REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 128 OF 2013

PETER TARACHA ..... 1ST APELLANT

PETER OPICHO ..... 2ND APPELLANT

VERSUS

INTERNATIONAL PENTECOSTAL

HOLINESS CHURCH ..... 1ST RESPONDENT

HURUMA CHILDRENS HOME ..... 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Principle Magistrate Honourable M. W.NJAGI (SRM), in ELDORET CMCC No. 45 of 2008, dated 21st January 2013)

JUDGMENT

1. This appeal arises from the judgment and decree of the lower court in Eldoret CMCC No. 45 of 2008 dated 21st January, 2013. The appellants were the defendants while the respondents were the plaintiffs in the suit filed in the lower court.
2. In their plaint dated 3rd March 2008, the respondents had sought the following orders:-

a. A permanent injunction restraining the defendants (appellants) from trespassing, threatening, obscuring, interfering with the smooth running of the children's home and or disturbing the peace of the home.
b. A restraining order barring the defendants from committing insubordination thereby rendering the conduct of the church services at Huruma IPHC church impossible.
c. Costs of the suit.
d. Any other order the court may deem fit to grant.

3. The above prayers were premised on claims that the appellants as members of the church named as the 1st respondent were interfering with the management and smooth running of the 2nd respondent, a home established and managed by the 1st respondent and that despite warnings by the church leadership and management organs, the appellants had continued with their acts of insubordination rendering church services impossible; that their persistent harassment and intrusion into the churches management and the running of the children's home was adversely affecting the two institutions.

   In their brief statement of defence dated 23rd November 2010, the appellants denied all the

allegations in the plaint and put the respondents to strict proof thereof.

4. After a full trial, the learned trial magistrate entered judgment for the respondents against the appellants. She issued orders of permanent injunction restraining the appellants from trespassing, threatening, obscuring and/or interfering with the peaceful running of Huruma Children's Home. She also awarded the respondents half costs of the suit.
5. The appellants were dissatisfied with the trial court's decision. They proffered an appeal to this court through their memorandum of appeal filed in court on 21st May, 2013. In their grounds of appeal, the appellants mainly faulted the learned trial magistrate's decision on grounds that she had treated the 1st and 2nd respondents as a single entity; that she failed to appreciate that the parties had their own internal mechanisms for settlement of disputes; that she mistook the appellant's suspension as expulsion from the church and that she disregarded the evidence tendered by their witnesses during the trial.
6. The appellants prosecuted their appeal in person while the respondents were represented by *Ms. Angu Kitigin & Company Advocates*. The parties agreed that the appeal be heard by way of written submissions. The appellants filed their submissions on 13th July, 2015 while those of the respondents were filed on 31st August, 2015.
7. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. The duty of a first appellate court is now well settled. The appellate court is duty bound to re-evaluate and reconsider the case that was presented before the lower court and make its own independent conclusions but giving allowance to the fact that it did not see or hear the witnesses.

   See: ***Selle & Another Vs Associated Motor Boat company ltd & others (1968)EA 123; Williamson Diamonds Ltd V Brown (1970) EA I.***

8. It is also an established principle of law that an appellate court should be slow to interfere or to reverse the findings made by the trial court unless it is satisfied that the court acted on no evidence or on a misapprehension of the evidence or applied the wrong legal principles in reaching its decision. See ***Sumaria & Another vs Allied Industrial Limited (2007) 2 KLR 1***; ***Jabane V Olienja (1986) KLR 661; Makube v Nyamoro (1983) KLR 403.***
9. I have considered the grounds of appeal, the pleadings before the lower court, the evidence tendered before the court and the judgment of the learned trial magistrate. I have also considered the written submissions filed by the parties and the authorities cited.
10. The appellants in their submissions have attacked the validity of the trial in the lower court contending that the respondents who were the plaintiffs then did not have legal capacity to file or maintain a suit against them and that the learned trial magistrate erred in failing to appreciate that fact.

    The record of the trial court shows that the 1st respondent was registered under ***Section 10*** of the ***Societies Act*** on 3rd March, 2009 as evidenced by the Certificate of Registration produced as Pexhbit 1 while the 2nd respondent was registered as a charitable children's institution under the Ministry of Gender, Children and Social Development – See letter dated 14th September, 2012 at page 168 of the Record of Appeal.

11. There is therefore no doubt that the respondents are not and were not body corporates with legal capacity to sue or be sued at the time the suit in the lower court was instituted. Case law abounds to the effect that entities registered under the Societies Act or other unincorporated bodies are not legal persons with the capacity to sue in their own names. They can only sue or be sued either through their officials, members or registered trustees in the case of registered trusts.
12. I have carefully gone through the entire ***Societies Act*** Chapter 108 of the Laws of Kenya and I have not come across a single provision that provides for the institution of suits by or against entities registered under the Act. I thus wholly agree with the sentiments expressed by Justice Bosire (as he then was) in ***John Ottenyo Amwayi & others V Rev. George Abura & others HCCC No. 6339 of 1990*** when he stated as follows:-

"The Societies Act does not contain provisions with regard to the presentation and prosecution of suits by or against unincorporated societies. It would appear to me that the legislature did not intend that suits be brought by or against those societies in their own names …."

13. In ***Kiserian Isinya Pipeline Road Resident Association & others V Jamii Bora Charitable Trust and Another Civil Appeal No. 307 of 2006*** Hon. Justice Alnashir Visram (as he then was) relying on several authorities including the case of ***Free Pentecostal Fellowship in Kenya V Kenya Commercial Bank HCC No. 5116 of 1992*** (O.S) struck out an appeal with costs on grounds *inter alia* that it had been lodged by appellants whose majority consisted of unincorporated entities which did not have capacity to sue. In the ***Free Pentecostal Fellowship in Kenya case (supra)*** Justice Bosire (as he then was) expressed himself in the following terms :-

"The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 Civil Procedure Rules.

In the instant matter, the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name".

14. Though I agree with the respondents in their submissions that the issue of their capacity to sue did not arise in the proceedings before the trial court, my take is that this is a significant point of law which the learned trial magistrate ought to have taken cognizance of without being urged by any party. It is important to appreciate that lack of capacity to sue or be sued is a weighty matter that goes to the root of the validity of proceedings before a court. It is not a mere procedural issue. The consequences of instituting a suit without legal capacity to sue are grave: such a suit is incompetent and any proceedings flowing from it are a nullity in law.
15. The learned trial magistrate ought to have addressed her mind to this legal point at the earliest opportunity even if none of the parties raised it. And although this issue was not explicitly included in the appellant's grounds of appeal, this court is duty bound to address it on appeal since it concerns the legality of the proceedings before the lower court.
16. That said, given the undisputed fact that the respondents are not and were not incorporated entities or bodies created by statute when they filed the suit against the appellants, it is obvious that they were not legal persons and consequently, they did not have the requisite legal capacity to sue the appellants.

17. I have read the judgment of the learned trial magistrate. I find that she did not address herself to the important issue of the respondent's capacity to file suit against the appellants. I find that the trial court's failure to address this issue and reach a determination on it led her to proceed on the erroneous assumption that the suit before her was a competent one when in fact it was not. The learned trial magistrate's failure to appreciate that the suit before her was incompetent having been instituted by entities who did not have legal capacity to sue or be sued was an error of law which invalidated the entire proceedings before the court. They were a nullity *ab initio*.
18. I say so well aware of the respondents' submissions that under ***Article 258*** of the Constitution, every person has a right to institute court proceedings claiming that the constitution has been contravened or is threatened with contravention. I am also alive to the provisions of ***Article 260*** of the Constitution which defines the word "person" to include an association or other body of persons whether incorporated or not incorporated.
19. The wording of ***Article 258*** is very clear including its marginal note which is indicated as "*enforcement of this constitution*". I have no doubt in my mind that the court proceedings contemplated by the said provision are only limited to those that concern the enforcement of constitutional rights where it is alleged that they have either been violated or are threatened with violation. The Article does not clearly apply to conventional civil suits.

20. In view of the above findings, it follows that the proceedings before the learned trial magistrate and her consequent decision were nullities in law. On this ground alone, I am satisfied that this appeal must succeed. It is accordingly allowed with the result that the judgment of the learned trial magistrate dated 21st January 2013 is hereby set aside and is substituted with an order that the plaintiff's suit is struck out with costs to the defendants.
21. As this appeal has succeeded for reasons other than those advanced by the appellants in support of their appeal, I order that each party shall bear its or his own costs.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 29th day of February 2016

In the presence of:

The appellants

Ms. Naomi Chonde Court Clerk

No appearance for the Respondents though duly notified.