REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI
Civil Appeal 254 of 2002

1. **JOSEPH KIMARI**

2. **REUBEN GICHUNGU**

3. **TERESIA NYAMBURA……..……..……..APPELLANTS**

AND

1. **JOHANNA MBOGO**

2. **MTUMISHI CHURCH OF GOD....……..…..…**
RESPONDENTS

(Appeal from the Judgment of the High Court of Kenya

Nairobi (Rimita, J)

dated 13th March, 2002

in

H.C.C.C. NO. 446 OF 2000)

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JUDGMENT OF THE COURT

It is trite law that in a first appeal before it this Court is obliged to reconsider the evidence, re-evaluate it and make its own conclusions, but as it does so it must remember that it has neither seen nor heard the witnesses – see Peters vs Sunday Post Ltd [1958] E.A. 424. Selle & Another vs Associated Motor Boat Co. Ltd & Others [1968] E.A. 123 and Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [198-88] 1 KAR 278. In the last case HANCOX JA (as he then was) put it thus at p. 292 of the Report:-

"**A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding he did."**

The first holding in that case is also relevant namely, that:-

"**The Court of Appeal would hesitate before reversing the decision of a trial Judge on his finding of fact and would only do so if (a) it appeared that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of material witness was inconsistent with evidence in the case generally."**

This is, therefore, the principle we must bear in mind as we deal with the grounds of appeal raised by the appellants in their memorandum of appeal.

Within the Dandora area of Nairobi was a corrugated iron sheet building which housed a church known as Mtumishi Church of God. Its Bishop is Johanna Mbogo. They are the 2nd and the 1st respondents respectively and the plaintiffs in the suit before the superior court. The appellants are petty traders and occupiers of plots adjacent to the Church.

It was the respondents' case before the superior court that they were the owners of all that plot of land known as Number 33716, Dandora. They had erected thereon a church building and a residential house with an estimated cost of Kshs. 400,000/-. On or about 22nd and 24th November, 1999 the appellants trespassed on to the said plot and destroyed the church and all other erections thereon. The matter was reported to the Police who arrested the appellants and arraigned them in court on a charge of malicious damage to property. The charge was, however, either withdrawn or dismissed due to the respondents failure to attend court and to testify.

The appellants' defence was terse. They averred that they had not trespassed on to the said plot. On the contrary, they allege, it was actually the respondents who encroached on their plots.

The learned Judge (Rimita, J) observed; and probably correctly so in our view, that the Church was only a society and had no capacity to sue or be sued as described in the pleadings, but, that the matter in dispute could be decided on the basis that the 1st respondent being the owner of the plot upon which the church building stood could be said to be the proper party to sue.

Two witnesses were called for the respondents and four for the appellants.

In a reserved judgment the learned Judge held:

"**The totality of the evidence made me believe that the plaintiffs must have built their church and the residential house on plots or parts of plots claimed by the defendants. This is what made the defendants take the law onto(sic) their own hands. Consequently, it was agreed that Councillor Mwangi Thayu who is still the Councillor of the area be summoned to give evidence."**

Councillor Mwangi Thayu confirmed that he sold plot NO.33716 to the plaintiffs. Councillor Thayu confirmed that each of the defendants has a pitch plot allocated by the City Council

"**What I think and find is that the defendants did not wish to recognize the new boundaries. They should have sought assistance of the surveyor from the City Council. Instead they choose to take the law into their own hands."**

The learned Judge then proceeded to enter judgment for the 1st respondent against the appellants jointly and severally in the sum of Kshs. 300,000 with costs and interest at court rates. This was on 13th March, 2002.

Being aggrieved by the foregoing, the appellants through their counsel Mr. Amuga complain in the main that the learned Judge erred in law in entertaining an incompetent suit since the Church had no capacity to sue and that there was no basis for the learned Judge to award damages to the respondents and yet they had failed to prove that the appellants had committed trespass.

The record before us is clear. The learned Judge in actual fact struck out the name of the Church and

excluded it from the benefit of the award which was in favour of the 1st respondent only. In our view, this contention is misconceived and is rejected.

In our attempt to answer the other grounds of appeal we find that the evidence of the appellants was most evasive. Though they did not unequivocally admit destroying the Church and the other structures on the respondents' plot the appellants contend that there existed a boundary dispute between them and the church. The appellants further do not deny that the Church had been demolished but they feign ignorance as to who might have done so.

We believe that it would have been illogical, in the particular circumstances of this case, to expect some strangers apart from the appellants to have a grudge against the Church to such an extent as to wish for its total destruction.

The learned Judge had seen and heard the witnesses and was indeed capable of gauging their demeanour since the case rested squarely on as to who was telling the truth or not.

We are satisfied on our own assessment of the evidence on record and submission of both counsel – Mr Amuga for the appellants and Ms Kiriti for the respondents-that the learned Judge acted on correct principle in reaching his decision.

In view of our holding, we find that this appeal has no merit and is hereby dismissed with costs to the respondents.

It is so ordered.

Dated and delivered at Nairobi this 20th day of December 2007.

P.K. TUNOI

…….……

JUDGE OF APPEAL

E.O. O'KUBASU

…….……..

JUDGE OF APPEAL

W.S. DEVERELL

…….……..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR