Mombasa Cement Limited v Ramji & 3 others (Civil Application Sup E001 of 2024) [2024] KECA 1139 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1139 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION SUP E001 OF 2024

PO KIAGE, K M'INOTI & F TUIYOTT, JJA

SEPTEMBER 20, 2024

IN THE MATTER OF AN INTENDED APPEAL

BETWEEN

MOMBASA CEMENT LIMITED ..... APPLICANT

AND

HARISH RAMJI ..... 1ST RESPONDENT

BHARAT RAMJI ..... 2ND RESPONDENT

ASHVIN RAMJI ..... 3RD RESPONDENT

NATIONAL SOCIAL SECURITY FUND ..... 4TH RESPONDENT

(An application for certification and leave to appeal to the Supreme Court of Kenya from the judgment of the Court of Appeal at Nairobi (Musinga (P.), Omondi & Ngenye, JJ.A.) dated and delivered on 15th December 2023 in Civil Appeal No. 590 of 2019)

RULING

1. The parties here are mired in a land dispute that commenced at the Environment and Land Court (ELC) and escalated on appeal to this Court. Mombasa Cement Limited (the applicant), aggrieved by the decision of this Court (Musinga (P.), Omondi & Ngenye, JJ.A.) dated 15th December 2023, is desirous of challenging the decision at the Supreme Court and is before us for certification that a matter of general public importance is involved as required by Article 163(4)(b) of *the Constitution*. The request for certification is in the Notice of Motion dated 11th January 2023.

2. Harish Ramji, Bharat Ramji and Ashvin Ramji (the 1st, 2nd and 3rd respondents respectively) are nominees and assignees of Golden Terrace Limited (Golden Terrace). Their case before the ELC was that by a letter of offer dated 20th December 2006, the Board of Trustees of NSSF (the 4th respondent),

allotted to Golden Terrace 120 acres to be excised from the land parcel known as LR No. 11895/24, pursuant to which a sale agreement of 22nd December 2006 was entered into between the two. The sale suffered a setback when it was stopped by orders issued by the court in HCCC No. 22 of 2022, Harp Investment Ltd -vs- NSSF, The Commissioner of Lands, The Registrar of Titles and Golden Terrace (the High Court suit). The transaction was, however, unlocked and completed when, on 16th June 2010 parties to the High Court suit entered a consent, upon which a decree was extracted. For purposes of the matter at hand, we need not reproduce the terms of the consent.

3. On its part, the applicant, who was in possession of the land during the pendency of the ELC proceedings and the appeal, stated that NSSF offered it land subdivided from a much larger piece known as LR No. 11895/11. It paid NSSF the full purchase price. The Court of Appeal found that although there was evidence of the offer, no sale agreement was ever entered into between the applicant and NSSF and that the applicant could not rely on the consent in High Court to sustain its claim as it was not a party to the said consent. Further, this Court observed that the land offered by NSSF to the applicant was different from that offered and acquired by the respondents.

4. Seminal to the issues raised in the application before us are two findings in the impugned decision. In answer to whether the 1st, 2nd and 3rd respondents had acquired a valid title to the land they claimed, this Court held:

> " 28. On 27th May 2010, NSSF, as the registered proprietor of LR No. 11895/50, in consideration of a sum of Kshs. 6,391,395 paid by the appellants, transferred to the appellants LR No. 11895/48. The transfer was registered on 16th June 2010, but the Certificate of Title that was issued on the same date refers to LR No. 11895/50.
>
> 29. It seems to us rather obvious that there was a clerical error in the preparation of the transfer documents in making reference to LR No. 11895/48 when the subject matter in the entire transfer was LR No. 11895/50. Such an error could easily have been rectified under section 59 (2) of the Registration of Titles Act."

5. Regarding whether the applicant had proprietary interest over the disputed property, this Court returned the following view:

> " 43. In response, the 1st respondent's advocates submitted that the transfer of the suit property was pursuant to the consent decree of 16th June 2010 and therefore the provisions of section 3 (3) of the Law of Contract are not applicable.
>
> 44. We do not agree with the 1st respondent's submission on this issue. Firstly, a consent order cannot vary express provisions of a Statute. Secondly, the 1st respondent was not a party to the said consent. Thirdly, even the consent expressly stated that each purchaser shall pay for his or her portion of the land "at the agreed rate of purchase price in the sale agreement". And lastly, the letter of offer was subject to a sale agreement, and even after the 1st respondent paid the 10% deposit of the purchase price they were pursuing execution of a formal sale agreement. The 1st respondent made some effort to have a formal sale agreement executed between her and NSSF, but that was not to be. It is

rather surprising that the 1st respondent paid the full purchase price before execution of any sale agreement."

6. In the application, the applicant contends that its intended appeal involves a matter of general public importance because this Court's decision creates utmost uncertainty in the application of law as it conflicts and is at cross purposes with previous decisions of the Court on two aspects of the law. It is argued that the decision has brought uncertainty regarding the operative parts of the transfer of proprietary rights or interests in property under the provisions of section 34 of the Registration of Titles Act (Cap. 288) (now repealed). The second is that the Court failed to consider or decide on whether a decree of the court can found an independent cause of action regardless of the provisions of section 3(3) of the *Law of Contract Act* in matters relating to transfer of an interest in land given that the essence of a decree pursuant to a consent of the parties is contractual in nature.

