



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 17 OF 2014 (FORMERLY HCC 75 OF 2011)

PIUS LIKAMA – Treasurer Mercy Children Centre

ELIZABETH FULTON – Secretary Mercy Children Centre

LEWIS FULTON – Co-Director Mercy Children Centre.....PLAINTIFFS

TODD LORENTZ – Donor Mercy Children Centre

MERCY CHILDREN CENTRE

ONE CHILD’S VILLAGE

VERSUS

CHARLES OUMA ODUOR.....DEFENDANT

J U D G E M E N T

1. By a plaint dated 28/9/2011 and filed on 11/10/2011, the six (6) Plaintiffs – **(1) PIUS LIKAMI, (2) ELIZABETH FULTON, (3) LEWIS FULTON, (4) TODD LORENTZ, (5) MERCY CHILDREN CENTRE (MCC)** and **(6) ONE CHILD VILLAGE (OCV)** – laid claim of ownership on land parcel No. MARACHI/BUMALA/1962 (disputed land) of which the Defendant – **CHARLES OUMA ODUOR** – was the registered owner. The Plaintiffs position then, as now, was that the disputed land was bought with funds availed by them and the Defendant, who was their point-man on the ground, was supposed to purchase the land and hold it in trust for them. The Defendant however, upon receiving funds, became crafty and/or fraudulent and proceeded to purchase the disputed land and register it as his own.

2. The Plaintiffs were involved in charitable work, which involved giving help to orphaned children. The Defendant was apparently of like mind and the Plaintiffs found him useful to them and their cause. The source of funds seemed to be the 6th Plaintiff, a global entity incorporated in CANADA, while the 5th Plaintiff was the locally registered organ through which the 6th Plaintiff sought to operationalize its activities locally. The other Plaintiffs are individuals who held various positions in both the 5th and 6th Defendant. Infact the 1st, 2nd and 3rd Plaintiffs were treasurer, secretary and co-director respectively of the 5th Plaintiff and they also doubled up as trustees. The 4th Plaintiff was a director of the 6th Plaintiff.

3. The plaint filed earlier was amended and re-filed on 1/11/2011. The essence of the amendment involved adding two other Defendants – **(1) THE DISTRICT LAND REGISTRAR** and **(2) THE ATTORNEY GENERAL**. These two were added because of their actual or perceived fraudulent collusion to register the disputed land in 1st Defendants name. It is important to clarify that the only Defendant in the original plaint became 1st Defendant upon amendment.

4. The 1st Defendant had himself filed his own suit – SPM CC No. 259, BUSIA – against the 1st, 2nd, 3rd and 4th Plaintiffs seeking, *interalia*, a permanent restraining order against them relating to the disputed land. The 1st Defendant, as Plaintiff in the lower court case, had pleaded that the disputed land was his own. He alleged that these four Plaintiffs in this case wanted to transfer it to someone else.

5. On 2/10/2013, it was agreed that the lower court matter and this suit be heard together, with the lower court matter being the lead or main suit while this suit was to be the counter claim. The court even directed that the lower court file be put together with this one. That never happened, however and this suit proceeded as if the lower court matter was not part of it.

6. The prayers sought in the suit are as follows:

Prayer (a): A declaration that land parcel No.

MARACHI/BUMALA/1962 is held in trust and for the benefit of the 5th Plaintiff and that the 1st Defendant is in breach of his duty as trustee.

Prayer (b): A permanent injunction against the 1st Defendant by himself, his servants, workers and/or agents from transferring, putting into use, subdividing, selling, leasing, alienating, and/or in any whatsoever interfering with L.R. NO. MARACHI/BUMALA/1962.

Prayer (c): An order for the transfer of the suit land MARACHI/BUMALA/1962 to one ROBERT ONDHOWE to hold in trust and for the benefit of the Plaintiffs.

Prayer (d): An order for the cancellation of the title deed issued by the 2nd Defendant to the suit land issued on 5/4/2001.

Prayer (e): An order to 2nd Defendant for rectification of the register in his custody to reflect the transfer of the land MARACHI/BUMALA/1962 as prayed under paragraph 10 above (meaning paragraph 10 of the amended plaint).

7. In this suit, the 1st Defendant filed a defence on 19/10/2011 denying the Plaintiffs claim. It is a defence to which the Plaintiffs responded vide a reply to defence filed on 1/11/2011. It is a response that reiterated the Plaintiffs claim while simultaneously joining issues with the defence.

8. The matter was first heard before my predecessor (Kibunja J) on 28/1/2015. Only one witness – JANE MILFRED SITAWA – testified. She was PW1 and had the power of Attorney from 4th Plaintiff to do so. PW1 reiterated what the amended plaint contains during hearing. The defence was conducted before me on 6/11/2017. From his evidence, it is clear that the 1st Defendant would wish the suit land to be transferred to 5th Plaintiff (MERCY CHILDREN CENTRE). After hearing the matter, both sides were supposed to file written submissions but as I write this judgement, only the Plaintiffs have filed submissions. It is important also to point out that both the 2nd and 3rd Defendant did not participate in the proceedings.

9. The Plaintiff's submissions pointed out, *inter alia*, some of the prayers in the suit have been overtaken by events. Indeed they were. And that is why I have deliberately avoided giving a detailed overview or analysis of evidence. What the Plaintiffs set out to achieve by filing this suit has been largely achieved. There were supervening developments that led to change of ownership of the disputed land from 1st Defendant to a 3rd party in trust for 5th Plaintiff. That is precisely what the Plaintiffs wanted, and that comes out clearly at paragraph 37 of the amended plaint.

10. The orders sought were premised on the fact that the 1st Defendant was the registered owner of the disputed land. Now that he is not, issuance of the orders would be in vain.

11. I need to point out that during hearing, the 1st Defendant gave evidence that showed a fundamental shift in his position. In the pleadings, everything rested on the alleged fact that the land was his. Infact, it is on that basis that he was seeking a permanent injunction against some of the Plaintiffs. But his evidence during hearing shows that he would now wish the suit land to be registered in the name of the 5th Plaintiff. Even if we were to assume that there were no supervening circumstances affecting the suit, the 1st Defendant's wish is not one that can be easily granted. And this is because pleadings form the basis upon which the orders are granted. The 1st Defendant needed to amend his defence to reflect this new shift. He never did so and his change of position during hearing would not avail much to him.

12. The only issue I need to consider in this suit is one of costs. It is a simple issue. There would not have been a suit if the 1st Defendant had not registered the land in a manner showing or suggesting that he was the sole owner. I have had a look at the documents availed by the Plaintiffs and it is clear that the 1st Defendant was meant to be a trustee or, if you like, a caretaker. Without hesitation therefore, I award costs of the suit to the Plaintiffs. I need to make it clear that no decision is made on prayers (a), (b), (c), (d) and (e) in the amended plaint as they have all been overtaken by events.

Dated, signed and delivered at Busia this 19th day of April, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff:

2nd Plaintiff:

3rd Plaintiff:

4th Plaintiff:

5th Plaintiff:

6th Plaintiff:

Defendants:

Counsel of Plaintiffs.....

Counsel of Defendants.....