



**Mung'ira v Board of Governors Consolata Hospital (Civil Appeal 229 of 2018) [2022] KECA 828 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KECA 828 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 229 OF 2018  
HM OKWENGU, F SICHALE & A MBOGHOLI-MSAGHA, JJA  
JULY 29, 2022**

**BETWEEN**

**LAWRENCE MUNGIIRIA ..... APPELLANT**

**AND**

**BOARD OF GOVERNORS CONSOLATA HOSPITAL ..... RESPONDENT**

*(An appeal from the Judgment and Decree of Environment and Land Court at Meru (Cherono, J) made on 31st October, 2018 in Meru ELC No. 83 of 2015)*

**JUDGMENT**

1. This appeal arises from a suit which was filed in the Environment and Land Court (ELC), by the respondent, the Board of Governors Consolata Hospital Nkubu (the Board), against the appellant Lawrence Mung'ira (Mung'ira), seeking an order of permanent injunction, restraining Mung'ira by himself, his servants or agents from entering, trespassing, occupying, taking possession, remaining in possession, or in any way interfering with the quiet possession, occupation and use of land parcel No. Nkuene/Taita/559 (suit property) by Consolata Hospital Nkubu (the Hospital), general damages for trespass and mesne profits. The Board claimed to be the registered and beneficial owner of the suit property, and contended that Mung'ira had without any colour of right, trespassed on to the suit property and blocked the entrance, thereby denying the Board access to the suit property.
2. Mung'ira filed a defence and counterclaim in which he denied the Board's claim, and maintained that he entered into the suit property through an agreement entered into on 4<sup>th</sup> March, 2015 for exchange of the suit property with his land known as Nkuene/Taita 3086.
3. In his counterclaim, Mung'ira claimed that he entered into the agreement with the Diocese of Meru Trustees who were the registered proprietors of the suit property, pursuant to which agreement, he surrendered his aforementioned title in exchange for the suit property. He subsequently took possession of the suit property and carried out tremendous developments. On 25<sup>th</sup> July 2015, Father



Silas Mwiti (Fr. Silas), the Health Coordinator of the Catholic Diocese of Meru and the Administrator of the Hospital, placed a caution on the suit property claiming a licensee's interest.

Following negotiations and an attempt at an out of court settlement, an agreement dated 31<sup>st</sup> May 2016, was entered into with the Diocese of Meru, where it was agreed that Mungiiiria surrenders an additional piece of land Nkuene/Taita/2893. However, the Board refused to accept the exchange, and instead Fr. Silas incited members of the public who destroyed Mungiiiria's developments on the suit property.

4. Mungiiiria, therefore, sought judgment against the Board and Fr. Silas on the counterclaim, for a declaration that the caution placed on the suit property by Fr. Silas is unlawful and should be lifted; general damages for unlawful caution of the suit property; and an order permanently restraining the Board, Fr. Silas, and their servants or agents from entering, remaining on, occupying, or in any way interfering with the suit property.
5. Hearing of the suit proceeded in the ELC before Cheronon, J. Three witnesses testified for the Board. These were Fr. Silas, one Gilbert Muriuki an accountant at the Hospital, and one Thomas Gikunda Mungania who described himself as a stakeholder of the Hospital representing the community which benefits from the Hospital. Mungiiiria also testified and called one witness, Fr. Patrick Micheni Kaaria, a priest with the Catholic Diocese of Meru Headquarters.
6. In a nutshell, the Board maintained that as the Board of the Hospital, it was the beneficiary of the suit property as the Diocese of Meru was only holding title as trustee for the Hospital; that the Board was not consulted regarding the purported exchange of the suit property with Mungiiiria's land; that the suit property was more valuable to the Hospital than Mungiiiria's property, as Mungiiiria's property was far from town; that the Bishop of Meru Diocese had written a letter to the Land Control Board cancelling the purported exchange of the properties following objections raised by the Board.
7. In his defence, Mungiiiria testified how he was approached by one Fr. Mungera with an offer to exchange the suit property with his land. They discussed and it was agreed that Mungiiiria takes the suit property in exchange for his parcel of land, Nkuene/Taita 3086. After some time, he learnt that the Bishop of Meru Diocese had written to the Land Control Board to stop the transaction. Subsequently, he was served with court documents. Together with his lawyer, they approached the Bishop, and following further negotiations, it was agreed that Mungiiiria gives them an additional parcel No. 2893 in consideration for which the suit in the ELC was to be withdrawn. The agreement was signed by the Bishop but the suit was not withdrawn.
8. Fr. Patrick Kaaria of the Catholic Diocese of Meru headquarters identified a letter written by the Bishop, in which the Bishop gave consent for the exchange of the suit property with Mungiiiria's land. He also produced a second letter written by the Bishop to Fr. Silas, requesting that the case be dropped. He maintained that the suit property belonged to Meru Diocese, and that the diocese had the right to use the land or give it to any other diocese.
9. In his judgment, the learned Judge found: that the Diocese of Meru was holding the suit property as trustees for the benefit of the Board who were endorsed in the title to the suit property as beneficiaries; that it was necessary that before the Diocese of Meru could make any decision involving the suit property, the Board as the beneficiaries be consulted; and that the Diocese of Meru as trustees could not act in a manner prejudicial to the interest of the Board. The learned Judge found that the Board was not consulted when the agreement for the exchange of the suit property with that of Mungiiiria's land was entered into, and the agreements entered into between Mungiiiria and the Diocese of Meru were therefore null and void. The learned Judge further noted that the agreements were not signed by the trustees authorized to execute documents on behalf of the registered trustees. Consequently,



the learned Judge ruled in favour of the Board and entered judgment granting the Board a permanent injunction restraining Mungiiira from the suit property.

10. Mungiiira being dissatisfied with that judgment has lodged an appeal before this Court raising nine (9) grounds. Briefly, he faults the learned Judge: for holding that the Diocese of Meru Registered Trustees, held the suit property in trust for the Board; in failing to consider the evidence tendered by Mungiiira; in holding that the agreements dated 4<sup>th</sup> March 2015 and 31<sup>st</sup> May 2016, were null and void even though they were properly executed and not challenged by the Board; in failing to consider the defence exhibits, that is, the letters written by the Bishop of Catholic Diocese of Meru; in failing to determine Mungiiira's counter claim; in failing to consider that Mungiiira was not privy to the contracts between the Board and the Diocese of Meru registered trustees; in holding that the Diocese of Meru should have consulted the Board while dealing with the suit property; and finally, in delivering a judgment that is against the weight of the evidence on record.
11. In support of the appeal, Mungiiira filed written submissions in which he identified five issues for determination. These were: whether the agreements dated 4<sup>th</sup> March, 2015 and 15<sup>th</sup> June, 2016 were valid and enforceable; whether Mungiiira was entitled to the prayers sought in the counterclaim; whether the Board had locus standi to institute the initial suit; whether the Board proved its claim for trespass; and whether the suit property is held by the Diocese of Meru in trust for the Board.
12. Mungiiira pointed out that he produced letters that were exchanged between himself and the registered owner of the suit property, that is the Diocese of Meru, and that the Diocese of Meru through the Bishop in charge, made an offer for exchange of the suit property with Mungiiira's property, which offer Mungiiira accepted. He pointed out that the agreements were not challenged by either of the parties and therefore the learned Judge erred in going into issues that were not raised in the trial. Mungiiira maintained that the Board is not a recognized entity with legal standing in the issues between him and the Diocese of Meru. Mungiiira urged that in light of the evidence before the trial court, he was entitled to the prayers sought in the counter claim. He faulted the trial judge for failing to make any determination on the counter claim.
13. With regard to the Board's locus standi to institute the initial suit, Mungiiira pointed out that the Board was not a registered entity or a legal person and could not therefore own property or sue or be sued in its own capacity. The suit before the trial court was therefore defective and ought to have been dismissed.
14. On the issue of trespass, Mungiiira argued that he was not a trespasser on to the suit property as the land is registered in the name of Diocese of Meru, and he entered into the land with the consent and permission of the Diocese of Meru, and therefore his occupation of the suit property is not illegal.
15. With regard to the issue of whether the suit property was held in trust for the Board, Mungiiira relying on several authorities argued that the court can neither presume nor imply a trust except to give effect to the intention of the parties, which intention must be clearly determined. He maintained that the Board had not pleaded nor proved the alleged trust, and there was no evidence upon which the ELC could find that the Diocese of Meru Registered Trustees held the suit property in trust for the Board.
16. Finally, Mungiiira urged that the Board was bound by its own pleadings and the learned Judge erred in allowing the Board to deviate from the issues that were raised in the pleadings.
17. The Board also filed written submissions in which it argued that Mungiiira had abandoned the grounds of appeal listed in his memorandum of appeal and argued new grounds. On the issue of trust, the Board submitted: that the title deed to the suit property showed clearly that the Board is the registered and beneficial owner of the suit property, because its name was endorsed on the register; that as beneficial