7. Learned counsel Mr. Khagram appearing for the applicant submitted that this Court has previously categorically set out the principle that where a certificate of title is being questioned, it is not indefeasible unless it can be shown that the process leading to it was unlawful. Counsel submits that, notwithstanding the absence of any evidence relating to the legality of the process relating to the issuance of the title to the 1st to 3rd respondents, the Court held that under section 23 of the Registration of Titles Act, the protection of indefeasibility was available to the 1st to 3rd respondents in the face of clear evidence that no right or interest in LR No. 11895/50 was transferred to them. It is contended that this Court made an assumption of a "clerical" error without any tangible evidence of it.

8. Counsel argued that the question whether an operative part of the transfer that purports to transfer a property other than that for which the title is issued, is from a jurisprudential perspective, a matter that requires evaluation making it a matter of general public importance. In addition, that it is fundamental, again from a jurisprudential perspective, and a matter of general public importance that the conflict of law as regards the indefeasibility of titles be resolved with certainty particularly in light of the Supreme Court's decision in *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment).

9. In response to these arguments, the 1st to 3rd respondents submit that this Court did not render a divergent view from the Supreme Court's holding in Dina Management as it did not consider the issue of indefeasibility of title. Mr. Issa, learned counsel appearing for the respondents, contends that his clients' case before the trial court was for trespass while the applicant filed a defence together with a counterclaim seeking cancellation of the title claiming that the title was fraudulently issued. That no issue of indefeasibility or root of title was pleaded or determined. Further, given that the applicant was seeking to be declared the rightful purchaser to the same title held by the 4th respondent and relied on the same title held by the 4th respondent as the basis of its claim, the alleged issue of indefeasibility of title cannot be said to arise.

10. While the respondents assert that the dispute has nothing to do with the question of indefeasibility of title, the applicant maintains it to be so and at the core of its request that we issue the certificate is that the decision of this Court is at odds with previous decisions of this Court on that question and, critically, conflicts with the decision of the Supreme Court on Dina Management. Even if we are to accept the applicant's position that this Court's decision in the matter at hand revolves around the issue of indefeasibility of title, nothing useful will be served by us certifying that matter to be one of general public importance because, as the applicant subtly concedes, that is an issue that has been settled by the apex court. It is clear to us that the applicant's real grouse is that the decision of this Court is incorrect in view of a line of cases by this same court on the question of indefeasibility of title as affirmed by the Supreme Court. At plenary we pointed out to counsel for the applicant, as we reiterate, that it was

not in the scheme of the Constitution that the Supreme Court would be an automatic appellate court in respect to all grievances arising from decisions of this Court. The issue of indefeasibility of title has been settled authoritatively by the Supreme Court in Dina Management and the question for appeal as framed by the applicant does not disclose anything new or novel.

11. On the second question, counsel for the applicant posits that the doctrine of merger treats a cause of action extinguished once a decree is issued and the claimant's sole right to bring an action can only be based on the decree. We are told that the decision in the instant matter contradicts the decision in Africa Oil Turkana Limited (previously known as *Turkana Drilling Consortium Ltd) & 3 others v Permanent Secretary, Ministry of Energy & 17 others* [2016] eKLR.

12. For the respondent, it was argued that on the issue of consent, this Court made three findings: although not turning on this, parties cannot record a consent to vary a statute; the applicant was not a party to the consent judgment; and that no agreement for sale was entered as contemplated by the consent.

13. Regarding whether the decision contradicts African Oil Turkana Ltd, the respondents read it as relating to the application of section 7 of the *Civil Procedure Act* in judicial review proceedings. The Court in that matter held that the trial court erred in granting a party leave to file a subsequent judicial review application after the initial application had been considered and dismissed by another court of equal jurisdiction and on appeal.

14. We have read and understood the impugned decision and that in African Oil Turkana Limited and make the following observations. The decision of this Court in this instant was simply, in the first place, that a consent between parties cannot vary express provisions of a statute. Second, the applicant was not a party to the said consent and in any event the consent itself contemplated that it could only be effected by parties in a sale agreement which admittedly the applicant did not enter into.

15. At the core of applicant's argument is that the decision of this Court in the instant matter contradicts a principle in the doctrine of merger that treats a cause as extinguished once a decree is issued and that the claimant's sole right to bring an action can only be based on the decree. How does that assertion fare against the challenged decision?

16. Nowhere in impugned decision does this Court disregard the principle of merger, rather it holds that the consent upon which the decree was extracted and could not, properly, vary the express provisions of a statute, in this event section 3(3) of the *Law of Contract Act*. More crucial is that the applicant was not a party to the consent, and if we may add, therefore to the decree, and could not draw a benefit from it. While the applicant may take a view that the two findings by this Court are erroneous, it fails to demonstrate that the Court disregarded the doctrine of merger. Perhaps more important, the applicant has not demonstrated the impugned decision whose effect, without pomp or pontification, is that a claimant who is a stranger to a decree that confers rights in personam to the parties to the decree cannot ride on the doctrine of merger to found a cause of action contradicts any other decisions of this Court. Second, we have not been shown any decision of this Court that endorses the position that a decree whose basis is a consent that is counter-statute can be relied upon to found a cause of action.

17. We reach a decision that the notice of motion dated January 11, 2024 lacks merit and is for dismissal, as we hereby do, with costs.

DATED AND DELIVERED IN NAIROBI THIS 20TH DAY OF SEPTEMBER 2024

P. O. KIAGE

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR