



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MAKHANDIA, OUKO & MURGOR, JJ.A)**

**CIVIL APPEAL NO. 292 OF 2009**

**BETWEEN**

**VICTORY SOUL WINNING CENTRE**

**(Suing through GEORGE NJOROGE MURAYA, MARY MURIAMA MORGAN**

**JAMES & MBURU MURIAMA**

*as its National Officials Trustees* ..... **APPELLANTS**

**AND**

**SIMON MUIRURI.....1<sup>ST</sup>**  
**RESPONDENT**

**GEORGE MBURU.....2<sup>ND</sup>**  
**RESPONDENT**

**FATUMA ABDI.....3<sup>RD</sup>**  
**RESPONDENT**

**FRANCIS NGUGI.....4<sup>TH</sup>**  
**RESPONDENT**

**TERESIAH WANGUI.....5<sup>TH</sup>**  
**RESPONDENT**

**ROBERT MAREGWA.....6<sup>TH</sup>**  
**RESPONDENT**

**MARTHA MUMO.....7<sup>TH</sup>**  
**RESPONDENT**

**PATRICK NZIVO.....8<sup>TH</sup>**  
**RESPONDENT**

**ALLAN KANGACHA & OTHERS.....10<sup>TH</sup>**

## RESPONDENT

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (J.L.A. Osiemo, J.) dated the 29<sup>th</sup> of September, 2006

in

H.C.C.C. No. 976 of 1999)

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## JUDGMENT OF THE COURT

The appellants lost the suit that they had instituted against the respondents in the High Court of Kenya at Nairobi. Vide an amended plaint dated 14<sup>th</sup> March 2002, they sought, *inter alia*, the eviction of the respondents from the Star of Hope Educational Centre “the school”, an injunction to restrain the respondents from interfering with the management and running of the school and damages for trespass to the school.

The suit was informed by the following facts. That in or about the year 1974 the appellants started a Christian organisation in the name and style of Huruma Pentecostal Church which combined religious as well as educational activities through donor funding that they solicited. In 1986 Huruma Pentecostal Church merged with Soul Winning Evangelistic Church and were registered under the Societies Act. However in or about 1993, Huruma Pentecostal church separated from Soul Winning Evangelistic Church and the former was separately registered under the Societies Act in the name of Victory Soul Winning Centre and continued to manage and run the school situate on unsurveyed Government land in Mukuru Lungu Lungu within Nairobi. At that time the school had a student population of 300 aged between 3 and 16 years and a Christian Church catering for the said students.

However, out of the blues the respondents by an application dated 21<sup>st</sup> April, 1999 had the school registered under the ministry of Social Services and were duly issued with the certificate. This was done without the knowledge, authority or consent of the appellants.

On or about 3<sup>rd</sup> May 1999 when the school opened for the second term, armed with the certificate of registration aforesaid the respondents unlawfully descended on the school and physically ejected the appellants’ trustees, staff, employees and servants. Since then the appellants have been unable to access the school. In the meantime, the respondents assumed full control of the school collecting school fees, engaging teachers, employees and parents. Hence, the suit by the appellants.

The respondents on the other hand denied that Victory Soul Winning Centre was a registered as a Society under the Societies Act or at all; that the said Soul Winning Evangelistic Church ever merged with Huruma Pentecostal Church. They insisted that they were the registered trustees of the Soul Winning Miracle land Church, the proprietor of the school. In the premises the appellants could not have suffered any damage or at all since they were not the proprietors of the school.

The suit fell for determination by **Osiemo, J.** In a judgment rendered on 29<sup>th</sup> September 2006, the High Court judge dismissed the suit with costs reasoning that:

***“The subject matter of the suit is an education institution called THE STAR OF HOPE EDUCATIONAL CENTRE as pleaded in paragraph 7 of the plaint”. PW1 testified that VICTORY SOUL WINNING CENTRE was a result of a change of name from NOEL ROHO SABATO and by a letter dated 4<sup>th</sup> July 2000 the Registrar of Societies confirms that the change was fraudulent. The letter reads:***

***“Kariuki Muigai & Co,***

*Advocates,*

*P. O. 76115,*

*NAIROBI.*

*Dear Sir,*

**RE: NOEL ROHO SABATO**

**VICTORY SOUL WINNING CENTRE**

***Yours dated 3<sup>rd</sup> July, 2000 refers and have to inform you that the change of name from Noel Roho Sabato to Victory Soul Winning Centre has been rescinded as the change of name was obtained fraudulently.***

**C. K. NYIHA (MRS.)**

**ASST. REGISTRAR OF SOCIETIES “**

***Counsel for the interested party went on to submit that if then the change from NOEL ROHO SABATO to VICTORY SOUL WINNING CENTRE was a fraud, the plaintiffs represent a fraudulently (sic) society and they therefore have no locus to institute this suit. The Registrar of Societies having confirmed in his said letter dated 4<sup>th</sup> July, 2000 that the change from NOEL ROHO SABATO to VICTORY SOUL WINNING CENTRE was fraudulent, the plaintiff VICTORY SOUL WINNING CENTRE has no locus to institute this suit and therefore the same is dismissed with costs to the interested party.”***

Unhappy with the decision, the appellants have preferred this appeal on six grounds;

That the learned judge erred in law and fact in failing to:

1. Analyse and re-evaluate the entire evidence and to draw his own conclusions and inferences.
2. To appreciate that the respondents had offered no evidence. Accordingly, in the absence of such evidence, there was no factual foundation upon which to issue the orders appealed against.
3. To appreciate that the respondents’ defiantly breached the appellants’ rights without any colour of right.
4. To address himself on the issue of whether the respondents were guilty of trespass.
5. To address himself on the issue on whether the appellants were entitled to any equitable remedy and whether the respondents had come to court with clean hands, and
6. To appreciate that the appellants were entitled to the protection of the law from the unlawful acts by the respondents.

When the appeal came up for hearing on 8<sup>th</sup> October, 2015 parties agreed to canvass it by way of written submissions. However, it was not until 27<sup>th</sup> January, 2017 that the appellants filed their submissions. The respondents apparently did not see the need to file their submissions. Indeed, even on the date of the plenary hearing for purposes of oral highlights of the submissions, the respondents did not turn up though served with the hearing notice.

During the oral highlights **Mr Wachira**, learned counsel for the appellants pointed out that the school, the

subject of the dispute had since been taken over by the County Government of Nairobi. The appellants were therefore no longer pursuing most of the grounds of appeal. In fact they were only keen to pursue damages for trespass and costs.

On damages, counsel submitted that the claim in the amended complaint was principally for damages for trespass and conversion, and not as appears to have been made, a case of registration of a name of the church; that the evidence on record proved that it was the appellants who had developed the school. It was submitted by the appellants that the respondents were, and still are law breakers and had no lawful excuse to forcefully trespass into the school and eject therefrom, the appellants. That the respondents in entering the school and assuming its management were trespassers and are liable to be evicted and to pay damages and costs suffered by the appellants.

The appellants' suit was dismissed on account of want of *locus standi* to institute the same. This was because the registration of Victory Soul Winning Centre was fraudulent. In fact the appellants are accused of forging the registration. That the change of name from Noel Roho Sabato to Victory Soul Winning Centre was not above board at all. This fact was confirmed by the Registrar of Societies. The appellants have done nothing to dispute or counter this position. Indeed the appellants took no step to challenge or impugn the decision of the Registrar aforesaid. That position remains to date and should therefore be regarded as the correct position with regard to the registration. Small wonder that the appellants have not said anything regarding the issue in their written submissions. They have completely ignored and skirted around the issue yet it was central to the determination of the suit.

The appellants have in their written submissions attempted to advance the argument that since in their amended complaint they gave their full names and the position they held in the school i.e. national officials and or trustees, then the suit no longer hinged on the legal status of the Victory Soul Winning Centre, rather it was now their personal claim. Our response is, that was never their case in the High Court. Secondly the amended complaint talks of "VICTORY SOUL WINNING CENTRE (suing through GEORGE NJOROGI MURAYA, MARY MURIAMA, MORGAN JAMES and MBURU MURIAMA as its National Officials Trustees)". So who is the plaintiff here? It can only be Victory Soul Winning Centre through its officials. In fact paragraph 1 of the amended complaint makes it plainly clear who the plaintiff is. It is in these terms: "***The plaintiff is VICTORY SOUL WINNING CENTRE a society duly registered under the Societies Act, Cap 108 Laws of Kenya, carrying on educational and religious activities at Nairobi and other parts of Kenya and sues through its national officials Chairman, Treasurer, Secretary and a National Committee member.....***" It is therefore

readily apparent that the officials named were not suing in their personal capacity but did so for purposes of satisfying legal requirement that a society cannot sue on its own but through its officials. Therefore the officials were mere nominal or peripheral plaintiffs. They cannot therefore disengage themselves from that role and now purport to be the aggrieved persons and sue in that regard.

Finally, one of the prayers in the complaint is for the respondents to be ordered to pay damages for trespass to the school. If the appellants wanted us to believe their submissions that they had instituted the suit in person, we would have expected the prayer to be that the damages for trespass be paid to them jointly and severally. We accordingly reject that argument.

Given the material and the unchallenged evidence placed before the learned judge on the registration of the society, the Judge cannot be faulted for holding that as the registration was fraudulent it had no *locus standi* to institute and prosecute the suit leading to this Appeal.

The appellants have also faulted the judgment of the High Court on the grounds that the High Court determined the case on issues that were not agreed on, and which were not material for the determination of the issues in controversy. The Judge therefore misapprehended the issues for determination resulting in a miscarriage of justice. That the amended complaint was specifically praying for damages for trespass and conversion, and not about the registration of the name of the church. We doubt whether the appellants want us to take this submissions seriously. Central in the suit was the status of the society vis-à-vis the ownership of the school. Both the appellants and respondents staked a claim to the school on account of

being trustees and/or officials of the Societies they had registered under the Societies Act to oversee the running and operations of the school. Whereas the appellants claimed to have registered Victory Soul Winning Centre, the respondents claimed to have registered Soul Winning Miracle Church for the same purpose. How could this clash of claims be ignored by the trial court in resolving the dispute? The question of damages would only have come in once a determination as to who between the contending parties had a proper and legal entitlement to the school.

As the trial court grappled with the issue, it transpired that the appellants' registration and legal existence was in doubt. In fact it was fraudulent. A court of equity frowns upon parties and transactions that are fraudulent. For the trial court to have proceeded in the manner suggested by the appellants, it would simply have been giving a seal of approval to the appellants' fraudulent conduct.

Further in the pleadings the legal status of the appellants was a central theme. In the amended plaint the appellants in paragraph 5 averred that in or about the year 1993, Huruma Pentecostal Church separated from Soul Winning Evangelistic Church and the former was separately registered under the Societies Act as Victory Soul Winning Centre. In their response the respondents denied that Victory Soul Winning Centre was a registered Society. In paragraph 11 the respondents averred further that the appellants had not suffered any damage as alleged or at all since they were not the proprietors of the school. These averments obviously called for the determination of the ownership of the school and that could not have been done without determining the legal status of the appellants. Again, the issue of registration of the appellants arose during the proceedings. The appellants' main witness **Bishop George Njoroge Muraya** was extensively cross examined on the registration of the school under the Societies Act and the question of fraudulent registration brought up. The witness even conceded under intense cross examination that the registration or change was done secretly.

Next in the statement of agreed issues dated 7<sup>th</sup> March 2000 the registration was made an issue. Finally in their respective written submissions in the trial court, again the question of registration was submitted on at length. So on what basis are the appellants maintaining that the trial court misapprehended the issues for determination? We cannot see any. Accordingly, we are satisfied that contrary to the submissions of the appellants, the trial court was right in determining the suit on the basis of whether or not the society had the necessary *locus standi* to institute and prosecute the suit. Having no *locus standi* to institute the suit in the first place means that the appellants were not entitled to damages for trespass.

With regard to costs, the appellants fault the trial court for awarding costs of the suit to the respondents. The jurisdiction of the trial court to award costs is anchored on section 27 of the Civil Procedure Act which, *inter alia* provides:

***“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid-***

***provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order” .***

The judge having dismissed the appellants' claim, he exercised his discretion in awarding the costs of the suit to the respondents. This Court cannot interfere with the exercise of the discretion by the judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly and plainly wrong in the exercise of his discretion and that as a result there has been misjustice. See **Mbogo and Another v Shah (1968) EA 93**. The appellants have not demonstrated how the judge exercised his discretion wrongly. In any case costs follow the event and the judge was right to award the costs of the suit to the respondents as they had successfully defended the suit

This appeal is bereft of merit and is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 28<sup>th</sup> day of July, 2017

**ASIKE- MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**