



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH

OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 57 OF 2015

BETWEEN

COUNTY GOVERNMENT OF MIGORI.....APPELLANT

AND

BISHOP PHILIP ANYALO.....1ST RESPONDENT

CATHOLIC DIOCESE OF HOMA BAY.....2ND RESPONDENT

REV. FR. RICHARD ODHIAMBO.....3RD RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya

at Migori, (Majanja, J.) dated 26th day of May, 2015

in HCCC NO. 2 OF 2015)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court (**Majanja, J.**) dismissing the appellant's suit relating to management of **Kitere Youth Polytechnic** with costs to the respondents.

[2] By a plaint dated 10th March, 2015, the appellant herein averred, amongst other things, that, by a letter dated 24th April, 2009, the 2nd respondent herein applied to the Ministry of Youth Affairs and Sports (*Ministry*) of the National Government to register Kitere Youth Polytechnic (**Kitere**) as a public institution; that subsequently, the Ministry registered Kitere as a public youth polytechnic on 20th May, 2015; that under the Constitution, it is the devolved function of the appellant to manage public village polytechnics; that since the registration of Kitere, it has operated as a public institution managed by the appellant through its department of Education, Culture and Sports and has been funded, assisted and run using public funds including posting of qualified staff, instructors, purchase of equipment, tools and public funding; that by a letter dated 29th April, 2014, the 1st and 2nd respondents asked the appellant to recall its staff and restore Kitere to a private status; that on 24th February, 2015, the respondents

unlawfully trespassed and forcibly took over the institution and that since then, the normal learning activities of the institution have been disrupted. The appellant pleaded that the 2nd respondent is only a sponsor and that its actions were *ultra vires* sections 26, 27, 55, 56, 57 and 59 of the Basic Education Act and violates the rights of all stake holders as protected by Article 47 of the Constitution.

[3] The reliefs sought in the plaint included a declaration that Kitere is a village polytechnic whose management falls under the appellant's devolved function; a declaration that Kitere is a Public Village Polytechnic and not a Private Institution owned by the 2nd respondent; a declaration that the actions of the respondents were illegal, unlawful and unconstitutional and an order of permanent injunction and damages.

[4] The respondents filed a joint defence in which they admitted that Kitere was registered as a Public Youth Polytechnic on 20th May, 2010; that after the registration the appellant provided and coordinated the availability of funds required for development of necessary infrastructure and training and that the appellant had the mandate to manage public village polytechnics.

However, the respondents averred, *inter alia*, that the registration of Kitere Polytechnic was irregularly undertaken and was a nullity; that the registration was provisional and lapsed after 18th months; that after the lapse of the provisional certificate, Kitere remained a private polytechnic and the demand to restore it to private status was proper and legitimate; that Kitere is built on land title No. **Kamagambo/Kanyajuok/71** which was registered in the name of the 2nd respondent and that respondents peacefully took over the management and their rightful property.

[5] The appellant filed a reply to the defence maintaining that the takeover of the management was unlawful.

[6] At the trial, oral evidence was not received, the trial judge being of the view that most of the facts pleaded and which were crucial for the determination of the issues raised were not in dispute. The trial judge instead directed the parties to file written submissions and highlight them. One of the several issues framed by the appellant in its written submissions was in respect of the status of ownership of land Kamagambo/Kanyajuok/71 on which the polytechnic was built.

Referring to witness statements, the respective counsel for the parties made submissions on that issue.

[7] The High Court identified the dispute as one concerning the management and control of Kitere and whether it is a private or public institution. The court stated that in resolving that dispute, the issue of ownership of the land and the issue concerning the registration of Kitere as a public institution were decisive. Regarding the issue of ownership, the learned judge made a finding that the land was currently registered in the name of the 2nd respondent although a dispute on land ownership was pending for determination in **High Court Migori Petition No. 36 of 2014 - County Government of Migori v. The Registered Trustees of Catholic Diocese of Homa Bay and 2 others.**

Since the dispute on ownership of land was pending for determination, the High Court refrained from discussing the issue further. Regarding the issue of the registration of the polytechnic as a public institution, the learned judge considered the contents of the Certificate of Registration dated 20th May, 2010, and made a finding that the Certificate was provisional for 18th months which had lapsed and concluded:

“in the present matter, although there was clear intention to convert Kitere to a public institution, which intention was evidenced by application for same and a provisional certificate issued, the certificate became invalid once the stipulated period lapsed. Since the certification lapsed, I am constrained to find and I hereby find that the ownership and management of Kitere Polytechnic reverted to the hands of the Diocese.”

