



**Ogwago & 7 others v Rachuonyo & 5 others (Civil Appeal
E122 of 2021) [2023] KEHC 2254 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E122 OF 2021**

**KW KIARIE, J
MARCH 22, 2023**

BETWEEN

DENNIS OCHIENG OGWAGO & 7 OTHERS APPELLANT

AND

EZEKIEL RAKUNJA RACHUONYO & 5 OTHERS RESPONDENT

*(Being an Appeal from the judgment in Homa Bay Chief Magistrate's
CMCC No. 72 of 2018 by Hon. R.B.N Maloba–Principal Magistrate)*

JUDGMENT

1. Dennis Ochieng Ogwago & 7 others, the appellants herein, were defendants in Homa Bay Chief Magistrate's CMCC No. 72 of 2018. The appellants were accused of having taken leadership positions contrary to the *constitution* of the Salvation Spirit of Israel-East Africa. The learned trial magistrate delivered her judgment on 11th November 2020. The elections of 7th November 2014 were declared a nullity and fresh elections ordered.
2. The appellants were aggrieved by the said judgment and filed this appeal. They were represented by the firm of M.A Okumu & Company Advocates. They raised grounds of appeal as follows:
 - a. The learned trial magistrate failed and/or erred in law and in fact by not considering the impracticability of ordering a repeat election in regard to the impugned elections held on the 7th November, 2014 when there have been successive elections of new office holders yearly from 2015 when the term of the appellant ended and/or expired.
 - b. The magistrate failed in law and in fact when she failed to observe that there was inordinate delay in filing the suit by the respondents four(4) years later after the impugned elections of 7th November, 2014 was held and subsequent office holders taking over and completing their successive terms.



- c. The learned magistrate having found it impossible to grant the remainder of the prayers sought by the respondents in their plaint, should have proceeded to dismiss the suit in its entirety since a part is bound by his/her pleadings.
 - d. The magistrate grossly misdirected herself in law and in fact when she made the order for a repeat election when there was no prayer to that effect by either of the parties in their plaints and counterclaims respectively.
 - e. The magistrate proceeded on very wrong principles of law by not dismissing in entirety the respondent's suit when upon finding that the elections by the respondents held on the 18th July, 2015 was tainted with illegalities, the respondents were guilty of approaching equity with unclean hands.
3. The appeal was opposed by the respondents through the firm of G.S. Okoth & Company Advocates. The grounds of opposition were as follows:
- a. The AGM of 18th July 2015 was called in disregard of the finding of the trial court that the first plaintiff/respondent had resigned from his post as chairman before elections of 7th November 2014.
 - b. That the appellants did not come to court with clean hands.
4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
5. According to the Constitution of the Salvation Spirit of Israel-East Africa, elections shall be held at the Annual General Meeting to be held every year. The disputed elections of the year 2014 were challenged in Homa Bay Chief Magistrate's CMCC No. 72 of 2018. This meant that by 2018, there were 4 subsequent elections. The learned trial magistrate ought to have stopped by declaring the elections of 2014 a nullity. She ought not to have ordered fresh elections for this prayer was already overtaken by events.
6. Going by the spirit of the Constitution of the Society, the learned trial Magistrate ought to have made a finding that there was an inordinate delay by the respondents to file the suit.
7. The entire suit ought to have been dismissed for it was impracticable to enforce any orders that flowed from the judgment.
8. The AGM of 18th July 2015 cannot be said to have disregarded the finding of the trial court due to the fact that the first plaintiff/respondent had resigned from his post as chairman before elections of 7th November 2014. This is because the order of the court was made in the judgment delivered on 11th November 2020.
9. I therefore find that the judgment of the learned trial magistrate cannot stand. I set the same aside and substitute the same with dismissal of the respondents' suit with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 22ND DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

