



Otenyo & 14 others v Church of God in East Africa (Kenya) Suing thru' Rt Rev Dr Byrum Makokha, Rev, James Obunde, Jeremiah Maenye & William Shimanyula Trustees of the Church) (Civil Appeal 115 of 2020) [2024] KEHC 9534 (KLR) (Civ) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 115 OF 2020

HI ONG'UDI, J

JULY 25, 2024

BETWEEN

ELIJAH SEKA OTENYO & 14 OTHERS APPELLANT

AND

CHURCH OF GOD IN EAST AFRICA (KENYA) SUING THRU' RT REV DR BYRUM MAKOKHA, REV, JAMES OBUNDE, JEREMIAH MAENYE & WILLIAM SHIMANYULA TRUSTEES OF THE CHURCH) RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E.K Usui, Chief Magistrate in Nakuru Chief Magistrate's CMCC No. 868 of 2006, delivered on 14th May 2020)

JUDGMENT

1. This appeal arises from a Judgment and decree issued in Nakuru Chief Magistrate's CMCC No. 868 of 2006. In the said suit, the respondent (the plaintiff in the lower court suit) prayed for judgment against the appellants (the defendants) for following orders;
 - i. A permanent injunction to restrain the Defendants by themselves, their agents and/or servants from interfering with the running, or operation of the Njoro Church of God either by, writing letters on its behalf, conducting Church Service, elections, functions or purporting to hold positions thereat, or making decisions on behalf of the Church and/or in any other manner howsoever from interfering with the affairs of the Njoro Church of God or interfering with Church properties either by remaining or staying in the Church house or compound and premises.
 - ii. Costs of this suit.



- iii. Interest on (ii)
- iv. Such further or other relief that this Honourable Court may deem fit to grant.
2. The matter was fully heard and the trial Magistrate delivered Judgment on 14th May, 2020 in favour of the respondent.
3. Being aggrieved by the judgment the appellants lodged the appeal dated 11th June, 2020 on the following grounds:
 - i. That the learned magistrate erred in law and fact in failing to properly evaluate the evidence adduced before her especially by the defendants thereby coming to conclusions of facts and law not supported or based on the evidence.
 - ii. That the learned magistrate erred in law and fact in finding a holding that the defendants have/had interfered with the running of the church without concrete primary and admissible evidence in that respect showing in what form the said defendants or any of them had interfered with the running of the church affairs.
 - iii. That the learned magistrate erred in law and fact by failing to appreciate that the cause of action pleaded had been overtaken by events by the refusal of the court at the interlocutory stage to grant injunctive orders and in view of the evidence adduced at the trial that the church services and operation at the particular church was going on smoothly and did not require the court's intervention or still merited adjudication.
 - iv. That the learned magistrate erred in law and fact by not appreciating that the issue of grievances raised in the suit were moot and not justiciable at the time the suit was filed and or at the time it was being decided.
 - v. That the learned magistrate erred in law and fact by ignoring evidence by the appellants that that the appellants as the Njoro Church of God had proprietary interests of the land upon which the church stood while the plaintiff (respondent) has none and that the appellants have/ had the right to operate on the premises in quo.
 - vi. That the learned magistrate erred in law and fact in disregarding the evidence of the appellants and their submissions and deciding the case on the basis only of the respondents account.
 - vii. That the learned magistrate erred in law and fact in failing to appreciate that the dispute before her was on the proprietary rights over the land on which Njoro Church of God stood, which the appellant proved to belong to the local church as Njoro Church of God and a fact which the Respondent did not dispute and that therefore there was no basis of granting the orders sought in the subject suit.
4. The Appeal was canvassed through written submissions.

Appellants' submissions

5. The appellants submissions were filed by Sheth & Wathigo Advocates and are dated 15th April, 2023. Counsel gave a background of the case and identified one issue for determination which is whether or not the appeal was merited. It was counsel's submission that from the evidence on record and testimony from both parties herein, it was clear that the respondent did not in any manner whatsoever contribute to the acquisition and/or erection of the Njoro Church of God. Further, that the trial magistrate erred in Law and fact in granting permanent injunction against the appellants who were co-owners of the suit property together with other members of the aforementioned church.



6. Counsel went on to submit that the respondent had not met the threshold required in law for grant of a permanent injunction for reasons that it did not have any proprietary interest on the plot upon which the Njoro Church of God was built. In support of the appellants' submissions, counsel drew the court's attention to the cases of *Moses & Another v Moraa & Another* (Civil Appeal 133 of 2021 [2024] KEHC 1121 (KLR)), *Mbogo and Another v Shah* [1968] EA 93, *Koyopel v Lomukerang & Another* (Environment & Land Case 8 of 2022) [2022] KEELC 20 (KLR), *INN v NK* [2020] eKLR and *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR.
7. He urged the court to review and/or set aside the trial court judgment/decrece.

Respondent's submissions

8. The respondent's submissions were filed by Mutonyi & Mbiyu Advocates and are dated 19th March, 2024. Counsel cited the several cases on the duty of the first appellate court among them being the case of *Jacinta Wanjiku_Kamau v Isaac Kamau Mun: ai & Another* 2006 eKLR where court held: "This being a first Appeal, it is our duty to re-evaluate the evidence, assess it and reach our own conclusions remembering that we have neither seen or heard the witnesses hence due allowance must be made for this..."
9. Regarding the first ground of appeal counsel submitted that the trial magistrate did not fail to properly evaluate the evidence before her. Further, that her finding was supported by the evidence of PW3, DW2, DW3 and DW4 together with the exhibits produced in court.
10. In respect of the second ground, he submitted that the trial Magistrate did not err in finding that there was enough evidence by the way of minutes and expulsions letter done by the respondent to the appellants that proved that they had been interfering with the running of Njoro Church of God.
11. Regarding grounds 3, 4, 5, 6 and 7 of the appeal counsel submitted that there was evidence that the respondent was running the Njoro church of God since 1969 which was long before this dispute arose. While relying on the case of *Palace Investments Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR, counsel submitted that the respondent had proved its case on a balance of probabilities before the trial court. He urged the court to dismiss the appeal with costs.

Analysis and determination

12. This being a first appeal, this court has a duty to re-consider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances. It must bear in mind that it did not see nor hear the witnesses testify, and must give an allowance for that.
13. In the classic case of *Selle & Another v Associated Motor Boat Co. Ltd. & Others* [1968] EA 123 the Court of Appeal stated as follows on the power of the first appellate court:

"I accept counsel for the Respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 this 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 based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul



Hammed Saif v Ali Mohamed Sholan [1955], 22 E.A.C.A. 270).[emphasis added]. Also see Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR"

14. Having considered the grounds of appeal, record of appeal, the parties' submissions and the authorities relied on by them, I opine that the issue for determination is whether the instant appeal is merited.
15. The appellants in their grounds of appeal contend that the trial magistrate erred in law and fact in failing to properly evaluate the evidence adduced before her especially that of the defendants thereby coming to conclusions of facts and law not supported or based on the evidence. Further, that she erred in holding that the defendants had interfered with the running of the church without concrete primary and admissible evidence. In their submissions they argued that that the respondent had not met the threshold required in law to be granted a permanent injunction for reasons that it did not have any proprietary interest in the property.
16. The respondent on their part argued that the trial magistrate had properly evaluated the evidence before her. Further, that her finding was supported by the evidence adduced in court both by the appellants' and respondent's witnesses together with the documentary evidence. They added that there was evidence that the respondent was running the Njoro church of God since 1969 which was long before this dispute arose.
17. The trial magistrate in her judgment faulted the appellants for not raising any reliable truth in their statement of defence and that the same composed of mere denials. Further, that they did not raise the question of whether Njoro Church of God and the respondent was one and the same in the said statement and that the same was only raised during trial.
18. She held that there was enough evidence by way of minutes and expulsion letter done by the respondent to the appellants to prove that they had been interfering with the running of the aforementioned church in Njoro. It was her finding that the respondent had proved its case on a balance of probabilities and entered judgment against the appellants as prayed in the plaint.
19. This court has perused the proceedings in the trial court and the exhibits produced before it. The court notes that in the list of documents relied on by the respondent (plaintiff) are documents in relation to appointment of its new trustees, its incorporation, a letter from the Nakuru County Council showing approval of an application for allocation of the plot to Njoro Church of God site at Jewathu and a transfer letter of one of its pastors to Njoro Church of God (pages 12-26 of the record of appeal).
20. The respondent in the plaint is described as Church of God in East Africa (Kenya) and it sought for a permanent injunction over Church of God Njoro. No documentary evidence was produced to show how the respondent and Church of God are related. PW1 to PW5 who claimed to be pastors in the respondent's church testified that Njoro Church of God was an affiliate of the respondent but they had no document to that effect. From the evidence on record the plot at Jewathu was allocated to Njoro Church of God and it made payments for it (see the appellant's list of documents page 36 -79 of the record of appeal).
21. Having observed as above, it is my finding that the respondent failed to prove its case on a balance of probabilities to warrant grant of injunction orders as sought in the plaint. The trial magistrate erred in finding the contrary and relying on the minutes and expulsion letter to issue the said orders.
22. The upshot is that the appeal herein is merited and the trial court's judgment delivered on 14th May, 2020 is hereby set aside and an order issued dismissing the respondent's original suit Nakuru CMCC No. 868 of 2006. There shall be no order as to costs.
23. Orders accordingly



DELIVERED. DATED AND SIGNED THIS 25TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

