



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 42 OF 2013

DAVID WAWERU MBUGUA.....PLAINTIFF

VERSUS

WILLIAM ADERO GOGA.....1ST DEFENDANT

SIMON TOO.....2ND DEFENDANT

GILBERT SAMOEL.....3RD DEFENDANT

MACREY WACHILONGA.....4TH DEFENDANT

BENJAMIN TARUS.....5TH DEFENDANT

AFRICAN INLAND CHURCH KENYA

TRUSTEES REGISTERED.....6TH DEFENDANT

JUDGMENT

1. By a plaint dated 2/4/2013 and filed in court on 10/4/2013, and later amended on 3rd June 2013, the plaintiff sought the following orders against the defendants jointly and severally:-

- i. A permanent injunction against the defendant their agents restraining them from trespassing or in any manner interfering with the plaintiff's parcel of land known as Kaisagat /Chepkoilel Block 5/ Amuka/ 303.**
- ii. An eviction order to remove the defendants or their agents from the plaintiff's parcel of land;**
- iii. Costs of this suit.**
- iv. Any other relief this Honourable court may deem just to fit to grant.**

The Plaintiff's Case

2. According to the amended plaint the plaintiff being the owner of the suit land promised to donate a portion thereof to the **AIC (African Inland Church) Amuka** in 1991; he further states that later numerous wrangles cropped up in administration of the church which interfered with his rightful proprietorship of the said piece of land forcing him to repudiate his promise; that upon that repudiation the defendants forcefully and illegally trespassed onto the said land measuring one acre on **26th March 2013** in the wee hours of the night and planted maize seeds on the land which he had ploughed; that the defendants have no right to the land hence this suit.

The 1st to 5th Defendant's Defence

3. The 1st to 5th defendants filed their defence on the **7th May 2013**. In it they deny the plaintiff's claim and aver that he relinquished his right and claim over the suit land voluntarily by his act of donating the suit land for the purpose of church use and developments by a letter dated **13th October 1991**. According to the defence the plaintiff never opposed the developments conducted on the suit land by the church including the construction of a permanent church building and he is therefore estopped from raising any claim to the suit land. The defendants admit the existence of wrangles in the top echelons of church leadership in the AIC church and aver that the plaintiff aligned

himself with a renegade group which had challenged the leadership of the AIC and his side had lost in the petition. They attribute the action of withdrawal of the plaintiff's gift to his attempts to interfere with the church leadership. They aver that they are wrongly sued and that the proper person to be sued is the 6th defendant.

The 6th Defendant's Defence and Counterclaim

4. The 6th defendant filed defence and counterclaim dated **14/10/2014** on **16/10/2014**. Their defence reiterates the contents of the defence of the 1st to 5th defendants. They state that they are authorized to hold on behalf of the church titles to various parcels of land in Kenya that may be vested in them by way of donation purchase, gift or other assurance that may be from time to time made. On the basis of the averments in the defence they seek the following orders in their counterclaim:

- i. A declaration that the 6th defendant is the lawful owner proprietor of the suit land;**
- ii. A permanent injunction to restrain the plaintiff from encroaching on or remaining on the suit property or in any other manner interfering with the 6th defendant's and the African inland church's use possession and enjoyment of the property.**
- iii. Costs of the suit and interest thereon.**

The Plaintiff's Reply to Defence and Counterclaim

5. In his reply to defence and counterclaim dated **24/10/2014** the plaintiff denied all the allegations in the defence and counterclaim of the 6th defendant and seeks its dismissal.

The Plaintiff's Evidence

6. The suit came up for hearing on **30/6/15**. The plaintiff's alone gave evidence in favour of his case. The plaintiff produced a Certificate of Official Search to prove that he owned the suit land. He averred that the church was built in the **1990s** on the suit land. He averred that he had promised to give the church one acre of his land but he did not complete his promise and there was delay in the processing of titles. His original plot was number **37** which was about **30** acres and which he subdivided into various portions which were all registered in his name. The plot on which the church is located is **Kaisagat Chepkoilel Block 5/303**. He averred that he has been cultivating on the said plot and that the church is occupying only a small portion of the land. In the year **2013** he prepared the land but the officials of the church came and planted on the land and they have been utilizing the land since. He stated that there were wrangles in the church and the 1st defendant and his son beat him up. Thereafter he and other members were evicted with the help of the police. He no longer worships at the Amuka AIC church but at a temporary church which he has put up elsewhere. Her further testified that he has never taken the church before the Land Control Board and that he does not have the intention of giving the land to the church. Part of the land is being used by the 1st defendant to rear animals. The defendant destroyed his barbed wire fence and the police took no action when he reported the incident to them. He denied being a party to the constitutional petition over the church leadership issue that had been filed at Nairobi. On cross examination he admitted to voluntarily writing the letter dated **13/10/1991** donating the suit land to the church. He stated further that he used to be chairman and treasurer of the church building committee and that he put up the church with his own funds and other funds from church members. He oversaw the construction of the church and there were no disputes during the process. He averred that he moved away from AIC Amuka due to constant harassment. He admitted that there were factions in the church and that he leaned towards the faction that was led by Mbuvi as contrasted to the faction that leaned towards Bishop Yego.

The Defendants' Evidence

7. **DW1, Reverend Macroy Wachilonge** testified on **30/6/15**. He testified that he is the Education Secretary Kitale Region; that Amuka church falls within his jurisdiction; that in **1990** the plaintiff verbally promised to give Amuka AIC church one acre of land; that he later wrote a letter dated **13/10/1991** in which he promised to give the church land; that the plaintiff gave the church the greenlight to develop the land; that it is a church tradition that where a member donates property to the church a declaration has to be made in the presence of his family who are asked whether they have any objection; that the plaintiff's wife was present during the dedication; that the plaintiff later had the land surveyed but registered the church portion in his name; that the plaintiff had been a treasurer of the church; that the plaintiff later left the church after another pastor was brought and the defendants are the ones who cultivate the suit land and that the produce thereof is used for church activities. To the witness the suit land was given to the church and can not be taken back. Upon cross examination the witness admitted that the defendants started cultivating the land in **2013**.

8. **DW2, William Goga Adera** testifying on **28/6/2016** stated that he is a Public Health Technician with the Trans Nzoia County as well as a church elder who has been chairman of Amuka church since its inception. He later became secretary and was subsequently re-elected chairman in **2013**. He stated that prior to the establishment of Amuka church they used to worship at Kimaran church; in **1990** they approached the Kimaran Church Council and told them that they needed their own church as Kimaran was far. Upon receiving the go ahead they established the Amuka AIC at the Amuka Primary School but due to the inconvenience they caused the school they could not continue worshipping there. They spoke with the plaintiff who agreed to accommodate them on his land; according to the witness the plaintiff promised to consult his family and he later came and told them that he and his family had decided to give the church one acre. They asked the plaintiff for a formal document whereupon he wrote the letter dated **13/10/91**. The letter was addressed to the chairman of the church and the witness was chairman by then. The letter was signed by the plaintiff and his wife. It gave them the go ahead to develop the suit land. The dedication was held in **1991** and was officiated by Bishop Silas Yego who was the then head of the AIC Kitale Region. They fenced the suit land and began building in 1992 after they conducted a harambee. By then the plaintiff was chairman of the church development committee and was in charge of building the church. He also worshipped there. The roofing of the church was done in 1996 and the church became complete. A kitchen and toilets were also put up in that year. The church has been cultivating the land since **1991**. In **2009** wrangles began in the church. The church split into two camps one led by the witness and another by the plaintiff. The wrangles escalated into fighting between

the two camps. He and the plaintiff were injured in the melee. His camp shifted back to Amuka Primary School leaving the plaintiff's camp in the one acre plot but they later went back to the suit land after intervention by Silas Yego.

9. Upon cross examination he admitted that the plaintiff cultivated the land in **2012**; however he asserted that their planting on the land was prompted by a court order that gave them leave to utilize the land. He admitted that they left the suit land in **March 2013** and returned there 6 months later. He also admitted that the plaintiff had been excommunicated from Amuka church after the proper process was followed and that had erected a church elsewhere on his land.

10. **DW3 Gilbert Samoei** testified on **2/10/18**. He stated that he is a pastor with the AIC church Amuka, that he has been with that church since 2009; that he found the plaintiff holding the position of treasurer in 2009; that he also found two factions one following the plaintiff and one following the 1st defendant; that in 2009 the plaintiff closed the church and the church leaders came to restore the congregation back to the church. Upon cross examination he admitted that the plaintiff at one time farmed on the land but asserted that he did it on behalf of the church; that at one time also the plaintiff claimed back the suit land and the congregation went back to Amuka Primary School, about **500** metres away, to worship there. However police came and broke the padlock on the church door and threw it away and they returned to the church. He denied that the plaintiff was excommunicated.

11. **DW4 Benjamin Kipruto Tarus**, testified on **2/10/18**. He stated that he is a pastor and leader in the church and he has been in the church since **1984**. He adopted his witness statement dated **30/8/2013** as his evidence-in-chief; he stated that the plaintiff donated land to the church which was consecrated and a stone church building erected on it. He concurred with the earlier witnesses about the leadership wrangles in the church. According to him the title to the land had not been processed when the land was donated by the plaintiff. To him the letter dated **30/10/1991** was an agreement. He admitted that there was no Land Control Board Consent. He further asserted on cross examination that the harvest from the suit land went to the church. He denied that the church ever moved from the suit premises to Amuka Primary School. The church build in 1991 is the one in use now. According to him the plaintiff left the Amuka Church of his own accord.

12. **DW5, Simon Too**, testified on **2/10/18**. He adopted his statement dated **30/8/2013** which substantially states what the earlier witnesses had stated before him. On cross examination he stated that the plaintiff began claiming back the suit land in **2009**.

Submissions

13. The plaintiff filed his submissions on **5th October 2018**. I have perused the file record and found no submissions filed on behalf of the defendants. I have considered the pleadings, the evidence and the filed submissions of the parties. The issues that arise in this suit are as follows:

(1) Did the plaintiff's gift of one acre of land comprised in plot number 303 to the Amuka Church effectively pass right title and interest to the church?

(2) Are the defendants' trespassers on the suit land?

(3) Can the plaintiff effectively revoke the gift and reclaim the land?

(4) Does lack of consent of the Land Control Board make the transaction null and void?

(5) What orders should issue on the plaint and the counterclaim?

(1) Did the plaintiff's gift of one acre of land comprised in plot number 303 to the Amuka Church effectively pass title to the church?

14. It is clear from the beginning that the suit land was meant to be a gift. There was no written agreement executed between both parties and certainly no consideration changed hands.

15. It is not disputed that the plaintiff orally promised to donate one acre of land to the Amuka Church and that he followed it up with a letter dated **13/10/91** in which he and his wife stated as follows:-

(a) He and his family have decided to confirm their decision to give to the church one acre of land.

(b) The land is to be used for church developments.

(c) The church may begin to develop the plot;

(d) They would secure the services of a surveyor to enable an excision of the plot he wished to donate to the church to enable the church obtain its own title deed.

16. The wording and the tenor of the letter dated **13/10/1991** conveys the impression that the plaintiff's family was of one mind, that they had released the land to the church for a noble purpose, and that they had no further claim of title to the same.

17. This can be deduced from the fact that in the letter dated **13/10/1991** they seem to recognize the size of the donated plot and the purpose and that the letter gives the church the permission to enter into possession and commence developments thereon.

18. The evidence of both parties is that the church took possession of the land and built a church building, a kitchen and a toilet thereon and that as at the year 1996 those developments were complete. The plaintiff knew the developments were being effected on the land that he had donated and he never raised any demur. It is the evidence of both parties that the plaintiff was part of the church, and that he indeed participated in the building of the structures on the suit land for the purposes of the church.

19. The plaintiff's conduct can not even be referred to as mere acquiescence. Both the donation of the land, the contribution in terms of materials and personal effort and attention in the mobilization of his fellow villagers in the construction of the church infrastructure was positive action towards a goal he seemed to cherish at the time.

20. In my view it translated to total surrender of the land to the church and it can not be said to have been inspired by anything else but his desire to serve God and save his fellow villagers from the need to trek all the way to Kimaran to worship God. It was a very commendable and selfless action on the part of the plaintiff and one to be emulated.

21. It is for those reasons that I am persuaded that even in the plaintiff's mind the interest in the gift had passed to the church after he wrote the letter dated 13/10/1991 and he was not intent on ever reclaiming the land back for his own personal use.

22. The church is deemed as having fully acquired the donated land by way of gift from the plaintiff's family for its own purposes. In my view, not even the plaintiff's participation in the development activities or the quantum of his contribution thereto could extenuate the quality of the title that the church obtained upon the plaintiff's family's surrender thereof.

(2) Are the defendant's trespassers on the suit land?

23. In my view the donation having taken effect following the voluntary decision and positive action on the part of plaintiff's family, the entry of the defendants on to the suit land was with the plaintiff's family's permission. In fact the plaintiff purposely put them into possession thereof.

24. I have looked through the pleading of the plaintiff and found no claim of mistake or duress or undue influence alleged in the acquisition of the land by the church. Since the title to the land had passed on to the church, the defendants can not be deemed as trespassers.

(3) Can the plaintiff effectively revoke the gift and reclaim the land?

25. I have considered the developments on the land. Doubtlessly the plaintiff was party to the development of the land and his role therein in terms of material and moral support as well as mobilization must have been great.

26. However it must be deemed that he was taking part in the developments as a member of the donee church, for all title and interest in the suit land had effectively passed to the church. The developments must be therefore be deemed as those of the church community and not by the plaintiff.

27. The church community therefore acted on the gift by accepting it and channeling its resources to change the nature of the land by developing church infrastructure. Even if the plaintiff were to be allowed to call for the reversion of the land to him its status had changed in favour of the church and the reversion would leave the church community who had been led by the plaintiff to act on his surrender of the land for church purposes, to suffer a great loss in terms of resources expended. It is clear that the church could not have developed the land without the assurance of the plaintiff that he had fully released it and that all that remained was the formal transfer of the title to their name.

28. The plaintiff is fastly riveted to his old irreversible position of a donor by the doctrine of equitable estoppel of the promissory nature. In the case of Nairobi *Milimani Law Courts Civil Case No. 56 Of 2015 DI Koisagat Tea Estate Ltd Versus Eritrea Orthodox Tewhdo Church Ltd* the court stated as follows:-

“In the case of Benjamin Airo Shiraku - Vs - Fauzia Mohammed HCC 272 of 2011 Justice Havelock (as he then was) and quite recently retired, citing Lord Denning in Coube - Vs - Coube [1951] 2 KB 215 held that:-

“Where one party by his words or conduct made to the other a promise or an assurance which was intended to affect their legal relations and to be acted on accordingly then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards, be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him.

But he must accept the legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by consideration but only his word.”

In other words, if one promises another and the other acts on that promise then the promisor cannot resile”.

29. The plaintiff can not in my view competently call for the reversion of the land to himself as the circumstances of the case show that he is bound by the doctrine of equitable estoppel.

(4) Does lack of consent of the Land Control Board make the transaction null and void?

30. Section 6 of the Land Control Act states as follows:-

(1) Each of the following transactions that is to say-

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area; (emphasis mine)

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

(3) This section does not apply to-

(a) the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or

(b) a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.

31. It is not disputed that the land in question is agricultural land. It was intimated that the church chairman has been pursuing a Land Control Board Consent to enable the transfer of the land to the church but in vain.

32. In view of the provisions of the above quoted section, the transactions that are envisaged in the Land Control Act include transfer by way of gift. Does the lack of a Land Control Board Consent then make the gift void?

33. In the Court of Appeal decision in *Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR* it was held that want of the Land Control Board consent is not fatal to the transaction in that matter.

34. In another decision, *Joseph Mathenge Kamutu -vs- Joseph Maina (2015) eKLR, Macharia Mwangi & 87 Others -vs- Davidson Kagiri (2014) eKLR* the court held that the appellant's action of receiving the full purchase price and putting the respondent in possession created a constructive trust in favour of the respondent, dismissed the appellant's claim and granted an order of specific performance in favour of the respondent.

35. Although the above quoted decisions dealt with sale transactions I find that the ultimate effect of a sale transaction and a gift transaction would be the transfer of the suit land to the purchaser and the donee respectively. That implies that there is not much difference between the two types of transactions in their ultimate effect. I do not see any good ground for holding that the reasoning of the court in the decisions above can not apply where a gift is concerned as in this case.

36. I therefore find that the dealing between the church and the plaintiff can not be deemed to be void by reason of want of a Land Control Board consent.

CONCLUSION.

(5) **What orders should issue?**

37. I find that the plaintiff holds the title to the suit land in trust for the Amuka Church. The 6th defendant has been enjoined in these proceedings and in the counterclaim they pray that the suit land be transferred and registered in their name as they are the trustees for the Church in Kenya.

38. In the final analysis I find that the plaintiff's suit has no merits while the 6th defendant's counterclaim is merited. I therefore issue the following orders:

(a) **The plaintiff's suit brought by way of plaint dated 2/4/2013 and filed in court on 10/4/2013, and later amended on 3rd June 2013 is hereby dismissed;**

(b) **The 6th defendant's counterclaim against the plaintiff is allowed;**

(c) **A declaration is hereby issued, declaring that the 6th defendant is the lawful owner proprietor of the suit land known as Kaisagat /Chepkoilel Block 5/Amuka/ 303;**

(d) **The plaintiff shall transfer the suit land to the 6th defendant in default of which the Deputy Registrar of this Court shall**

execute all documents necessary to transfer the suit land known as Kaisagat /Chepkoilel Block 5/ Amuka/ 303 into the 6th defendant's name;

(e) A permanent injunction is hereby issued to restrain the plaintiff from encroaching on or remaining on the suit property land known as Kaisagat /Chepkoilel Block 5/ Amuka/ 303 or in any other manner interfering with the 6th defendant's and the African Inland Church's use possession and enjoyment of the property.

It is so ordered.

Dated, signed and delivered at Kitale on this 26th day of November, 2018.

MWANGI NJOROGE

JUDGE

26/11/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kibii for the plaintiff

Mr. Kiarie holding brief for Khaminwa for 1st - 5th defendants

Mr. Kiarie holding brief for Maloba for 6th defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

26/11/2018