IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO, (P), MUSINGA & J. MOHAMMED, JJ.A.)

CIVL APPEAL NO. 56 OF 2016

BETWEEN

LYDIA KABUGO NDERI *(Suing for and behalf of the Estate of*

LATE MARY MUTHONI NDERI).....APPELLANT

AND

NYERI PLOT OWNERS LIMITED.....1ST RESPONDENT

KENYA HOTELS LIMITED.....2ND RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nyeri (Ombwayo, J.)

dated 7th March, 2016 and delivered on 21st March, 2016 by Lady Justice Waithaka, J.

in

H.C.C.C No. 105 of 2008)

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JUDGMENT OF THE COURT

At the heart of this appeal is a dispute between the estate of the late Mary Muthoni Nderi (deceased), represented by Lydia Kabugo Nderi, the appellant, who holds letters of administration *ad litem* for the purpose of this litigation, on the one hand and the 1st respondent, Nyeri Plot Owners Limited, on the other hand.

The dispute concerns the ownership of L.R No. Nyeri Municipality/Block 1/665 (the property), which was a subdivision of L.R. No. 1108/263, being a parcel of land in front of the present day Outspan Hotel in Nyeri town. Outspan Hotel itself stands on L.R No. Nyeri Municipality/Block /1/633.

At one point, the entire original parcel, L.R No. 1108/263, and the hotel belonged to a settler, one John Walker. While John Walker was the registered owner, he granted some hotel employees 2½ acres of the land to farm. John Walker subsequently sold the hotel to Captain Sanceby, who, in turn, sold it to Jack Block of Block Hotels Limited, at the time.

Each side of this dispute is claiming ownership of the property. The learned Judge of the Environment and Land Court (Ombwayo, J.) found, for the respondent, the reason for that decision is the main issue in this appeal.

This is how the 1st respondent's claim to the property arose. The respondent is a company incorporated by a group of Outspan Hotel workers. It is their case that during the 1972 end of year staff party, at which they were in attendance, Jack Block gifted them the original L.R No. 1108/263, in appreciation for their dedicated service. They confirmed, however that at the point, the property was registered in the name of Kenya Hotels Limited, the 2nd respondent, and a subsidiary of Block Hotels Ltd. Jack Block, nonetheless, assured the staff that the parcel belonged to him and that he was free to give it to them.

Being the registered owner of the land and the hotel, the 2nd respondent subsequently sold Outspan Hotel as well as the land on which it stood to Aberdare Safari Hotels Limited (ASHL). It has been the 1st respondent's position that the said sale did not include L.R. No. 1108/263.

The 1st respondent's contention is that only the hotel and the land upon which it stood was sold; and that ASHL irregularly subdivided L.R. No. 1108/263 into five parcels, transferring four parcels to one Stephen Mugo Mutothori in the year 2002 without the 1st respondent's knowledge, yet the entire parcel had been gifted to it.

The 1st respondent further argued that the suit property being one of the subdivisions, and not having been transferred, belonged to it. It was the subdivision of the original parcel and transfer of some of the resultant plots that prompted the 1st respondent to file a suit, not against ASHL, but against the 2nd respondent in the subordinate court, Nyeri CMCC No. 489 of 2002. We shall revert to this suit later but suffice at this stage to point out that a judgment in default of a defence was issued on 28th October, 2002, whose effect was to declare that the 2nd respondent held the suit property in trust for the 1st respondent.

The 2nd respondent was therefore ordered to transfer it to the 1st respondent. By a further order on 30th April, 2003, the court directed the Executive Officer of the court to execute the documents to facilitate the transfer of the suit property to the 1st respondent while authorizing the District Land Registrar to dispense with the production of the former title documents during registration of the transfer. Accordingly, the suit property was transferred to the 1st respondent on 30th July, 2003 and a certificate of lease issued on 19th August, 2003. That, in brief, is the basis of the respondent's claim to the suit property.

On the other hand, the appellant invited the court below and this Court to find that long before the 1st respondent was incorporated, her father, Ignatius Nderi, (Ignatius) purchased the suit property in 1978 from the 2nd respondent, the registered proprietor. Thereafter, Ignatius gifted the suit property to his sister, the deceased; that Ignatius instructed the 2nd respondent to transfer it to the deceased. But for one reason or another, the suit property was not transferred to the deceased during her lifetime. That notwithstanding, the appellant maintained that the deceased's estate being the *bonafide* proprietor of the suit property was entitled to it; that the deceased, before her death and now her estate having acquired and been in possession of the suit property for many years, and considering the extensive developments they have made on it since 1986, it would be unconscionable to divest them of the ownership.

For those reasons, according to the appellant, it came as a shock to her when she learnt that the suit property had been transferred and registered in the 1st respondent's name under unclear circumstances and without notice to those in occupation; that the transfer was tainted by misrepresentation by the 1st respondent through concealment of the deceased's estate's interest in the suit property; and by deliberately failing to join the deceased's estate in the suit before the Magistrates' court despite being aware that the deceased was in occupation and the orders sought would affect that interest. The appellant also argued that the proceedings in the subordinate court were a nullity on account of the action being time barred; that, as a result, the subordinate court lacked jurisdiction to issue the orders it pronounced; that the 1st respondent colluded with the then Nyeri Municipal Council to deprive the deceased's estate of

the suit property; and that the 2nd respondent failed to disclose that it had in fact transferred the suit property to the deceased's estate.

As a result of these facts and threats by the 1st respondent to evict the appellant, the latter instituted **H.C.C.C No. 105 of 2008**, challenging the title held by the 1st respondent. By the amended plaint, the appellant sought, *inter alia*, a declaration that the deceased's estate is the legal owner of the suit property; and that the certificate of lease issued to the 1st respondent is illegal and void *ab initio*. She also prayed for the cancellation of the certificate of lease held by the 1st respondent; and setting aside of the orders made on 30th April, 2003 in the subordinate court purporting to vest and transfer the suit property to the 1st respondent.

The 1st respondent filed defence and a counter-claim in which it applied for an order of eviction of the appellant from the suit property on the ground that the latter was a trespasser.

Ombwayo, J., after analysing the pleadings and evidence presented by both sides found in favour of the 1st respondent in a judgment of 7th March, 2016. He issued an eviction order against the appellant. It is that determination that provoked this appeal brought on a whopping 32 repetitive and argumentative grounds, contrary to the prescribed form. Just to remind the drafter of the memorandum in this appeal that **Rule 86 (1)** of the **Court of Appeal Rules** requires, in mandatory terms that-

> **"A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make."** (Our emphasis).

This Court, in **Michael Mungai vs. Independent Electoral and Boundaries Commission & 2 others** [2014] eKLR reiterated the caution that **Rule 86 (1)** must be strictly observed in drafting the grounds of appeal.

That apart, those prolix grounds challenge the decision of the learned Judge for failing to test the veracity of the proceedings in the subordinate court but instead relying on them exclusively; failing to find that the title held by the 1st respondent was impeachable under **Section 26(1)** of the **Land Registration Act**; misconstruing the nature of the appellant's claim; exhibiting bias against the appellant; and issuing the impugned judgment which offended the notions of justice, equity, fairness and rationality.

The firm of Anthony Gikaria & Co. Advocates representing the appellant filed written submissions expounding the foregoing grounds and fully relied on those submissions without the necessity of highlighting them. Mr. Kioni from the firm of Kabira Kioni & Co. Advocates for the 1st respondent, on the other hand, briefly highlighted their submissions.

The first ground challenges the decision of the learned Judge to rely on the proceedings and decision of the subordinate court. According to the appellant, had the learned Judge tested the veracity of those proceedings, he would have realized that the 1st respondent's cause of action was based on recovery of the suit property from the 2nd respondent, who was then registered as the proprietor; that in line with **Section 7** of the **Limitation of Actions Act (LAA)**, the 1st respondent's suit was time-barred; and that the 1st respondent had not only lost its right to recover the suit property but the subordinate court had no jurisdiction to entertain the action.

In addition, it was the appellant's case that, even the 1st respondent's counter claim in the Environment and Land Court, was likewise, time barred. Yet, the learned Judge did not address the question of limitation which went to the jurisdiction of the court to entertain the counter claim.

On the third ground, it was contended that the learned Judge failed to appreciate that, despite being on the

suit property, the deceased's estate was neither joined nor heard in the suit in the subordinate court; the deceased's estate could neither appeal nor seek review of subordinate court's decision as it was not a party to that suit.

The learned Judge was further faulted on the fourth ground for misconstruing the nature of the appellant's challenge to the 1st respondent's title; that the appellant's case was based on fraud as well as misrepresentation and illegality in the acquisition of the 1st respondent's title; and that due to these infractions, the 1st respondent's title was impeachable.

In view of the foregoing, the appellant pleaded that, at least the learned Judge ought to have recognized the existence of a constructive trust between the deceased and the 2nd respondent with respect to the suit property the moment the 2nd respondent executed a transfer in her favour manifesting a clear intention to transfer the suit property to the deceased.

Lastly, the appellant claimed that the learned Judge overlooked the fact that the deceased's estate, having been in uninterrupted possession and occupation of the suit property from 1978 constituted an overriding interest over the suit property.

In opposing the appeal, the 1st respondent submitted that both the appellant's suit at the High Court and this appeal appear to challenge the validity of the judgment and decree of the subordinate court; that no appeal was brought against that judgment which remains unchallenged to this day; that an order issued by any competent court is valid unless and until the same is overturned in an appeal or reviewed successfully; and that the subordinate court's decree was valid and transferred legitimate interest in the suit property to the 1st respondent.

The 1st respondent further submitted that the deceased's estate had no overriding interests over the suit property because the deceased entered into possession of the suit property as a tenant or licensee and therefore, time was incapable of running in her favour for purposes of a claim in adverse possession.

Regarding the alleged transfer of the suit property by the 2nd respondent to the deceased, it has been argued that there was no evidence to support such a claim as the letter relied on by the appellant as such proof was written, not by the 2nd respondent, but by HZ Company Limited and that the letter related to some houses as opposed to the suit property; that neither ASHL nor H.Z. Company Limited had any proprietary interest in the suit property to pass on to the deceased.

For these reasons, the 1st respondent has urged us to dismiss the appeal.

The 2nd respondent did not participate in these proceedings, just like it did not in the trial court.

We remind ourselves of our duty in a first appeal to regard it as as a retrial and to reconsider the evidence, evaluate it afresh and draw our own independent conclusions, but always bearing in mind that we lack the advantage of the trial court where evidence was presented by witnesses.

Again, we must reiterate that we are not bound necessarily to follow the trial judge's findings of fact if it appears to us that he did not take into account material matters, or considered immaterial matters in arriving at the impugned decision. We have paraphrased in the foregoing statement the time-honoured lines postulated in the case of **Selle vs. Associated Motor Boat Co**. [1968] EA 123.

With this in mind, we consider that this appeal turns broadly on who between the appellant and the 1st respondent is entitled as the legitimate owner to the suit property?

The 1st respondent's case is based on two events; the 1972 end of year staff party, at which their boss, Jack Block gifted the 1st respondent's promoters with the suit property, and the subsequent confirmation of its ownership of the property by the subordinate court in its judgment, which has not been set aside.

The 1st respondent's argument is that a judgment is binding to the "whole world" in subsequent litigation involving similar matters or issues with regard to those matters or issues actually litigated and determined therein; and that, the only recourse available to the appellant was to appeal the judgment or apply to the Magistrates' court to review its order. The appellant, having failed to utilize any of the options, was shut out. That, in our understanding, is a plea of estoppel.

The appellant, for her part, has argued that she cannot be bound by a decision she was not a party to, and which arose from an action which was itself statute barred.

It is common factor that in 2002, the 1st respondent took out proceedings against the 2nd respondent in Nyeri CMCC 489 of 2002, **Nyeri Plot Owners Limited vs. Kenya Hotels Limited**, for an order directing the latter to transfer the suit property to the 1st respondent. Because the 2nd respondent, having entered appearance, did not file a defence, the 1st respondent requested and got judgment in default. On application by the 1st respondent, the subordinate court authorized the court's Executive Officer to execute transfer documents in favour of the 1st respondent. The Nyeri District Lands Registrar was ordered to effect registration in favour of the 1st respondent without the necessity of the old documents of title being produced.

Stung by this development, the 2nd respondent moved the Magistrates' court with an application to set aside the default judgment and all the subsequent orders flowing from it. It also applied that the defence, annexed to the application be admitted in the proceedings. This application was dismissed with costs by the Senior Resident Magistrate.

To resolve the arguments around the decision of the subordinate court, we make reference to **Halsbury's Laws of England, 4th Edition Vol. 16** at **paragraph 1503** where estoppel of record is explained as follows:

> **"Estoppel of record or quasi of record, also known as estoppel *per rem judicatam*, arises (1) where an issue of fact has been judicially determined in a final manner between parties by a tribunal having jurisdiction, concurrent or exclusive, in the matter, and the same issue comes directly in question in subsequent proceedings between the parties (this is sometimes known as cause of action estoppel); (2) where the first determination was by a court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between the parties (this is sometimes known as issue estoppel); (3) in some cases where an issue of fact affecting the status of a person or thing has been necessarily determined in a final manner as a substantive part of a judgment in rem of a tribunal having jurisdiction to determine that status, and the same issue comes directly in question in subsequent civil or criminal proceedings between any parties whatever".**

See **Dyer & Blair Investment Bank Limited vs. John Kungu Kiarie & Another** [2017] eKLR and **Section 44** of the **Evidence Act** on judgments in rem. Even though as a general rule, every judgment is regarded as conclusive evidence for or against all persons of its own existence, date and legal effect, it is by no means conclusive of its accuracy or correctness. According to the above passage taken from **Halsbury's Laws of England**, and **section 44** of the Evidence Act, before the doctrine of estoppel by record can apply, it must be established that the judgment was on the merits of the case, based on the evidence, heard, evaluated and determined conclusively.

Secondly, the proceedings must be between the parties. This position has been fortified by this Court in **Fursys (Kenya) Limited vs. Southern Credit Banking Corporation Limited** [2015] eKLR as follows:-

> **"Clearly, the doctrine of estoppel by record would not operate unless the parties to the litigation or their privies claimed or defended in the same right in the former proceedings as they represent in the later ones."**

Because the judgment in the subordinate court was by default and since the appellant was not a party to

the suit estoppel could not apply.

On the main issue of who is the legitimate owner of the suit property, each one of the two main protagonists must establish, on a balance of probabilities, their claims over the suit property. See **Sections 107 & 108** of the **Evidence Act** on who bears the burden of proving a fact.

Starting with the appellant, because she is the one who sued the 1st respondent, she had the burden of proving that the 2nd respondent sold to Ignatius the suit property in 1978. In support of that contention, the appellant relied on a letter dated 15th February, 1978 addressed to ASHL by H.Z & Co. Ltd. The letter alluded to an agreement concerning L.R No. 1108/263 and read in part as follows:

> **"… It was agreed as follows:-**
>
> > **Based on Kenya Hotels Ltd. letter Ref…, Tysons Report and valuation … and H.Z. & Co. Ltd. letter Ref… it was agreed by us to sell you three houses with the boys quarters (furniture not included) for the amount of …**
>
> **The fourth house as per the attached sketch, had been sold to Mr. I Nderi of P.O Box 30026 Nairobi.**
>
> **According to our agreement M/S Aberdare Safari Hotel Ltd. will transfer the land on which the fourth house is located to Mr. I Nderi for Shs. 1:00 (one only) …"** (Our emphasis).

Although the contents of this letter alone cannot be taken as conclusive evidence that Ignatius purchased the suit property from the 2nd respondent in 1978, the consistent history behind that transaction, taken together with other evidence, leaves us in no doubt that there was a relationship and a clear commitment between the appellant and the 2nd respondent in so far as the transfer of suit property to the former is concerned.

That history shows that in 1985 the suit property, which we reiterate was a subdivision of the original parcel, was leased to the 2nd respondent by a lease registered on 3rd February 1986 for a term of 41 years with effect from 1st April, 1985. It is evident from Part B of the lease that a Certificate of Lease in favour of the 2nd respondent was issued on 4th July, 1986. After the issuance of the Certificate of Lease in 1986, and in view of the understanding between Ignatius and the 2nd respondent, the former asked Mureithi Valuers, a firm of valuers and property developers, to advise him on the market value of the property. In their report dated 8th November, 1991, the Valuers confirmed the size of the suit property as 0.5 acres and the market value at the time to be Kshs. 850,000 (land, Kshs. 300,000 and developments, Kshs. 550,000). It has been explained, and we are persuaded that Ignatius intended to transfer this property directly to his deceased daughter (represented by the appellant). He executed a transfer in January, 1996. His daughter, the deceased too executed the transfer but unfortunately died on 4th July, 2002, before obtaining a Certificate of Lease in her name. The effect of what we have outlined leads us to conclude that, although the process of transfer of the property to the deceased was not complete, the deceased was legitimately in occupation of the suit property. Indeed, she took possession and remained in continuous occupation long before the so-called new year gift to the 1st respondent.

Turning to this gift, which was the foundation of the 1st respondent's suit in the subordinate court, we must reiterate that upto the point that suit was instituted, the suit property was undoubtedly the 2nd respondent's property, registered in its name. It is precisely because the 2nd respondent was the registered proprietor at the time the 1st respondent claimed to have been gifted the property, that the suit in the subordinate court was brought against it.

Indeed, at the time the subordinate court's decree was issued granting the ownership of the suit property to the 1st respondent, and even when the Certificate of Lease was issued in favour of the 1st respondent on

19th August,2003, the registered owner remained the 2nd respondent.

