



**IN THE COURT OF APPEAL**

**AT KISUMU**

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

**CIVIL APPEAL NO. 13 OF 2015**

**BETWEEN**

**MOHAMMED JUMA PONDA ..... 1<sup>ST</sup> APPELLANT**  
**MOHAMMED AHMED MMADI ..... 2<sup>ND</sup> APPELLANT**  
**MUNIR OMAR SALIM ..... 3<sup>RD</sup> APPELLANT**  
**JAMIA MOSQUE COMMITTEE – BUNGOMA ..... 4<sup>TH</sup> APPELLANT**

**VERSUS**

**SALIM BARASA ..... 1<sup>ST</sup> RESPONDENT**  
**ABDALLA NDALA ..... 2<sup>ND</sup> RESPONDENT**  
**KASSIM SIMIYU WERUNGA ..... 3<sup>RD</sup> RESPONDENT**  
**SHABAN BARASA ..... 4<sup>TH</sup> RESPONDENT**  
**ABDI SHARIFF ..... 5<sup>TH</sup> RESPONDENT**  
**ABDULRAZAK MOHAMMED ..... 6<sup>TH</sup> RESPONDENT**  
**BUNGOMA MUSLIM ASSOCIATION ..... 7<sup>TH</sup> RESPONDENT**

*(An appeal from a Judgment of the High Court of Kenya at Bungoma (Omollo, J.) dated 13<sup>th</sup> day of May, 2014*

*in*

**HCC NO. 23 OF 2005)**

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## **JUDGMENT OF THE COURT**

1. This is an appeal from the judgment of the High Court of Kenya at Bungoma (A. Omollo, J) delivered on 13<sup>th</sup> May 2014 dismissing the appellants' suit against the respondents for a declaration that the properties known as Title Number Bungoma Municipality/341 registered in the names of Shaban Barasa, Abdi Shariff and Abdul Razak Mohamed, the 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> respondents as Trustees of the 7<sup>th</sup> respondent Bungoma Muslim Association (Jamia Mosque) and Title Number Bungoma/ Municipality/695 registered in the name of Bungoma Muslim Association of Bungoma were so registered in trust for Jamia Mosque Committee-Bungoma, the 4<sup>th</sup> appellant.

### **Background**

2. In their further amended plaint presented to the High Court in October 2010, the appellants asserted that the 4<sup>th</sup> appellant was registered to cater for the interests of Islamic faith within Bungoma Municipality and to facilitate the acquisition, maintenance, upkeep and development of all mosques falling within Bungoma Town and its environs; that prior to the registration of the 4<sup>th</sup> appellant, the Muslim community in Bungoma, whose affairs were run by committees that were referred to as "Jamia Mosque Committee", was allocated parcel number Bungoma Municipality/341 on which a mosque had been built and Bungoma/ Municipality/695 for purposes of further expansion; that the two properties were registered on 15<sup>th</sup> January 1996 and on 21<sup>st</sup> February 2002 respectively in the names of the 7<sup>th</sup> respondent without the knowledge, consent or authority of the appellants and the entire Muslim fraternity in Bungoma for whose benefit the properties were intended. The appellants contended that the properties were registered in the name of the 7<sup>th</sup> respondent "*to hold in trust for Jamia Mosque Committee Bungoma, pending its formal registration as a legal entity*" and accordingly sought a declaration to that effect and for an order compelling the respondents to transfer the properties to the appellants.

3. In their defence, the respondents denied the appellants' claims and further pleaded that the properties were acquired for and on behalf of and for the benefit of all Muslims professing the Muslim faith and residing within Bungoma District in accordance with the 7<sup>th</sup> respondent's constitution; that the 7<sup>th</sup> respondent was not under any duty to hold the properties in trust for the appellants; that the properties belong to all members of the Muslim community in Bungoma; and that the membership of the 7<sup>th</sup> respondent, which is the 'mother association' is drawn from the wider Bungoma District as opposed to the membership of the 4<sup>th</sup> appellant whose membership is narrower and confined to Muslims within Bungoma Municipality.

4. After hearing and considering the evidence and submissions by learned counsel, the trial court framed the question "*whether the plaintiffs established the defendants hold the titles for the two suit parcels in trust for them*". The trial court concluded that it was not satisfied that the appellants had established their case in that regard stating, "*I find from the evidence that there are no facts proved to establish the creation or existence of trust relationship between the plaintiffs and the defendants*" and proceeded to dismiss the appellants' suit. Dissatisfied, the appellants lodged the present appeal.

### **The appeal and submissions by counsel**

5. Referring to the grounds of appeal set out in the appellants' memorandum of appeal, Mr. Murunga, George learned counsel for the appellants, submitted that the membership to the 7<sup>th</sup> respondent is restricted to those who are able to pay for the membership; that unless one is a paid up member, he cannot participate in the affairs of the 7<sup>th</sup> respondent; that in contrast, membership to the 4<sup>th</sup> appellant is free; that the 4<sup>th</sup> appellant was the forerunner to the 7<sup>th</sup> respondent and the registration of two properties in the name of the 7<sup>th</sup> respondent was done without the knowledge of the appellants; that credible and consistent evidence was led before the trial court on how the properties were acquired and that the Mosque on the property was built long before the 7<sup>th</sup> respondent came into existence and that the appellants' case should

have been allowed. At the very least, counsel argued, the nature of the dispute between the parties was such that the appellants should not have been condemned by the High Court to pay the costs of the suit.

6. Opposing the appeal, learned counsel for the respondents Mr. Ocharo Kebira, submitted that there was no evidence before the trial court to support a verdict other than the one dismissing the appellants' suit with costs; that no evidence was tendered before the trial court to support the contention by the appellants that the properties were registered in the name of the 7<sup>th</sup> respondent without consent of the Muslim community or in trust for the 4<sup>th</sup> appellant; that the 7<sup>th</sup> respondent's title to the properties is protected under sections 27 and 28 of the repealed Registered Land Act under which the properties were registered; that the only basis on which the title could be invalidated would be under section 143 of the same Act, if it is established that the 7<sup>th</sup> respondent was privy to fraud or mistake in procuring the titles; that no evidence to that effect was presented; that in any case if regard is had to which of the two organizations, as between the 4<sup>th</sup> appellant and the 7<sup>th</sup> respondent, is the umbrella body, there can be no doubt that the 7<sup>th</sup> respondent is the umbrella body because under its constitution, membership is drawn from the Muslim community of then Bungoma district as opposed to the membership of the 4<sup>th</sup> respondent that is confined to Muslim community drawn from the smaller area of Bungoma Municipality.

7. On the question whether the 7<sup>th</sup> respondent was registered as owner of the properties in trust as alleged by the appellants, counsel submitted that there was no evidence of such trust; that no trust could have been found to exist having regard to the fact that the 4<sup>th</sup> appellant was registered in the year 2004 and the titles to the properties were issued in 1996 and 2002 respectively, prior to the 4<sup>th</sup> appellant's coming into existence; that there was evidence of discussions leading up to the formation of the 7<sup>th</sup> respondent; and that the Judge was right to dismiss the appellants' suit.

8. As regards the costs of the suit, counsel submitted that the order made by the trial court is consistent with the established principle under section 27 of the Civil Procedure Act conferring discretion on the court to be guided by the general rule that costs should follow the event and there is no basis for interfering with the decision on costs either.

### **Determination**

9. We have considered the appeal and the submissions by learned counsel. The only issue that we have to determine in this appeal is whether the appellants' claims that the properties were registered in the name of the 7<sup>th</sup> respondent "*without the knowledge, consent and/or authority of the plaintiffs and the entire Muslim fraternity in Bungoma*" and that the properties were registered in the names 4<sup>th</sup> to 6<sup>th</sup> respondents "*to hold in trust for Jamia Mosque Committee Bungoma, pending its formal registration as a legal entity*" were on a balance of probabilities proved before the trial court.

10. Our duty in that regard as a first appellate court is to review the evidence and to draw our own conclusions bearing in mind that we do not have the benefit that accrued to the trial court of hearing and observing the witnesses as they testified. [See **Selle vs. Associated Motor Boat Co Ltd [1968] EA 123**] With that in mind, what then was the evidence before the trial court?

11. According to the first appellant, Mohammed Juma Ponda who testified as PW 1, the 1<sup>st</sup> to 3<sup>rd</sup> appellants were the duly elected office bearers of Jamia Mosque Committee-Bungoma having been elected on 19<sup>th</sup> October 2002; that upon registration of the 4<sup>th</sup> appellant under the Societies Act on 29<sup>th</sup> April 2004 the 1<sup>st</sup> to 3<sup>rd</sup> appellants were duly elected as office bearers in accordance with the constitution of the 4<sup>th</sup> appellant and continued to hold positions in the society; that a parcel of land was donated to the Muslim community way back in 1957 on which a mosque was built; that under the rules of Islam, elected elders are put in charge of administration whilst the Imam is in charge of prayers and that when in 1987 the elders wanted to obtain title for the property on which the mosque stands, they established that it was in the name of Bungoma Municipal Council; that the elders approached Bungoma Municipal Council which did not have objection to the appellants getting the land; that Bungoma Municipality/341 was

registered in the name of the 7<sup>th</sup> Respondent on 21<sup>st</sup> February, 2002 and on the same date transferred to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents as trustee of the 7<sup>th</sup> respondent and Jamia Mosque; that by that time the 4<sup>th</sup> appellant was not registered; that no meeting was held to resolve that the land be registered in the name of the 7<sup>th</sup> respondent and it was a mistake for the land to be registered in the name of individuals.

