



REPUBLIC OF KENYA



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**Kamau & others v Njuguna & others (Environment and Land Appeal
43 of 2023) [2023] KEELC 21516 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21516 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 43 OF 2023
YM ANGIMA, J
NOVEMBER 9, 2023
(FORMERLY NYAHURURU ELCA NO. E011 OF 2022)**

BETWEEN

THOMAS MUHIA KAMAU & OTHERS APPELLANT

AND

SIMON KAMAU NJUGUNA & OTHERS RESPONDENT

*(An appeal against the judgment and decree of Hon. D.N. Sure
(SRM) dated 13.07.2022 in Engineer SPM ELC No. E010 of 2021)*

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. D.N. Sure (SRM) dated 13.07.2022 in Engineer SPM ELC No. E010 of 2022 – Simon Kamau Njuguna & 2 Others (Suing as trustees of Israel Assemblies of Kenya Church) v Thomas Muhia Kamau & 8 Others. By the said judgment, the trial court allowed the Respondents’ suit as prayed in the plaint together with costs and interest thereon.

B. Background

2. By a plaint dated 12.04.2021 amended on 26.04.2021 and further amended on 06.08.2021 the Respondents sought the following reliefs against the Appellants:
 - a. The honourable court do order the Defendants, their agents and or servants to remove all the illegal structures adjacent to and blocking the access and frontage to the Plaintiffs’ parcel of land known as Nyandarua/North Kinangop township/34.



- b. A permanent injunction restraining the Defendants their agents and or servants from further blocking the Plaintiff's access to its parcel of land and constructing illegal structures adjacent to the Plaintiff's parcel of land known as Nyandarua/North Kinangop Township/34.
 - c. An order directing the Defendants to remove the illegal structures built on and adjacent to the Plaintiff's parcel of land known as Nyandarua/North Kinangop Township/34.
 - d. Costs of this suit and interest thereon.
 - e. Any other relief that this honourable court may deem fit and just to grant.
3. The Respondents stated that they were members of Israel Assemblies of God Church (the Church) and were suing in their capacity as trustees of the church. They pleaded that at all material times the church was the proprietor of Title No. Nyandarua/North Kinangop Township/34 (the suit property) since 1970. It was pleaded that the church had constructed some structures thereon for use as a church and a dwelling house for the minister in charge.
 4. The Respondents further pleaded that the Appellants had without their consent put up some semi-permanent structures around the suit property thereby hindering access to the suit property. It was further pleaded that the church intended to construct a commercial building on the suit property but could not undertake the project as the Appellants were blocking the frontage and access to the suit property. The Respondents contended that despite issuance of a demand and notice of intention to sue the Appellants had failed to make good their claim hence the suit.
 5. The record shows that the 1st, 2nd, 3rd and 4th Appellants filed a statement of defence dated 20.04.2021 denying the Respondents' claim in its entirety and putting them to strict proof thereof. They denied that the church was the owner of the suit property and that it had constructed a church building and a dwelling house for its minister in charge thereon.
 6. The Appellants admitted constructing semi-permanent structures but asserted that they did so with the permission of the County Government of Nyandarua. It was pleaded that the church was not the owner of the land on which the structures were erected. The Appellants denied that they had blocked the Respondents' access to the suit property and put them to strict proof thereof.
 7. The Respondents contended that they were lawfully operating their businesses with the authority of the County Government of Nyandarua and that they held valid business licences for that purpose. It was further contended that removal of the said structures would cause the Appellants massive economic losses and deprive them of their source of livelihood. The Respondents admitted receipt of a demand and notice of intention to sue but contended that the Respondents had no legal basis for issuing them. They consequently prayed for dismissal of the Respondents' suit with costs.
 8. The record shows that the 7th Appellant only entered appearance to the suit but did not file any defence to the action. The 6th Appellant filed a notice granting authority to the 4th Appellant to plead on his behalf but the rest of the Appellants did not defend the suit.

C. Trial Court's Decision

9. When the suit was listed for hearing on 08.06.2022 neither the Appellants nor their advocates attended court for hearing. As a result, the Respondents' suit was heard ex parte. The Respondents called 2 witnesses at the trial and closed their case. Vide a judgment dated 13.07.2022 the trial court found that the Respondents had proved ownership of the suit property as well as the Appellants' interference with free access to the property. The court was satisfied that the Respondents had proved their claim on a



balance of probabilities hence it entered judgment for them as prayed in the amended plaint together with costs and interest.

D. Grounds of Appeal

10. Being aggrieved by the said judgment the Appellants filed a memorandum of appeal dated 10.08.2022 raising the following seven (7) grounds of appeal:
 - a. That the learned magistrate erred in law and fact by failing to adequately consider that any such development by the Respondents on the subject property was subject to approval by the office of the Physical Planner Nyandarua County.
 - b. That the learned magistrate erred in law and fact by not considering the outcome of the Respondents' application to the office of the Physical Planner Nyandarua County to obtain permission and approval of the map of their proposed development.
 - c. That the learned magistrate erred in law and fact by relying on the Respondents' application for development permission as the same was not accompanied by any approval or any such document such as an approved map of the proposed development.
 - d. That the learned magistrate's reliance on the said application for development permission created an absurdity as the status of the said application was unknown as no documents or witness was ever availed to show the status of the said application.
 - e. That should the said application be rejected by the office of the physical planner, Nyandarua County, it would have rendered the entire suit moot.
 - f. That the learned magistrate erred in law and fact by finding that the Appellants have blocked or impeded the Respondents' access to the subject property which was verily not the case.
11. As a result, the Appellants sought the following reliefs in the appeal:
 - a. The appeal be allowed and the judgment/decreed of the honourable/court set aside in its entirety.
 - b. This honourable court be pleased to revisit the judgment and decree and come up with an appropriate and independent determination/finding in respect thereof.
 - c. Any other remedy be granted that this honourable court may deem fit in the circumstances of this case.

E. Directions on Submissions

12. When the appeal was listed for directions, the parties were directed to canvass the appeal through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Appellants' submissions were filed on 04.08.2023 whereas the Respondents' submissions were filed on 14.07.2023.

F. Issues for Determination

13. Although the Appellants raised 7 grounds in their memorandum of appeal, the court is of the view that those grounds may be summarized as follows:
 - a. Whether the trial court erred in law and fact in holding that the Respondents had proved their claim to the required standard.



- b. Who shall bear costs of the appeal.

G. Applicable legal principles

14. As a first appellate court, this court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at P.126 as follows:

“...Briefly put they are that this court must 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. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

15. Similarly, in the case of *Peters v Sunday Post Ltd* [1958] EA 424 Sir Kenneth O’ Connor, P. rendered the applicable principles as follows:

“...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

16. In the same case, Sir Kenneth O’Connor quoted Viscount Simon, L.C in *Watt v Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony,



has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

17. In the case of *Kapsiran Clan v Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:
 - a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

H. Analysis and Determination

a. Whether The Trial Court Erred In Law And Fact In Holding That The Respondents Had Proved Their Claim To The Required Standard

18. The court has considered the material and submissions on record on this issue. The Appellants faulted the trial court for failing to consider the fact that the application by the church for approval of its proposed development had not yet been approved by the County Government of Nyandarua. It was contended that the application may well be rejected by the planning authority in which case the Respondents would have no legitimate complaint. The trial court was also faulted for finding that the Respondents had proved that the Appellants had interfered with the frontage of the suit property and obstructed access thereto.
19. The court finds the Appellants’ submissions on the issue of the granting of development permission quite baffling. The Appellants are in effect suggesting that a property owner is not entitled to have free and unobstructed frontage and access to his property unless and until development permission has been granted for any proposed construction. The material on record only demonstrated that the church had in fact applied for development permission and paid for the application.
20. The court is unable to accept the Appellants’ proposition as sound in law. The court is not aware of any law which stipulates that a property owner is not entitled to enjoy all the rights of a proprietor envisaged under Section 24 of the *Land Registration Act*, 2012 unless and until he has obtained development permission or approval of his proposed building plans. The Appellants themselves did not cite any legal or statutory authority for that proposition. The material on record shows that the suit property was already developed with at least a church building and a dwelling house. The court is of the opinion that the church was not obligated to undertake further developments thereto before it could enjoy all the rights and privileges belonging or appurtenant to its ownership, including enjoyment of the frontage.
21. The court takes the view that even the County Government of Nyandarua had no legal or constitutional authority to limit the Respondents’ bundle of rights by licensing kiosk operators to block the frontage of the suit property and to interfere with free access to the property. Moreover, a licence to operate a business cannot be a greenlight to the holder thereof to violate the rights of others. Additionally, a trading licence per se cannot alter or confer any property rights under the law of real property. Section 25 of the *Land Registration Act*, 2012 is clear in that regard.
22. The court has fully considered the material on record on the question of blockage of the frontage of the suit property and obstruction of free access thereto. The material on record shows that the



Respondents' evidence was not challenged at the trial since the Appellants were absent on the hearing date. The Respondents' evidence was also not controverted by contrary evidence since the Appellants did not tender any evidence at the trial. In the premises, the court is of the opinion that the trial court was entitled to accept the Respondents' evidence as true.

23. It must be remembered that the Respondents produced photographic evidence at the trial showing that the Appellants had erected some semi-permanent structures along the perimeter wall of the church. That evidence was not challenged at the trial. The court is of the view that it was not necessary for the Respondents to demonstrate that the Appellants had blocked 100% of the frontage in order to succeed in their claim. The photographs showed that both sides of the gate had kiosks constructed thereon. It was not necessary to demonstrate that there was another kiosk right in front of the gate.
24. The material on record shows that the Appellants' kiosks were actually located on a road reserve fronting the suit property. They were not erected on plots capable of being allocated. The court adopts with approval the following passage from the case of *Ceciliah Njoki Maina v Jane Wambui Wahome* [2019] eKLR on the issue:

“The Respondent had a right and indeed a legitimate expectation that she would have unrestricted frontage and access to these roads. When the Appellant set out to construct structures on the frontage of the Respondent's land, the Respondent had a right to complain as her right to have unrestricted access and frontage to the road was infringed.”

25. In the premises, the court finds no fault with the finding and holding of the trial court to the effect that the Respondents had proved their claim against the Appellants on a balance of probabilities. The court is satisfied that there was sufficient evidence on record to demonstrate that the church was the owner of the suit property and that the Appellants had erected semi-permanent structures blocking its frontage. The court is satisfied that the Appellants had no lawful justification for doing so since a business or trading licence cannot authorize the construction of semi-permanent structures. As a consequence, the court finds no merit in the Appellants' grounds of appeal.

d. Who Shall Bear Costs Of The Appeal

26. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigants should be deprived of costs of the appeal. Consequently, the Respondent shall be awarded costs of the appeal.

I. Conclusion and Disposal Orders

27. The upshot of the foregoing is that the court finds no merit whatsoever in the appeal. As a result, the court makes the following orders for disposal thereof:
 - a. The Appellants' appeal be and is hereby dismissed in its entirety.
 - b. The judgment and decree of the trial court in Engineer SPM ELC No. E010 of 2021 is hereby affirmed.
 - c. The Respondents are hereby awarded costs of the appeal.

It is so decided.



JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 9TH DAY OF NOVEMBER, 2023.

Y. M. ANGIMA

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

N/A for the Appellants

Ms. Nyawira Mureithi for the Respondents