- owner, the Board had to sanction any disposition over the suit property; that the trustees stand in a fiduciary position and holds the property for the benefit of the beneficiary and not for their own benefit; and that the learned Judge was right in holding that the Diocese of Meru Registered Trustees should have consulted the Board before dealing with the suit property.
18. With regard to the agreement for exchange of the properties, the Board submitted that the agreement dated 4<sup>th</sup> March 2015 was signed by Fr. Julius Mwongera, and no evidence was produced to show that he is a trustee of the Diocese of Meru or authorized to execute documents on behalf of the trustees. The agreement dated 31<sup>st</sup> May 2016 was signed by an unidentified person, while there was also an unsigned space for another signature. The Board urged that both agreements were null and void, and that the Bishop of the Diocese of Meru did not sign any of those agreements, nor was he proved to be a registered trustee of Diocese of Meru.
  19. The Board referred to section 3(3) of the *Trustees (Perpetual Succession) Act*, Cap 164, under which trustees are a body corporate, and argued that as a Board, it was a separate entity, distinct from the Bishop. In addition, that contrary to section 38 of the *Land Act* and Section 3 of the *Law of Contract Act*, there was no proper signed contract upon which Mungiiiria's counterclaim could be founded, nor was there any Land Control Board consent as required under section 8 of the *Land Control Act*. The letters of the Bishop were therefore of no consequence.
  20. The Board urged the Court to find that the learned Judge properly analyzed the evidence adduced by Mungiiiria and the Board during trial, and found that the Board had proved its case on a balance of probabilities. Further, that Mungiiiria failed to prove his counterclaim, and was therefore not entitled to the prayers sought in the counterclaim.
  21. On the issue of locus standi, the Board submitted that it was properly before the court as the hospital is a duly registered hospital, with capacity to sue and be sued. The Court was therefore urged to dismiss the appeal.
  22. We have carefully considered and perused the record of appeal, together with the submissions made by the respective parties. This being a first appeal, we have an obligation under Rule 31 of the *Court of Appeal Rules*, 2022 to reappraise the evidence and draw inference of fact. As was stated in *Kenya Ports Authority vs Kuston (Kenya) Limited* [2009] 2EA 212:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
  23. The main issue in this appeal is whether the learned Judge properly evaluated the evidence and came to the correct conclusion in finding in favour of the Board. Put differently, whether the Board proved its case to the required standard. In addressing this issue, there are several other ancillary issues such as: whether the Board had the locus standi to bring the suit against Mungiiiria; whether the Board is the beneficial owner of the suit property; whether the agreements entered into between the Diocese of Meru and Mungiiiria were lawful; and whether Mungiiiria acquired any rights over the suit property pursuant to those agreements.
  24. Mungiiiria challenged the Board's locus standi to institute the suit. However, the Board claimed that it was the beneficial owner of the suit property and this was supported by a copy of the title deed and a



copy of the green card, both of which indicated the registered owner of the suit property as Diocese of Meru (Trustees Registered – Consolata Hospital Nkubu).

25. The Diocese of Meru entered into two agreements with Mungiiira. In the first agreement dated 4<sup>th</sup> March, 2015, entitled “Agreement for exchange of LR. Nkuene/Taita/3086 and Nkuene/Taita/559” the parties are indicated as “Lawrence Mungiiira and Diocese of Meru (Trustees Registered – Consolata Hospital Nkubu)”. The Diocese of Meru Registered Trustees – Consolata Hospital is indicated in the agreement as owning the suit property, and the agreement is signed by Mungiiira and Julius Mwongera, who is described as Land Officer Diocese of Meru. The said Julius Mwongera was not called to testify, nor was any evidence adduced to confirm his authority to sign the agreement either on behalf of Meru Diocese Trustees or Consolata Hospital Nkubu.
26. It is evident that the Diocese of Meru Trustees Registered were not holding the suit property on their own behalf, but were holding it as trustees for and on behalf of Consolata Hospital Nkubu. In the agreement signed on 4<sup>th</sup> March 2015, the Diocese of Meru Trustees Registered were alive to this fact and therefore purported to act on behalf of Consolata Hospital Nkubu who own the suit property.
27. The Board initiated the suit in its capacity as the Board of Consolata Hospital- Nkubu. No evidence was adduced to show whether the Board is a Board which is registered. However, from the set of minutes of the Board that were produced in evidence, it is apparent that the Board is a management Board responsible for the running of the hospital. Fr. Silas, who is the Health Coordinator of the Catholic Diocese of Meru, is the Hospital Administrator and appears to have taken the lead in pursuing the suit. The fact that the proprietor of the suit property is indicated in both the title and the Green Card as Diocese of Meru Trustees Registered- Consolata Hospital Nkubu, leaves no doubt that the Diocese of Meru is only a trustee for Consolata Hospital, Nkubu. It is not clear why the Board was not registered as the Trustees of the Hospital, but that notwithstanding, the registration of the Diocese of Meru as trustees for the Hospital meant the Hospital was the beneficiary of the suit property.
28. As trustees, the Diocese of Meru could only deal with the suit property for the benefit of the Hospital. The evidence of Fr Silas and the minutes that were produced, shows that the Board was not consulted, nor did it consent to the exchange of the suit property with Mungiiira’s land. Consequently, the Diocese of Meru had no authority to enter into the agreement for disposal of the suit property to Mungiiira.
29. Furthermore, an examination of the two agreements that were relied upon by Mungiiira reveals that the agreements were not properly executed. There is no evidence that they were signed by persons who are trustees of Diocese of Meru, nor do the agreements bear any seal or stamp of such trustees. In addition, the agreements involved disposal of land, and the suit property being agricultural land, under Section 6(1) of the *Land Control Act* the Land Control Board consent to the transaction was mandatory and without it the transaction was void. Yet, the evidence was that the Land Control Board consent could not be issued because the Board objected to the transaction, Without the Land Control Board consent the agreements became void 6 months after the date they were signed.
30. We find that Mungiiira’s counterclaim based on the two agreements and his occupation of the suit property on the authority of Diocese of Meru, cannot hold. The Hospital was the registered beneficial owner of the suit property, and Mungiiira had no right to the suit property. Although the learned Judge erred in failing to make a finding in regard to the appellant’s counterclaim, that is not of any consequence as the evidence is clear that the suit property belonged to the Hospital and the appellant’s counterclaim had no merit and was therefore for dismissal.

The upshot of the above is that this appeal has no merit. It is dismissed with costs.



DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JULY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

*I certify that this is a true copy of the original*

*Signed*

DEPUTY REGISTRAR

