



REPUBLIC OF KENYA



KENYA LAW
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**Mandila & 2 others v Swali (Civil Appeal 20 of 2021)
[2023] KEHC 20388 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 20 OF 2021**

**WM MUSYOKA, J
JULY 21, 2023**

BETWEEN

ALFRED MANDILA 1ST APPELLANT

DAVID NAMBALE 2ND APPELLANT

PHILIP LUCHELI NDINA 3RD APPELLANT

AND

MOSES SWALI RESPONDENT

(Being an appeal from the ruling and order of Hon. Njalale, Senior Resident Magistrate, SRM, delivered on 15th April 2021, in Butali SPMCCC No. 276 of 2018)

JUDGMENT

1. The suit before the trial court was by the appellants against the respondent, for release of a number of documents and items to them by him, namely a certificate of registration of the Evangelical Free Mission in Kenya, and the official seal, stamps and other official records of the said Church. The respondent resisted the suit by a defence, in which he denied liability. He averred that the matter was res judicata, and that the appellants were not officials of the Church, but of a splinter church. A trial was conducted, where each side called witnesses. A judgment was delivered on April 15, 2021, dismissing the suit, on grounds that the appellants were not bona fide elected officials of the Church.
2. The appeal herein arises from the said judgment, dated 15th April 2021. The appellant argues that the trial court applied the wrong standards of proof, the findings by the court were not supported by evidence, the trial court wrongly made presumptions of law, there was no counterclaim, the court erred in finding that the appellants were registered officials on account of a court order, the court failed to appreciate the evidence, and the court erred in finding that the respondent was validly elected secretary of the Church.



3. Directions were given on October 18, 2022, for canvassing of the appeal by way of written submissions. Both sides complied, by filing written submissions. The submissions by the appellants read more like a witness statement, and I have difficulty getting the legal points made, save the point that the Registrar of Societies had exercise discretion under section 18 of the *Societies Act*, cap 108, Laws of Kenya, to reject a list of officials sent to her by the respondent, and as a consequence the trial court could not declare him an official of the society. The respondent avers that officials of the Church could only be appointed as per the Constitution of the Church, and that the appellants had been registered as officials on the strength of a court order, made in a suit which was subsequently withdrawn. It is submitted that the Registrar of Societies had no authority to determine the officials of a society.
4. There was only 1 issue for determination before the trial court, which was who the bona fide officials of the Church were, between the appellants and the respondent, to warrant grant of the orders sought. The trial court concluded that the respondent was the bona fide official, while the appellants were not. That was arrived at on the basis that the registration of the appellants, as officials of the Church, contravened the Church Constitution, and that registration did not reflect the true position on the ground.
5. The only issue for me to consider is whether the trial court made an error in concluding that the appellants were not bona fide officials of the Church.
6. It is common ground that the appellants are the registered officials of the Church, according to the records held at the registry of societies. That happened in 2016, on the basis of a court order. It would appear that the suit, the basis of whose orders the registration was done, was withdrawn. However, the official keeper of records, of the persons recognized as bona fide officials of a registered society, is the Registrar of Societies, according to whose records the bona fide officials of the Church are the appellants, and not the respondent. It could be that the suit, on whose basis the appellants were registered as such, was terminated, but that did not erase or alter or change the official records, as kept by the Registrar, and no attempt was made to vary those records, or to seek assistance of the registrar to identify new officials.
7. I note that the trial court cited section 45 of the *Societies Act*, and even reproduced it verbatim in the judgment, but then after that it ignored it, and stated that the register did not reflect what was on the ground. The entire section 45 is not wholly relevant to these proceedings, but the relevant part, section 45(c), provides that the persons appearing in the register are to be presumed to be the bona fide officials of the society, until the contrary is proved. The contrary can only be proved to the Registrar, so that she can thereafter effect the necessary changes. There is no evidence that any attempt was made, by anyone, to prove the contrary to the Registrar. The suit before the trial court did not have the Registrar as a party, and its outcome cannot alter the registration, for no orders were sought and obtained against the Registrar, with respect to that registration, and that registration stands valid to date, until such time that the contrary is proved to the Registrar.
8. For avoidance of doubt, section 45(c) of the *Societies Act* reads:

“General presumptions

45. In any prosecution or other proceedings under this Act

(a) ...

(b) ...



(c) a person named in the register kept by the Registrar as the holder of an office of a society shall be presumed to be the holder of that office or as the case may be, an office of that society, until the contrary is proved;

(d) ...”

9. Going by section 45 of the *Societies Act*, the register reflects the appellants as the bona fide officials of the Church, until such time that the contrary shall be proved to the Registrar of Societies. The respondent does not appear in that register, and he is, therefore, not a bona fide official of the Church. The de jure officials are the appellants. It could be that the respondent and others were elected, at some point or other, as officials under the Church Constitution. However, they can only be de facto officials, so long as their names are not in the register kept by the Registrar of Societies, and have not proved to the Registrar that they are the bona fide officials, to warrant the Registrar changing the registration particulars. Legally, the officials entitled to the documents, certificates, seals and records of the society are the de jure officials, that is those recognized by the Registrar of Societies, going by the contents of the register maintained at the office of the Registrar. The suit before the trial court was not about convincing the Registrar otherwise. The trial court ought to have found in favour of the appellants.
10. I am persuaded that the appeal herein should be allowed, for the foregoing reasons. I hereby allow it with costs. The order, in Butali SPMCCC No. 276 of 2018, made in the judgment dated 15th April 2021, dismissing the suit, is hereby vacated, and substituted with an order allowing the said suit with costs. This appeal file shall be closed. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF JULY 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Manyoni, instructed by Momanyi Manyoni & Company, Advocates for the appellants.

Ms. Rauto, instructed by Rauto & Company, Advocates for the respondent.

