IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 77 OF 2015

BETWEEN

THE REGISTERED TRUSTEES OF

MAXIMUM MIRACLE CENTRE.....……..……APPELLANT

AND

ANDREW MLEWA MKARE.....……..……..…….RESPONDENT

(Appeal from the judgment and decree of the Environment & Land Court at Malindi, (Angote, J.) dated 13th March 2015

in

ELCC No. 130 of 2013)

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JUDGMENT OF THE COURT

The dispute in this appeal pits a church, the ***Maximum Miracle Centre (the appellant),*** against its former pastor, ***Andrew Mlewa Mkare (the respondent)***. Both the appellant and the respondent are claiming to be the owners of a portion of land measuring 100 x 800 ft. which is part of a bigger parcel of land known as ***Plot No. 114***, situate in an adjudication section in Watamu, Kilifi. Although the disputed portion is yet to be registered, both parties claim, pending the registration, to be entitled to the registrable interest therein. For convenience we shall refer to that unregistered portion and the interest therein as "the suit property"**.** On the suit property is constructed a building known as ***Maximum Miracle Centre***. The appellant claims that it raised the money for the purchase of the suit property and construction of the centre from its members. The respondent, on the other hand contends that he took out personal loans from a bank and a Sacco society, purchased the property and constructed the building before falling out with the appellant.

Certainly, and sadly, as professed Christians who ought to live by the Holy Book, their respective versions cannot both be true. Whichever of them is untruthful has jettisoned, wittingly or otherwise, a long chain of scripture on truth, not least among them, ***St. Paul's*** sacred charge to Christians in his ***Epistle to the Ephesians*** –

"Therefore each of you must put off falsehood and speak truthfully to your neighbour, for we are members of one body" [Ephesians 4:25, NIV].

By a plaint dated 1st August 2010, the registered trustees of the appellant instituted proceedings against the respondent in the ***Land and Environment Court (ELC)*** at Malindi seeking a declaration that the appellant was the beneficial owner of the suit property; a mandatory injunction to compel the respondent to deliver to the appellant possession of the suit property and the assets and developments thereon; a permanent injunction to restrain the respondent from continuing in occupation of the suit property, leasing, selling or transferring it; general damages for trespass; and costs. These reliefs were sought on the basis of averments that the suit property was purchased in or about 2007 through donations and tithes by the appellant's members and well-wishers. It was further averred the respondent, as the appellant's ordained pastor, was entrusted with the responsibility of acquiring the suit property and constructing a church thereon.

Illegally, unlawfully and without any colour of right, the appellant pleaded, the respondent converted the suit property into his own property and started operating thereon his own church or ministry. Despite suspension and request to hand over the suit property to the appellant, the respondent declined to comply, thus occasioning the appellant loss and damage.

The respondent filed a defence dated 1st August 2013 and denied that the appellant was the owner, beneficial or legal, of the suit property. His version of events was that he had founded his own church in 2000, before being affiliated to the appellant in 2004. The affiliation only enabled the respondent to use the appellant's name, without any form of support by the appellant. In 2007 he purchased the suit property and erected thereon a structure, using his own funds. After differences arose between him and the appellant, he deaffiliated from the appellant and entered a new alliance with a different ministry. The respondent concluded by pleading that the appellant had no claim to the suit property and was merely endeavoring to unjustly enrich itself at his expense.

After hearing the testimony of 3 witnesses for the appellant and 4 witness for the respondent, and considering the documentary evidence adduced by the parties, ***Angote, J.*** concluded that on a balance of probabilities, the suit property and the developments thereon were the property of the respondent rather than of the appellant. Satisfied that the appellant had failed to prove its case, he dismissed the suit with costs, thus precipitating this appeal.

Although the appellant's memorandum of appeal sets out four grounds of appeal, they all boil down to the one issue, namely whether the appellant adduced evidence to prove, on a balance of probabilities, that it was the beneficial owner of the suit property and the developments thereon. By consent of the parties, the appeal was canvassed through written submissions, with no oral highlights.

For the appellant, who was represented by ***Odongo B. O & Company Advocates***, it was submitted that the trial judge erred by ignoring the evidence adduced by the appellant's witnesses, which showed that members of the appellant in Watamu contributed the money for the purchase of the suit property and construction of the church. Those members, it was argued, raised Kshs 150,000/-, which they gave to the respondent in his capacity as their pastor on the understanding that he would add it to his Sacco savings and purchase the suit property.

As further proof that the suit property belonged to the appellant, it was contended that the appellant's name and slogan of *"Kuna Nuru Gizani"* were painted prominently on the building on the suit property. It was further argued that the respondent, having by his conduct represented to the whole world that the suit property belonged to the appellant, was estopped from claiming otherwise.