Upon that finding, the High Court dismissed appellant's suit with costs.

[8] The judgment of the High Court is assailed on several grounds the main ones being; that the court failed to appreciate that Kitere had been public in nature since inception except for sponsorship by the 2nd appellant and had since 2010 been managed and controlled as a public institution; that the court erred in holding that the lapse of provisional registration reversed ownership from public to private; that the court erred in deciding the suit on the single issue of lapse of provisional certificate and ignoring all other facts and circumstances, and, that the court erred in fact and in law in holding that since the land was registered in the name of the 2nd respondent, the 2nd respondent was the owner of the institution.

[9] There was no dispute that Kitere Youth Polytechnic is built on land title No. Kamagambo/Kanyajuok/71 which measures 8.6 Hectares. The history of the acquisition of the land, registration of Kitere and the development thereon had been described in the respective witness statements and documents filed in the suit. They show briefly as follows:

In about 1974, the local community decided to establish a secondary school. The land was donated by some members of the local community. The community mobilized fund raising and established Kitere Harambee Technical School later changed to Kitere Youth Polytechnic which was registered by the District Community Development Officer under the sponsorship of **Catholic Diocese of Kisii**.

The Catholic Diocese of Kisii upon request of the management committee provided volunteers as instructors. In the course of time more buildings were constructed. On 17th November, 1977, the land was registered in the name of **South Nyanza County Council**, the predecessor of the appellant and reserved for Kitere Primary School.

On 13th February, 2014, the Land Registrar altered the land register and registered the **Catholic Diocese of Homa Bay** as the proprietor of the land.

On 19th September, 2014, the registered proprietor charged the land to the Co-operative Bank of Kenya to secure a loan of Shs. 26, 408, 000/= for the construction of hostels.

[10] This prompted the appellant herein to file a petition dated 21st October, 2014 at the High Court in Kisii against the Registered Trustees of Catholic Church, Diocese of Homa Bay, the Attorney General and The National Land Commission claiming that the transfer was fraudulent, irregular and illegal. The appellant filed in that petition a notice of motion seeking two injunctive orders.

The appellant's application for interlocutory injunction in that petition was partially allowed by **Okongo, J.** on 20th March, 2015 whereby the learned judge granted an interlocutory injunction against the respondents in that petition restraining them from among other things, selling, charging or constructing new buildings (*save for the hostel*) pending the hearing and determination of the petition.

[11] However, the learned judge declined to grant an interlocutory injunction to restrain the respondents from entering into or interfering with the appellant's possession or quiet enjoyment of the land holding:

“According to the material before me neither the petitioner nor its predecessor has been in possession of the suit property

The occupatants of the suit property have been Kitere Catholic Church, Kitere Youth Polytechnic and Kitere Primary School.

It has been claimed that Rongo University College also occupies a portion of the suit property. There is no evidence however before me of their occupation of the property. Kitere Primary School moved out of the suit property to a separate and distinct parcel of land.”

The 2nd respondent filed an appeal in this Court – **Civil Appeal No. 65 of 2015** against the grant of the interlocutory injunction. We take judicial notice of the fact that the said appeal was withdrawn by

consent on 18th July, 2018 and this Court ordered that petition No. 36 of 2014 to be heard on priority basis. The suit is still pending for hearing in the High Court.

[12] In relation to the present appeal, we respectfully agree with the finding of the trial judge that the issue of the ownership of land on which Kitere is constructed was a relevant and important factor. As the learned judge correctly found, the registration of the 2nd respondent as the proprietor of the land entitled it to all attendant benefits that come with absolute and indefeasible ownership including the right to control the manner in which education activities are carried out subject to the law governing the running of an educational institution.

It is submitted on behalf of the appellant that Okong'o, J. in finding that the appellant had established a *prima facie* noted that the transfer of the land was irregular and illegal.

That finding should not have been made at an interlocutory stage and it should be understood in the context of the application which was before the court. Since the appellant had sought an interlocutory injunction pending the determination of the petition, that finding was only preliminary.

[13] Indeed, in the withdrawn Civil Appeal No. 65 of 2015 the respective counsel agreed and an order was made that:

“Any conclusive findings of law or fact in the Ruling of Okongo, J. dated 20th March, 2015 with respect to ownership of LR No. Kamagambo/Kanyajuok/71 shall not be binding at the trial of Petition No. 36 of 2014.”

The court (*Okongo, J.*) did not reverse the registration of the 2nd respondent as the proprietor of the land. As long as 2nd respondent remains registered as absolute proprietor of the land on which Kitere is constructed, Kitere is a private polytechnic under the superintendence of the 2nd respondent subject to running it in compliance with the policy and directives of the Ministry of Education.

[14] On the question of registration of Kitere, by a letter dated 24th July, 2009, the 2nd respondent applied to the Ministry of Higher Education to assist Kitere and stated in part:

“For this long, it has served as a private institution under the management of Catholic Church...

We therefore ask you to:

1. As we retain sponsorship, you send qualified staff and necessary equipments.
2. Allocate the youth revolving funds to the school thus will improve the intended goals for the institution.
3. Allow us register it as a public institution but retain the Boarding sections as private ...”

The Certificate of Registration of Kitere as a public polytechnic dated 20th May, 2010 stated in the remarks:

“This is a Provisional Certificate. A permanent Certificate MUST be obtained eighteen (18) months from the date of registration when this Provisional Certificate becomes invalid.”

The suit which gave rise to this appeal was instituted in March, 2015 more than 3 years after the Provisional Certificate expired. There was no evidence that the 2nd respondent obtained a permanent registration certificate or that one was issued.

[15] It is contended by the appellant that Kitere is not now registered with the County Education Board or

with Technical and Vocational Training Authority.

If that is so, and if, Kitere is currently operating without official sanction, that is a matter which did not directly arise in the suit and which can be resolved in a different forum.

In our view, the finding by the learned judge that upon the lapse of the certificate of registration the ownership and management of Kitere reverted to the 2nd respondent is correct considering that it is the 2nd respondent who applied for the conversion of the polytechnic from private to public status.

Further, the contention by the appellant that Kitere has always been a public polytechnic would have been valid if it was made before 14th February, 2014 when the land was public land and registered in the name of the predecessor of the appellant. When the land was converted to private land and registered in the name of the 2nd respondent, the claim that the polytechnic is a public institution cannot now stand. However, the issue whether the land is public or private land will be conclusively determined in the pending petition.

[16] As regards the appeal against the order of costs, the appellant states in the memorandum of appeal that the court exercised its discretion wrongly by condemning it to pay costs in the circumstances of the case.

It is submitted on behalf of the appellant that it brought and maintained the proceedings in the public interest and not for personal interest or financial consideration.

The learned judge had a discretion on the award of costs and costs normally follow the event.

The documents on the record show that the issue of status of Kitere has been contentious. Some members of the public wanted the polytechnic to be restored to the public. **Mr. Bosire**, the Senior Land Registrar, Migori, who presided over some meetings recommended in his decision dated 8th May, 2014, that the land title No. Kamagambo/Kanyajuok/71 be sub-divided into two portions – one for Kitere Youth Polytechnic and one for Kitere Catholic Church. Several other meetings were held after the 2nd respondent took over the management of the polytechnic.

It is apparent that the 2nd respondent claimed back the management of the polytechnic after public funds had been expended on the institution.

It is evident that in filing the suit, the appellant was motivated by public interest after efforts to resolve the dispute amicably had failed. In the circumstances, it was just to require each party to bear its own costs.

It is also just for the same reason that we should not make order as to the costs of the appeal.

[17] For the foregoing reasons, the substantive appeal regarding the control and management of Kitere is dismissed. However, the appeal on costs is allowed, the order of the High Court set aside and in lieu thereof each party shall bear its own costs of the suit in the High Court.

We make no orders as regards the costs of this appeal.

Orders accordingly.

DATED and Delivered at Kisumu this 18th day of October, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR