



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 145 OF 2009

RAMJI DHANJI GAMI.....PLAINTIFF

VERSUS

DHANJINATHA KHETANI

DINESH KHIMJI HIRANI

JAGDISHI KHIMJI HIRANI.....DEFENDANTS

JUDGMENT

1. On 21. 8. 2008 by a plaint dated the same day, the Appellant herein RAMJI DHANJI GAMI sued the Respondent in their capacity as the officials of a religious society called SHRI CUTCH SATSANG, SWAMINARAYAN MANDIR (TEMPLE) Mombasa, and seeking against them orders of Permanent injunction restraining them from inviting, allowing or letting persons absorbed as saints from another temple in India from preaching or delivering summons at the defendant temple at any time without the express recommendation that the management committee of the defendant were bound to strictly comply with the provisions of **clause 11(f)** of the Society's Constitution.
2. To that suit the defendants filed a defence and a counter claim in which they contended and averred that the provisions of clause 11(f) was fully complied with and that they were obliged to accept and allow the subject saints to preach, stay, put up and give summons at the temple; that His Holiness 1008 Shree Rakeshprusadiji is recognised as the Acharya of the Southern Sect -Vadtal.
3. The defendant equally mounted a counter claim in which it was pleaded that the Temple's Constitution permitted the committee to allow the Saints as it did; that the head of the Southern sect was recognized by the Bhuj Mandir and that the visit by the Saints in 2008 was not the first one but there had been others before. The counter claim then prayed for orders that the committee was entitled to receive the saints and allow them to preach provided that clause 11(f) of the Constitution was adhered to; an order of injunction restraining the defendants from interfering with the visit provided there was compliance with clause 11(f) of the Constitution and an injunction restraining the plaintiff from acting contrary to the Constitution of the society.
4. The suit was heard before L. Mutende, SPM who received evidence from two witnesses on each side

and in a reserved judgment dated 14. 7. 2009 dismissed the plaintiff's suit for having not been proved, to the requisite standards while allowing the counter claim in terms of prayers a, b & c as well as costs of the suit and the counter claim.

5. That judgment did not go down well with the plaintiff, as appellant herein who on 7. 8. 2009 filed the current appeal and raised 14 grounds of appeal as follows:

- I. That Learned Magistrate erred in law and in fact in dismissing the Plaintiff's suit with costs without due and proper consideration of the evidence on record as adduced on the part of the Plaintiff and without proper consideration of the issues as addressed in the Plaintiff's submissions.
- II. That the Learned Magistrate erred in law and in fact in entering judgment in favour of the Respondents for the Counter-claim when the Respondents had failed to prove on a balance of probabilities their prayers under Counter-Claim.

III. The Learned Magistrate erred in law and in fact in entering judgment in favour of the Respondents for the Counter-Claim with costs to the Respondents without due regard to and consideration of the fact that the prayers sought in Counter-Claim were the same prayers sought in the CMCC No. 2303 of 2007 that was filed by the Respondents against the Appellant and withdrawn without notice to the Appellant.

IV. That Learned Magistrate erred in law and in fact in failing to consider and determine that on the basis of the pleadings and the evidence adduced on the side of both parties to the said suit the following issues arose and ought to have been duly considered by the Court:-

a) Whom is the true and proper Head or Acharyas of the Southern Sect-Vadtal?

b) Whether the Shree Swaminarayan Mandir of Cutch- Bhuj had given direction on the dispute relating to the Head of Acharyas of the Southern Sect-Vadtal and whether the decision of the Bhuj Temple is binding on the Shri Cutch Satsand Swaminarayan Mandir (Temple) Mombasa?

V. That the Learned Magistrate erred both in law and in fact in finding and/or holding that the amended and applicable Constitution for the Shri Cutch Satsand Swaminarayan Mandir (Temple) Mombaa is the one produced in evidence by the Respondents as Dexh.-1 for the reasons that:-

a) The Learned Magistrate in her judgment misrepresented the evidence of the PW2, the Assistant Deputy Registrar of Societies, as to the original copy of the Constitution for the Temple based on the arrangement of the documents in the file of the Temple as kept by the Registrar of Societies.

b) The Learned Magistrate failed to consider the purport of the evidence of Pw2, the Assistant Deputy Registrar of Societies, to the effect that on the look of the file it is difficult to clearly state which of the 2 different copies of the Constitution of the Temple in the file was the first or the second.

c) The Learned Magistrate failed to consider the fact that DW2, whom is the Secretary of the Temple did not avail any original copy of the Constitution possibly in his possession to demonstrate the applicable and operational copy of the Constitution for the Temple.

d) The Learned Magistrate failed to consider and find that from the evidence adduced on the both sides on record it is not reasonably possible to confirm as to which is a true and proper applicable Constitution for the Temple.

VI. That the Learned Magistrate erred both in law and in fact in denying the Appellant a reasonable opportunity to cause the attendance in court of Mr. Sadiq Ghalia, Advocate, to testify and produce in court the proper and applicable version of the Constitution of the Shri Cutch Satsang Swaminarayan Mandir (Temple) Mombasa that was forwarded to him by the Registrar of Societies vide a letter dated the 3rd day of January, 1973.

VII. That the Learned Magistrate erred both in law and in fact in finding and holding that the Shri Cutch Satsang Swaminarayan Mandir (Temple), Mombasa is under the control of the Shree Nar-Narayan Dev Mandir of Cutch Bhuj for the reasons that:-

a) The Learned Magistrate subjectively relied upon the wrong version of the Constitution for the Temple to reach at such wrong finding.

b) The Learned Magistrate failed to objectively consider the purport of the hereunder specific provisions of the Constitution of the Temple that demonstrate that the Shri Cutch Satsang Swaminarayan Mandir (Temple), Mombasa is under the control of the Shree Nar-Narayan Dev Mandir of Cutch Bhuj:-

1. Under Clause 3(a) amendments to the Constitution and Rules are to be strictly undertaken with the express permission of the Shree Nar-Narayan Dev Mandir of Cutch-Bhuj.
2. Under Clause 3(b) the decision of the Shree Nar-Narayan Dev Mandir of Cutch-Bhuj on the matters touching on the Constitution and Rules of the Shri Cutch Satsang Swaminarayan Mandir (Temple) Mombasa is final and binding on every member of the Mombasa Temple.
3. Under Clause 11(b) only such members whom act in accordance with the principles and conventions of the Shree Nar-Narayan Dev Mandir of Cutch – Bhuj have a right to vote in matters of the Shri Cutch Satsang Swaminarayan Mandir (Temple) Mombasa and are bound to secure the best interests of the Shree Nar-Narayan Dev Mandir of Cutch- Bhuj.
4. Under Clause 15 the Shri Cutch Satsang Swaminarayan Mandir (Temple) Mombasa cannot be dissolved except with express advice of the Shree Nar-Narayan Dev Mandir of Cutch Bhuj and on dissolution the management of the Mombasa Temple is to be taken over by the Shree Nar Narayan Dev Mandir of Cutch-Bhuj.

VIII. That the Learned Magistrate erred in law and in fact in failing to consider and appreciate the fact that it was admitted on the part of the both sides to the said suit that there is a civil suit pending in the Supreme Court of India relating to the dispute on the leadership of Southern Sect-Vadtal.

IX. That the Learned Magistrate erred in law and in fact in failing to consider and find that in the light of the Counter-claim filed by the Respondents the Respondents were under an obligation to discharge the evidential burden of establishing that shree Rakeshprasadji Maharay is true and proper Acharyas of the Southern Sect-Vadtal and that the Respondents had properly acted within the wording and spirit of the Constitution of the Shri Cutch Satsand Swaminarayan Mandi (Temple) Mombasa in receiving the notes of recommendation for the priests that have been visiting the Temple from the Southern Sect-Vadtal.

X. That the Learned Magistrate erred in law and in fact in purporting to find that the letter dated 27th October, 2008 addressed to the Shri Cutch Satsang Swaminarayan Mandir (Temple) Mombasa by the Shree Nar-Narayan Dev Mandir of Cuth -Bhuj indicates that both Reakeshprasadji Maharay and Ajedraprasadji Maharay were in control of the Southern Sect-Vadtal.

XI. That the Learned Magistrate erred in law and in fact in failing to find and hold tht the Shree Nar-Narayan Dev Mandir of Cutch-Bhuj had duly given directions on the dispute as to whom is the Acharyas of the Southern Sect-Vadtal and that the decision that the Mombasa Temple to await judgment of the Supreme Court of India on the leadership wrangles over the true Acharyas of the Southern Sect-Vadtal is binding on all parties including the Respondents.

XII. That the Learned Magistrate erred in law and in fact in her evaluation of the evidence adduced before the court and in coming to the wrong conclusions.

XIII. That the Learned Magistrate erred in law and in fact in failing to properly consider the submissions by the Appellant's counsels on record.

XIV. That the Learned Magistrate's findings are not supported by the evidence on record and the pleadings filed in the suit by both parties.

6. The totality of the memorandum of appeal is that it challenges the trial courts appreciation of the evidence leading to courts finding, the finding as to which was the true Constitution of the temple; the weight and purport of evidence by PW2 and the interpretation to be given to the Temple's Constitution besides the question who was the true Acharya and the relation with the Mombasa temple.

7. On 7. 5. 2015 the court gave directions that the appeal be heard by way of written submissions pursuant to which direction the parties filed respective submissions and attended to court on the 13.10.2015 to highlight same.

The Appellants case:

8. In both the written and highlight of submissions the Appellant contends that the Mombasa temple was under the control of the Bunj Mandir was explicit from the Temple's Constitution and that it was admitted by the defendant in its defence hence the only question that was to be resolved is who was the true head of the Southern Sect. The Court of appeal decision in IEBC -vs- STEPHEN MUTINDA MULE was cited for the ratio that parties are bound by their pleadings and that a court, however well intentioned, is not permitted to decide a dispute on an issue not pleaded by the parties. It was for their contention that there had not been a clear leader of sect as a determination was awaited from the court in India.

Respondents case

9. The Respondents position is succinct that the only dispute between the parties was whether or not their acts of accepting and allowing the Saints from the Southern Sect was in consonance with the Temple's Constitution. It was submitted that the Appellant placed reliance on the Temple's Constitution without knowledge that there had been amendments and that the Saints had recommendations from the Acharya of the Southern Sect.

Analysis and Determination

10. A detailed perusal of the pleadings, evaluation of proceedings before the trial court reveals to me that the only dispute that was before the court for resolution was whether or not the Respondents were permitted by the Constitution of the Temple to accept and allow the Saints from Southern Sect, to put up stay and give summons at the Temple. That dispute would be determined by what the Temple's Constitution provided in that regard. Consequently therefore the only issue that the trial court was to grapple with and determine was whether or not the actions of the Respondent in accepting the Saints to the Temple was in consonance or violation of the Temple's Constitution.

11. At trial the plaintiff called PW2 who produced the file kept by the registrar of societies. In that file was a Constitution that was said to be the amended Constitution. That amended Constitution EXH D1 & 7 e provide at clause 11(f):-

“In this mandir (temple) the followers of Shri Nar, Narayan Deu and Shri Laximenaryan Dev and Saints, Brahmacharis and Prasadas who observe and act in accordance with the Rules and Regulations of both the sects would be allowed to put up and stay provided they bring a note of recommendation either from the Acharyas or head of the respective sects or of the working committee of the Bhuj mandir.”

12. The plaintiffs cause of action in my opinion is disclosed at paragraphs 7, 8, 9, 10, 11 & 12 of the plaint. Paragraphs 7 & 8 are instructive on the complaint by the plaintiff. The two paragraphs read:

“(7) The Plaintiff states that the Society in furtherance of its objective aforesaid are pursuant to the provisions of its Constitution and Rules is to allow Saints of the Swaminarayan faith to stay, preach and give Sermons in the Temple known as Cutch Satsang Swaminarayan

Mandir(Temple), Mombasa.

(8) There is a major dispute in India as to whom is the true and proper Acharyas or Head of the Shree Laxminaray Dev. Southern Sect-Vadtal as between Shree Rakeshpadasaji Maharaj Shree and Shree Ajendraprasadasji Maharaj-shree and consequence of the dispute and doubt on the said leadership it is necessary a mandatory for the Management Committee of the Society to seek for advice or permission from the Working Committee for the Bhuj Temple in respect of any such invitation or recommendation to deliver sermon at the Shri Cutch Satsang Swaminarayan Mandir (Temple), Mombasa by any visiting Saint”

13. In the mind of the court the issue for determination was ascertainable from these averments by the plaintiff when juxtaposed against the Constitution and the evidence led at trial.

14. Being a first appellant court I am enjoined to reevaluate and re-examine the entire evidence and come to own conclusion without necessarily concurring with the trial court while noting that the trial court had the benefit of hearing and observing the witnesses as they tendered their evidence at trial. That the parties are bound by their pleadings must be born in mind at all times if the court was to adhere to the need and dictates of the right to a fair hearing.

15. It is to me clear, as daylight, that the Appellant came to court on the basis and foundation how that it was mandatory that the recommendation for the Saints to visit and put up at the Temple could only be made by working committee of the Bhuj mandir.

16. I find that that stand was misconceived because the Societies Constitution envisaged a recommendation from the either the Acharyas or heads of the respective sects or of the working committee of Bhuj mandir. To say that the recommendation could only come from the working committee of the Bhuj Mandir because there was no clear leader of the sect was to miss the point.

17. The issue was whether recommendation had come from one of the three authorities. The trial court upon reviewing the evidence tendered delivered itself as follows:-

“Mombasa Temple is part of the Northern Sect of the Bhunj Temple. The division between the Saints and Northern Secs is simply administrative. The suits who were to deliver summons had recommendation pursuant to clause 11 (f) of their constitution. It was upon the plaintiff to adduce evidence to prove that the recommendation was not genuine. This was not done.”

18. My review and reevaluation of the pleadings and evidence tendered does not reveal to me any error by the trial court that would entitle me to interfere in its finding as a trial court. A look at the evidence reveal the there was indeed a recommendation. The plaintiffs position was that it could only have come from the working committee of the Bhuj Mandir. That to me was not a dictate of the constitution as kept by the registrar of societies and produced in court as evidence.

19. I find that the trial court made its determination on the basis of the evidence tendered and the pleadings on record without venturing outside the permitted area and cannot be faulted.

20. The plaintiff indeed failed in its onus in law and the suit had to fail. The suit having failed, what remained for the determination by the court was the counter claim which sought a declaration that the defendant acted within the permitted parameters of the constitution and that it was the plaintiff who was purporting to go against the provisions of the constitution and should be enjoined.

21. As pleaded, the court had no option but to find for one side against the other based on the provisions of the pivotal clause in the constitution that touched on the dispute.

22. The totality of the foregoing is that this appeal lacks merit and the same is thus dismissed with costs to the Respondent.

23. It is so ordered.

Dated, signed and delivered at Mombasa this 4th day of March, 2016.

In the presence of:-

Mr.Ondego for Mr.Nyongesa for the Applicant/plaintiff.

Mr.Mogaka for Mr.Omwenga for the Defendant/Respondent.

P.J.O.OTIENO

JUDGE