



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 98 OF 2012**

**HUBERT L. MARTIN**

**CYRIL ODEMDO**

**FACET KHAEMBA ( Suing as officers of the Church of God Prophecy )**  
 .....**PLAINTIFFS**

**VERSUS**

**MARGARET J. KAMAR .....**  
 .....**1<sup>ST</sup> DEFENDANT**

**DAMARIS LENAYARA .....****2<sup>ND</sup>**  
**DEFENDANT**

**EILEEN KENDAGOR .....****3<sup>RD</sup> DEFENDANT**

**MARY KAPARO (sued as Trustee of Rift Valley MaendeleoYa Wanawake**  
**Organization.....4<sup>TH</sup> DEFENDANT**

**MAENDELEO YA WANAWAKE .....****5<sup>TH</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

*(Suit touching on two titles to same land; Both plaintiff and defendant having leasehold titles; question of which of the two titles should be upheld; principles to be applied; need for parties to show root of title; plaintiff alleging to have purchased from a person not party to suit, said person's title alleged to have been purchased from third party but who had already surrendered his title to Government; nothing to transfer upon surrender; plaintiff's title not genuine; defendant's title upheld).*

**A. INTRODUCTION AND PLEADINGS**

1. Through a plaint dated 1<sup>st</sup> November 2000, the plaintiff, the Church of God Prophecy (the Church), sued The Trustees of the Rift Valley Maendeleo Ya Wanawake Organisation (Rift Valley MYWO) (1st -

5th defendants) over the land parcel Nakuru Municipality Block 16/219 (the suit property). The plaint was later amended to add the Commissioner of Lands as 6th defendant. It is pleaded that the Church had purchased the said land on 7 April 1997 from one George Mutua, and thereafter, the land was duly registered in the name of the Church and a Certificate of Lease issued on 18 April 1997. It is pleaded that at the time of transfer, there were no encumbrances nor competing interests noted in the register and that the particulars in the original register reflected the name of one Geoffrey Makana Asanyo, who obtained a lease in his favour from the Government of Kenya on 1 November 1994. It is pleaded that the original lessee then transferred his interest to George Mutua on 15 April 1997, who was then reflected in the lands registry, and a Certificate of Official Search showed him as proprietor. It is pleaded that pursuant to the allotment to Mr. Asanyo, and subsequent sale to third parties, the suit property was not available for allotment to any other person. It is pleaded that on 17 October 2000, the plaintiff Church commenced construction but on 27 October 2000, the defendant, through the Rift Valley Provincial Police disrupted the same. In the suit, the plaintiffs have asked for the following orders :-

*(a) A declaration that Nakuru Municipality Block 16/219 belongs to the plaintiff having been bought for valuable consideration from one George Mutua without notice and upon a reflection of the said George Mutua in the Register as the valid lessee and a subsequent transfer in favour of the plaintiffs.*

*(b) A declaration that the defendants are trespassers.*

*(c) General damages for trespass.*

*(d) A permanent injunction restraining the defendants by themselves and or agents from interfering or in any way stopping the construction of the Church complex in Nakuru Municipality Block 16/219 until the hearing of the suit.*

*(e) Costs of the suit.*

2. Rift Valley MYWO entered appearance and filed a defence. They averred that they are the registered owners of the suit property and the true allottees. They also filed a counterclaim where it was pleaded that the suit property was allocated to the Rift Valley Maendeleo Ya Wanawake Organisation in the year 1983 by the Commissioner of Lands. It is pleaded that on 1 November 1994, a third party was irregularly allocated the said parcel of land but the allocation was nullified by the Commissioner of Lands and the same reversed to the defendants on the 8 August 1997 and a lease re-issued on 1 August 1997. In the Counterclaim, they asked for the following orders :-

*(a) A declaration that they are the bona fide owners of the suit land.*

*(b) A declaration that the plaintiffs are trespassers on the suit land.*

*(c) An order for eviction of the plaintiffs.*

*(d) A permanent injunction restraining the plaintiffs by themselves or agents or servants from dealing, alienating or in any way interfering with the defendants' possession of the suit land.*

*(e) Costs of the suit.*

3. A Reply to Defence and Reply to Counterclaim was filed wherein the plaintiff basically reiterated its assertion that it is the bona fide proprietor.

4. On 13 March 2001, an application was filed by the Rift Valley MYWO, to have Mr. Asanyo enjoined as a party to the case. The application was allowed and Mr. Asanyo was enjoined as Third Party. The Third Party Notice filed on 23<sup>rd</sup> March 2001, is curiously worded for it states that the "*plaintiff claims from the Third Party for contribution on the grounds that they derive title from (Mr. Asanyo) which title*

*was defective ab initio... And take notice that should you wish to dispute the Plaintiff's claim against the Defendant, or the Defendant's claim against you, you must appear within 14 days...otherwise you will be taken to admit the Plaintiff's claim against the defendant and the defendant's claim against you and you will be bound by any Judgment given in the suit."* Strictly speaking, in a Third Party notice, it ought to be the defendant claiming contribution from the Third Party and not the plaintiff, for the plaintiff has already chosen to direct his claim against the defendant. It will be observed that the Notice issued herein was drawn to suggest that the plaintiff claims against the Third Party which cannot be the case.

5. Be as it may, Mr. Asanyo did appoint counsel to represent him in the matter but I have not seen any pleadings filed by him.

6. There were the usual applications for injunction, a ruling of which went to the Court of Appeal, and even an ex parte judgment, which was later set aside, but these are not relevant to my determination and I need not dwell on them.

## **B. THE EVIDENCE**

7. PW-1 was Cyrus Odendo who is the National Overseer for the plaintiff Church. He testified that the Church was registered in the year 1982. In 1997, the Church was looking for land to develop its headquarters and an agent introduced them to George Mutua (Mr. Mutua), since the latter was selling the suit land. They saw the property and conducted an official search which showed the owner as Geoffrey Asanyo (Mr. Asanyo). They went back to Mr. Mutua who informed them that he had purchased the land from Mr. Asanyo. They were not comfortable proceeding with the purchase given this position, but after some time, Mr. Mutua called them and advised that he had now got the land registered in his name. They then entered into an agreement for sale of the suit property with Mr. Mutua. The agreement is dated 7 April 1997 and was produced as an exhibit. The property was thereafter transferred into their name and they paid the full purchase price to Mr. Mutua. They then took possession, fenced the land, and allowed some small scale farming on it. In the year 2000, they were ready to construct. They cleared the land rates and applied for change of user after which they commenced construction of the proposed Church Complex. It is while they were constructing that they were disrupted by Rift Valley MYWO. They held some meetings with Hon. Margaret Kamar of Rift Valley MYWO and with officials from the Ministry of Lands which did not bear fruit.

8. In cross-examination, PW-1 testified inter alia that they did a search which showed Mr. Asanyo as proprietor. The search was however not produced as an exhibit. He also admitted not having produced the Consent to Transfer nor Stamp Duty receipts for the transfer. He stated that they held meetings in the office of the Commissioner of Lands where both Hon. Kamar and Mr. Asanyo were present where the issue of the surrender of the land by Mr. Asanyo was discussed. He found it difficult to admit that they were defrauded by Mr. Mutua who was then a Bank Manager at National Bank Nakuru. He testified that they have not sued him because they have no claim against him. He admitted not having an Official Search showing that Mr. Mutua was the registered proprietor.

9. With that evidence the plaintiffs closed their case.

10. DW-1 was Prof. Margaret Kamar. She is former Chair of Rift Valley MYWO. She testified that when she took charge, she was handed over an allotment letter dated 20 May 1983 to the suit property which showed 1.3 hectares. The allottee was Maendeleo Ya Wanawake. She went to pay for the land rent, and rates but the land appeared to have been subdivided. The then Commissioner of Lands, Mr. Gachanja, informed her that there was an erroneous subdivision, but promised to handle it, and was advised to pay the land rent which she paid. This was around the year 1998-1999. They inspected the land and found some ploughing but they did not think much of it. They however reacted when they found the plaintiff Church constructing on the site.

11. She recalled a meeting in 1997 called by Mr. Gachanja to resolve the conflict on the subdivision. The land had been subdivided into 6 plots being Nakuru Municipality Block 16/ 213, 214, 215, 216, 217, 218 and 219 (the latter being the suit land). The plot No. 217 was actually a road reserve. She testified that

Mr. Gachanja called all the allottees of these subdivisions. She attended the meeting. She stated that all allottees surrendered their titles except for those allotted the plots No. 213 and 214.

12. She testified that at the time the Church commenced construction, Rift Valley MYWO had title to the suit property which they got on 1 March 2000. They got title to this land and to the other sub-plots. She reported to the Commissioner of Lands who invited the original allottee. It is then that she discovered that the suit land had been allotted to Mr. Asanyo. At the meeting, Mr. Asanyo stated that he had surrendered the land in the year 1997 and refunded the sum of Kshs. 273,833/= that he had paid the Government for the land.

13. Cross-examined by counsel for the plaintiff, DW-1 testified that Rift Valley MYWO was registered on 7 January 1999. The allotment letter in 1983 was issued to Maendeleo Ya Wanawake, the national body. In 1996, an Executive decision was made to have Maendeleo Ya Wanawake land held by its branches. The Certificate of title was received on 1 March 2000. She testified that the Commissioner of Lands held the view that the land allotted to them was erroneously subdivided. That is how the parcel No. 219, the suit property, was surrendered.

14. DW-2 was Geoffrey Asanyo. He described himself as a businessman dealing in real estate. He testified that he was allotted the suit property in the year 1994 and a lease issued to him after he made the requisite payments. He was later asked to surrender it by both the Commissioner of Lands and former President Daniel arap Moi as it belonged to Maendeleo Ya Wanawake. He surrendered the plot and he was refunded his money on 14 February 1997. He testified that he does not know George Mutua and he has never sold anything to him. He stated that he was the first lessor and upon surrender he had no interest to transfer. He stated that if there was any document showing that he sold land to a Mr. Mutua, those documents are not genuine.

15. In cross-examination, he testified that he has never reported his lease as lost and denied ever having dealt with a Mr. Mutua. He however knew a Mr. Mutua who was a Bank Manager. He denied having ever been in a meeting where the title herein was discussed and denied ever offering the Church alternative land. He also denied ever offering this land to the Church to purchase. Once he surrendered the land, he lost all interest in it.

16. There was attempt by the State to call a witness but upon the plaintiff's objection, I declined the witness to continue, as he had not been disclosed before to the parties during pre-trials.

17. With the above evidence the defendants closed their case.

### **C . SUBMISSIONS OF COUNSEL**

18. In his submissions, counsel for the plaintiff reviewed the evidence and inter alia submitted that at the time the property was transferred to the plaintiff, there was no encumbrance or competing interest from any third party noted in the register. He submitted that the lease of Rift Valley MYWO was issued on 1 March 2000 while the title of the plaintiff was in force. He submitted that the series of events leading to the registration of the defendants as title owners was clouded in mystery and secrecy bordering on fraud. He further submitted that Rift Valley MYWO came into existence in the year 1999 and could not legally be allotted land before then. He pointed at the pleadings of the defendant as stating that the lease was nullified and reversed on 8 August 1997 and a lease reissued on 1 August 1997 and submitted that a lease could only be reissued after the reversal and not before. He submitted that the register showed George Mutua as proprietor before the sale to the plaintiff Church and that Section 37 (2) of the Registered Land Act (CAP 300) provided that the Certificate of Title is prima facie evidence of ownership. He questioned why the Maendeleo Ya Wanawake waited since 1983 to be issued with title.

19. He relied on the case of *George Cheyne & 20 Others vs Robin Munyua Kimotho* Civil Appeal No. 272 of 1998 as authority for indefeasibility of title and the case of *Musonga vs Nyati (1984) KLR 425* as authority that fraud must be strictly proved.

20. He submitted that the plaintiffs are bona fide purchasers without notice and was not aware of any fraudulent dealings nor were they parties to the same. He submitted that S.143 of the Registered Land Act would only provide for cancellation of title where there is fraud or mistake and there was none on the plaintiff's part. He submitted that the plaintiff's registration was a first registration and was protected by Section 143 of the RLA. He relied on *Mugongo vs Sihowa , Court of Appeal at Kisumu, Civil Appeal No. 39 of 1986*.

21. He submitted that Rift Valley MYWO was guilty of trespass and that the plaintiff is therefore entitled to damages. He further submitted that the plaintiff is entitled to a permanent injunction against the defendants and sought judgment in favour of the plaintiff.

22. On the part of Rift Valley MYWO, it was submitted that the plaintiff's title originates from that once held by Mr. Asanyo which was sold to the plaintiffs by Mr. Mutua. He submitted that it was not known how Mr. Mutua became owner of the suit property but the plaintiff did not call him as a witness. He submitted that the only inference is that his evidence would have been adverse to the plaintiff.

23. He submitted that once Mr. Asanyo surrendered his lease, his lease lost validity and any interest derived from his lease were extinguished and no interest could pass to Mr. Mutua. He relied on the *nemo dat* rule as applied to sales of land in the case of *Julius Kariuki Mungai vs Baliga Limited & Another (2004) eKLR* and *Fatuma Ali Omar & Another vs Omar Ali Omar & 20 Others (2015) eKLR*. He submitted that the plaintiff's title must have been obtained by fraud or misrepresentation. He submitted that the land belongs to the defendants and the plaintiffs are trespassers and orders of eviction should issue.

24. For the Third Party, it was inter alia submitted that no specific prayer was sought against the Third Party and no claim has been advanced by the defendants against the Third Party. It was submitted that his position was akin to that of an interested party. She relied on the case of *Joseph Leboo & 2 Others vs Director Kenya Forest Services & Another (2013) eKLR*. She submitted that the sale to the plaintiffs took place after Mr. Asanyo had surrendered the suit land. She pointed out that the plaintiff did not call Mr. Mutua although he featured prominently in the proceedings and neither was he enjoined as a party. She was of the view that this was meant to cover up for him or exonerate him from the acts of fraud in question. She submitted that the plaintiffs are not bona fide purchasers for value and that their claim lie against Mr. Mutua for the recovery of the purchase price or compensation by way of damages.

25. No submissions were made on behalf of the State.

#### **D. ANALYSIS AND DECISION**

26. I have carefully considered the pleadings, the evidence and the submissions of counsel.

27. In a nutshell, the plaintiff's position is that it purchased the suit property from Mr. Mutua after it was demonstrated that Mr. Mutua was proprietor of the suit property. The property was then transferred to them and they are now the registered proprietor. The position of the 1st - 5th defendants is that the property was allotted to Maendeleo Ya Wanawake in the year 1983. In the 1990s their allotted property was wrongfully subdivided and persons given title to the subdivisions, one of which is the suit property. However, the title herein was surrendered by the allottee and a fresh title issued to them. They are of the view that they are therefore the legitimate title holders.

28. It is clear that the contest herein is between the plaintiff and Rift Valley MYWO. Although Mr. Asanyo was brought in as Third Party, no specific prayers were sought against him. As I stated earlier in this judgment, I found the method of inclusion of Mr. Asanyo to these proceedings to be curious.

29. I am aware of the contention of the plaintiff on the status of Rift Valley MYWO but I do not see any issue because it was explained by DW-1 that Maendeleo Ya Wanawake is a Society and it has permitted its Branches to be in charge of land situated within their jurisdictions.

30. The core issue in the suit is therefore whether the land should be of the plaintiff Church or of Rift Valley MYWO. Both parties have Certificates of Title to the suit property. Of course, the issuance of two titles is not contemplated in the law and strictly speaking should not happen. If the Land Registry followed all processes and procedures as they are required to do, this is not a phenomenon that should occur. Unfortunately, it is a sad reality in our country, that there may be more than one title to the same land issued to different people. Probably it is time that we seriously investigated the personnel at the Lands Registry and prosecuted them for a lot of people have suffered pain and loss out of their ineptitude or blatant fraudulent dealings. If they did their work as required of them, we would not have cases such as these. I note that I have digressed and I better come back to the matter at hand.

31. A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. 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. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.

32. The position of the plaintiff church is that it purchased the land from Mr. Mutua. It believed that Mr. Mutua had title. When they first approached Mr. Mutua, the plaintiffs knew that the land was registered in the name of Mr. Asanyo. They however never approached Mr. Asanyo and they believed Mr. Mutua when he told them that he had purchased the land from Mr. Asanyo. It is then that they entered into the agreement for sale. I have looked at the Agreement for Sale and I note that the same is dated 7 April 1997. The plaintiffs state that the property was then transferred to them and they hold a Certificate of Lease. This was issued on 18 April 1997. Although the plaintiffs stated that they conducted a search of the property before they purchased it, no Certificate of Official Search was produced to show that the property was actually recognized by the Lands Registry as being one owned by Mr. Mutua. I cannot therefore say that the plaintiff conducted proper due diligence before purchasing the property. There is of course the not so little matter that Mr. Asanyo has categorically denied having any sort transaction with any George Mutua. No agreement between Mr. Asanyo and Mr. Mutua was produced and there is absolutely nothing to show that Mr. Asanyo ever transacted with Mr. Mutua over this parcel of land. Mr. Mutua himself was neither sued nor called as a witness by the plaintiff for reasons that remain a curiosity for he was a critical player in the way in which the plaintiff derived its Certificate of Lease. The whole manner in which Mr. Mutua derived title is shrouded in smoke screens and secrecy. I cannot tell whether it was by design or by fault, that Mr. Mutua was not called as a witness to shed light on this extremely important issue that is central to the manner of acquisition of the title of the plaintiff.

33. Be as it may, it is the position of the plaintiff church that it acquired the title that was previously owned by Mr. Asanyo. However, no such title existed at the time they entered into the agreement in April of 1997. There is a wealth of evidence that Mr. Asanyo had already surrendered his title. His lease which was produced as an exhibit by the defendants shows that he obtained it on 24 November 1994. Owing to pressure, he surrendered this lease and was refunded on 14 February 1997. It cannot be said that he continued to hold a lease after he surrendered it. Therefore as at 7 April 1997, when the plaintiff was purchasing the property from a person who said that he had derived his title from Mr. Asanyo, the lease of Mr. Asanyo was non-existent. Other than the Government, who received the surrender, there was no way any person could say that he has obtained title as a successor to the surrendered lease. Mr. Mutua could not have got any title from Mr. Asanyo as Mr. Asanyo had already surrendered his lease. It follows that he could have had no title to pass for you cannot pass what you do not have in the first place. I really do not see how the plaintiffs can argue that they obtained a good title from Mr. Mutua.

34. On the other hand, Rift Valley MYWO, tabled evidence that the suit property was part of what had

been allotted to them in the year 1983. There was a subdivision of the whole, which they contested, leading to surrender by the persons who held the subdivisions, the suit property included. Thereafter, they obtained a title to the suit property. I cannot in any way fault the manner in which the title of Rift Valley MYWO was derived. It was obtained after the surrender of the lease by Mr. Asanyo. Upon surrender, the Government did affirm the allocation to Rift Valley MYWO.

35. Balancing the two competing titles, it is my view that it is Rift Valley MYWO who have good title to the suit property. The title of the plaintiff is extremely suspicious and in my view the same could only have been obtained either by the fraud of Mr. Mutua, or by the mistake of the Land Registry, or both. Section 26 of the Land Registration Act, Act No. 3 of 2012, provides that a title which was acquired by way of fraud or misrepresentation, where a person is proved to be a party can be attacked. So too a title which was acquired illegally, unprocedurally or through a corrupt scheme. The said Section is drawn as follows :-

*26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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.*

*(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.*

36. From the evidence, I may not say that the Church participated in any fraud or misrepresentation. But the title they hold, clearly, was acquired illegally, unprocedurally or through a corrupt scheme. I say so because the position of the Church is that Mr. Mutua got title from Mr. Asanyo, of which there is no proof, and even if that was the case, the same cannot be upheld for Mr. Asanyo had already surrendered his title to the Government and had nothing to transfer to Mr. Mutua. Consequently, Mr. Mutua had nothing to transfer to the Church. I have no choice but to forthwith cancel the title of the plaintiff Church. I direct that the same be surrendered to this court so that it does not remain in circulation for it can be used as a tool of further fraud. I do not see how the plaintiffs can succeed and their case is hereby dismissed. Having held that they have no interest in the suit property, they have no choice but to vacate and leave it to Rift Valley MYWO, who to me, have a better title than that held by the plaintiff Church. In essence the case of the plaintiffs fails and that of Rift Valley MYWO succeeds.

37. I however sympathize with the plaintiff church who may have honestly thought that it has a good title that it sought to protect and I will therefore make no orders as to costs. The plaintiff church however needs to vacate the suit premises within 3 months of this judgment which I believe is enough time to enable them find alternative accommodation.

38. I now make the following final orders :-

*(a) I declare that between the plaintiff and the 1st - 5th defendants, it is the 1st- 5th defendants who hold a better title to the land parcel Nakuru Municipality Block 16/219.*

*(b) I declare that the Certificate of Lease held by the plaintiff to the land parcel Nakuru Municipality Block 16/219 is not a good title and the same is hereby cancelled. I direct the plaintiff to surrender the Certificate of Lease to this court forthwith and the same should*

*not be used to transact over the subject property.*

*(c) I order the plaintiff to vacate the suit land within 3 months of this judgment and in default an order of eviction to issue.*

*(d) Upon vacating the suit land or being evicted, the plaintiffs are permanently restrained from entering, being upon, utilizing or in any other way interfering with the suit land.*

*(e) There shall be no orders as to costs.*

39. *It is so ordered.*

**Dated, signed and delivered in open court at Nakuru this 18<sup>th</sup> day of February, 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of:**

Mr Biko instructed by M/s Odhiambo & Odhiambo Adovates for the plaintiffs

Mr Kahigah instructed by M/s Mirugi Kariuki & Company Advocates for 1<sup>st</sup> – 5<sup>th</sup> defendants.

Mr Kiprotich Kirui of the State Law office for 6<sup>th</sup> defendant

No appearance on part of M/s Konosi & Company Advocates for Third Party

CA: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**