



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A)**

**CIVIL APPEAL NO. 54 OF 2014**

**BETWEEN**

**THE CHAIRMAN KENYA NATIONAL UNION OF TEACHERS**

**THE CHAIRMAN KENYA NATIONAL UNION OF TEACHERS**

**BRANCH EXECUTIVE COMMITTEE.....APPELLANTS**

**AND**

**HENRY INYAGALA**

**DRAKE F. AMBUNDO**

**ISAAC MUGOGO (suing on their own behalf and on behalf of**

**KAKAMEGA TEACHERS HOUSING COMMITTEE AND**

**HOUSING CONTRIBUTION GROUP.....RESPONDENTS**

***(An appeal from the judgment and decree of High Court at Kakamega by Dulu, J.) dated 19<sup>th</sup> June 2014***

***in***

***(HCCC No. 4 of 2001)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This appeal concerns a dispute over the ownership, registration and management of a property known as, Plot No. Kakamega Town Block 1/81 (*the disputed premises*) comprising a property upon which a commercial building was constructed, which the respondents contend belonged to the Kakamega Teachers Housing Committee Group (*the Group*), as the original contributors for the purchase and construction of the building through contributions from their salaries.

According to the respondents and other members on whose behalf the suit was filed, following the

construction of the building, the disputed premises was registered in the name the 2<sup>nd</sup> appellant. It was contended that sometime in 1988, 1989 and 1994 it was resolved that the disputed premises be handed over to the first teacher contributors of the Group, who were to manage it for the benefit of all the older teacher contributors.

They further stated that the appellants were to effect the transfer, and hand over the disputed premises to the duly appointed representatives of the Group, but had failed and or refused to do so; that the omission had caused them great loss and damage, as the appellants had neglected to manage the disputed premises in the best interest of the contributors. Furthermore, that the appellants were attempting to charge the disputed premises to secure a loan with the Kenya Commercial Bank without the consent of the contributors.

The respondents therefore sought, a declaration that the disputed premises currently registered in the name of the 2<sup>nd</sup> appellant is the property of the Group, and should be so registered and handed over to the Group; that the appellants should account for the rental income from the disputed premises; a declaration that the loan advance and charge of the disputed premises was illegal and which loan should be repaid and the disputed premises discharged; that an order be directed to the Land Registrar to issue a title in respect of the disputed premises in the names of “Kakamega Teachers House Contributors Group”; a perpetual order of injunction restraining the appellants from managing or in any way interfering with the affairs of the Group; general damages together with any other relief the court may deem fit to grant.

In their defence, the appellants contended that no such entity known by the name of Kakamega Teachers House Contributors Group existed; that the disputed premises was acquired and developed by appellants as the organization’s property and that the question of original contributors to the development project did not arise. It was their contention that the property was properly controlled and managed by the appellants. They denied that any resolution was made to transfer the disputed premises to the Group or to any other entity, and that it is a legal requirement for the list of assets of the 1<sup>st</sup> appellant to be circulated to the members at its Annual General Meetings, and finally, that the existence of a trust over the disputed premises could not be seen to arise.

In its judgment, the High Court found that on a balance of probabilities the respondents had proved that they had contributed towards construction of the disputed premises and made a declaratory order to the effect that the disputed premises was the property of the Group. The court ordered that the appellants to account for the income and expenditure of the disputed premises to the respondents, and further ordered that the parties find an amicable way of resolving the issue of registration of the disputed premises as evidenced by the minutes and documents on record, as well as the charge that existed over the disputed premises and thereafter seek formal registration in favour of the respondents.

The appellants were aggrieved by the decision of the court and filed this appeal comprising seven grounds, which were that the learned judge erred in failing to appreciate that the respondents’ case was not proved to the required standard; that the orders issued by the court were inconclusive, contradictory and incapable of execution; that the learned judge failed to apply the laws applicable to the acquisition, transfer and ownership of land, particularly in a case where the entity to which the disputed premises was to be transferred did not exist; and failing to establish a nexus between the respondents and the appellant.

At the hearing of the appeal, learned counsel for the appellants **Ms. Omboto** submitted that, the burden of proof was on the respondents to prove ownership of the disputed premises by showing evidence of payment; that the list of names upon which the High Court relied was not verifiable, as it did not indicate the identity card numbers or the Teachers Service Commission numbers of the listed individuals. The circular produced though made by the 1<sup>st</sup> appellant showed that it concerned various other titles. As a consequence the High Court was wrong to rely on the list of alleged contributors to find that the respondents were entitled to the disputed premises.

Counsel further submitted that, despite having found that the Group was not registered and that the membership was uncertain, the learned judge erred when he declared that the disputed premises belonged to the Group, and suggested that the parties find a way of resolving the issue by registration of the Group

resolving the issue. On the issue of transfer and ownership, counsel submitted that the fact of non-registration of the Group was a bar to the registration of the disputed premises, and as such the court orders were ambiguous and extraneous. In this regard counsel cited ***Dakianga Distributors (K) Limited vs Kenya Seed Company Limited [2015] eKLR*** where such orders were considered to be 'AOB'.

Counsel concluded that though the respondents were members of the appellants, the court was wrong to order the transfer of the disputed premises to Group, to the detriment of the entire membership. From the bar the Court was informed that the Group had not been registered.

**Mr. Athunga**, learned counsel for the respondents opposed the appeal and submitted that the main issue in contention was the ownership of the disputed premises. That as the appellants had not rebutted or controverted the respondents' evidence, the respondents had proved their case on a balance of probabilities. Counsel further submitted that, the circular and minutes which emanated from the respondent's office showed that the disputed premises was to have been transferred to the respondents as contributors, and its name changed. Counsel took the position that, there was nothing to negate its being returned to the contributors at a future date.

It was counsel's submissions that in 1968, the appellants did not exist, and that prior to this the members of the Group had made their contributions towards the construction through the county council. There was also evidence to show that the disputed premises is producing income solely for the benefit of the appellants and not its members. The contributors are entitled to an account of the income that has accrued from the disputed premises, and it was wrong for the appellants to utilise the income from the disputed premises for the benefit of other non-contributors. Counsel concluded that the Group comprised of 2000 members and since the title was not capable of being registered in all the contributors' names, it should be held in trust for them.

We have carefully considered the pleadings and the evidence before the trial court and are of the view that the main issues for our consideration are:

- i. *whether a nexus existed between the respondents and the appellants;*
- ii. *whether the respondents' case was proved that on a balance of probabilities that the disputed premises belonged to them;*
- iii. *whether the appellants passed resolutions that the disputed premises was to be transferred to the Group; and*
- iv. *whether the orders issued by the High Court were capable of execution.*

This is a first appeal and it is our duty to reevaluate the evidence and come to our own conclusion on the facts, but remaining cognisant of the fact that we have not seen or heard the witnesses. See ***Mwanasokoni vs Kenya Bus Limited [1985] KLR 931***.

We will begin by addressing the first issue of whether a nexus was established between the respondents and the appellants.

According to the pleadings and the evidence the 1<sup>st</sup> appellant is the duly registered teachers union. The 2<sup>nd</sup> appellant is the Chairman of the Branch Executive Committee of the 1<sup>st</sup> appellant. The 1<sup>st</sup> respondent is a retired teacher and education officer, as well as a member of KNUST Kakamega and an official of the Group, and the 2<sup>nd</sup> respondent is a retired teacher and a member of the Group. The 3<sup>rd</sup> respondent was deceased and did not testify.

Since the respondents are members or former members of the 2<sup>nd</sup> appellant, we find that a relationship or nexus exists between the respondents and the appellants.

The next issue is whether the learned judge was right in finding that the Group had contributed towards the acquisition and construction of the disputed premises, and therefore proved their case on a balance of probabilities.

According to 1<sup>st</sup> respondent, the green card showed that the registered proprietor of the disputed premises was the 2<sup>nd</sup> appellant, and not the Trustees of the 1<sup>st</sup> appellant. He produced a list of contributors as at 1<sup>st</sup> October 1968 and another list identifying the contributors between the years 1970 and 1971 as evidence of members who had contributed towards the construction of the disputed premises.

The appellants refuted the validity of the list of contributors, Robert Opwora, the 2<sup>nd</sup> appellant's Chairman, testified that it was not possible to verify the list of contributors, as no Teachers Service Commission or Identity Card Numbers were specified against each of the alleged contributors. He contended that all payments for the plot and building were made by the 2<sup>nd</sup> appellant.

Mr. Opwora further testified that no records were available to show how many teachers had joined the branch since its inception, and the only records he was aware of were those that comprised the current membership.

When shown the list of contributors, Fredrick Anguba, a former Executive Secretary of the 2<sup>nd</sup> appellant, testified for the appellants and stated that the list was not verifiable as it lacked vital information. He also stated,

***“From the records that I have, teachers contributed towards the construction of the offices and the building remains the property of KNUT National Trustees.”***

On his part Bitonye Laban Wakhisi, the current Secretary General of the 2<sup>nd</sup> appellant confirmed that the disputed premises was bought using members contributions and he concluded thus;

***“Yes, we keep records of all the contributors in our Kakamega Central Office including those who have died or retired”.***

We have considered these rival claims. It is evidence that the respondents have relied on a circular of 1<sup>st</sup> October, 1968 from the 1<sup>st</sup> appellant's Headquarters, a directive was issued to the effect that all buildings in Kenya constructed by the original teachers be transferred to them. There are also minutes of various meetings held between 6<sup>th</sup> August, 1987 and 31<sup>st</sup> May, 1988, where members of the 2<sup>nd</sup> appellant were present. These meetings resolved to commence a process by which the disputed premises would be transferred to the original teachers.

It was also resolved that a committee oversees the hand over process. It was proposed that an investment company be incorporated to which the disputed premises was to be transferred. A draft memorandum and articles of association of the proposed company were discussed, and the name of the building was to be changed from KNUT House to “Kakamega Teachers Contributors Group”.

From the record, despite the existence of minutes and resolutions setting out a road map for the transfer of the disputed premises, various difficulties were experienced in actualizing the proposals. As already seen, the comprehensive and conclusive identification of the older teachers who had contributed, to formulate the membership remained elusive. Many were since deceased. And, the teacher contributors' company was not at any time incorporated.

That notwithstanding, since the minutes retrieved from the offices of the 2<sup>nd</sup> appellant were signed by the successive Executive Secretaries of the 2<sup>nd</sup> appellant and remained uncontroverted, we find like the learned Judge, that the disputed premises comprising the property and the building belongs to the respondents and the teachers who contributed to it. We are satisfied that, the 2<sup>nd</sup> appellant unequivocally resolved to transfer the disputed premises to the original teachers, the only proviso being that the concerned teachers be identified, and incorporated into a registered entity into which the disputed premises could be transferred.

In a way, we agree with the appellants that the learned Judge's final orders are incapable of execution.

Order Nos. 3 and 4 require the co-operation of both sides to implement. This appeal is clear testimony that the appellants are not willing to co-operate. It follows that unless further orders are made, the learned Judge's said orders are incapable of execution. In the circumstances and to give effect to our decision in this appeal, we set aside the learned Judge's final order Nos. 3 and 4 and substitute them with the following orders:

1. The 2<sup>nd</sup> appellant shall, within six (6) months of the date hereof furnish the respondent with a list of the original contributors to the purchase and construction of the suit premises. The appellants will have no difficulty in providing that list. From the evidence of Fredrick Anguba and Bitonye Laban Wakhisi as stated above, it is clear that the record of the original contributors and the period of construction is with the 2<sup>nd</sup> appellant.
2. Upon receipt of the said list, the respondents shall incorporate a limited liability company to which the suit premises shall be transferred.
3. The appellants shall transfer the suit premises, free of all encumbrances, to that company within six (6) months of receipt from the respondents of a copy of the certificate of its incorporation.
4. Save as herein above stated, we uphold the learned trial Judge's decision and accordingly dismiss this appeal.
5. The respondents shall also have three-quarters of the cost of this appeal.

It is so ordered.

*Dated and delivered at Kisumu this 12<sup>th</sup> day of February, 2016.*

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**