



Ngeywo & another v Simiyu & another (Suing as Founder Members and Officials of Holy Spirit and Truth Gospel Ministry) (Civil Appeal 99 of 2019) [2024] KEHC 1698 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1698 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 99 OF 2019
DK KEMEL, J
FEBRUARY 22, 2024**

BETWEEN

JOHN KAPTOO NGEYWO 1ST APPELLANT

BEFILE KISACH 2ND APPELLANT

AND

MOSES LUMBASI SIMIYU 1ST RESPONDENT

JOHN WANJALA BUSURU 2ND RESPONDENT

SUING AS FOUNDER MEMBERS AND OFFICIALS OF HOLY SPIRIT AND TRUTH GOSPEL MINISTRY

JUDGMENT

1. The Appellants herein lodged this Appeal to Civil Case No. 272 of 2011 on 31st October 2019 vide a Memorandum of Appeal dated 30th October 2019. They relied on four (4) Grounds of Appeal as follows:
 - i. That the learned trial magistrate failed to fully consider and take into account the Appellants submission hence occasioning a miscarriage of justice.
 - ii. That the learned trial magistrate failed to hold that the Respondents did not have capacity to file the suit on 17th May 2011 as founder members and officials of the Holy Spirit and Truth Gospel Ministry, which entity was not in existence then, hence occasioning a miscarriage of justice.
 - iii. That The learned trial magistrate erred in law and fact when he ordered that the Appellants do pay to the Respondents Kshs. 200,000/= being a nominal award for the loss of land and breach of trust, hence occasioning a miscarriage of justice.



- iv. That learned trial magistrate erred in law and fact when he ordered that the Appellants pay to the Respondents cost of the suit, hence occasioning a miscarriage of justice.
2. The Appellants prayed for orders that; the appeal herein be allowed and an order dismissing the Respondent's suit to issue, and that the Appellants be awarded costs of this appeal and costs of the suit.
3. The Respondents also filed a cross appeal vide a memorandum of appeal dated 21st June, 2023 wherein they raised the following grounds of appeal:
 - a. That the learned trial magistrate erred in law and fact when he ordered the Respondents to pay only Kshs 200,000/ being nominal award for loss of the land and reach of trust, hence a miscarriage of justice.
 - b. That the learned trial magistrate erred in law and fact when he failed to consider other economic market value and social factors when awarding only Kshs 200, 000/ being nominal award for loss of land and breach of trust, hence occasioning a miscarriage of justice.
 - c. That the award of Kshs 200, 000/ does not reflect the current market value of the property lost as a result of the breach of trust and hence a miscarriage of justice.

The Respondents prays for a sum of Kshs 1, 000, 000/ as a nominal award for loss of land and breach of trust as well as costs of the appeal and the suit in the lower court.

4. This being a first appeal, this court's role as the first appellate Court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial Court saw and heard the parties and giving allowance for that and so as to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123.
5. According to the Pleadings in the lower Court, the Respondents herein vide an amended Plaint alleged that they were the Chairman and Secretary of the Christian Ministry known as Holy Spirit Ministry. They alleged that they bought parcels of land at Kang'ang'a at Mount Elgon area between the years 2000 and 2007 but due to the ethnic clashes in the year 2006 they had to relocate to Bungoma Town, leaving the management of the society's assets which included a church and school to the Appellants.
6. It was their case that the 1st Appellant was employed as a teacher while the 2nd Appellant was a pastor. They told the Court that the Appellants took over the Society's church and school, excluding them from the running of affairs and they further failed to account for monies received by the society.
7. Further, they alleged that the Appellants fraudulently caused an entity by the name Kang'ang'a to be registered and that they fraudulently proceeded to register parcel No. North Malakisi /West Sasuri/1806 in the entity's name.
8. The Respondents prayed for injunction orders barring the Appellants from running the society's affairs and an order compelling the Appellants to render accounts. They further sought orders in relation to cancellation of the title and an order that they be registered as proprietors instead.
9. The Appellants vide an amended statement of defence denied all the allegations save for description of parties and further claimed that the Respondent lacked legal capacity to institute a suit on behalf of the Holy Spirit and Truth Gospel Ministry.
10. The matter proceeded to hearing. PW1 was Moses Lumbasi Simiyu, who testified that he started the Holy Spirit and Truth Gospel Ministry (HSTGM) at Kanduyi in the year 1994 and that the same was duly registered. He produced a copy of the registration from the *Societies Act* in Court as Pexh.4 and produced the Church Constitution in Court as Pexh.5. According to him, in 2005 he had the



intention of spreading the ministry to Kang'ang'a thus proceeded to purchase land from the sons of Zablon Wepukhulu in phases and built a church on the same land. He approached Action Aid who agreed to fund his school project and that he got the 1st Respondent to be in-charge of the school. Due to ethnic clashes, he was forced to flee to Chwele leaving the 1st Respondent in-charge of the school while the 2nd Respondent was to be in-charge of the Church. In 2009, when calm resumed, he tried to return but the Appellants violently opposed the same. He told the Court that the Appellants had registered Holy Spirit and Truth Academy Ministry and used the same to take away the Respondent's hold of the Church and School.

11. At the close of the Respondents' case, the Appellants' witness DW1, John Kaptoo Ngewyo, testified that he is a member of the Holy Spirit and Truth Ministry and that he was never employed by the Respondents herein and that there is no church by the said name Holy Spirit and Truth Gospel Ministry.
12. In its judgement, the trial Court entered a judgement for the Respondents as against the Appellants jointly and severally; ordered that Appellants to pay the Respondents the sum of Kshs. 200,000/= being the nominal award for the loss of the said land and breach of trust and that the Respondents have the costs of the suit and interest from the date of judgement in the lower Court.
13. This appeal is against the finding of the trial Court. The contents of the Appellants appeal are set out in the memorandum of appeal filed on 31st October 2019.
14. Vide Court directions, the appeal was to be canvassed vide written submissions. None of the parties complied.
15. I have given the facts of the case and the pleadings the attention it deserves and i have considered the case of *Ephantus Mango & Geoffrey Nguyo Ngatia vs Dancun Mwangi Wambugu* [1982-88] KAR 278 as quoted in *Edith Gicuku Mungai v John Njiru Njeru & another* [2019] eKLR that observed that:

“A Court on appeal will not normally interfere with a finding on fact by a 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 principles.”
16. Upon evaluating the lower Court pleadings and the submissions as filed by the parties, i find the issue for determination is whether this Court should interfere with the holding of the trial Magistrate.
17. From the evidence as adduced by the Respondents, it is elaborate that the Holy Spirit and Truth Gospel Ministry is registered under section 10 of the *Societies Act* and that the same was effected on 27th August 2012. This makes the suit that was before the lower Court to be a representative one as it was filed by two individuals in a representative capacity on behalf of an unincorporated body, Holy Spirit and Truth Gospel Ministry. The arguments by the Appellants therefore fails as the Respondents have capacity. I also wish to rely on the case of *John Ottenyo Amwayi & two others -vs- Rev. George Abura & two others* – Civil Appeal No. 6339/1990 Bosire J (as he then was) held as follows:-

“The *Societies Act* does not contain Provisions with regard to the presentation and prosecution of suits by or against the unincorporated societies. It would appear to me that the legislature did not intend that suits be brought by or against those societies in their own names.”
18. It is noted that the Respondents tendered their application for registration of Holy Spirit and Truth Gospel Ministry on 11th January 1996 as per Pexh 2 and that the same was denied as per Pexh 3 but was later accepted on 27th August 2012. This did not mean that the persons, who were associated with



- Holy Spirit and Truth Gospel Ministry, prior to its registration were not recognized by law as they still carried out their activities outside legal recognition. Registration of the Holy Spirit and Truth Gospel Ministry simply allowed it to operate legally and make it recognizable by law for certain purposes.
19. From the foregoing, it is evident that locus standi in situation of unincorporated societies vests in its membership and its interests can only be ventilated before any Court via its members.
 20. On the membership of the Appellants to the Holy Spirit and Truth Gospel Ministry, based on the evidence on record, the Respondents did not avail evidence to show that the Appellants were paid up members of the Holy Spirit and Truth Gospel Ministry. PW21 proceeded to provide documentation to show that he fundraised for the 1st Appellant but there was no evidence indicating the 1st Appellant's subscription to the Holy Spirit and Truth Gospel Ministry as a member. I take cognizance of the fact that PW1 availed pictures and correspondences (minutes dated 7th September 2009) that proved a close and intimate relationship of pastoral nature between himself and the 1st Respondent and his appointment as a headteacher of the school. Further, it indicated the 2nd Respondent as a member who was also appointed to lead the Church at Kang'ang'a.
 21. On the issue of the ownership of the parcel of land North Malakisi/West Sasuri/1806, according to the official search dated 22nd August 2014 the same indicated that the legal proprietor of the parcel of land as Kang'ang'a Holy Spirit and Truth Ministry Academy. On further perusal of the Court record, it is noted that a title deed was issued to that effect bearing the proprietor as Kang'ang'a Holy Spirit and Truth Ministry Academy. It is also noted that the Respondents availed a sale agreement dated 17th August 2017 indicating them and other two individuals as the buyers of the plot at Kang'ang'a. This Court will not venture into the argument of who is the legal owner of the said parcel of land as the same is not within its jurisdiction but as far as the evidence goes, the holder of the title herein is Kang'ang'a Holy Spirit and Truth Ministry Academy which is the society of the Appellants herein.
 22. The Respondents alleged that the title was obtained via fraudulent means but failed to adduced concrete evidence of the same. The standard of proof for fraud is above the balance of probabilities and below beyond reasonable doubt and based on my critical analysis of the evidence availed by the Respondents, it is evident that they failed to discharge this burden. They left it upon the Court to determine the same on the pre-requisite of its establishment. The allegations that the Appellants fraudulently incorporated Kang'ang'a Holy Spirit and Truth Ministry Academy for purposes of registering the parcel of land North Malakisi/West Sasuri/1806, is simply a mere allegation as far as this Court is concerned. The Respondents ought to have availed material evidence in form of witnesses and documentation, if necessary for the relevant Sacco and Land Registry to substantiate their claims. There is no evidence of whether the Appellants herein are the members to the alleged Kang'ang'a Holy Spirit and Truth Ministry Academy and that they did cause the said parcel of land North Malakisi/West Sasuri/1806 to be registered fraudulently.
 23. Its noteworthy that the lower Court visited the scene and established that the land in question is marked by cadastral maps and land reference numbers and that the Respondents failed to provide evidence to indicate that the portion on which the Church is erected is the same that they purchased in the availed sale agreements. They failed to summon the vendor as a witness to testify to the fact that the same land is the one with an impugned title. I concur with the trial Court that the Respondents failed to established the requisite elements to substantiate the allegation of fraud.
 24. The trial Court noted that its observation of the 1st Appellant's demeanor was untruthful and his credibility was wanting. A perusal of the witness statements availed by the Appellants, it is noted that a witness statement from the vendor was availed and which indicated that he sold land to the Holy Spirit and Truth Gospel Ministry and not Holy Spirit and Truth Ministry. It was further established



- that the Holy Spirit and Truth Ministry was incorporated in 2011 while the suit was still pending in Court and that the Vendor also admitted that the plot on which the church was built did not have a title in 2011 and that the same was only obtained in 2014. On visiting the scene, the lower Court established that there was only one church on the ground and that the Appellants' allegations that the Church of Holy Spirit and Truth Gospel Ministry is 500 meters from the Church of Holy Spirit and Truth Gospel Ministry was found to be incorrect. The Court further established that there was only one school in the premises.
25. From the foregoing, I must agree with the decision of the trial Court when it opted to believe that the Respondents did leave the affairs of the church and the school of Holy Spirit and Truth Gospel Ministry in the hands of the Appellants and that the Appellants proceeded to mismanage and or neglect the same judging from their actions.
 26. On the prayers sought, the trial Court reiterated that the Respondents prayed for: an injunction barring the defendants from running the society's affairs, an order of accounts to be rendered by the Appellants; registration of the suit land be cancelled and that the Holy Spirit and Truth Gospel Ministry should be registered as the proprietor instead. As noted above, the proper court with jurisdiction to deal with the issue is the Environment and Land Court. It is noted that the parties herein have already filed a suit in the said court.
 27. On perusal of the lower Court record, it is noted that the 2nd Appellant was a pastor of the Holy Spirit and Truth Gospel Ministry as at 1st April 1999 until the date on 1st April 2000. Further, the 2nd Appellant was appointed a pastor, anew, as from 7th September 2006 till the clashes were over. The Respondents further availed minutes to a general meeting that was held on 7th September 2006 that clearly indicated the 2nd Appellant as a member of the Holy Spirit and Truth Gospel Ministry and the 1st Appellant as not only a member but also a headteacher. No evidence was availed by the Appellants herein to rebut that of the Respondents. This simply means that a prima facie case was established that the Appellants herein are in control of the school and church that duly belongs to the Holy Spirit and Truth Gospel Ministry Society. I concur with the decision of the lower Court that indeed an injunction ought to be issued against the Appellants to prohibit them from running the Holy Spirit and Truth Gospel Ministry Society affairs. On the subject of the parcel of land North Malakisi/West Sasuri/1806, I am in agreement with the holding of the trial magistrate as it is clear from the availed title that the same is owned by Kang'ang'a Holy Spirit and Truth Ministries Academy and that no evidence was availed to show that the Appellants as the members of the said entity and that the Respondents did not sue the Appellants in their representatives capacity as office holders/members of the said entity.
 28. As stated above, this Court will not venture into the arena of the ownership of the parcel of land North Malakisi/West Sasuri/1806 as that is not within the scope of its jurisdiction. It is my view that, the Respondents ought to approach the relevant Court, Environment and Land Court, to argue their case with regard to the said parcel of land.
 29. On the aspect of rendering of accounts by the Appellants, it is clear the Respondents left behind the running of the Holy Spirit and Truth Gospel Ministry affairs, the school and church, in the hands of the Appellants herein and that the Appellants proceeded to cause loss by their neglect. The best remedy would have been that they render accounts but as established from the Court record, the said order would be inconsequential given the circumstances as the church and that the land had been transmitted to third parties. I concur with the trial Court that justice cannot be done or seen to be done when it would allow the Appellants get away with a heist in their mischief. It is clear the Appellant's breached the trust of the Respondents leading to the loss of their church, land and even school.



30. As regards the cross appeal, it is noted that both parties herein did not submit thereon. The issue for determination is whether the nominal award is too low in the circumstances of this case. It is trite that nominal awards consist of an insignificant allocation awarded upon proof that a party has violated the legal rights of another like in this case which involved the enjoyment of properties. The appointment of the Appellants in various capacities within the church made it clear that the same was to lapse the moment the clashes in Mt Elgon region ended. According to the Respondents, they notified the Appellants to hand over the control of the affairs of the church but they became hostile and still continued to withhold properties namely the school and the church plus the land on which they stood to the Respondents. During the cross-examination of the Appellants, there was clear breach of trust by the Appellants. The court had to award some amount of damages for the loss of access and use of the property. The Respondents could have made profits from the properties. It is my considered view that the trial magistrate made a commensurate and fair award in view of the wrong done by the Appellants in the circumstances. A nominal award of Kshs.200,000.00 in my view is fair for the loss of the said land and for breach of trust. The said award is not so low as to represent an erroneous estimate of the damages. In any event, the Respondents still have a remedy to approach the ELC for redress. I find that the trial Court did not commit any error of principle in entering judgement in favour of the Respondents as against the Appellants jointly and severally in the said amount. I therefore find no merit in the cross appeal.
31. In the result, it is my finding that the Appellants' appeal as well as the Respondents' cross appeal lack merit. The same are hereby dismissed. Each party to bear their own costs.

It is hereby ordered.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF FEBRUARY 2024.

D. KEMEI

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JUDGE

In the presence of:

Bw' Onchiri for Appellants

No appearance for Respondents/Cross Appellants

Kizito Court Assistant

