Ongoro & another (Both Trading as Framchoice Inputs and Techical Services) v The Registered Trustees of Anglican Church of Kenya Diocese of Maseno South (Civil Appeal 100 of 2019) [2025] KEHC 8448 (KLR) (16 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8448 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 100 OF 2019

BM MUSYOKI, J

JUNE 16, 2025

BETWEEN

SAMEL TIMOTHY AYERE ONGORO ..... 1ST APPELLANT

MILDRED ATIENO AYERE ..... 2ND APPELLANT

BOTH TRADING AS FRAMCHOICE INPUTS AND TECHICAL SERVICES

AND

THE REGISTERED TRUSTEES OF ANGLICAN CHURCH OF KENYA DIOCESE OF MASENO SOUTH ..... RESPONDENT

(Being an appeal from judgment in the Chief Magistrate's Court at Kisumu (R.K. Ondieki SPM) civil case number 679 of 2016 dated 22nd July 2019)

JUDGMENT

1. In the trial court, the respondent sued the appellants for recovery of Kshs 8,664,000.00 being rent arrears for occupation of some space in building erected on land parcel number Kisumu Municipality Block 8/64 (hereinafter referred to as 'the suit property') pursuant to lease between the parties dated 27th January 2010. The appellants filed defence denying all the averments in the plaint except their descriptions and address. They even denied the description of the respondent.

2. The matter went for hearing where the respondent called two witnesses but the appellants after several adjournments closed their case without calling any witness. The court delivered judgement in favour of the respondent which sparked this appeal vide memorandum of appeal dated 21-08-2019 which has raised the following 10 grounds;

    1. That the learned trial Magistrate erred in law and fact by dismissing the appellant's arguments and submissions on the lack of registered trustees as mere technicality.

2. That learned trial Magistrate erred in law and fact by failing to find that the plaintiff did not have requisite capacity to institute and maintain the suit.

3. That the learned trial Magistrate erred in law and fact by failing to find that the plaintiff did not prove that it is a registered trust with trustees capable of instituting and maintaining a suit.

4. That the learned trial Magistrate erred in law and fact by failing to find that there was no proper suit.

5. That the learned trial Magistrate erred in fact and law by failing to find that the plaintiff did not prove its case on a balance of probability as required by the law.

6. That the learned trial Magistrate erred in law and fact by failing to find that the plaintiff did not avail any evidence of the ownership of rented premises the subject of dispute.

7. That the learned trial Magistrate erred in law and fact by relying on a non-registered lease.

8. That the learned trial Magistrate erred in law and fact in failing to take into consideration the appellants' case and submissions.

9. That the learned trial Magistrate erred in law and fact in failing to properly evaluate the entire evidence on record and submissions thereby arriving at wrong findings.

10. That the judgment was against the weight of evidence.

3. I have read the submissions of the parties in this matter and reconciling the same with the grounds of appeal as reproduced above, I have formed the opinion that there are only two issues for determination viz;

   a. Whether the suit was fatally defective due to lack of evidence of the registration status of the respondent.

   b. Whether there was enough evidence in proof of the debt.

4. This being a first appeal, this court has an obligation to conduct the same in a manner of a re-hearing where it should subject the evidence to a fresh analysis and come to its own independent conclusion but bearing in mind that it did not take the evidence of the witnesses and did not have an opportunity to observe the demeanour of the witnesses. By doing that, the court would be giving due allowance to any negligible gaps which may be found in the recorded testimony of the witnesses.

5. The respondent called one Joshua Osewe Osido as its first witness. Joshua told the court that he worked with the Registered Trustees of Anglican Church of Kenya which was the plaintiff in the matter. He stated that he was the appellant's administrative secretary. Through his statement filed in court on 28-08-2015, he stated that he was well versed with the matter and added that in or about May 2009, the plaintiff put up a tender inviting bid for lease of 8667 square feet of the suit property which it owned. The appellants responded to the invitation and were successful following which a lease agreement was executed by the parties. The lease took effect on 1-09-2009

6. Subsequent to execution of the lease and occupation of the rented premises, the appellants defaulted in payments of rent and security charges. Despite demands from the respondent, the appellants did not settle the said arrears and eventually gave vacant possession on 31-08-2011 leaving the said arrears outstanding. He added that when the appellants failed to pay, the respondent appointed a debt collector who approached the appellant for recovery following which the appellants admitted owing the respondent but they still failed to settle. The witness added that he was present when the handing

over was done and that the outstanding debt was Kshs 8,664,000.00. He produced documents listed in the respondent's list of documents dated 20-08-2015 including receipts for payment of the rent issued to the appellants.

7. In cross-examination, the witness stated that the respondent was a registered trust although he did not have the registered trust deed. He also admitted that he did not have documents of ownership of the suit property and he was not aware whether the lease was registered. He added that the defaults started after payment of the first installment. He maintained that he was the respondent's administrative secretary. He added that the lease did not have provision for payment of security and identified a letter dated 2-06-2009 that stated that the appellant would make their own security arrangements.

8. When he was re-examined, PW1 stated that the appellant's witness statement did not deny the ownership of the property by the respondent and identified a letter dated 6-01-2009 by the Church Commissioners of Kenya who are the registered trustees confirming him as the administrative secretary to act on its behalf in legal matters over the suit land.

9. The second witness for the appellant was John Oduor Ongondi who told the court that he worked for Maseno South Diocese as an accountant with the responsibility of keeping records, books of accounts, reconciliations of debtors' accounts for leased properties and making finance statements. He was also the treasurer of the diocese. He added that when the respondent advertised for tenders for leasing of space in the suit property, the appellants' bid was accepted upon which a letter of offer was issued. He continued that the lease was then executed and went on to produce documents in relation to the tender and payments of rent.

10. The witness added that the agreed monthly rent was Kshs 550,000.00 and Kshs 9,000.00 for security per month. According to this witness, the appellants did not pay the rent regularly and as a result, the respondent started writing demand letters which he identified and produced as exhibits. The respondent tried to recover the debt through a debt collector in vain. The witness stated further that the appellants handed back the premises on 31-08-2011. He put the total amount owing as at the time of giving vacant possession at Kshs 8,664,000.00.

11. In cross-examination, PW2 confirmed that he was not a registered trustee of the diocese and he did not have the trust deed in court. He also stated that there was nothing to show that the person who had filed the suit had powers to do so. He was also not aware whether the lease had been registered or not.

12. The appellants have combined grounds 1, 2, 3 and 4 and extensively submitted on the registration status and locus standi of the respondent. According to the appellant, the trial court erred by failing to appreciate that lack of evidence that the respondent had a registered trust deed was fatal to the case. The lower court held that the issue of registration was a technicality.

13. It is conceded that the respondent's witnesses did not produce a registered trust deed in court. This notwithstanding, I have gone through the documents and correspondences exchanged between the parties prior to and after they entered into the lease agreement. The appellants did not deny signing the lease or corresponding with the respondent as it were. The correspondences from the respondent were signed by PW1 as its administrative secretary. The lease itself which is the basis of the relationship between the parties indicated the lessor as the respondent. The letter of offer dated 16-05-2019 is done on the letter head of the respondent. In their own correspondences, the appellants addressed the Diocesan Administrative Secretary, Diocese of Maseno South. The receipts for payments of rent and deposit issued to the appellants which they have not denied were issued under the banner of ACK Diocese of Maseno South.

14. The appellants occupied the premises for two years on understanding that the respondent was the landlord and that is the entity they had contracted with. There is no evidence that there was a third party challenging the respondent's title. The appellants have not sought to recover the Kshs 4,950,000.00 it paid to the respondent meaning that it acknowledged the identity of the recipient of the money as the owner of the property. It was the same entity that the appellants handed over the rented premises on 31-08-2011.

15. In this scenario, it is clear that the appellant knew who they were dealing with and with who they had entered into contract. I also find that the status of the respondent was not an issue needing proof before the court. The different names given in the documents are clear on the identification of the landlord. It is trite law that a case cannot be defeated by mere misjoinder or misdescription of the parties. That is the purport of Order 1 Rule 6 of the Civil Procedure Rules which provides that;

'No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.'

16 Honourable Justice R.E. Aburili held as follows in Geoffrey Asanyo & another v John Kiragu Ngunyi & 13 others [2015] KEHC 7710 (KLR);

'I find the defect to be that of misdescription or misjoinder of parties which is a procedural technicality that cannot defeat the substance of a suit. I also find that no prejudice will be occasioned to the defendants herein who are named together with entities which are said to be unincorporated. The court is entitled to determine issues between parties actually before it, since under Order 1 rule 12 of the Civil procedure rules 9 and Order 2 rule 14, no suit shall be defeated for misjoinder or non joinder and no technical objection shall render a suit invalid. This is further supported by Article 159(2)(d) of *the Constitution* which abhors procedural technicalities at the expense of substantive justice.'

17. Also, in Fubeco Fushun v Naiposha Company Limited & 11 others [2014] KEHC 8694 (KLR), while dealing with similar situation Honourable Justice F. Gikonyo stated in that;

'I hold and find that this is not a case of non-existent or faceless entity that would invariably be incapable of suing or being sued. It is a case of pure misdescription of a party and is governed by the same law on misdescription of parties in a contract.....

18. Despite the misdescription, I repeat, the Defendant all along knew who the Plaintiff was; it was the person with whom it entered into contract herein. All its pleadings and responses show that the Defendant made adequate and pointed responses to the Plaintiff's claim; leaving no doubt whatsoever that it was addressing the Plaintiff's claim which arose from the contract dated 1st March, 2010. The Defendant is just dishonest.'

19. The appellants have cited Article 260 of *the Constitution* which defines a person to include a company, association or other body of persons whether incorporated or unincorporated. The appellants in the same breath calls for proof of incorporation of the respondent yet the constitutional definition recognizes an unincorporated body as a person capable of bringing legal proceedings in a court of law. As far as I am concerned, as long as the person approaching the court can specifically and accurately be identified by the name they are using, they will have locus standi or capacity to sue.

20. In view of the above, it is my position and holding that the court trial court did not err in holding that the issue was a mere technicality. What was at the core of the suit was rent arrears owed to the owner of the property who identified itself as the respondent and whose name appeared in the lease and well known to the appellants.

21. I now turn to the second issue of whether the respondent proved its case on a balance of probabilities. The appellant produced a total of 25 exbibits which concluded the lease, letter of offer, correspondences between the parties regarding the settlement of the rent arrears and receipts for payment of total of Kshs 4,950,000.00 over the two-year period the appellants occupied the rented premises.

22. The appellants have argued that the lease was not registered and as such not admissible in evidence and as such the trial court should not have relied on it. The appellants did not object to production of the lease during the trial and in my view, raising it on appeal is an afterthought. The appellants chose not to testify and, in that regard, there was no evidence adduced on their part to rebut the evidence that there was a lease between them and the respondent. They did not deny executing the lease neither did they challenge any of the many documents produced in proof of the contractual relationship between the parties.

23. Even if the lease were to be excluded from the evidence, there will still be enough evidence to establish on a balance of probabilities that the appellants were the respondent's tenants. For instance, the letter of offer, correspondences between the parties and some part payments of the rent are proof of the contract. I flag out letter dated 2-06-2009 which was produced as plaintiff's exhibit 2 in which the appellants were accepting the letter of offer and committing to pay Kshs 550,000.00 to the respondent herein which they eventually paid on 22-09-2009. There is also the letter dated 25-07-2011 signed by Mildred Ayere, the 2nd appellant which acknowledged rent arrears of Kshs 6,550,000.00 owed to the respondent and security of Kshs 135,000.00 and which was asking for indulgence to organise their finances. This letter was produced as plaintiff's exhibit 19

24. The other argument raised by the appellants on the second issue is that the respondent did not prove that it owned the suit property. The issue of proof of ownership of the property was not a matter for trial. It is my position that the case before the court was based on an agreement between the parties. The appellants did not question or have reservation of their occupation of the premises on the basis that the respondent did not own the property. The appellants occupied, used and benefitted from the premises through permission and let by the respondents. They also enjoyed the common services like security offered by the respondent. The suit was not based on ownership of the property but a contract which has not been challenged. In that regard, I find this argument a lame effort by the appellants to escape their contractual obligations and I dismiss it.

25. Based on the above analysis, I find no merits in this appeal and the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in absence of the parties.