



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CONSOLIDATED CIVIL APPEAL NOS. 96 OF 2008 AND 89 OF 2002

BETWEEN

THE LIVING WATERS E.A.P.C

(SUING THRO' HIS REGISTERED OFFICIALS VIZ

**ANDREW NYAGA, FREDRICK NTERE AND CORNELIUS
MWORIA.....APPELLANTS**

AND

EAST AFRICA PENTECOSTAL CHURCH (SUING THROUGH ITS REGISTERED

**TRUSTEES VIZ JUSTUS KINOTI RINGERA, CHARLES LEAWA SOSPETER
NJERU**

AND ANDREW

KINYAMU.....RESPONDENTS

J U D G M E N T

(appeals from the ruling of hon. Njeru ithiga SPM in CMCC NO. 428 of 2002 delivered on 13th August, 2002 and judgment of hon. M.S.G. Khadambi SRM in CMCC NO. 727 of 2004 (Meru) delivered on 2nd October 2008).

BACKGROUND

This Consolidated appeal arises from two cases filed in the Magistrate's Court in Meru Law Courts being CMCC No. 428 of 2002 and 727 of 2004 respectively. In CMCC NO. 428 of 2002, the Plaintiff namely the East Africa Pentecostal Church had originally sued fifteen people through its three registered officials. Of the fifteen people sued in the original Plaint, the first eleven were sued in their capacity as the officials of the then unregistered society called East Africa Pentecostal Church 2000 whereas the remaining four were sued as the "followers" of the same Church. The Plaintiff sought in the Plaint Judgment against the Defendant jointly and severally for a declaration that the defendants were no longer members of the Plaintiff's Church. They also sought a permanent mandatory injunction to restrain the defendants from undermining the Plaintiff Church constitution and its leadership. In addition, it sought costs and interest of that suit, Together with that suit, the Plaintiff filed a Chamber Summons dated 5th July, 2002 seeking temporary injunction orders to restrain the defendants from holding any meeting or any meetings without the approval of the parish overseer or pastor or conducting any fundraising and particularly a fundraising

that was then scheduled for 7th July 2002 at Gakurine Church until further orders of the Court. That application was under certificate of urgency and was first heard *ex parte* and orders granted. When the application was heard *inter partes* later, it was refused for lack of merit. Aggrieved by that decision the Plaintiff appealed against the same to the High Court in HCA No. 89 of 2002. In the Memorandum of appeal dated 20th August 2002, the Plaintiff/Appellant sought for orders *inter alia* Injunctive Orders restraining the Respondents from holding any Church meetings until the approval of the parish overseer or pastor and/or any Church fundraising until determination of the suit or further orders, That Appeal was filed together with a Chamber Summons dated the same 20/8/2002. That Chamber summons sought five (5) orders. That application was opposed and before it could be heard *inter partes*, the Respondents intended their Church was registered and the Applicants had to file an amended Memorandum of Appeal together with a fresh Chamber Summons dated 5th February, 2004. That application indicated that the registered Church for the Respondent is Living Waters EAPC. That application was heard by the Learned Judge Hon Onyandia J. (As he then was) and on 18TH March 2004 struck out, but granted the Applicants leave to file a fresh application within 14 days. On 30th March 2004, the Applicants filed a similar application which was heard by Hon. Lady Justice Sitati (As she then was) and on 27th July, 2004, she dismissed the same. The applicant were still aggrieved by the ruling and filed a notice of Appeal on 2nd August 2004 and the Respondent this time round is the Living Waters EAPC, through its registered officials, Rev Andrew Nyaga, Fredrick Nteere and Cornelius Mworira. The original defendants are no longer parties. The Applicant filed an application under Rule 5 (2) (b) of the court of Appeal Rules seeking the following orders *inter alia*:-

“2. That this Honourable Court be pleased to issue an order of Injunction restraining the respondents by themselves, their agents assignees and anybody else acting on (sic) their behalf from alienating Church buildings, converting the already built up Church building to their exclusive use, chasing the Applicant’s affected pastors from their Church; and preventing them from conducting service; and restraining them from erecting sign boards on various named churches, changing name of the Applicant-EAST AFRICA PENTECOSTAL CHURCH to Living Waters EAPC. In the second Appeal No. 96 of 2008, the parties are the same as the earlier case where the Plaintiff had sued the defendant/Appellant for the following orders;

1) General damages for interference and non –user of its properties listed as follows:-

a) Makutano E.A.P. C

b) Themba

c) Chugu

d) Runogone

e) Kithoka

f) Kaithe

g) Karumathi

h) Kirung’a

i) Mwiteria and

j) Kienderu

2) A permanent Injunction restraining the defendants by itself or through its agents, servants or representatives from interfering with the Plaintiffs parties above named:-

3) Costs of the suit.

The Plaintiff/Respondent filed the suit simultaneously with an application dated 3rd December, 2004. That application was filed under Certificate of Urgency and when the same was placed before the duty Magistrate, it was certified urgent and temporary injunction orders were granted.

After full hearing the trial Court delivered its Judgment on 22nd October 2008 in the following terms:

- a) A permanent Injunction is hereby granted to restrain the Defendant through its agents, servants and/or representatives from interfering in any way with the Plaintiffs property in the titles over LR Nos. 1713, 2885, 2267,576,461 and 250 as enumerated above.
- b) The Claim for general damages is hereby dismissed for lacking in merit.
- c) The Plaintiff gets the Costs of the suit.

Being dissatisfied with the decision of the Learned Magistrate the Defendant/Appellant exercised their right of appeal and filed HCCA No. 96 of 2008 on the following grounds-

- 1) The Learned trial Magistrate erred in law and fact in that she failed to find that the Plaintiff's suit before the Court was a nullity in law and the same was totally defective for misjoinder and misdescription of the parties as it was brought by wrong parties.
- 2) The Learned trial Magistrate erred in law and fact in that she failed to evaluate the entire evidence on record with resultant conclusion that the Respondent was the owner of the suit properties namely title No. 1713, 2885 2267,567 461 and 250 in spite of overwhelming evidence on record that the Respondent did not own the same.
- 3) The learned trial Magistrate erred in law and fact in that she made a finding that the Respondent was entitled to an order of Injunction when there was no order on record capable of being confirmed.
- 4) The Learned Trial Magistrate erred in Law and fact in that she found that the Plaintiff suit was proved to the required standards.
- 5) The Learned Trial Magistrate erred in Law and fact by disregarding the exhibits produced by the Appellant to the effect that they have all along been in occupation of the suit properties.
- 6) The Learned Trial Magistrate erred in law and fact by failing to consider and analyse the appellant's witnesses and their evidence and thereby arrived at the wrong finding over the properties in dispute.
- 7) The Learned trial Magistrate erred in law and fact that she failed to consider the appellants submissions and the judicial authorities tendered before the Court.
- 8) The Learned Trial Magistrate erred in law and fact in that she found that the Respondent was initially known as the East Africa Faith Mission Pentecostal Churches when there was no such evidence before the Court.

APPELLANTS SUBMISSIONS

The Counsel for the Appellant submitted that the Respondents pleading before the trial Court were defective and incompetent and untenable in law on the following two reasons:-

First, the Respondent had included in its plaint the names of one ANDREW KINYAMU as one of the alleged trustees of the Respondent and other persons who are no longer its trustees.

Secondly, the Respondent had wrongly sued the appellant by do so via the Chairman, Secretary and treasurer. He urged that the appellant has its own trustees and it ought to have been sued as such. Learned Counsel further submitted that the Respondent did not amend its Complaint and did not also file a reply to defence. He stated that the Respondents failure to sue the Appellants' trustees in a case of this nature was fatal to the Respondent's suit. The Appellant also submitted that the Respondent's suit was not in good faith and that the same demonstrates bad blood as a result of the Appellant's member's refusal to remain as members of the Respondent. It is also submitted that the Respondent's case had no probative value and that the same was based on speculation.

The counsel for the Appellant argued that the Respondents members were seeking to acquire some of the parcels of land belonging to the Meru County Council without any basis in law. It is also submitted that the Principles for granting an injunction as enunciated in Locus Classicus case of Giella Vs- Cassmanf Brown Ltd were not met.

On grounds 7, 8 and 9 the Appellant submitted that the Lower Court did not consider the entire evidence tendered before Court. In conclusion the Appellant urged me to set aside the decree and thereafter dismiss the Respondents case with costs.

RESPONDENT'S CASE

The Respondent submit that all the persons named as Trustees of the Respondent were such trustees at the time of filing the suit. The Respondent argued that the Appellant is registered under the society Act and that it is proper to sue it through its registered officials. It also submitted that under Paragraph 2 of the Complaint the Appellants admitted the descriptive parts of the complaint and that they are estopped from challenging its capacity on appeal. The Respondent also submitted that there was admission from the evidence of DW 1 DW 2 and DW 3 that Andrew Nyaga Fredrick Nteere and Cornelius Nyaga were the officials of the Appellant. As such, a Society, not being a body corporate can only be sued through its official on matter that concern the society.

The Respondent argued that the trial Court properly directed its mind to the evidence adduced in arriving at the judgment. She said that the finding as to the ownership of the five (5) properties was overwhelming after it produced copies of the registered showing the same were registered in her name. He also submitted that there was no evidence that the Appellant had always been in occupation of the suit premises. She said that the Appellant only came into existence in 2003 while the properties in question were all acquired by the Respondent long before the Appellant came into being.

In regard to Appeal No. 111 of 2008, the Respondent argued that the trial court was informed that the building on L.R. NYAKI/KITHOKA 677 and NYAKI/CHUGU/433 were built by the Appellant in the year 2008, long before the Respondent came into being and therefore failed to find in his favour. As such, she submitted that trial Magistrate failed to analyse and evaluate the evidence on record. In conclusion the Respondent prayed that Appeal No. 96 of 2008 be dismissed and that Appeal No 111 of 2008 be allowed with costs.

APPLICABLE LAW

This being an appeal from the Subordinate Courts, the law is clear on how such appeal should be handled. In PETERS –VS- SUNDAY POST LIMITED [1958] EA at page 424, it was held as follows:-

“Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusion of the trial Judge should stand, this jurisdiction is exercised with caution. If there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide”.

Guided by that principle I now proceed to evaluate the evidence to determine whether the decision arrived by the Learned Magistrate is supported by evidence and the law and whether any part of the decision

require my intervention by way of review. In doing so, I will start with Civil Appeal No. 96 of 2008 which has nine (9) grounds of Appeal. Under ground 1 of that appeal, the Learned Trial Magistrate in her Judgment quoted order 1 Rule 1 of the Civil Procedure Rules which saves a suit from being incompetent by reason of misjoinder or mis description. The Learned Trial Magistrate properly directed herself to the law in saving the suit. On the second ground of Appeal, the Learned Magistrate properly analysed the evidence adduced by the Plaintiff witnesses in arriving at the decision that the following properties were registered in favour of the Plaintiff/respondent.

- 1) L.R NO NYAKI/KITHOKA/1713 being the Church known as Themba.
- 2) L.R NTIMA/IGGOKI/2885 being the Church at Makutano area.
- 3) L.R NO. NYAKI/KITHOKA/2267 and NYAKI/KITHOKA/576 being vacant plots for KITHOKA CHURCH.
- 4) L.R. NO. NYAKI/CHUGU/461.

Where stands Kienderu Church.

PW 1 testified and produced Green cards in respect of P. Exhibit No. 6 is which parcel No. NYAKI/KITHOKA/1713 Green card-P. Exhibit 9 which is parcel No. NTIMA/IGOKI/2885, Certificate of Search Exhibit NO. 8 In respect of Parcel No NYAKI/KITHOKA/ 2267. P-Exhibit NO.7 is a green card showing that the property is reserved for East Africa Faith Miss Pentecostal Churches. The Plaintiff indicated that that was their original name before it took up the current name. The Learned Magistrate correctly observed in her judgment as follows:-

“The Plaintiff clearly showed that that was its original name before it took up the current name. This Court does not hesitate in recognizing the Plaintiff as being the easily identifiably beneficiary as against the defendant”.

As regards the plots owned by the Meru Municipal Council (now Meru County Government) reserved for religious purposes, the plots have not been allocated to any particular Church organization. Since it belongs to the County Government of Meru and that Plaintiff has not proved ownership over those properties. In the evidence adduced by PW 1 the Plaintiff has demonstrated that through the Properties are not registered in their name, they have built a big stone Church in Plot No. NYAKI/KITHOKA/677 referred to as Kithoka syo Mpuru EAPC branch with consent from the defunct County Council of Meru. They produced the green card for that plot as P Exhibit No.12 the witness also referred to plot No. NYAKI/CHUGU/433 which is reserved for religious purposes. They have built a big Church referred to as Kugu EAPC. The construction was also done with Consent from the defunct County Council. A green card was also produced as Exhibits. The other properties claimed by the Plaintiff include Mwitieria EAPC branch on a rented premise Kaithe EAPC on a rented premise and Karumando on a rented premise. The Plaintiff has demonstrated that she has an interest in all these properties capable of being protected by a Court of Equity. I am satisfied that the Learned Magistrate Hon. Khadambi properly directed her mind to the facts before her and saw in arriving at the impugned decision on the properties in question. I am satisfied that the Learned Magistrate satisfied herself on the principles for the grant of the injunction orders as set out in the Locus classius case of GIELLA –VS- CASSMAN BROWN LTD (1958ea. In regard to the Appeal No. 111 of 2008, the Appellant raised two grounds of appeal. I will combine the two grounds into one after evaluating the ruling by Hon. N.ITHIGA delivered on 14/8/2002. I find that decision of the Learned Magistrate is not informed by the pleading on record and the applicable law. The Applicant/Appellant had deponed in the Supporting Affidavit referred to constitution of the society which provides for mechanisms for resolving disputes between parties and which the Defendant (Respondent had breached. Those averments on oath were not controverted. In my view the Applicant/Appellant had demonstrated a prima facie case with High Chances of success at the main trial. I am also the considered view that the Applicant/Appellant had demonstrated that they were likely to suffer injury that may not be compensated by damages. In the upshot, I allow Appeal in Civil Appeal No 111 of 2004 with each party her own costs. I also order each party to bear their own costs of the application dated 14/08/2002. As for

my finding in Civil Appeal No. 89 of 2002, I hold and find the Appeal lacking merit and the same is hereby dismissed with costs to the Respondent.

It is so ordered.

SIGNED AT GARISSA BY JUDGE CHERONO

DATED AND DELIVERED THIS 7TH DAY OF DECEMBER, 2017 IN THE PRESENCE OF:-

Janet-Court Assistant

Miss Wanjohi for Appellant present

Muthomi H/B for Murango Mwenda for Respondent present

HON. L. N. MBUGUA

ELC JUDGE