Coastland Properties Ltd v Shah & 2 others (Civil Appeal E011 of 2020) [2025] KECA 277 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 277 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E011 OF 2020

AK MURGOR, P NYAMWEYA & GV ODUNGA, JJA

FEBRUARY 21, 2025

BETWEEN

COASTLAND PROPERTIES LTD ..... APPELLANT

AND

VIPINKUMAR NATHALALA SHAH ..... 1ST RESPONDENT

SOUTH COAST BEACH PROPERTIES LTD ..... 2ND RESPONDENT

OMAR SAID MWATAYARI ..... 3RD RESPONDENT

(Being an appeal against the judgment of the Environment and Land Court at Mombasa (A. Omollo, J.) delivered on 21st December 2020 in Mombasa ELC Nos. 276 and 277 of 2014 (Consolidated)

JUDGMENT

1. The 3rd respondent, Omar Said Mwatayari filed a suit in the Environment and Land Court at Mombasa on 22nd December 2004 against the 1st and 2nd respondents, Vipinkumar Nathalala Shah and South Coast Beach Properties Ltd respectively, seeking a return of plot Nos. Kwale/Galu Kinondo/733 and 734 (the subdivisions) which he alleged the 1st and 2nd respondents had caused to be sub-divided from plot No. Galu Kinondo/55 (the original plot) without his consent.

2. According to the 3rd respondent, there was no agreement between himself and the 1st and 2nd respondents to sub-divide and transfer his plot, and therefore the subdivision was undertaken through collusion, fraud and without following the laid down procedure; that he did not know about the transfer until sometime in 2004 when he visited the Lands registry to report a loss of the title.

3. He produced a Certificate of official search dated 15th October 2004 that indicated that he was the registered owner of the original plot as at 15th November 1974, subsequent to which a Land certificate was issued. The search also showed that the original title was closed pursuant to the sub- division of the

original plot into two plots. He also produced an adjudication record dated 28th May 1974 where his name was entered as the owner. He further relied on a letter to the Land Registrar dated 26th October 2004 seeking to know how the title was closed following sub-division as well as details of the new owners. The Land Registrar's response on 1st November 2004 was that according to their records, all the transactions were properly executed. The response prompted the 3rd respondent to file a suit seeking cancellation of the 1st and 2nd respondents' titles and for his name to be reinstated as the registered owner. He also claimed general damages for fraud together with costs and interests.

4. Thereafter, the 3rd respondent obtained a default Judgment (Mwera, J.- as he then was) of 16th September 2005 which was set aside by this Court in Civil Appeal No. 46 of 2008 on 16th October 2009, pursuant to which, the 1st and 2nd respondents, then joined, Coastland Properties Limited, the appellant to the suit as a necessary party, following its purchase of the original plot from the 3rd respondent when he obtained the default Judgment.

5. In reply, the 1st and 2nd respondents filed their statement of defence on 27th October 2009. The defence was later amended on 18th July 2012 to include a counter-claim. They denied the claim against them and further denied having caused the sub-division of the original plot without the consent of the 3rd respondent or any other person. They also denied the allegations of fraud and claimed that they had separately bought their plots and were therefore bonafide purchasers for value without notice.

6. In their counter-claim, they claimed that the appellant colluded with the 3rd respondent to fraudulently register documents of transfer of the original plot to itself. They therefore sought a reversion of the original plot back to the subdivisions; an order that Plot No. Kwale/Galu Kinondo/734 be registered in the name of the 1st respondent; an order that Plot No. Kwale/Galu Kinondo/733 be registered in the name of the 2nd respondent; that the 3rd respondent's suit be dismissed and that the appellant vacate the suit property.

7. The 3rd respondent filed a reply to defence and counter-claim in which he denied that he ever applied to have the original plot sub-divided into two plots. He also denied selling the suit plots to the 1st and 2nd respondents, and further asserted that their claim had been overtaken by events since the original property has been transferred to the appellant pursuant to a valid court order, and that the orders sought in the counter-claim were incapable of enforcement.

8. The appellant on its part also filed a reply to the defence and counter- claim where it claimed that it purchased title No. Kwale/Galu Kinondo/55 from the 3rd respondent and subsequently sub-divided it into L.R Nos. 1636, 1637, 1638 and 1639; that at the time of purchase, the suit was not in existence.

9. The trial Judge upon considering the dispute, held that the fact that the 3rd respondent denied selling or transferring the land to the 1st and 2nd respondents did not shift the burden to them to prove how they acquired the plots; that it was incumbent on the 3rd respondent to show that the document of transfer presented to the Land Registrar was a fraud. The court went on to dismiss the 3rd respondent's case and allowed the 1st and 2nd respondents claim as prayed in their counter claim.

10. Aggrieved, the appellant has filed this appeal on grounds that; the learned Judge was in error in writing a Judgment without the benefit of the 3rd respondent's (the plaintiff, Omar Said Mwatayari) sworn testimony which rendered the entire Judgment defective; in relying solely on the 3rd respondent's witness statement without benefiting from the actual testimony adduced during examination in chief, cross-examination and re-examination which had led to a miscarriage of justice, and in refusing to allow the appellant to call its witness(es); in allowing the 1st and 2nd respondents' counterclaims against the weight of evidence, and yet they could not explain how the original plot vested in them; in failing

to find that the 1st and 2nd respondents had not demonstrated how ownership of the original plot changed from the 3rd respondent's name into their names, yet the 3rd respondent had denied selling or transferring the original plot to them; in failing to find that the burden of proof shifted to the 1st and 2nd respondents; in failing to find that the appellant was an innocent and bona fide purchaser for value without notice of any defect in the title to the original plot; in ordering the eviction of the appellant and or persons claiming through it from the original plot without a hearing; in failing to properly review and consider the evidence on the record; in applying wrong legal principles in determining the suit; and in misrepresenting the facts, the evidence and the law.

11. When the appeal came up for hearing on a virtual platform, learned counsel Mr. Nyaanga and Mr. Ngaire appeared for the appellant, while learned counsel Mr. S. Khargram was on record for the 1st and 2nd respondents. Both the appellant and the respondents filed written submissions.

12. The appellant's counsel sought to rely on their written submissions where it was submitted that the trial court made a grave and fatal error by purporting to deliver a Judgment without the sworn evidence of the 3rd respondent, which was a matter that went to the root of the very administration of justice; that the court having established that there were missing proceedings regarding the oral testimony of the 3rd respondent, had two available options— to either, recall the parties and retake the missing evidence or alternatively, to order a de-novo hearing; that no prejudice would have been suffered by the respondents as they would have had an opportunity to cross-examine the 3rd respondent afresh; that further, the 3rd respondent discharged his burden of proof, and the court having agreed, that the 3rd respondent's name was registered as owner of the original plot, it was not incumbent on him to prove "how the suit title changed from the plaintiff's name to the 1st and 2nd Defendants"; that the burden lay squarely on the 1st and 2nd respondents to prove how they cane to own the original plot.

13. Counsel submitted that the appellant was a bona-fide purchaser for value of the original plot, as it had acquired it in good faith, and for valuable consideration and it therefore held a valid title devoid of fraud following its acquisition.

14. For their part, counsel for the 1st and 2nd respondent submitted that the appellant, was only joined into the trial court proceedings as a 'Necessary Party' given that it claimed that it had purchased the subject plot from the 3rd respondent, and that its interest in the original plot under the mother title was restored pursuant to the default Judgment of 16th September 2005; that the appellant could not avail itself of any substantive relief before the trial court as it was only joined to enable it have the opportunity of being heard given that it held the title to the original plot by virtue of the ex-parte Judgment that was set aside; that therefore, it could not seek any relief in this appeal as that would be tantamount to granting substantive orders to the appellant.

15. Counsel further submitted that the appellant though provided with sufficient opportunity, elected to apply to file its witness statement too late in the day, when both the 3rd respondent and the 1st and 2nd respondents had closed their cases; that the appellant's title to the original plot was premised on a nullity and was void ab initio. Consequently, there was no longer a valid title in law known as Plot No. Kwale/Galu Kinondo/55 that was capable of conferring any proprietary rights, nor was any interest capable of being transferred to the appellant by the 3rd respondent as claimed.

16. This being a first appeal, the mandate of this Court under Rule 31 of the Court of Appeal Rules is to re-evaluate the evidence tendered before the trial court and to reach our own findings and conclusions, bearing in mind that we did not have the occasion to see or hear the witnesses and make due allowance

for the same. This mandate was amplified in the case of Abok James Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR this Court expressed itself as follows:

> This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and re- analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not Authority v Kunston (Kenya) Limited [2000] 2EA 212"

17. The issues that arise for determination are: i) the appellant as a "Necessary Party" was within its rights to lodge this appeal; ii) whether the trial Judge was in error in relying on the 3rd respondent's written statements in the absence of the oral evidence as a result of missing proceedings; and iii) whether the 1st and 2nd respondents proved their ownership of the original plot or whether the appellant was an innocent and bona fide purchaser for value without notice of any defect in the title to the original plot.