It is equally not in doubt that the 2nd respondent, is a limited liability company. And the question that we must answer now is who Jack Block was in the 2nd respondent and whether he could gift a property belonging to the 2nd respondent. The first question is critical because all we see on record is that the 2nd respondent was a subsidiary of Block Hotels Ltd, another limited liability company. It cannot be assumed that Jack Block was a director of the 2nd respondent and had legal capacity to transfer the property. There must be some evidence to that effect.

But even assuming that he indeed was a director or a promoter of the 2nd respondent, we hold the view consistent with the law that any dealings with the company's property, in the manner alleged by the 1st respondent could only be by the organs of the company and no member, promoter or director of the company could unilaterally gift a company property. It is elementary learning, from the celebrated English decision in **Salomon vs. Salomon** [1897] AC 78, that a company is separate corporate legal entity, and that:-

> **"The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation, the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act".**

There is no evidence after the declaration by Jack Block at a party that he would gift the workers, that he took steps to formalize the offer through the company organs.

Indeed, it is as surprising as it is strange that the alleged offer was made in 1972 but the 1st respondent took no steps to enforce it until 2002, a whole 30 years. We note too that the said Jack Block, notwithstanding the alleged offer, allowed H.Z. Company Limited to construct temporary houses on the suit property from which it collected rent. It is also arguable whether an offer made to a group of individuals, the hotel staff, can be claimed by a company, the 1st respondent, which was not even in existence and without consideration.

The conclusion we have reached in this aspect of the appeal is that the 1st respondent mischievously moved the subordinate court to declare it the owner of the suit property when it knew fully well that the appellant was in occupation. It concealed that fact from the subordinate court and deliberately left her out of those proceedings.

We turn to consider the appellant's own possession of the suit property. It is apparent from the record that the deceased had been in possession of the suit property from 1986, 16 years before she died in 2002 and today 35 years. She dealt with the property as if it was hers. She even had tenants on the property. Her estate continued to be in possession after her death. The 1st respondent went to court on 1st August, 2002. Attempts in 2008 by the 1st respondent to evict the appellant and her tenants were stopped dead on their tracks after being served with the pleadings in the High Court.

The deceased had been in continuous and uninterrupted possession from the year 1986 and her possession was known by both respondents, one of which, the 2nd respondent was the registered owner.

Indeed, from the latter's reaction to the outcome of the subordinate court's case, we further draw the conclusion that it was surprised with those events. Indeed, had it gifted the 1st respondent the property, it would have been satisfied with the judgment. Instead, as we have alluded, it sought to set it aside.

The property was registered under the repealed **Registered Land Act (RLA)**. By **section 27** of the Act -

"(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease".

Section 30 qualified this statement of ownership as follows by recognizing overriding interests;

"30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed". (Emphasis ours).

It is equally significant to say that by **section 32 (2);**

"A title deed or certificate of lease shall be only *prima facie* evidence of the matters shown therein, and the land or lease shall be subject to all entries in the register".

We may only add at this tail end of the judgment that for the entire period the 1st respondent claimed to be entitled to the property it had never been in occupation of it.

For the reason that **Section 26** of Land Registration Act, 2012 was enacted after the dispute had been referred to court, we decline the invitation by the appellant to apply it by holding that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme, a finding we have, nonetheless reached even without resorting to that provision.

Under the repealed **section 143** of the **RLA,** the register would be rectified by way of cancellation or amendment where the court was satisfied that any registration **"has been obtained, made or omitted by fraud or mistake….."** which the proprietor had knowledge of or **"caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default".**

The appellant, in paragraph 16 pleaded that the title held by the 1st respondent was obtained by fraud. She particularised 8 grounds of fraud. **Section 2** of the **Registration of Titles Act (repealed**) defines fraud as follows;

"Fraud" shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration."

As a result of all we have said above, we are satisfied that the appellant established her claim to the suit property to the standard required in a civil case and the learned judge therefore erred in failing to evaluate the evidence presented before her.

Accordingly, we find merit in this appeal and allow it on the aforementioned grounds, set aside the entire judgment dated 7th March, 2016 and substitute it with an order declaring the appellant, on behalf of the deceased's estate, as the legal owner of the suit property.

We order, pursuant to **section 80** of the Land Registration Act, 2012, that the register be rectified by the cancellation of the certificate of lease held by the 1st respondent and direct the registration of the estate of

the late Mary Muthoni Nderi, (deceased), as its lawful owner.

We award costs of this appeal and at the High Court to the appellant to be borne by the 1st respondent.

Dated and delivered at Nairobi this 5th day of March, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR