



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJA.

CIVIL APPEAL NO. 22 OF 2016

BETWEEN

KITALE PENTECOSTAL CHURCH *Through the Board of Trustees namely;*

JOSEPHAT OGOLE ELEGWA.....FIRST APPELLANT

MICHAEL WAMALWA NALWELISIE.....SECOND APPELLANT

RUTH SIKOLIA MAKONJO.....THIRD APPELLANT

MARGARET MASITA MIHALIA.....FOURTH APPELLANT

HUMPHREY MWOLE EGOSANGWA.....FIFTH APPELLANT

AND

BERNARD AYEKA.....FIRST RESPONDENT

ALLAN LIDAMBITSA.....SECOND RESPONDENT

SHEM LUYAI.....THIRD RESPONDENT

JOHN JUMA.....FOURTH RESPONDENT

(Appeal from the judgment and degree of the Environment and Land Court at Kitale (Obaga, J.) dated 27th October, 2015

in

KITALE ELC NO. 115 OF 2013

JUDGMENT OF THE COURT

[1] This appeal arises from a suit that was filed in the Environment and Land Court at Kitale by Kitale Pentecostal Church (KPC) through its Board of Trustees namely; Josphat Ogole Elegwa, Michael Wamalwa Nalwelisie, Ruth Sikolia Makonjo, Margaret Masitsa Muhalia and Humphrey Mwole Egosangwa (who are now the appellants). The suit was filed against Bernard Ayeka, Allan Lidambitsa, Shem Luyai and John Juma (who are now the respondents), in their capacity as former officials or interim trustees of KPC. The relief sought by the appellants was for judgment in their favour against the respondents jointly and severally; and an order that the respondents do surrender the certificate of lease comprised in Title Deed No. Kitale Municipality Block 3/11 (herein the suit property) to the appellants.

[2] The respondents filed a joint defence in which they denied the appellants' claim and further denied that KPC was a church duly registered under the Societies Act Cap 108 Laws of Kenya, or that the respondents were registered officials of the church as alleged. In the alternative, the respondents contended that if KPC was registered as a separate autonomous church, then the said registration was done unlawfully and

fraudulently. The respondents maintained that they were still the recognized trustees of KPC and that KPC is an affiliate of the Pentecostal Assemblies of God (K) (PAG (K)).

[3] The respondents maintained that they are registered in trust as proprietors of the suit property on which the church premises of KPC stands, and that in accordance with the church Constitution, the title deeds and certificates of title are kept under the custody of the registered trustees of PAG (K) at its Headquarters in Nyang'ori.

[4] During the trial, Michael Wamalwa Nalwelisie testified on behalf of the appellants, while Ayeka Bernard and Rev. Patrick Lihanda testified on behalf of the respondents. The learned judge having considered the evidence and the submissions made by the parties' advocates, identified three issues. First, whether KPC is an affiliate of PAG (K) or not; secondly, whether the title to the suit property is kept by the respondents and, if, they can be compelled to surrender the same; and thirdly, who are the lawful recognized trustees of KPC.

[5] The learned judge found that the suit property was allotted to PAG (K) who directed that the property be registered in the name of KPC because KPC was under the umbrella of PAG (K), and KPC was still affiliated to PAG (K); that the title to the suit property was kept by PAG (K) at its headquarters and the respondents were not in possession of the title; that the respondents were the recognized trustees of KPC through a trust created on 3rd June, 2013; and that there was no evidence that the registered trustees were replaced through sanction of PAG (K), the parent church. The learned judge therefore concluded that the appellants had failed to prove their case and dismissed the suit with costs.

[6] The appellants are aggrieved by this judgment and have lodged a memorandum of appeal raising fourteen (14) grounds in which they fault the judgment of the trial court on grounds, *inter alia*, that there was no evidence that KPC was an affiliate of PAG (K); that the title deed indicates the owner of the suit property as KPC, and therefore, the learned judge misdirected himself in declaring that the title belonged to PAG (K); that the learned judge erred in failing to find that the Church is fully registered under the Societies Act, and that the registration of KPC was not obtained by fraud or coercion; that the court erred in disregarding the registration of the appellants as trustees and in failing to find that the respondents were the recognized trustees.

[7] During the hearing of the appeal, the appellants were represented by Mr. Moses Kaosa and the respondents were represented by Mr. Kisa Rodney. Each counsel filed written submissions and duly highlighted the submissions each urging the Court to find in favour of their client.

[8] For the appellants, it was submitted that it was clear from the certificate of lease of the suit property that KPC and the appellants were the owner of the suit property; and that there was no dispute between PAG (K) and KPC over the ownership of the suit property; that the dispute was between the respondents as former trustees and the appellants as the incoming trustees over the surrender of the certificate of lease in regard to the suit property; that there was no evidence that KPC was an affiliate of PAG (K); that the court failed to recognize the registration of KPC as an independent church yet the certificate of registration had not been cancelled. The appellant relied on **Civil Appeal No. 108 of 2002, the Registered Trustees Anglican Church of Kenya, Mbeere Diocese vs Rev. David Waweru Njoroge**, for the proposition that transfer of land is concluded upon the registration of the transferee as the proprietor of the land, and that all beneficial interests and rights relating to the transferred land vests on the transferee as the sole proprietor.

[9] On its part, the respondents submitted that the fourteen (14) grounds raised by the appellants boil down to one ground namely; that the learned judge erred in failing to issue an order directing the respondents to surrender the certificate of lease for the suit property to the appellants. The respondents argued that the trial judge was correct because the certificate of title for the suit property was not in the possession and or control of the respondents, as the evidence revealed that the certificate of lease was at the PAG (K) headquarters. Secondly, that the appellant church was not the KPC that is named in the certificate of lease for the suit property as KPC which is named in the certificate of lease was an affiliate of PAG (K) while the appellant church was a faction that broke away from KPC and registered itself using the same name.

[10] In addition, the respondent submitted that the appellant church had no proprietary interest in the suit property as the evidence revealed that the suit property was allocated to PAG (K) on 17th June, 1971 and was registered and a certificate of lease issued in the name of KPC on 7th August, 1977, while the appellant church was registered on 15th May, 2012, and was therefore not in existence when the certificate of lease was issued. The respondents further pointed out that in his evidence the appellant's witness Michael Wamalwa Nalwilesie conceded that KPC was operating under PAG (K) and that it is PAG (K) who gave the suit property to KPC. The Court was therefore urged to uphold the judgment of the trial court.

[11] We have carefully considered this appeal, the record of appeal and the submissions. We reiterate our duty as a first appellate court as stated by this Court in **Kenya Ports Authority vs Kuston (Kenya) Limited [2009] 2 EA 212** (that was relied upon by the respondents advocate):

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in evidence.”

[12] It is common ground that the dispute herein involves the certificate of lease for the suit property which the appellants claim as trustees of KPC. It is also common ground that the suit property was registered in the names of the respondents as trustees for KPC on 7th August, 1997. The appellants have relied on a certificate of registration dated 15th May, 2012, issued by the Registrar of Societies confirming that KPC was registered on that day under **section 10** of the **Societies Act**. They have also relied on a trust deed registered on 3rd June, 2013, in which the appellants were registered as trustees of a charitable trust called Kitale Pentecostal Church Trust, created by Kitale Pentecostal Church, one of whose object was to hold properties, investments and securities acquired by Kitale Pentecostal Church.

[13] The main issue which arises is whether Kitale Pentecostal Church registered on 15th May, 2012, was the same as KPC that was registered as the proprietor of the leasehold interest in the suit property on 7th August, 1997 with the respondents as trustees. The appellants maintained that the two (2) are the same entity hence its contention that the certificate of lease should now be handed over to them to hold as the current trustees.

[14] We have reconsidered and evaluated the evidence but find no reason to depart from the findings that were made by the trial judge. The relationship between the appellants and PAG (K) was a relevant consideration. This is because the allocation of the suit property was initially made to PAG (K), and it is PAG (K) which requested the Commissioner of Lands to issue the title to the respondents as trustees of KPC. There is no evidence that the KPC that PAG (K) referred to, is the same as the Kenya Pentecostal Church that was registered as a society in 2012. The appellants having brought the suit, it was upon them to prove that KPC to whom the suit property was registered in 1997 was actually the same entity as the society subsequently registered in 2012, and that the trusteeship had changed from the respondents to the appellants. No such evidence was adduced. To the contrary, the appellants deny any association with PAG (K). This means that there is no nexus between KPC to whom the certificate of title to the suit property was issued and the registered society or KPC referred to by the appellants, and the two cannot be presumed to be the same. Moreover, the society having been registered in 2012, it was not possible for it to own property in 1997 long before it was registered.

[15] We come to the conclusion that the appellants failed to prove their case and the learned judge cannot be faulted for dismissing the same. Accordingly, we find no merit in this appeal. It is dismissed with costs.

DATED and delivered at Eldoret this 17th day of January, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.