



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 32 OF 2009 (O.S)

GIBSON NG'ONDU

FRANCIS MAINGA

GEORGE NDOLO

ISAAC WAMBUA NZYOKA AND 1,121 OTHERS.....PLAINTIFFS

VERSUS

ALEXANDER MUTINDA MWINI.....1ST DEFENDANT

ALBANUS PAUL MUTISYA.....2ND DEFENDANT

BERNARD MUTUKU NDUNGU.....3RD DEFENDANT

(All the above sued as the Chairman, Secretary & Treasurer, Kenya

National Union of Teachers, Machakos Branch) and Executors

as trustees of the charge dated 1st December, 2008

KENYA NATIONAL UNION OF TEACHERS.....4TH DEFENDANT

KENYA NATIONAL UNION OF TEACHERS,

MACHAKOS BRANCH.....5TH DEFENDANT

REGISTERED TRUSTEES, KENYA NATIONAL UNION

OF TEACHERS, MACHAKOS BRANCH.....6TH DEFENDANT

JUDGMENT

Introduction:

1. This suit was commenced by way of an Originating Summons dated 16th February, 2009. The Originating Summons was then amended on 30th July, 2014 in which the Plaintiffs are seeking for the following reliefs:

- a. A declaration that the 1,125 persons named in the list marked 'GN-1' and annexed to the Affidavit filed herewith are the beneficial owners of the Land Title Machakos Municipality Block 1/59 (the property).*
- b. A declaration that the loan given on the security of the aforesaid property in favour of IDB Capital Limited is unauthorized and therefore illegal.*
- c. An order directed at the Defendants to transfer Land Title Machakos Municipality Block 1/59 to the Plaintiffs' nominee, that is, United Retired Teachers Company Limited.*

d. An order directed at the District Land Registrar, Machakos to cancel the registration of the said charge dated 1st December, 2008 in favour of IDB Capital Limited.

e. Such orders and directions as may appropriately be consequential to the declarations sought and to the cancellation of the registration of the charge dated 1st December, 2008 registered in favour of IDB Capital Limited.

f. Such other orders, directions and reliefs as may be necessary to serve the ends of justice.

2. The Amended Originating Summons is supported by the Affidavit of the 1st Plaintiff, who swore it on behalf of all the Plaintiffs. The 1st Plaintiff deponed that all the Plaintiffs were teachers in the Greater Machakos Region (*Masaku District and Makueni District*) in the years 1966, 1967 and 1968 and that to secure their future after retirement, they agreed to contribute monies from their salaries for the purpose of investing.

3. The 1st Plaintiff deponed that in 1966, the said teachers resolved to contribute Kshs. 8 each by 1968 with a view of purchasing a commercial property in Machakos; that they bought parcel of land known as Machakos Municipality Block 1/59 for Kshs. 36,000 and that the property was registered in the name of the trustees appointed by the members who were all officials of Kenya National Union of Teachers (KNUT) Machakos Branch.

4. According to the Plaintiffs, after purchasing the suit premises, they agreed to have Kenya National Union of Teachers (KNUT), Machakos Branch, where they were all members to use the premises for its operations and leased out the remaining part of the building to other tenants; that after they retired, they formed a committee to pursue the registration of the property in their name and that instead, the Defendants used the title document to secure a loan facility of Kshs. 30,000,000 from IDB Capital Limited.

5. It is the Plaintiffs' case that the 4th Defendant advised them to register a company for the purpose of owning the suit land, which they did and that the suit land was to be transferred to their company after settling the loan that it owed the bank. However, that never happened.

6. The 1st Plaintiff finally deponed that all the documents relating to the purchase of the suit premises are in the custody of the Defendants and that the Defendants should be compelled to transfer the land to them.

7. The Executive Secretary of the 5th Defendant deponed that it is not true that the Plaintiffs were teachers in the Greater Machakos District in the alleged years; that the suit land is the property of the 5th Defendant solely purchased for the benefit of all teachers who are its members and that the suit property is not registered in the name of the 5th Defendant in trust for the Plaintiffs.

8. The 4th Defendant's Secretary General deponed that the 4th Defendant was registered as a Trade Union on 14th May, 1959; that the membership of the Union is to every teacher and that a member of the Union ceases to be such if he retires or resigns from the teaching services.

9. The Secretary General of Kenya National Union of Teachers (KNUT) deponed that the Union has established branches all over the country and that the property owned by the branches are the common property of the Union.

10. It is the 4th Defendant's case that as members of the Union, the Plaintiffs contributed their monthly subscription of Kshs. 8 to the Union accounts for the performance of the objectives of the Union; that the suit land was purchased in the year 1968 by the Union through its funds and that all Union properties are registered in the name of registered trustees who ordinarily hold the position for a certain term.

The Plaintiffs' case:

11. The Originating Summons proceeded by way of *viva voce* evidence.

12. The 4th Plaintiff, PW1, informed the court that he had been authorized by the other Plaintiffs to testify on their behalf; that he was employed by the Kenya National Union of Teachers (KNUT) Machakos Branch as its Executive Officer in 1963 and that some of his duties included keeping records of all Union monies collected from the County Councils.

13. It was the evidence of PW1 that the Plaintiffs were teachers in the Greater Machakos County, which include Machakos and Makueni; that the Machakos Branch members agreed and came up with a Housing Project and that the teachers in the Branch agreed to contribute monies from their salaries for the purpose of investing the same to secure their future.

14. It was the evidence of PW1 that in 1966, the teachers of the Greater Machakos Region who are represented by the Plaintiffs resolved in their Annual General Meeting to have every teacher contribute Kshs. 8 by 1968 with a view of purchasing a commercial property in Machakos town and that by 1968, the amount raised by the teachers was sufficient and that they purchased the suit land for Kshs. 36,000 from one Gulab Morah.

15. According to PW1, the number of the teachers who participated in the purchase of the land was 1,125 and that the suit property was registered in the name of the trustees appointed by the members, who were all officials of Kenya National Union of Teachers (KNUT), Machakos Branch; that the title to the suit land has always been registered in trust for their benefit and that after the purchase, the Plaintiffs unanimously agreed to have Kenya National Union of Teachers (KNUT), Machakos Branch use the premises for its operations and leased out the remaining part to other tenants.

16. PW1 informed the court that they later on formed a committee with a view of pursuing registration of the suit property in their names; that the 5th Defendant charged the land to IDB Capital Limited for a sum of Kshs. 30,000,000 without their knowledge and that the 4th Defendant informed them that it had no objection to the transfer of the suit land in their name if and after constituting themselves into a legal entity.

17. According to PW1, they registered an entity known as United Retired Teachers Self Help Group for the purpose of owning the property; that they later on registered a limited liability company known as United Retired Teachers Company Limited and that the 4th and 5th Defendants have not transferred the suit land to the Plaintiffs or their duly registered company. The witness produced in evidence the documents annexed on the Supporting Affidavit and the Further Affidavit as PEXB 1 and 2. I shall revert to the documents in a short while.

18. In cross-examination, PW1 stated that he was employed as a teacher in 1963 although he started working as a teacher in 1953; that he joined Kenya National Union of Teachers (KNUT) in 1958 and that he was an Executive Officer for both the branch and the head office Kenya National Union of Teachers (KNUT).

19. It was the evidence of PW1 that most of the initial members who contributed to the purchase of the suit land have died; that by 1957, they were already making monthly contributions to Kenya National Union of Teachers (KNUT); that he was the National Treasurer of KNUT in 1963 and that he served in that capacity for twenty (20) years.

20. PW1 informed the court that the supreme body of Kenya National Union of Teachers (KNUT) is the Annual Delegates Conference and that at the Branch level, the members of KNUT are required to have an Executive Committee, just like the Executive Committee of the national office.

21. PW1 denied that the Kshs. 8 that the teachers of Machakos used to contribute was in respect of dues to the Union and that the Kshs. 8 for the suit property was collected at the Branch level. PW1 stated that the Plaintiffs paid to their lawyer the deposit of Kshs. 9,000 for the building and that the receipt that was given by the lawyer is in the KNUT office. According to PW1, the balance of the purchase price of Kshs. 27,000 was borrowed from the bank and that other than being an official of KNUT, he was also a Trustee for the Plaintiffs at the time of the purchase of the suit premises.

22. Although the suit land was registered in the names of trustees of Kenya National Union of Teachers (KNUT) in 1974, PW1 denied that the said Trustees were representing KNUT Machakos Branch; that the payment of Kshs. 8 per month by the Plaintiffs was by way of a check-off system by the then County Council and that it is the Plaintiffs who borrowed the balance of the purchase price and not Kenya National Union of Teachers (KNUT).

23. The 1st Plaintiff, PW2, informed the court that he joined the teaching profession in 1966; that in 1966, teachers used to be paid by the County Council and that they mobilized teachers to buy the suit property as an investment venture.

24. According to PW2, they contributed Kshs. 4 in the first year and a further Kshs. 4 in the second year; that the suit premises was registered in the names of three trustees who were also the officials of KNUT, Machakos Branch and that the National office (KNUT) agreed to have the building registered in the names of the representatives of the members who bought the premises.

25. PW2 informed the court that after registering a company as advised by the National office, they discovered that KNUT had used the suit property as security for Kshs. 30,000,000 and that KNUT agreed to transfer the land to the Plaintiffs upon re-paying the loan.

26. On cross-examination, PW2 stated that they leased a portion of the building to KNUT, Machakos Branch, without charging them rent because they were part of KNUT; that they appointed a select committee in 1991 to manage the suit premises and that other than KNUT, the other tenants in the premises used to pay rent to an account that they had opened. It was the evidence of PW2 that they discovered that KNUT, Machakos Branch had the suit premises unlawfully transferred to the National office in 1998.

The Defence Case:

27. The Executive Secretary of KNUT, Machakos Branch, stated that the 5th Defendant is one of the Branches of KNUT, a trade Union for teachers who are employed by the Teachers Service Commission; that the Union conducts its business through its elected officials who are elected by members and that the Branches have the power to acquire property.

28. DW1 stated that the suit property is owned by Kenya National Union of Teachers (KNUT) and is registered in the names of its Trustees; that the building was never purchased for some teachers as alleged by the Plaintiffs and that none of the retired teachers can claim that they own the suit premises.

29. In cross-examination, DW1 stated that he joined the teaching profession in 1994 and became a member of KNUT the same year. According to DW1, he became an executive member of KNUT, Machakos Branch on 18th February, 2016.

30. DW1 informed the court that the Branch can acquire properties for the purpose of serving their members and that as a Union, they do not declare dividends. It was the evidence of DW1 that the Machakos KNUT Branch owns the suit premises and that all members of the branch pay to KNUT 2% of their basis salary. Upon receipt of this money, the head office transmits a percentage to all the branches country wide.

31. DW1 stated that the suit property was bought by Machakos KNUT Branch and that the decision to purchase the land must have been sanctioned by the executive committee of the Branch. DW1 informed the court that the Constitution of KNUT was first ratified on 14th May, 1959 and that the most recent version was ratified in the year 2013. DW1 stated that once a member retires from teaching, he ceases being a

member of the Union and stops enjoying any benefits accruing from the Union.

32. DW1 stated that since 1967, the suit property has always belonged to KNUT, Machakos Branch and that it was registered in the names of the trustees of the Union.

33. On the issue of how members of the Union are recognized, DW1 stated that the list is usually generated by the head office and then transmitted to the branches; that the list would indicate the TSC numbers of each teacher, the station and the contribution made by members and that the Plaintiffs' list does not meet that criteria.

34. DW1 finally stated that the suit land is owned by the 5th Defendant, that the 5th Defendant has always been in occupation of the said land and that the 5th Defendant has leased a portion of the premises and receives rent from the tenants.

35. The retired National Treasurer of KNUT, DW2, informed the court that prior to joining the National office, he was the Branch Executive Secretary, Machakos Branch of KNUT; that the Plaintiffs were members of the 4th Defendant under the 5th Defendant's Branch and that the branches, through the Branch Executive Committee, are mandated to seek for and obtain loans.

36. DW2 stated that the Plaintiffs contributed their monthly subscriptions then at Kshs. 8 to the Union accounts and that it is the Union that purchased the suit land in 1968. On 30th June, 2010, DW2 stated that the National Secretary and Chairman forced him to make a decision in respect of the suit premises and that the said decision was never ratified by the Branch Executive Committee and the Annual General Meeting as required. DW2 produced several documents which I shall refer to later.

Submissions:

37. The Plaintiffs' advocate submitted that the suit property belongs to the Plaintiffs, having purchased the land in 1966, 1967 and 1968 when they were teachers; that being the first group of teachers after independence, they did not consider it necessary to register an entity in whose name they could register the land and that the property was paid within a period of three (3) years. Counsel relied on the decision of ***The Chairman Kenya National Union of Teachers & Another vs. Henry Inyagala & 2 others (2016) eKLR.***

38. The 4th Defendant's counsel submitted that the Plaintiffs were unable to produce any document in support of the contributions from the members towards the purchase of the suit property and that the dues that the Plaintiffs paid were applied towards the operations of the Union, including the purchase of the suit land.

39. The 4th Defendant's counsel submitted that the 4th Defendant's Constitution govern the management of the affairs of the Union; that under Section 37(1) of the Labour Relations Act, all property of a registered trade Union vests in its trustees for the use and benefit of the trade Union and that the Plaintiffs have not proved their claim.

40. On his part, the 5th and 6th Defendants' counsel submitted that the Plaintiffs' suit is time barred; that the Plaintiffs never produced evidence to show that the suit land was registered in trust for them and that the suit land is the property of the 5th Defendant.

Analysis and findings:

41. In this matter, the Plaintiffs have described themselves as retired teachers in the Greater Machakos, and that they were teachers in 1966, 1967 and 1968 when they purchased a parcel of land known as Machakos Municipality Block 1/59 (*the suit land*). The said Plaintiffs are seeking for an order declaring them as beneficial owners of the said land.

42. The list annexed on the 1st Plaintiff's Affidavit shows the names of the said retired teachers. The list is from "*Makindu Retired Teachers Self Help Group*," "*Mbooni Zone*," Kibaoni Mwala Teachers Housing Co-operative Society; Masaku Teachers Housing Co-operative Society Limited (*Kilungu Region Members*); Ukia Zone; Kathiani Region; Mtito Andei, Matiliku Division; Old Central Division; Kasikau Region amongst other regions. The said list of retired teachers has the Teachers Service Commission numbers and the national identity card numbers of each respective teacher.

43. The Plaintiffs' two witnesses informed the court that the Plaintiffs contributed Kshs. 8 towards the purchase of the suit land. According to the said witnesses, they raised Kshs. 9,000 which they paid to the Vendor as a deposit, with the balance of the purchase price being paid by a financier in 1968. Although the Plaintiffs were unable to produce the Sale Agreement and the pay slips showing the deductions of Kshs. 8 that was made by each member, they relied on some documents to prove their claim.

44. The Plaintiffs produced in evidence the letter dated 10th May, 1991. In the said letter, the then Executive Secretary of Masaku Branch (*the 5th Defendant*) acknowledged that the suit land (*then known as KNUT Building Plot No. 909/116*) was bought and owned by the teachers who bought it in 1966. The letter further stated that "*all the teachers who were in the classroom in March, 1966 are assumed to be the owners of this building.*" In the said letter, the 4th Defendant's Executive Secretary further stated as follows:

"I was to Appeal to this Committee to do everything possible to see that teachers and especially those who have retired benefit from this building before they all died."

45. In the second letter dated 29th July, 1991, the 4th Defendant's Executive Secretary did a letter addressed to the Executive Committee members and all "*teachers working in 1966.*" In the said letter, the 4th Defendant informed the retired teachers to attend the meeting that had

been scheduled on 10th August, 1991 at the Machakos Primary School play ground “so that a decision is made on taking over the building.”

46. It would appear that the anticipated takeover of the building never materialized, but instead, the 4th Defendant charged the property to IBD Capital Limited on 1st December, 2008.

47. Despite the charge on the suit property, the KNUT National office, through its then Secretary General, informed the Chairman of the United Retired Teachers Self Help Group to register a private limited liability company which was capable of owning property. In the said letter dated 18th November, 2009, the National Secretary General of KNUT wrote as follows:

“The Union has generally been carrying out the transfer of property to the various companies formed by teachers and we would like to give the early indication that after due diligence is carried out then the transfer will be done immediately. Given the position above; and the fact that there is a case in court filed by yourselves on behalf of the teachers against the Machakos Branch; we urge that you consider to stand the matter over, in court as you carry out the registration process and the first Annual General Meeting of the company. Our considered opinion is that there is consensus that the Union is simply a trustee, and is willing to transfer the property to a properly constituted corporate...”

48. The letter by the National Secretary was copied to the KNUT National Chairman. In another letter dated 18th January, 2010, the National Secretary General of KNUT informed the Plaintiffs that the 4th Defendant was still willing to transfer the suit land to them. Indeed, all the above letters culminated into a meeting of 30th June, 2010 between “KNUT Headquarters Top Three, KNUT Machakos Branch Top Three, and The Representatives of Retired Teachers Company.” This meeting was chaired by the National Chairman of KNUT. In the meeting, it was agreed that the building should be handed over to the retired teachers after the completion of the loan at the end of November, 2011.

49. Although DW2 stated that he was intimidated by the national officials to sign the Minutes of 30th June, 2010, there is no evidence of such intimidation. Indeed, DW2 did not raise any objection on the transfer of the suit premises to the teachers. In any event, DW2 only joined the 5th Defendant as an Executive Secretary in 1996, and became a member of KNUT in 1980. Without any document showing how the building was bought in 1968, he cannot state that it is the 5th Defendant which bought the suit premises. The same applies to DW1 who was employed as a teacher in 1994.

50. The Plaintiffs called PW1 who was employed in 1963 by KNUT Machakos Branch as its Executive Officer who went on to become the National treasurer. He was clear that the teachers contributed Kshs. 8 each between 1966-1968 and purchased the suit land. It was his evidence that the officials who represented the teachers in the purchase of the building were also officials of KNUT Machakos Branch. Having been in the picture of the scheme of things since 1963, and in the absence of documentary evidence to the contrary, his evidence is credible.

51. Indeed, the fact that the 4th and 5th Defendants do not have documents to support the allegations that the building was purchased by them informed the concession by the officials of the 4th and 5th Defendants in writing that the building was purchased by the teachers in 1968. The registration of the title in the names of the trustees of the branch was for convenience purposes. In any event, the 4th and 5th Defendants did not produce in this court the Constitution of KNUT in 1968 to enable the court understand the legal standing of the Union by then, and more so in which capacity it could own property.

52. The fact that the teachers in the early 1960’s came together in their respective branches and contributed towards the purchase of buildings as an investment venture happened all over the country. This fact is captured in the Court of Appeal decision in the case of *The Chairman Kenya National Union of Teachers & others vs. Henry Inyagala & others (2016) eKLR*. In the said matter, the Court of Appeal found as follows:

“We have considered these rival claims. It is evidence that the Respondents have relied on a circular of 1st October, 1968 from the 1st Appellant’s headquarters, a directive was issued to the effect that all buildings in Kenya constructed by the original teachers be transferred to them. There are also Minutes of various meetings held between 6th August, 1987 and 31st May, 1988, where members of the 2nd Appellant were present. These meetings resolved to commence a process by which the disputed premises would be transferred to the original teachers. It was also resolved that a committee oversees the hand over process.”

53. The observation by the Court of Appeal in the above matter shows that the 4th and 5th Defendants conveniently withheld information concerning the purchase of the suit land to this court. Being a body whose mandate is to keep records of its members, especially pertaining to the monthly deductions, this court expected the Defendants to avail all the records for the period of 1966-1968 on how the Plaintiffs contributed to the purchase of the suit premises. However, they failed to do so and instead relied on the title document with a view of defeating the Plaintiffs’ claim.

54. However, as I have stated above, and as observed by the Court of Appeal, the teachers of this country purchased buildings which were then erroneously or conveniently registered in the names of KNUT Branches. Just like in the above quoted cases, the Minutes that were produced in this court and the letters of the 4th and 5th Defendants shows that the Defendants conceded to the Plaintiffs’ claim. This court does not need to look further than that especially where no evidence was produced to show a contrary position.

55. For those reasons, I find that Plaintiffs have proved their claim on a balance of probabilities. The Plaintiffs’ Amended Originating Summons is allowed as follows:

a. A declaration be and is hereby issued that the 1,125 persons named in the list marked ‘GN-1’ and annexed on the Affidavit in support of the Originating Summons are the beneficial owners of a parcel of land known as Machakos Municipality Block 1/59.

b. A declaration be and is hereby issued that the security of the suit property in favour of IDB Capital Limited is unauthorized and therefore illegal.

c. An order be and is hereby issued that the Defendants to transfer parcel of land known as Machakos Municipality Block 1/59 to the Plaintiffs' nominee, that is, United Retired Teachers Company Limited.

d. The 4th and 5th Defendants to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE