



Care Mission Kenya & 4 others v Otieno & another (t/a Deity ECD Primary School Busia (K) and Emmanuel Children Home Busia (K)) (Environment & Land Case 18 of 2018) [2024] KEELC 27 (KLR) (18 January 2024) (Ruling)

Neutral citation: [2024] KEELC 27 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 18 OF 2018
BN OLAO, J
JANUARY 18, 2024**

BETWEEN

**CARE MISSION KENYA 1ST PLAINTIFF
ODDVA STEN LINKAS 2ND PLAINTIFF
RITA WAHLBERG 3RD PLAINTIFF
WENCHE LUDVIGSEN 4TH PLAINTIFF
HAKON BORGEN 5TH PLAINTIFF**

AND

**BENTER AKINYI OTIENO 1ST DEFENDANT
REVEREND PETER OGOLA 2ND DEFENDANT
T/A DEITY ECD PRIMARY SCHOOL BUSIA (K) AND EMMANUEL
CHILDREN HOME BUSIA (K)**

RULING

1. The dispute involving Care Mission Of Kenya, Oddva Sten Linkas, Rita Wahlberg, Wenche Ludvisgen and Hakon Borgen (the 1st to 5th Plaintiffs respectively) and Benta Akinyi Otieno and Reverend Peter Ogola (the 1st and 2nd Defendants respectively and trading as Deity ECD Primary School Busia & Emmanuel Children Home Busia) was heard by Omollo J.
2. Having heard the parties, the judge made the final disposal orders vide a judgment delivered on November 4, 2021:
 - a. “The Plaintiffs’ suit and the Defendants’ counter-claim have partially succeeded.



- b. The Plaintiffs' claim is allowed in terms of prayer (b) by way of an order of this Court issued and directed to the Defendants to include the 2nd Plaintiff and/or the trustees of Care Mission Norway in the Board of Management of Diety ECD Primary School.
 - c. From the date of this judgment going forward, the Defendants or BOM Diety ECD Primary shall render statements of accounts to the 2nd Plaintiff and or the trustees of Care Mission Norway for funds sent in support of the institution from the said trustees and or the 2nd Plaintiff.
 - d. The title currently held in the name of the 1st Plaintiff in respect of L.R No. Bukhayo/Mundika/9903 shall be cancelled forthwith and in its place an order be and is hereby directed to the Land Registrar Busia to rectify the register to restore the name of Diety ECD Primary & Care Mission Norway as the owners thereof. A title deed shall no be issued after rectification until a new Board of Management is constituted to receive it.
 - e. Each party to bear their respective costs of the suit.”
3. The Defendants were aggrieved by that judgment and filed a Notice of Appeal dated December 29, 2021. It is not clear if any appeal was subsequently filed and if so, its current status.
 4. I now have for my determination the Plaintiffs' Notice of Motion dated 11th August 2023 premised under the provisions of Sections 1A, 2A & 3A of the *Civil Procedure Rules* as well as Sections 152E and 152F of the *Land Act*. The Plaintiff seek the following orders:
 1. Spent.
 2. That this Honourable Court be pleased to issue orders of eviction of the Defendants Rev. Benta Akinyi Otieno T/A Deity ECD Primary School Busia (K) AND Emmanuel Children Home Busia (K) from all that parcel of land known as Bukhayo/Mundika/9903, 7812, 7813 and 10245 (the suit properties) and for vacant possession of the properties to be delivered to the Plaintiffs.
 3. That the Officer Commanding Busia County Police Station does supervise the eviction.
 4. That costs of the application be provided for.
 5. The application is premised on the grounds set out therein and is also supported by the affidavit of Oddva Sten Linkas the 2nd Plaintiff herein.
 6. The gravamen of the application is that the Defendants have been served with several notices to vacate the suit properties for failing to pay outstanding rent now totaling Kshs 4,500,000 and also to account for the sum of Kshs 9,200,000 thus exposing the Plaintiffs to lose of damages to their investment. That the Plaintiffs own the suit properties in which they hold overriding interests within the meaning of Section 30 of the repealed *Registered Land Act* and Section 28 of the new *Land Registration Act* and the Defendants have no locus thereon. That the parties had an agreement with the 1st Defendant in 2008 to the effect that Oddva Sten Linkas of Care Mission Kenya shall own Deity ECD Primary School Busia (K) including the building thereon. That the Plaintiffs have therefore issued the Defendants with eviction notices dated 7th February 2019 and 17th July 2023 which the Defendants have ignored and refused to comply with thus causing the Plaintiffs loss of income and grave prejudice. This has caused the Plaintiffs to advertise the suit properties for sale and the same has attracted interested bidders.
 7. The following documents are annexed to the Notice of Motion:



1. Copy of title deed for the land parcel No Bukhayo/Mundika/9903 in the name of Care-mission Kenya.
 2. Copy of title deed for the land parcel No Bukhayo/Mundika/7812 in the name of Care-mission Kenya.
 3. Certificate of search for the land parcel No Bukhayo/Mundika/7812.
 4. Copy of title deed for the land parcel No Bukhayo/Mundika/7813 in the name of Care Mission Kenya.
 5. Certificate of search for the land parcel No Bukhayo/Mundika/7813.
 6. Copy of title deed for the land parcel No Bukhayo/Mundika/10245 in the name of Care-mission Kenya.
 7. Certificate of search for the land parcel No Bukhayo/Mundika/10245.
 8. Copy of agreement dated 28th November 2008 between Oddver Sten Linkas and Benta Akinyi Otieno.
 9. Photographs of Deity Academy School Busia (K).
 10. Notice of Public Auction issued by Restorers Consult Auctioneers for the sale of the following properties by public auction on 15th March 2023:
 - a. Bukhayo/Mundika/10245.
 - b. Bukhayo/Mundika/9903.
 - c. Bukhayo/Mundika/7812.
 - d. Bukhayo/Mundika/7813.
 11. Copies of funds transfers which are not in English or Swahili.
8. The application is opposed and Benta Akinyi Otieno filed a replying affidavit dated 3rd October 2023 in which she deposed, inter alia, that the Plaintiffs have failed to internalize the decree in this case where they had prayed for the taking of accounts, dissolution of the School's Board and payment of rent from 2008. That after trial, the Court gave judgment for orders of restitution of the School's Board, rendering of accounts for funds advanced to the school and restoration of the land parcel No Bukhayo/Mundika/9903 in the name of the school. That the Court did not issue any orders for the eviction of Defendants nor payment of rent of Kshs 4,500,000 or that accounts be rendered in the sum of Kshs 9,200,000. That the orders for eviction should be addressed through a separate suit and the claims for Kshs 4,500,000 and Kshs 9,200,000 and res judicata. That since the judgment failed to address the status of the land parcels No Bukhayo/Mundika/7812, 7813, 10244 and 10245 the Defendants have filed an appeal against the same.
9. Annexed to the replying affidavit is a copy of the decree and memorandum of appeal.
10. The 2nd Plaintiff filed a further affidavit dated 6th October 2023 in which he deposed that he is the trustee of Care Mission Kenya and Care Mission Norway who are the absolute owners of the land parcel No Bukhayo/Mundika/9903, 7812, 7813 and 10245 and the replying affidavit of Benta Akinyi Otieno is misleading as to the import of the Judgment of Omollo J which directed that the Defendants do include the 2nd Plaintiff in the Board of Management of Deity ECD Primary School and the title to



land parcel No Bukhayo/Mundika/9903 be cancelled and registered in name of Deity ECD Primary & Care Mission Norway.

11. Further, that Deity ECD Primary & Care Mission Norway are owned by the 2nd, 3rd, 4th and 5th Plaintiffs as Trustees while Deity ECD Primary is owned by the 2nd Plaintiff. That there is no stay of execution of the judgment by Omollo J and there is an application in the Court of Appeal to strike out the Defendant's intended appeal and the Defendants are trespassers on the suit properties. That on 15th March 2023 the properties No Bukhayo/Mundika/10245, 9903, 7812 and 7813 were advertised for sale and were sold to 3rd parties a matter that is within the knowledge of all the parties herein.
12. The following documents are annexed to the further affidavit:
 1. A document which is neither in English or Swahili language and with no translation.
 2. Copy of certificate of incorporation of Care-mission Kenya.
 3. Copy of agreement between the 2nd Plaintiff and the 1st Defendant dated 28th November 2008.
 4. Copy of letter from the Deputy Registrar Court of Appeal Kisumu dated 6th June 2022 and addressed to Wachakana & Company Advocates I.R.O. Civil Application No E025 of 2022.
 5. Copy of application to strike out record of appeal.
 6. Notice of Motion to strike out record of appeal.
 7. Notice of Public Auction by Restorers Consult Auctioneers for the sale of land parcels No:
 1. Bukhayo/Mundika/10245
 2. Bukhayo/Mundika/9903
 3. Bukhayo/Mundika/7812
 4. Bukhayo/Mundika/7813
 8. Copy of letter dated 14th August 2023 from Wanyama & Company Advocates addressed to:
 - a. Oddva Linkas
 - b. Wenche Ludvigsen
 - c. Rita Wahlberg and
 - d. Hakon Borgen
 9. Letter dated August 2023 from Care Mission Kenya addressed to the 1st Defendant by Oddva Linkas.
 10. Letter dated August 2023 from Care Mission Kenya addressed to the 1st Defendant by:
 - a. Oddva Linkas
 - b. Wenche Ludvigsen
 - c. Rita Wahlberg and
 - d. Hakon Borgen
 11. Landlord's Notice to terminate or alter terms of tenancy dated 17th July 2023 and addressed to the Defendants in respect to the land parcels No Bukhayo/Mundika/7812, 7813 and 10245.



12. Copy of letter from Care Mission Kenya dated 13th July 2023 addressed to the Land Registrar Busia and signed by:
 - a. Oddva Linkas
 - b. Wenche Ludvigsen
 - c. Rita Wahlberg and
 - d. Hakon Borgen
13. Letter dated 13th July 2023 from Care Mission Kenya addressed to Restorers Consult Auctioneers and signed by:
 - a. Oddva Linkas
 - b. Wenche Ludvigsen
 - c. Rita Wahlberg and
 - d. Hakon Borgen
14. Letter dated 3rd January 2023 from Care Mission addressed to the Defendants and signed by:
 - a. Oddva Linkas
 - b. Wenche Ludvigsen
 - c. Rita Wahlberg and
 - d. Hakon Borgen
13. When the application was placed before me on 11th August 2023, I did not certify it as urgent and directed that a date be taken in the registry. On 4th October 2023, I directed that it be canvassed by way of written submissions to be filed on or before 23rd October 2023.
14. Those submissions were subsequently filed both by Mr. Wachakana instructed by the firm of Wachakana & Company Advocates for the Plaintiffs and by Mr. Wanyama instructed by the firm of Wanyama & Company Advocates for the Defendants.
15. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.
16. I must start by pointing out that some of the documents annexed to the supporting affidavit by Oddva Sten Linkas dated 11th August 2023 such as the copies of what appears to be funds transfer forms are not in a language familiar to me. I have not therefore been able to understand their contents other than the fact that some refer to NoK 52,000.00 and KES 670,967.74. A party who files documents which are not in English must always file a translated copy to enable the Court understand its contents otherwise such documents serve no purpose. In this case, there are 42 such documents which have not been helpful at all. This Court will nonetheless do the best that it can with the other documents filed in support of the application.
17. By their Notice of Motion dated 11th August 2023 and which is the subject of this ruling, the Plaintiffs seek the following substantive order in paragraph (11).

11 “That this Honourable Court be pleased to issue orders of eviction of the Respondents Rev. Benta Akinyi Otieno T/A Deity ECD Primary School,



Busia (K) & Emmanuel Children Home Busia (K) from all that parcels of land known as Bukhayo/Mundika/9903 AND 7812, 7813 and 10245 and for vacant possession of the properties to be delivered to the Applicants.”

18. I have at the commencement of this ruling quoted in extenso the final orders contained in the judgment by Omollo J delivered on 4th November 2021 and I need not repeat them again. It is clear from those orders that although the Judge found that the Plaintiff's suit and the Defendants' counter-claim had “partially succeeded”, she went on to clarify in respect to the Plaintiff's claim that it had been allowed in terms of prayer (b) which was to the effect that the Defendants include the 2nd Plaintiff and/or trustees of Care Missionary in the Board of Management of Deity ECD Primary School. The Defendants were directed to render accounts to the 2nd Plaintiff. The Judge further cancelled the title to the land parcel No. Bukhayo/Mundika/9903 in the name of the 1st Plaintiff and the Land Registrar Busia was directed to register the same in the name of Deity ECD Primary AND Care Mission Norway as the owners after a new Board of Management is instituted. It is clear from those final orders that although the Defendants in their counter claim had sought cancellation of the Plaintiffs as owners of the land parcels No Bukhayo/Mundika/7812, 7813, 10244 and 10245, no orders were made with respect to that counter-claim perhaps due to an oversight. Indeed there is no mention of the land parcel No Bukhayo/Mundika/7812, 7813, 10244 and 10245 in those final orders in addition to the other remedy of permanent injunction which the Defendants sought in their counter-claim against the Plaintiffs. The up-shot of all the above is that it is not clear which of the Defendant's counter-claim was partially allowed and which one was partially dismissed in as far as the ownership of titles to the land parcels No Bukhayo/Mundika/7812, 7813, 10244 and 10245 was concerned. What is clear is that the 1st Plaintiff's title in respect to the land parcel No Bukhayo/Mundika/9903 was cancelled and the same was ordered to be registered in the names of Deity ECD Primary & Care Mission Norway. This Court is not allowed to presume what the Judge had in mind when she made those partial orders. She is the one best placed to do so because even the subsequent decree issued on 4th November 2021 is silent with respect to the land parcel No Bukhayo/Mundika/7812, 7813, 10244 and 10245 and is restricted to the land parcel No Bukhayo/Mundika/9903. It would be presumptuous, therefore, for this Court to issue any eviction orders with regard to the land parcels No Bukhayo/Mundika/7812, 7813 and 10245 as sought in the application. In any event, the remedy of eviction is a substantive remedy and was neither sought by the Plaintiffs in their suit nor by the Defendants in their counter-claim. What was also sought by the Defendants in their counter-claim and the judgment is silent on it was an order of permanent injunction. Given those circumstances, it is difficult for this Court to grant the prayer for eviction as sought in the Notice of Motion subject to this ruling.
19. More specifically, the 2nd Plaintiff has deposed in paragraphs 8 and 9 of his further affidavit dated 6th October 2023 that the land parcels No Bukhayo/Mundika/9903, 7812, 7813 and 10245 have in fact already been sold to other persons. This is how he has pleaded:
 8. “That on 15th March 2023, the following properties were advertised by Restorers Consult Auctioneers on behalf of the 1st, 2nd, 3rd, 4th and 5th Applicants and were indeed sold to 3rd parties: Bukhayo/Mundika/10245, 9903, 7812, 7813 as shown by true copies of the advertisement attached and marked O4.
 9. That the Respondents through their advocates confirmed the sale vide their letter dated 14th August 2023 attached and marked O5.”



20. There is no evidence to show that the land parcel No Bukhayo/Mundika/9903, 7812, 7813 and 10245 were in fact sold to 3rd parties because the copies of title deeds thereto show that they are registered in the names of Care Mission Kenya as at 28th February 2018 although they were indeed advertised for sale by public auction on 15th March 2023. However, when the 2nd Plaintiff, and who is a trustee of Care Mission Kenya and Care Mission Norway and therefore competent to depone on such matters, asserts that the land parcels No Bukhayo/Mundika/9903, 7812, 7813 and 10245 have been “sold to 3rd parties”, this Court must believe him especially when there is no other evidence to the contrary. That would mean that the Plaintiffs have relinquished their proprietorship of those parcels of land to “3rd parties” who should therefore be the ones seeking the eviction of the Defendants therefrom. In essence, by their own admission as per the further affidavit of the 2nd Plaintiff, the Plaintiffs are busy bodies in so far as the ownership of the land parcels No Bukhayo/Mundika/9903, 7812, 7813 and 10245 are concerned. At best, they are witnesses for the un-named “3rd parties”, if at all.
21. Ultimately therefore and having considered the Notice of Motion dated 11th August 2023, this Court makes the following disposal orders:
1. The Notice of Motion dated 11th August 2023 is dismissed.
 2. The Plaintiffs shall meet the Defendants’ costs thereof.

RULING DATED, SIGNED AND DELIVERED ON THIS 18TH DAY OF JANUARY 2024 BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