18. On the question of whether the appellant as a "Necessary Party" was within its rights to lodge this appeal, Black's Law Dictionary, 9th Edition defines a "Necessary Party" as a,"... party who being closely connected to a lawsuit

> ...but whose absence will not require dismissal of proceedings.."

19. Nambuye, J (as she then was) in the case of Kingori vs Chege & 3 Others [2002] 2 KLR 243 observed:

> "...parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to have been joined are parties who are necessary to *the constitution* of the suit without whom no decree at all can be passed. Therefore, in case of a defendant two conditions must be met: (1) There must be a right to some relief against him in respect of the matter involved in the suit. (2) His presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the questions involved in the proceedings. A proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation which interest will be recognisable in the Court of law being an interest, which the Court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party. But a person may be added as a defendant though no relief may be claimed against him provided his presence is proper for a complete and final decision of the question involved in the suit and such a person is called a proper party as distinguished from a necessary party..."

20. Similarly, the Supreme Court of Nigeria in the case of African Democratic Congress (ADC) vs Bello (SC. 687/2016) [2016] NGSC 82 (29 September 2016) held that:

> A necessary party in a case is one whose presence or involvement in the matter is not only necessary but crucial and unavoidable for the effective, effectual, exhaustive, complete and comprehensive subject matter of the proceedings but also who in his absence, the proceeding cannot be fairly dealt with. In other words, the question to be settled in the action between the existing parties in the suit must be a question which cannot be properly settled unless they are parties to the action instituted by the plaintiff."

21. From the above it is clear that a party is necessary to a suit where it is shown that the legal reliefs sought would directly affect the person sought to be joined, to avoid a multiplicity of suits or where it is shown that the Defendant cannot effectually set a defence unless that person is joined in the suit.

22. Additionally, in the Ugandan case of Departed Asians Property Custodian Board vs Jaffer Brothers Ltd [1999] 1 EA 55 that was cited with approval by this Court in the case of Civicon Limited vs Kivuwatt Limited & 2 others [2015] eKLR it was:

> A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person." (Emphasis ours)

23. At the outset of the suit, the appellant was joined as a necessary party. However, as the matter proceeded, the 1st and 2nd respondents filed an amended defence and counterclaim dated 16th July 2012 in which they sued the appellant as a 3rd defendant, while in their counter-claim, they pleaded that the appellant (the 3rd defendant) colluded with the 3rd respondent (the plaintiff) and/or unknown persons to prepare and fraudulently register documents of transfer relating to the original plot. The particulars of fraud levelled against the appellant were that;

    (a) The third defendant knowingly embarked on this exercise when a search om the Court's records would have shown that the plaintiff's default judgment was suspect and questionable.

    b. No presidential approval and/or Land Control Board's consent was obtained before the finalisation.

    c. The 3rd defendant refused to heed the Lawyer's notice and even Court Orders restraining it from continuing with further construction and even now they are still going ahead in total defiance.

    d. The 3rd defendant either in collusion with the plaintiff or on its own, caused the Land office records to go missing for a substantial period of time.

    e. Generally, to conduct itself in a manner as to unlawfully dispossess the 1st and 2nd defendants of their right to titles."

24. Correspondingly, in the Counterclaim the 1st and 2nd respondents prayed for;

    (a) The diversion of Plot Number Kwale/Galu Kinondo/55 to Kwale/Galu Kinondo 733 and 734.

    b. An order that Kwale/Galu Kinondo/734 be registered in the name of the 1st defendant.

    c. An order that Kwale/Galu Kinondo/733 be registered in the name of the 2nd defendant.

    d. The plaintiff's suit be dismissed with costs to the 1st and 2nd defendants.

e. Costs of and incidental to this suit.

f. The 3rd defendant do vacate and move out immediately from the respective plots."

25. In reply, the appellant filed a defence and a counterclaim where it asserted that it purchased the original plot from the 3rd respondent.

26. In the Judgment the trial court issued the following orders;

"(a) An order is made that the 1st defendant be and is the registered owner of Kwale/Galu Kinondo/734.

b. An order be and is hereby given that L.R No. Kwale/Galu Kinondo/733 be registered in the name of the 2nd defendant.

c. The 3rd defendant/Necessary Party do vacate the suit premises within 90 days of delivery of this judgment.

d. In default the 1st & 2nd defendants be at liberty to evict the necessary party and or persons claiming through it using lawful means.

e. Costs of the suit and the counter-claim awarded to the 1st and 2nd defendants."

27. The pleadings clearly show that there were allegations and counter allegations between the appellant, the 1st 2nd and 3rd respondents, where the appellant also claimed ownership of the original plot. As the matter progressed, its status mutated from that of a necessary party to a substantive defendant who was ultimately directly affected by the orders of the trial court when it was ordered to vacate the original plot. Given that the appellant was a defendant and a Judgment debtor in the primary suit we find that it had the right to file this appeal before this Court against the Judgment and decree of the Environment and Land Court.

26. Having so found we turn to consider whether the learned judge rightly determined the suit solely upon reliance of the 3rd respondent's witness statement. In the Judgment the trial Judge's opening remarks were that;

> "This file was reconstructed thus some parts were missing. I was unable to trace the handwritten evidence by the plaintiff other than where his advocate said this is the close of the plaintiff's case. I have therefore relied wholly on the written statement of the plaintiff that was available. This suit was consolidated with No. 277 of 2004."

27. Therefore, it cannot be controverted that in arriving at its decision, the trial court relied wholly on the 3rd respondent's witness statement without having the benefit of evaluating his oral evidence adduced before the court.

28. As to whether the witness statement was sufficient, according to Halsbury's Laws of England Vol. 11, 5th Edition Para 751 note 1, a written statement or document signed by a person usually contains the evidence which that person would be allowed to give orally.

29. Halsbury's Laws of England Vol. 11, 5th Edition Para 751, goes further to explain the application of witness statements thus:

> If a party has served a witness statement and he wishes to rely at trial on the evidence of the witness who made the statement, he must call the witness to give oral evidence...Where a witness is called to give oral evidence under this provision, his witness statement will stand

as his evidence in chief unless the Court orders otherwise. A witness giving oral evidence at trial may, with permission of the court, amplify his witness statement and give evidence in relation to new matters which have arisen since the witness statement was served on the other parties. The Court will give such permission only if it considers that there is a good reason not to confine the evidence of the witness to the contents of his witness statement."

30. So that, where the court adopts a witness statement, it is to be considered as evidence in chief only and thereafter, the witness should be subjected to cross examination to test the veracity of the facts attested, unless the court orders otherwise. Our review of the proceedings does not disclose that the 3rd respondent adopted his witness statement, and thereafter presented himself for cross examination or reexamination, since there was no record of his testimony on the Court record.

31. Moreover, the procedure of hearing of suits and examination of witnesses is provided in Order 18 of the Civil Procedure Rules (2010). The order comprehensively sets out the manner in which a trial hearing should proceed, including the recording and production of evidence, both oral and documentary. Of importance to the instant case is order 18 rules 1 and 2 which provide:

1. The plaintiff shall have the right to begin unless the court otherwise orders.

2. Unless the court otherwise orders—

    1. On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

    2. The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.

(3) ...."

32. Once again, our interrogation of the Court record does not disclose that in the 3rd respondent's case the process outlined in order18 was adhered to, because there is nothing on the record that indicates that the 3rd respondent either testified or even adduced any evidence. In effect, it is distinctive that the Court record in respect of the parties' suit was undeniably wanting.

33. Concerning the court record, the Supreme Court in the case of Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & another [2016] eKLR in considering an appeal from the decision of this Court in the case of Benjoh Amalgamated Limited & another vs Kenya Commercial Bank Limited [2014] eKLR expressed itself on the importance of court records and held:

> ...The importance of the record of a Court, particularly for a Court of record, such as the High Court, cannot be gainsaid. We agree with learned counsel for respondent, Mr. Muite, that the record of a Court of record is a fundamental reference-point in the administration of justice. We have perused the Court of Appeal Ruling granting certification, and we find no fault with its observations and findings, as regards this vital question of the availability of a record of a Court of record. The Court of Appeal in granting leave, indeed reinforced the public-interest element in this issue, that speaks to its nature, as a matter of general public importance, when it held thus:
>
> > "...we must also concede that upon hearing the forceful submissions made before us by Mr. Muite for the applicant, we cannot but conclude that the issue of the character of superior Courts as Courts of record and the consequences of absence or incompleteness of the record, where rights are determined with finality on the

basis of what ought to be on that very record, is neither shallow nor idle. Rather, formulated in the precise manner in which it was before us, the issue appears to us to have far-reaching consequences and implications on the integrity of the adjudicative processes of the Courts..."

34. This Court further stated:

> The importance of the record is self-evident from the very definition of a Court of record. The learned Indian Author P. Ramanatha Aiyar, in The Major Law Lexicon, 4th Ed. 2010, Vol. 2 at para. 1611 states that a Court of record is:
>
> "...a Court where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony... a Court that is bound to keep a record of its proceedings ... 'Recordum' is a memorial or remembrance in rolls of parchment, of the proceedings and acts of a Court of justice ... But legally records are restricted to the rolls of such only as are Courts of record, and not the rolls of inferior courts (Coke, Litt.260a)...The obligation to keep a record of its acts, proceedings and decisions would then appear to be of the very essence and character of a Court of record: 'a Court of record necessarily requires some duly authorized person to record the proceedings' as was stated in Ex. Parte Cregg, 6 Fed, Cas. No. 3. 380 2 curt. 98."

35. Of significance to appreciate from the above excerpt, and which cannot be over-emphasized, is the importance of an authentic and comprehensive Court record. Without it, a court is in no position to arrive at the justice of the case, since in order to reach a just decision, a court of law ordinarily relies on the pleadings and evidence adduced by the parties to support the pleaded facts.

36. On 16th October 2019, in the instant case, the 1st and 2nd respondents' counsel Mr. Khargram informed the court that they had filed an application for reconstruction of the court file which had disappeared. On the same day, the court ordered the reconstruction of the file, and further ordered the parties to file their written submissions.

37. Further, the record at page 126 indicated that certain pages of the proceedings were missing in the following terms:

> "Order- This is an old matter but the court diary is full. We shall try to see if the matter can be reached on 1.12.2016.
>
> PAGES MISSING (PLAINTIFF'S PROCEEDIN (SIC) MISSING"
>
> ...Oddiaga – This is the close of the Plaintiff's case"

38. The above is therefore clear that the primary file of the trial court was reconstructed owing to missing records. It is also noteworthy that the reconstruction ordered failed to yield comprehensive results; to wit, the 3rd respondent's oral evidence and cross-examination were distinctly expressed to have been missing from the record. As a result, the record did not indicate whether the 3rd respondent's witness statement was adopted as evidence in chief and thereafter subjected to cross-examination as was the other evidence on record, because crucial parts of the Court record were missing. Consequently, the trial Judge's having relied solely on the 3rd respondent's witness statement without taking into account whether there was other evidence adduced during the hearing, or ascertaining the veracity of that evidence from the cross examination and reexamination of the 3rd respondent's evidence, effectively

compromised the administration of fair justice, not only in respect of the 3rd respondent's and the appellant's case, but also in that of the 1st and 2nd respondents.

39. Given the shortcomings in the record, it is also not lost on us that, in determining the dispute, the trial Judge focused on the discrepancies in the 3rd respondent's case, despite being acutely aware that the record indicated that his evidence was missing. It begs the question whether the missing evidence, if at all it was available, could have answered the queries raised by the trial court, and led to a different conclusion.

40. In the wake of the missing proceedings, especially the evidence of the 3rd respondent on whom the suit was framed, and on which the appellant's defence was premised, we are of the view that, it would have been prudent and judicious for the trial Judge to have ordered a retrial, rather than relying solely on the 3rd respondent's witness statement, which in any event was inadmissible, particularly as the proceedings did not disclose whether they were adopted, or tested for their veracity as should have been the case.

41. Having so found, it becomes necessary to interfere with, and set aside the trial court's decision, and remit the consolidated suits back to the Environment and Land Court for determination. In so doing, we need not determine the other issues that arise in the appeal.

42. In sum, the appeal is merited and succeeds, and we make the following orders:

    i. The Judgment of the Environment and Land Court at Mombasa delivered on 21st December 2020 be and is hereby set aside;

    ii. that ELC Nos. 276 and 277 of 2014 (Consolidated) are remitted back to the Environment and Land Court for hearing and determination by another Judge of that court other than A. Omollo, J; and

    iii. Costs to the appellant.

    It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY, 2025.

A. K. MURGOR

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR