



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE, J. MOHAMMED & KANTAL, JJA]

CIVIL APPEAL NO. 240 OF 2015

BETWEEN

SUNPALM LIMITED.....APPELLANT

AND

MOHAMED SIAKA ALI

(THROUGH MOHAMED SHAIBU SHOSI-

PERSONAL LEGAL REPRESENTATIVE)1ST RESPONDENT

ISSA TIMAMY T/A TIMAMI & CO. ADVOCATES.....2ND RESPONDENT

STEWART MADZAYO T/A

MADZAYO & CO. ADVOCATES3RD RESPONDENT

CHIEF LAND REGISTRAR4TH RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court at Nairobi (J.M. Mutungi, J) dated 31st July, 2015

IN

ELC CASE NO. 663 of 2005

JUDGMENT OF THE COURT

This is an appeal against the judgment of **Mutungi, J** delivered on **31st July, 2015**.

A brief background to this appeal is that **Mohamed Siaka Ali** (the then plaintiff and now deceased) filed an amended plaint dated **11th March, 2008** and sought orders, *inter alia*, to have the registration of Land Reference Number **Kilifi/Jimba/669** (the suit Land) in favour of Sun Palm Limited (the appellant herein and the then 1st defendant) be declared null and void and that the appellant be ordered to vacate the suit land. **Issa Timamy**, (the 2nd respondent herein and the then 2nd defendant) and **Stewart Madzayo**, (the 3rd respondent herein and the then 3rd defendant) were sued in their capacities as legal counsel.

Then there was the Chief Land Registrar (the 4th respondent herein and the then 4th defendant) who although no claim(s) were made against it, was sued apparently by virtue of the office.

Mohamed Siaka Ali, (the then plaintiff) died on **5th August, 2005** and **Mohamed Shaib Shosi** (the 1st respondent herein) applied to be the deceased's legal representative. On **30th October, 2007**, **Rawal, J** (as she then was) granted the order substituting the deceased with the respondent.

In the amended plaint, the deceased averred that he was the owner of the suit land; that the 2nd and 3rd respondents fraudulently caused the suit land to be transferred to the appellant and that although he intended to sell only five (5) acres of the suit land, a total of 8 acres was illegally transferred.

The 2nd respondent filed a statement of defence dated **13th March, 2007** and denied in toto the averments in the plaint. On **11th October, 2012**, the 2nd respondent filed its list of authorities and copies of documents to be relied on during the trial. We shall refer to these documents later in this judgment. The suit against the 3rd respondent was withdrawn on **20th January, 2014** and that brought the claims against the 3rd respondent to closure. The 4th respondent did not enter appearance and/or file a defence. Upon closure of pleadings, all the remaining parties opted not to call any witness but to rely on the witness statements and the documents filed together with the witness statements.

The learned judge (**Mutungi, J**) considered the witness statements and the supporting documentary evidence and in a judgment rendered on **31st July, 2015**, found in favour of the 1st respondent. He ordered as follows:

(1) That the registration of Land Parcel Kilifi/Jimba/669/ in favour of Sunpalm Limited be and is hereby declared null and void and is ordered to be cancelled forthwith,

(2) That the Chief Land Registrar through the land Registrar, Kilifi be and is hereby ordered to register Mohamed Saibu Shosi the personal legal representative of Mohamed Siaka Ali (deceased) as the owner of land parcel Kilifi/Jimba/669 in place of Sunpalm Limited, the 1st defendant herein,

(3) That the suit against the 2nd defendant is hereby dismissed,

(4) That each party will bear their own costs of the suit”.