12. In relation to Bungoma/ Municipality/695, PW 1 stated that the same was allocated to the Muslim community; it was initially registered under the name of Bungoma County Council before being transferred to the 7<sup>th</sup> respondent and that the same should be transferred and registered in the name of the 4<sup>th</sup> appellant.

13. According to PW 1 the manner in which the properties were registered in the name of the 7<sup>th</sup> respondent was not procedural or legal and the same should be transferred and registered in the name of the 4<sup>th</sup> appellant.

14. Rashid Sagana (PW2) stated in his evidence that the property Bungoma Municipality/341 was donated by one Mzee Simon Nandemu for purposes of construction of a Mosque; the mosque was constructed in late 1950's; by the time the plot was registered, the 4<sup>th</sup> appellant was not itself registered and it was registered in the names of the trustees of the 7<sup>th</sup> respondent; that Bungoma/ Municipality/695 was also allocated to the Muslim community and that the 7<sup>th</sup> respondent holds it in trust for the 4<sup>th</sup> appellant which is the umbrella body of all Muslims and that both properties should be transferred to the 4<sup>th</sup> appellant for the benefit of all Muslims.

15. For the respondents, Kassim Simiyu Werunga (DW1), the treasurer of the 7<sup>th</sup> respondent stated that under its constitution the 7<sup>th</sup> respondent is concerned with the welfare of Muslims in Bungoma District. He denied that the properties were registered in the names of the 7<sup>th</sup> respondent with a view to subsequently transferring the same to the 4<sup>th</sup> appellant upon its registration; that the 4<sup>th</sup> appellant's mandate is confined to Muslims within the narrower territory of Bungoma Municipality; that a mosque and a shopping mall have been developed on the properties and it would be unfair to the larger Muslim community for the properties to be registered in the name of the 4<sup>th</sup> appellant; and that the registration of the properties in the name of the 7<sup>th</sup> respondent was done with the knowledge of the Muslim faithful; and that all Muslims are free to participate in the affairs of the 7<sup>th</sup> respondent.

16. No evidence was tendered of any deliberations by the Muslim faithful within Bungoma Municipality or the larger Bungoma District at which it was resolved that the registration of the 7<sup>th</sup> respondent as proprietor of the properties would be on the basis that once the 4<sup>th</sup> appellant is registered, the properties would then be conveyed to it. The copy of minutes of Jamia Mosque Committee-Bungoma of 19<sup>th</sup> October 2002 that were produced before the trial court did not address the issue of the properties beyond confirming those officials elected to serve on the Executive Committee.

17. The correspondence that was produced before the lower court includes a copy of a letter dated 5<sup>th</sup> January 1987 from the Municipal Council of Bungoma to the District Land Officer indicating that the "*Trustees of the Moslem Community Property*" had expressed their desire to have plot No. 341 registered and that the Municipal Council of Bungoma did not have any objection in that regard. There is a letter from the 1<sup>st</sup> appellant in his capacity as the Chairman of the Bungoma District Council of the Supreme Council of Kenya Muslims dated 11<sup>th</sup> June 1993 addressed to the Town Clerk, Bungoma Municipal Council, stating that the "*body authorized to deal with Islamic affairs on behalf of Bungoma Muslim Community is Jamia Masjid Madrassa Committee*" and that the Bungoma District Council of the Supreme Council of Kenya Muslims did not have a problem if that committee went ahead with plans of acquiring a Deed over plot number 341 Bungoma Town.

18. There is also correspondence exhibited between Rashid Sagana, Secretary the Bungoma District Council of the Supreme Council of Kenya Muslims and Bungoma Municipal Council exchanged between

July and August 1985 following up on the “Mosque plot”. And finally on 11<sup>th</sup> October 1989, the department of Lands, Nairobi wrote to the Chairman, Bungoma Township Mosque, Madrasah & Affairs informing him “*the allocation of the above site to you is being considered*”

19. No evidence was tendered before the lower court as to what transpired between 1989 and 1996 when the register for parcel 695 was opened and 2002 when the register for parcel 341 was opened and the properties registered in the name of Bungoma County Council and subsequently leased to the 7<sup>th</sup> respondent.

20. Based on the certificate of registration exhibited in the lower court, the 4<sup>th</sup> appellant was not registered under the Societies Act until 29<sup>th</sup> April 2004.

21. Having regard to the evidence, there is no basis to conclude that the properties were registered in the names of 4<sup>th</sup> to 6<sup>th</sup> respondents as trustees of the 7<sup>th</sup> respondent to hold in trust for the 4<sup>th</sup> appellant. We cannot therefore interfere with the decision of the trial court.

22. The appellants have also failed to demonstrate to us that the lower court wrongly exercised its discretion in awarding costs of the suit to the respondents. The result is that the appeal fails and it is dismissed with costs to the respondents.

**Dated and Delivered at Kisumu This 17<sup>th</sup> Day of November, 2015.**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

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**DEPUTY REGISTRAR**