Regarding the finding by the learned trial judge that the appellant had failed to adduce any documentary evidence to prove its beneficial ownership of the suit property and the church thereon, the appellant's counsel submitted without batting an eye lid, that the learned judge ought to have taken judicial notice that the dispute involved spiritual issues where parties operate on the basis of faith and trust rather than secular matters where suspicion reigns supreme. For good measure, it was submitted that the learned judge was expecting too much (in terms of evidence, we suppose) in a dispute arising from spiritual matters whilst such expectations should be restricted to secular disputes only!

Lastly, regarding the finding by the learned judge that the appellant had in fact leased the suit premises from the respondent, it was submitted that the lease agreement which was produced as an exhibit was suspect because it was not mentioned in the respondent's pre-litigation letter of demand or in his defence and that the same was not binding on the appellant as it was not made with the latter's authority.

For the respondent, ***Messrs. Katsole & Company Advocates*** submitted that the appeal was bereft of merit and supported the findings and conclusions of the trial judge. It was contended that having considered the evidence adduced by both the appellant and the respondent, the learned judge properly concluded that the appellant had adduced no evidence to support the assertion that it had purchased the suit property and constructed the church.

On whether the appellant was estopped from denying the appellant's ownership of the suit property, it was submitted that since the issue of estoppel was never pleaded or raised in the ELC, it was too late in the day to raise it in this appeal. As regards the contention that the learned judge ought to have taken judicial notice regarding the matters in dispute, it was submitted that the appellant, like every other litigant, was bound to adduce evidence if it expected judgment in its favour, which it had failed to do.

Lastly, on the appellant's challenge of the lease agreement, the respondent submitted that those issues ought to have been raised when the lease agreement was produced in evidence before the trial court. It was argued that on the contrary, the appellant did not object to the production of the agreement or challenge its authenticity.

This is a first appeal and as has been stated time and again, our task is to reconsider the evidence adduced before the trial court, evaluate the same and reach our own independent conclusions. In doing so, we will make due allowance for the fact that, unlike the trial court, we neither saw nor heard any of the seven witnesses as they testified. For precisely that reason, we shall be slow to interfere with findings of fact by the trial judge unless it is demonstrably shown that he acted on wrong principle in reaching the finding or failed to take account of particular circumstances material to estimation of the evidence, or his impression based on demeanor of witnesses was inconsistent with the evidence as a whole. (See ***Ramji Ratna & Co. Ltd. v. Wood Products (Kenya) Ltd. CA. No. 117 of 2001).***

From the outset, we must reiterate the provisions of the ***Evidence Act*** on the burden of proof. ***Section 107*** places the burden of proof upon the party who desires the court to give judgment in his favour and ***section 108*** adds that the burden of proof in a suit or proceeding lies on the person who would fail if no evidence at all was given on either side. Addressing provisions similar to section 107 and 108 of the Evidence Act, the learned authors of ***Mulla on the Code of Civil Procedure, 16th Edition, Vol. 2*** state as follows:

"The right to begin is to be determined by the rules of evidence. As a general rule, the party on whom the burden of proof rests should begin...the burden of proof lies on that party who would fail if no evidence at all were given on either side. It is well settled law that a person who sets the law in motion and seeks a relief before the court, must necessarily be in a position to prove his case and get relief molded by the law."

See also ***Delphis Bank Ltd v. Channan Singh Chatthe & 5 Others, CA No 179 of 2008 (Kisumu).***

It was the appellant who initiated the litigation culminating in this appeal. It was the appellant who wished to be declared the beneficial owner of the suit property. It was the appellant who stood to fail in the suit if neither it nor the respondent called any evidence. Hence the legal burden of proof was squarely upon the appellant.

The appellant's evidence was adduced by three witnesses. ***Njenga Njoroge (PW1)***, who was the appellant's administrator in the Coast region testified that his duties included overseeing the appellant's projects and developments and that the suit property was purchased between 2006 and 2007 from money raised by the appellant's members through tithes, personal contributions and fund raising initiatives. On his part, ***Benjamin Muthiara Mutune (PW2)*** testified that he was a member of the appellant in Watamu

and the project manager. He too maintained that the suit property was purchased with money contributed by members of the appellant. He produced as an exhibit a handwritten list of contributions totaling to Kshs 154,000/-. He testified further that he gave Kshs 150,000/- to the respondent to add to his Sacco savings and purchase the property. It was his evidence that the respondent did not involve them in the purchase of the suit property. Lastly, ***Joseph Mwinzi (PW3),*** who was also a member of the appellant in Watamu, testified that the respondent identified the suit property in 2006 and thereafter members of the appellant started raising funds to purchase it. According to PW3, the appellant's treasurer in Watamu gave the purchase price to the respondent.

On the other hand, the respondent's evidence was that at the material time, he was an employee of Hemingway's, Watamu. In 2000 he started his own church known as ***Life Solutions Centre*** before it became affiliated to the appellant in 2004. In June 2007, he entered into an agreement with Anderson Maitha Katana to purchase the suit property for Kshs. 300,000/-. A month earlier in May 2007 he had applied for a personal loan of Kshs 150,000/- from Barclays Bank of Kenya Ltd, Watamu. In November 2007 he applied for a further loan of Kshs 200,000/- from Chuchungi Sacco Society Ltd. He produced in evidence copies of those loan application forms, showing monthly deductions from his salary and a sale agreement dated 6th June 2007, which bears his name as the purchaser. He also produced an acknowledgement signed by Anderson Maitha Katana confirming receipt of the full purchase price from the respondent. Subsequently on 27th November 2007, the respondent leased the suit property to the appellant for a period of six years. The lease agreement was also produced as an exhibit.

The respondent's evidence was largely supported by that of his three witnesses who testified that the suit property was purchased by the respondent rather than by the appellant.

In brief, that is the evidence that was adduced before the trial judge. After considering it at length, the learned judge made the following pertinent findings: that the appellant did not produce any documentary evidence to support its claim that it raised and gave the respondent the purchase price; that in his capacity as a pastor of the appellant, the respondent was prohibited by the appellant's constitution from handling the church's finances or overseeing its projects; that the respondent purchased the suit property in January 2007 before he was ordained as a pastor of the appellant in August 2008; that the respondent had adduced credible evidence to show that he raised the purchase price by taking personal loans; and that the suit property did not belong to the appellant, otherwise the appellant would not have entered into a lease agreement with the respondent regarding the same.

Having carefully re-evaluated and re-appraised the evidence, we do not see any basis for interfering with the well-reasoned conclusions of the trial judge, which we find to be sound and firmly supported by the evidence. The handwritten list of contributions produced by PW2 showing an amount of 154,000/- does not show the date of the contributions or even the purpose of the contributions. The provisions of the Evidence Act, which we have already adverted to in this judgment regarding burden of proof cannot be supplanted by the appellant's questionable distinction between evidence in spiritual matters and evidence in secular or temporal disputes. While ***section 60(1) (o)*** of the Evidence Act permits a court to take judicial notice of all matters of general or local notoriety, we do not see the basis, in the circumstances of this case, for the submission that the trial court should have taken judicial notice, so as to find in favour of the appellant. As ***Madan JA.*** (as he then was) stated in ***Gupta v. Continental Builders Ltd (1976-80) 1 KLR 809:***

"The party who asks that judicial notice be taken of a fact has the burden of convincing the judge (a) that the matter is so notorious as not to be the subject of dispute among reasonable men, or (b) that the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy."

Accordingly, by their very nature, the contested issues before the trial court were only amenable to resolution by adducing evidence rather than taking judicial notice, because the issues in dispute were far from notorious.

The same applies, with respect, to the argument founded on estoppel. Estoppel was neither pleaded nor

made an issue before the trial court, and the learned judge therefore did not address it. In addition, we do not see the basis for invoking the doctrine of estoppel on the facts of this appeal because there is no evidence that the respondent, by word or conduct, represented to the appellant that the suit property was its property, as a result of which the appellant changed its position to its detriment. The reason for painting the church on the suit property with the appellant's name and slogan was adequately explained. It was because of the affiliation agreement between the appellant and the respondent, which did not amount to a representation that the suit property and the developments thereon were the appellant's property. In ***Nurdin Bandali v. Lombank Tanganyika Ltd [1963] EA 304***, the former Court of Appeal for Eastern Africa stated thus:

"The precise limits of an equitable estoppel are, however, by no means clear. It is clear, however, that before it can arise one party must have made to another party a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it should be acted upon and the other party, in belief of the truth of the representation, acted upon it." (Emphasis added).

We would add that the very existence of the lease agreement between the appellant and the respondent regarding the suit property, the belated challenge of which we reject, loudly refutes any argument that the respondent had made any representation that the suit property belonged to the appellant. The appellant could not reasonably have rented from the respondent property, which it knew to be its own property. There's absolutely no merit in the argument.

Ultimately we are satisfied that this appeal has no merit and the same is hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Mombasa this 17th day of June, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR