Africa Inland Church (Maungu) & 3 others v Mboye & another (Environment and Land Appeal 3 of 2024) [2024] KEELC 6156 (KLR) (Environment and Land) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6156 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND APPEAL 3 OF 2024

EK WABWOTO, J

SEPTEMBER 26, 2024

(FORMERLY MOMBASA ELC APPEAL NO. E039 OF 2023)

BETWEEN

AFRICA INLAND CHURCH (MAUNGU) ..... 1ST APPELLANT

REV. NGULI D.C.C KALAMA (MACHAKOS) ..... 2ND APPELLANT

PASTOR KAMBI MWANZIJE LALO ..... 3RD APPELLANT

SELINA MUSEMBI (CHAIRLADY) ..... 4TH APPELLANT

AND

MKANYIKA ANTHONY MBOYE ..... 1ST RESPONDENT

DANIEL MWANDOE MZAME ..... 2ND RESPONDENT

(From the Judgment of Hon. A. M. Obura (Mrs.) (CM) delivered on 25th May 2023 in VOI PMCELC Case No. 75 of 2013 Mkanyika Antony Mboye, Daniel Mwandoe Mzame =Versus= African Inland Church (Maungu), Rev. Nguli D.C.C Kalama (Machakos), Robert Nyamai (Church Elder), Pastor Kambi Mwanzije Lalo, Selina Musembi (Chairlady) at Voi Law Courts)

JUDGMENT

1. This is an appeal in respect to the judgment and decree of Hon. A. M. Obura CM delivered on 25th day of May 2023 in respect to Voi PMCELC No. 75 of 2013 wherein the trial court issued the following orders:-

    1. The suit property Plot 264 shall be subdivided equally between the Plaintiffs and the 1st Defendant.

2. The County Surveyor and the Land Registrar are hereby directed to comply with this directive.

3. The Defendant shall bear the costs of the suit and all incidental costs.

2. The Appellants being aggrieved by the said decision filed the instant appeal vide a Memorandum of Appeal dated 9th June 2023 raising the following grounds:-

1. That the Learned Magistrate erred in law and fact, by making a finding that the unsurveyed Plot No. 264 be subdivided equally among the Appellants and the Respondents.

2. That the Learned Magistrate erred in law and fact by making a finding that the Respondents had proved their case on a balance of probability and without considering the evidence tendered by the Appellants.

3. That the Learned Magistrate erred in law and fact by proceeding to subdivide Plot No. 264 which parcel of land was not being claimed by the Respondents.

4. That the Learned Magistrate erred in law and fact by making a finding that Plot No. 264 be subdivided into equal shares despite their being no evidence placed before the Court by the Respondents indicating the size of Plot they were claiming from the Appellants.

5. That the Learned Magistrate erred in law and fact by failing to consider the Surveyors Report which indicated that Plot No. 264 was allocated to the Africa Inland Church Kenya.

6. That the Learned Magistrate erred in law and fact by making a finding that there was a valid suit before the Honorable Court which was not the position.

3. The Appellants thus sought to set aside the judgment and decree of the trial court.

4. The appeal was canvassed by way of written submissions. The Appellants filed written submissions dated 28th March 2024 while the Respondents filed written submissions dated 20th August 2024.

5. The Appellants proceeded to submit on grounds number 1, 3, 4 and 5 together and ground 6 and 2 separately.

6. It was submitted that the Respondents did not mention the parcel of land which the Appellants have entered by either stating the plot number and or the size of the plot and or the extent of encroachment by the Appellants whom the Respondent has not mentioned their being 4 Defendants in their Amended Plaint and thus they have not precisely stated when the cause of action arose.

7. It was contended that the Learned Magistrate erred in law and in fact by making a finding that the parcel of land Plot No. 264 was the suit property the Respondents were claiming despite no mention of Plot No. 264 in their further Amended Plaint and or their statements filed in court. It was further submitted that the further Amended Plaint was silent on when the cause of action arose which was material to the determination of the dispute herein.

8. It was also submitted that the Learned Magistrate erred in law and fact when making a finding that the Respondent has proved their case on a balance of probability since the plot number and size had not been pleaded, it was not clear the cause of action arose and further there was no documentary evidence showing the Respondent's ownership of unsurveyed parcel of land situated in Maungu, Taita Taveta County.

9. It was further submitted that the Appellants had shown and produced during trial an allotment letter dated 20th December 1995 showing that they had been allocated Plot No. 264. It was argued that the Learned Magistrate erred when she ordered subdivision of Plot No. 264 into two equal shares which in

effect amounted to taking the role of the County Government of Taita Taveta. It was further submitted that the orders issued were in vain since the County Government of Taita Taveta was not a party to the suit and it is only the County Government of Taita Taveta that had powers to allocate the suit land within Maungu Town.

10. The Appellants concluded their submissions by abandoning ground No. 6 of the Memorandum of Appeal and urged this court to allow the Appeal and set aside the judgment of the trial court.

11. The Respondent submitted on the following two issues; whether the Appeal is merited and who should bear the costs of the Appeal.

12. It was argued that the Appellants were allocated 0.03Ha of the suit property but they were unable to explain how the same has increased over time and further their claim for 0.62Ha of the suit property is thus unsubstantiated. The initial allotment offer dated 20th December 1995 indicated that the Appellants portion was only 0.03Ha. The court was urged to dismiss the Appeal with costs to the Respondents.

13. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. In China Zhingxing Construction Company Ltd vs Ann Akuru Sophia [2020] eKLR it was stated as follows:

> "The appropriate standard of review established in these cases can be stated in three complementary principles:
>
> a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
>
> b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
>
> c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time."

The High Court in the China Zhongxing Construction Company Ltd case (supra) cited the Court of Appeal for East Africa in Peters vs Sunday Post Limited [1958] EA 424 where Sir Kenneth O'Connor stated as follows:-

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs-Thomas (1), [1947] A.C. 484."

14. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.

15. The court is of the view that the following are salient issues for determination herein: -

i. Whether the Appeal is merited.

ii. Whether the trial court erred in granting the orders issued based on the facts and the law.

iii. What are the appropriate reliefs to grant?

16. The Appellants case before the trial court was that the Appellants lawfully own the suit property and they denied to have unlawfully entered upon the 1st Respondent's land.

17. The Respondents case on the other hand was that the 1st Respondent is the owner or proprietor of the unsurveyed parcel of land and that the Appellants unjustifiably entered upon the said property with an intention of depriving the 1st Respondent of it. The Respondents also averred that the Appellants stopped them from cultivating the said parcel of land without any colour of right or authority.

18. Evidence was adduced before the trial court that the 1st Respondent owned the suit property which was located in Maungu town along Nairobi – Mombasa Highway since 1976. The property measured 2 acres before the Assistant Chief subdivided it and sold a portion measuring 50 x 100 to the 1st Appellant. It was also emerged that in resolving the dispute, a Committee of Elders upon deliberating on the matter resolved that a portion measuring 50 by 100 be hived off for the church while the 1st Respondent retaining the remaining portion. This decision was not complied with by the Appellants who failed to abide by the same. The court was also furnished with the following documents which were produced in evidence by the Respondents; a copy of letter dated 24th August 2009 from one Dan Mwandoe Mzame to the Maungu Plot Complaints Committee, a copy of the said Committee's decision dated 16th November 2009, letter dated 7th March 2012 from the area Chief Maungu Location addressed to the 1st Appellant, a letter dated 16th July 2012 from Kituo Cha Sheria on behalf of the 2nd Respondent addressed to the District Commissioner Taita Taveta and a letter dated 15th September 1995 from the Area Sub-Chief to the Respondents among others.

19. The Appellants evidence on the other hand was to the effect that the church was allocated the property vide an allotment letter dated 20th December 1995 and they paid for the same vide a receipt dated 9th January 1996 of Kshs. 5,000/=

20. The Appellants also adduced evidence confirming that the actual size of the property is 0.62ha and not 0.03ha as per the initial offer. They also adduced evidence that they have been utilizing the property since its allocation and they have never seen the Respondents on the property.

21. The court has re-evaluated the totality of the both oral and documentary evidence adduced in this case and it is important for this court to assess the root of the Appellants and Respondents interest in the property. The formula in unlocking such disputes is to get to the root of title as pronounced in the case of Hubert L. Martin & 2 others v Margaret Kamar & 5 others [2016] eKLR. However, it is also worth noting that the suit property was previously unregistered and unsurveyed before acquisition by the parties herein.

22. The Appellants adduced evidence to have been allocated the property measuring 0.03 vide an allotment letter dated 20th December 1995. It was also evident that the same was allocated to them after they had made an application for the plot vide a letter dated 8th May 1987. The 1st Appellant after being allocated the property proceeded and made payment of Kshs. 6,082 to the Ministry of Land vide a receipt issued on 9th January 1996 and further made payment of Kshs. 5,000/= to the then County Council of Taita Taveta vide a receipt dated 21st September 2010. It was also evident that the 1st Appellant is in current occupation of the suit property and has developed the same. The Appellants witnesses also testified

that the initial allocation was for 0.03ha though the correct size was 0.62. It also emerged that the amended allotment letter had not yet been issued to the 1st Appellant.

23. The Respondents on the other hand testified that the 1st Respondent acquired the plot in 1976 and has been cultivating the same until when the 1st Appellant acquired it. It was also evident that when the 1st Respondent took possession of the property the dispute was referred to the Maungu Complaints Committee consisting of the Elders who resolved that a portion measuring 50 by 100 of the said property should be hived off for the church while the 1st Respondent to retain the remaining portion. The Appellants never complied with the said resolution and hence the said dispute found its way to court.

24. From the evidence on record, it is evident that the allotment of the suit property to the 1st Respondent did not take care of the 1st Respondent's interest in the property considering that she had been in the property since 1976 and was only deprived of the same on the 1st Respondent's occupation.

25. The report of the Maungu Complaints Committee had the following resolution;

> "Baada ya kusikiza ushahidi pande zote mbili. Ushahidi kamati ilipata ni kwamba Kanisa hilo la A.I.C. wako na ploti pale. Hata barua ilioandikwa na utawala mwaka wa 1995 inathibitisha kwamba Dan Mwandoe yuko upande wa kulia kulingana na ushahidi A.I.C. wako upande wa kushoto.
>
> Dan Mwandoe ni mtoto wa mama Mkanyika Antony Mboe ambaye alikuwa akilima pale tangu jadi."

26. It is apparent that the 1st Respondent had established an interest over the property before the same was allocated to the 1st Appellant and in view of the foregoing the trial court cannot be faulted for its decision in finding that the Respondents had proven their interest over the property.

27. In view of the foregoing, this court also notes that the resolution of Maungu Plots Complaints Committee dated 16th November 2009 comprising of Elders from the said jurisdiction which was adduced in evidence was a form of alternative dispute resolution mechanism.

28. Under Article 159 (2) (c) of *the Constitution*, this Court is required to recognise and promote Alternative Justice System and the traditional dispute resolutions mechanism fall under the Alternative Justice System. Under Section 20 of the *Environment and Land Court Act*, the Court on its own motion can adopt and implement the alternative dispute resolution which includes the traditional dispute resolution mechanisms. See the cases of; Kitur & another (Suing on behalf of the Estate of Stephen Kitur) v Kitur & another (Environment & Land Case 68 of 2021) [2023] KEELC 78 (KLR) (19 January 2023) (Judgment) and Kinyanjui & 97 others v Trustees (Environment & Land Case 263 of 2012) [2023] KEELC 15966 (KLR) (1 March 2023) (Ruling).

29. The court has also noted that part of the said resolution constituted some of the orders granted by the trial court after hearing the disputes between the parties.

30. The Appellants in their submissions argued that this court should allow the appeal on the basis that the Respondents did not identify the plot number in their pleadings before the lower court and further that they did not plead when the cause of action arose. The court has considered the said line of argument and rejects the same on the basis that the same did not affect the outcome of the decision rendered by the trial court since all the parties were outrightly clear as to what was the property in dispute herein and further the said issue was never raised in the Appellants pleadings before the trial court. This is a court of law and a court of justice and hence it cannot be swayed by the said argument.

31. From the totality of record, it is the finding of this Court that there was sufficient evidence before the trial court that the Respondents had proved their case to the required standard and were entitled to the orders that were sought. The trial court cannot be faulted for its decision and this court cannot interfere with the same.

32. For those reasons, it is the finding of this court that the appeal is devoid of merit and the same is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 26TH DAY OF SEPTEMBER, 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Okanga for Appellants.

Mr. Mwazighe for Respondents.

Court Assistants: Mary Ngoira and Norah Chao.