembly of Kenya Registered Trustee.
- ii. That the Defendants had purported to be the registered trustees of Israel Assemblies of God and who are the true successors in the title of Israel Assemblies of Kenya.
- iii. That the Defendants had obtained registration of a certificate of lease without surrender of the original lease issued to Israel Assembly of Kenya Registered Trustees.
- iv. That the Defendants had acquired a lease certificate for property which did not belong to them and knowingly deceiving and or acting in cohorts with the Land Registrar Nyandarua to obtained the certificate for a totally different entity.
- v. That the Defendants had obtained a lease certificate without any foundation as no lease had been executed in their favour.

60. That since the burden of proving fraud was left to the person claiming the same, the standard of proof was higher than the balance of convenience as was held in the case of **Ndolo vs Ndolo [2008] 1KLR (G & F) 742** the Plaintiff submitted on the history of the formation of both the parties to the effect that there was no dispute that when the Defendant came into life in 2005 there existed a church known as Israel Assemblies of Kenya registration number 5234 that had been registered on the 23rd January 1969.

61. That this had been the same church that had changed its name to Israel Assembly of Kenya on the 10th May 1977 and later to Israel Assemblies of God on the 8th July 1993. That certificate of registration had retained the same number being 5234. That at the time, one of the trustees to the Plaintiffs' church when the suit land was allocated, is currently a trustee of the Defendant church. That the Plaintiff had adduced evidence that they had objected to the use of the name 'Israel Assembly of Kenya' which name the Plaintiff had used in 1977 but had abandoned it in the year 1993 where the Registrar of Societies had directed the Defendant to submit the certificate issued for cancellation which was never done.

62. That the certificate held by the Defendants clearly showed that the suit land was first registered in the name of Israel Assembly of Kenya (Registered Trustees) on the 23rd October 1972, which position was also confirmed by the certificate of search herein produced as Pf exh 10.

63. The the Plaintiff relied on the provisions of Sections 106(1), 80, 28 and 80 (1) Land Registration Act to submit that where it was clear that acts of fraud had been used to obtain title, the court had unlimited jurisdiction to cancel the said title and/or lease.

64. In regard to the present matter, it was the Plaintiffs' submission that they had proved their claim of fraud as against the Defendant to the required standard and sought that the court cancels the certificate of lease issued to the Defendant on 12th March 2007 as prayed.

65. On the last issue for determination as to who was entitled to the prayers sought and who should bear the costs of the suit, it was the Plaintiffs submission that the Defendant chose to leave their church and establish a different church in the year 2005. They cannot therefore be seen to want to carry or take away the previous developments that were erected on the suit land in the name of the Plaintiffs' church. That it was the old church then known as Israel Assemblies of Kenya and now Israel Assemblies of God that was legally allocated the suit land and is therefore the rightful owner.

66. That on the issue of costs, the Plaintiff submitted that the same followed the event and that they were entitled to costs of this suit.

Defendants' Submission

67. The Defendants submission was based on two issues for determination which were as follows ;

- i. Who were the members of the original church before splitting
- ii. Who are the current legal owners of the said parcel of land

68. That on the first issue for determination, it was the Defendants submissions that both the Plaintiff and the Defendants explained in detail on the history of the church which was formed in the year 1969 and was issued with a lease in the name of Israel Assemblies of Kenya in the year 1970.

69. That thereafter, the church got into a conflict amongst its members where it was resolved that there ought to be an election. It was the Defendants submission that before the elections were held, one Isaac Mutota without consulting the members proceeded to the Registrar of Societies and changed the name of the church from Israel Assemblies of Kenya to Israel Assembly of Kenya. That later the parties had an election where Isaac Mutota was defeated by his rival John Were Muturi Ndogo, the new Arch Bishop. That at all material times, the registered name was now known as Israel Assembly of Kenya and upon members realizing the changes there was a further division where some members supported the change when others did not, the then Arch Bishop Joshua Muthioma intended to retain the original name. This was the basis of the dispute between the parties. That the Plaintiffs having not been satisfied with the decision, decided to form another church leaving the original church still in existence.

70. It was the Defendants' submission that he who alleges must prove and that the proof required in this case was that of a balance of probabilities wherein they relied on the decided case of **Miller vs. Minister of Pensions [1947]2 ALL ER.**

71. It was the Defendants' submission that unlike what the Plaintiffs would want the court to believe, that registration of the church was done while they were still in church, the testimony of DW1 was to the effect that changing of the church name was done without the consent of the members of Israel Assembly of God by one Joseph.

72. That both conflicting parties have been worshipping in the same premise but with different leaders and the present case was filed by the Plaintiffs with the intention to evict other members from the premises of the church due to the fact that they were not willing to conform to the changes. That although it the Plaintiffs' case was that the names of the church changed unanimously, yet they did not produce any record to show there was consensus before the change of the names. That under Section 21 of the Societies Act, the same required that exempted society to notify the Registrar in case of change of name. This provision of the law was complied with by the Defendant who had notified the Registrar of Societies and had continued conducting its business with the original name which had been sanctioned by the Registrar of Societies.

73. That Section 4(1) of the Societies Act makes every society which was not registered or exempted from registration an unlawful society. That the Defendants were the legally registered society wherein the Plaintiffs who claimed to have changed their names legally failed to justify their claim.

74. On the third question for determination as to who were the current legal owners of the said parcels suit of land, it was the Defendants submission that the Plaintiffs had not proved their case as required by law and that their claim was sustainable given that the Defendants had been issued with a title deed. That the Plaintiffs' intention for filing the present suit was with the aim of evicting the believer from a church where they had been in possession of for a long period of time. That the Plaintiffs did not involve the Land Registrar or any officers involved in the issuance of the title deed to testify on their behalf since the Defendants would not have engaged in fraudulent acts of obtaining the title without engaging with a third party.

75. That the dispute between the parties would have been sorted by the Registrar of Society as provided for under Section 18 of the Societies Act which provision clearly provides for a mechanism for dealing with disputes amongst its members and/or officials of the church. That looking at the matter in question, there was no doubt that there was a dispute revolving around an election that arose between the parties.

76. The Defendants' and submission was that the Plaintiffs had failed to adduce evidence to show how the Defendants fraudulently registered themselves as owners of the suit land. The Defendants' certificate of lease was indefeasible having had followed the due process of law and that judgment as well as the costs of the entire suit should be given in favor of the Defendants.

Determination.

77. I have considered the matter before me the, evidence as well as the submission, the authorities and the applicable law. I find that this matter is one that pities two functions of two different churches that were initially the same church, against each other over the ownership, use and occupation of parcels of land known as North Kinangop Township/34 wherein the Plaintiff has alleged acts of fraud against the Defendant in the acquisition of the title. I find that the dispute herein has nothing to do with the leadership wrangles.

78. Having laid down the background of the matter in question and having considered the evidence adduced in the matter, the issues that come out clearly for determination are as follows.

- i. Whether there was fraud involved in the registration of the Nyandarua/North Kinangop Township/34 to **Israel Assembly of Kenya** the Defendants herein.
- ii. Do the Plaintiffs have any cause of action against the Defendants herein?
- iii. Who should pay the cost of the suit?

79. On the first issue for determination, having pleaded fraud and illegality on the part of the Defendants in the manner in which they obtained the suit land, the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In **R.G Patel vs Lalji Makanji 1957 E.A 314**, the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

80. I have no doubt in my mind that the Plaintiffs herein have distinctly pleaded the facts on which fraud is alleged against the Defendants. The next step however was for them to prove those allegations to the required standard. I will therefore interrogate this allegation of fraud as submitted by the Plaintiff.

81. It was the Plaintiff's testimony that the church herein, **Israel Assemblies of Kenya** having been registered in the year 1969, had been issued with the suit land in 1970 on lease for 99 years. That the Defendants herein who had been registered on 26th July 2005 had fraudulently presented themselves as the registered proprietors of the land thereby collecting title deed by which they now claimed ownership to the suit land herein.

82. The Plaintiffs' case was that the Defendants' acts of fraud included the following conduct:

- i. That the Defendant had changed the name of the lease issued to the Plaintiff from Israel Assemblies of Kenya Registered trustees to Israel Assembly of Kenya Registered Trustee.

- ii. That the Defendants had purported to be the registered trustees of Israel Assemblies of God and who are the true successors in the title of Israel Assemblies of Kenya
- iii. That the Defendants had obtained registration of a certificate of lease without surrender of the original lease issued to Israel Assembly of Kenya Registered Trustees
- iv. That the Defendants had acquired a lease certificate for property which did not belong to them and knowingly deceiving and or acting in cohorts with the Land Registrar Nyandarua to obtained the certificate for a totally different entity
- v. That the Defendants had obtained a lease certificate without any foundation as no lease had been executed in their favour.

83. I find the undisputed facts of this case being that:

84. That the original Church had been registered in the year 1969 as Israel Assemblies of Kenya wherein they had been issued with a Certificate of Registration No.5234.

85. It is also not in contention that vide a lease for 99 years dated the 1st February 1970, the suit land herein being parcel No. North Kinangop township/34 had been issued to the Israel Assemblies of Kenya Registered Trustees upon an application for issuance of allocation of land by one Daniel Wakaba.

86. It is also not in contention that upon being issued with the lease, the church had embarked on developing the said suit land wherein they had built the present church building.

87. That further, a certificate of incorporation was issued to the Israel Assemblies of Kenya, Registered Trustees on the 11th November 1970.

88. It is also not in dispute that Defendant, Archbishop Joshua Wilson Muthioma was the general secretary and also a trustee of the original church as at 5th April 1976

89. That later in the year 1977, there had emerged a difference in the leadership of the church wherein the church had split into two and whereas the Plaintiffs retained their original registration certificate number 5234, the Defendants registered a new church using the Plaintiff's old name known as **Israel Assembly of Kenya** on the 26th July 2005 wherein they had been issued with certificate registration No. 25178.

90. That later in the year 1977, the Israel Assemblies of Kenya Registered Trustees had changed their name to Israel Assembly of Kenya wherein they had still retained their number of their certificate registration.

91. In the year 1993 they had once again changed their name to Israel Assemblies of God but still retained the same number of their initial certificate of registration.

92. In effect therefore the Plaintiff being the Israel Assemblies of Kenya Registered Trustees having decided to change its name a couple of times was still the same entity going by their certificate of registration.

93. It is also not in dispute that the Defendant herein having registered themselves as the **Israel Assembly of Kenya** on the 26th July 2005, their registration raised concern with the Registrar of Societies who vide his letter dated the 7th February 2011, expressed his concern over this registration which was in a name that was identical to the Plaintiff's name 'Israel Assemblies of God' (formally Israel Assemblies of Kenya) where he had warned them that their registration was liable for cancellation and/or suspension as the name continued to deceive the public and members of either society. The Defendants had then been asked to change their name.

94. It is also not in dispute that after forming the **Israel Assembly of Kenya**, the Defendants went and collected the title deed to the suit land from the land registry on the 12th March 2007 which title then vested the suit land in them as proprietors wherein they now lay claim of proprietorship to the suit land.

95. Now that the root of the Defendants title has been challenged, the court is under duty to investigate whether the said title was procured after the Defendant had conformed to procedure and can properly trace its root without a break in the chain. And further whether the Defendants had demonstrated how they got their title starting with its root because no party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property.

96. The evidence tabled in court through supporting documents, was that after the registration of the Plaintiff church in the year 1969, it had been issued with a lease to the suit land on the 1970 wherein the building of the church had been constructed on the suit land in 1975. It was further confirmed that the church had changed its name in 1977 to Israel Assembly of Kenya. The green card produced herein was to the effect that the title was registered to the Israel Assembly of Kenya on the 23rd October 1972. That in 1993 the Plaintiffs had changed their name to Israel Assemblies of God, the present name. At all particular times, they had maintained their registration number being 5234. The root of their title was traced to when they had been registered, when they had been issued the lease after which a title in their previous name of **Israel Assembly of Kenya** had been issued in 1972 whereby they had then built the building of the church in 1975. All these was done before the formation and registration of the Defendant church.

97. Evidence also emerged that the Defendants herein registered their church in the year 2005 using the previous name of the Plaintiff

church being Israel Assembly of Kenya. That this registration had raised issues with the Registrar of Societies who had warned them that their registration was liable for cancellation and or suspension as the name continued to deceive the public and members of either society. The Defendants had then been asked to change their name.

98. Suffice to note that upon registration of the Defendants Church in 2005 using the Plaintiff's previous name, they had gone to the Land Registry and had collected the title deed of the suit land on the 12th March 2007. It should not be lost that title to the suit land had already been registered to the Plaintiff on 23rd October 1972 using its previous name.

99. The Defendants did not lay basis as to how they had acquired the suit land, since the land had been issued to the Plaintiff church initially, the 'Israel Assemblies of Kenya' and title had been registered to the Plaintiff's subsequent name of 'Israel Assembly of Kenya,' before the formation of the Defendant's church. It was incumbent of the Defendant to adduce evidence of how the same suit land had been issued to it. There were no letters of allocation produced in court, no letters of revocation of the lease and/or title issued to the Plaintiff church was produced in court revoking the Plaintiff's lease and therefore freeing the suit land for re-allocation

100. The land having been allocated to the Plaintiff and a lease issued therein, *without cancellation of the original lease, it retained its sanctity*, the same was therefore not available for allocation and if at all the same had been available, then there would have been a process in which it would be repossessed and re-allocated to the Defendant. No such evidence was tendered.

101. The search certificate as well as the green card were in agreement that the title to the suit land had been registered to the Plaintiff in 1972 when it was still operating under the Title "Israel Assembly of Kenya Registered Trustees, which was before the Defendant church came into existence.

102. The Court of Appeal in the case of **Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR**, held as follows:

'We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.'

103. Whereas the law respects and upholds sanctity of title, it also provides for situations when title shall not be absolute and indefeasible.

104. Having established that that the parcels of land in question were registered under the Registered Land Act, Act (Cap 300) which was repealed upon the passage of the **Land Registration Act, 2012**, their registration was governed by the provisions of Section 26 (1) of the Land Registration Act of 2012 which provides as follows:-

"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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.

105. **Is the title impeachable by virtue of section 26?** It thus follows that in order to challenge the Defendant's title so as to have it cancelled as prayed by the Plaintiff, evidence according to Section 26 of the Act ought to have been led to prove that the Defendant's title to parcel No. Nyandarua/North Kinangop Township/34 was acquired fraudulently, through misrepresentation, illegally, un-procedurally, or through a corrupt scheme.

106. In the present case, the Defendants cannot shield themselves with the title that they hold. The act of the Defendant of processing the registering of their church in the Plaintiff Church's former name and refusing to change the same despite warning of dire consequence from the Registrar of Societies and thereafter collecting title to the suit land in the said name while masquerading to be the Plaintiffs, were patently illegal and un-procedural and the Defendant must have known what they were doing. It is therefore clear the title held by the Defendants can be impugned under section 26(1) (a) of the Act as they were party to the fraud and/or misrepresentation.

107. I appreciate that under **Section 107(1) of the Evidence Act**, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which (s)he asserts, must prove that those facts exist. I am satisfied that the Plaintiffs have discharged their burden of its claim against the Defendant.

108. In the circumstances, I find that the Plaintiffs have established their case on a balance of probabilities and that they deserve the orders sought in their suit vide their Plaint dated the 28th July 2009 and therefore proceed to allow the same with costs.

Dated and delivered at Nyahururu this 19th day of November 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