The appellant was aggrieved by the said outcome and in a Memorandum of Appeal dated **28th September, 2015**, listed 12 grounds of appeal faulting the trial judge for:

- (i) misapprehension of the chronology of events from the sale to the transfer of the suit land,
- (ii) failure to rely on the witness statements filed by the appellant,
- (iii) relying on documents not produced in evidence,
- (iv) considering only the documents filed by the 1st and 2nd respondents,
- (v) failure to consider all the evidence and documents filed by the appellant,
- (vi) failure to appreciate that the onus of obtaining the Land Control Board consent lay with the 1st respondent
- (vii) erring in not finding that the decision of the Land Control Board is final and cannot be questioned in court,
- (viii) erring in not finding that Presidential exemption was obtained in favour of the appellant,
- (ix) relying on the respondent's submissions on the nationality of the appellant in the absence of any evidence as to the appellant's nationality,
- (x) failure to find that no fraud was proved against the appellant,
- (xi) failure to consider documentary evidence tendered by the appellant and the 1st respondent as relates to the purchase price, and finally,
- (xii) failure to weigh all the evidence in delivering his judgment.

On **22nd July, 2019**, the appeal came up for plenary hearing before us.

Learned counsel for the appellant, **Ms Mureithi** highlighted the appellant's submissions filed on **9th February, 2018**. Counsel contended that the onus to obtain the consent of the Land Control Board lay on the 1st respondent; that the 1st respondent did not prove that the consent of the Land Control Board of **24th October, 1996** was fraudulently obtained; that the Land Control Board Consent and the Presidential Consent having been sought and obtained, were forwarded together with the original title to the 2nd respondent who effected the transfer in favour of the appellant. On the purchase price, it was contended that Ksh 660,000.00 was paid in cash at the time of signing the agreement (**22nd October, 1996**), Kshs 1,240,000.00 was paid vide a cheque in the 1st respondent's name and finally, Kshs 3,100,000.00 was paid by **Eleonora Cozzi**, (a director of the appellant) directly to the 1st respondent. It was also submitted that contrary to the 1st respondent's assertion, the appellant is a Kenyan registered company and one of its directors is a Kenyan. In conclusion, the learned judge was faulted in finding in favour of the 1st respondent in the absence of any witness testimony and/or production of documents.

On behalf of the 1st respondent, learned counsel **Mr. Mugambi** relied on submissions filed on **31st January, 2019** which he highlighted before us. He submitted that whereas the appellant and the 1st respondent attended the Malindi Divisional Land Control Board meeting on **24th October, 1996**, chaired by **Mr. N.O. Hiribaye**, (the then District Officer I), the application for consent to sell the suit land was not considered but was deferred; that the suit land was transferred vide a consent purportedly issued on **24th October, 1996** signed by one **L.K. Kosilbet** as chairman of the Land Control Board; that **L.K. Kosilbet** was not in the meeting of **24th October, 1996**; that the two directors, **Cozzi Corriado** and **Cozzi Eleonaro** (being Italians), should have sought exemption to purchase the suit land from the President of Kenya pursuant to section 9(1)(c) of the Land Control Act; that during a pre-trial conference, the 1st respondent indicated that he was not to call any witness and that he would rely on the witness statements and the supporting documents and no one raised an objection.

On **9th November, 2015**, **Mr. Odera**, learned counsel for the 2nd respondent filed a Notice affirming that part of the decision that dismissed the suit against the 2nd respondent. The 2nd respondent's written submissions and list of authorities were filed on **27th February, 2018**. On behalf of the 2nd respondent, it was submitted that the learned judge was correct in coming to the conclusion that no forgery or negligence was proved against the 2nd respondent. We were also asked to find that neither the appellant nor the respondents tendered any evidence before the trial court and neither were the documents relied on by the learned judge produced in court.

Mr. Eredi for the 4th respondent highlighted the submissions filed on **19th February, 2019** as well as the authorities filed on **22nd July, 2019**. It was his view that the appellant who did not testify was also under an obligation to counter the 1st respondent's allegations made against it; that the Presidential consent for sale/purchase of beach plots was not a requirement under the Land Control Act; that there was no consent of the Land Control Board and finally, that on **23rd March, 2015**, the appellant elected not to call any witness and closed its case, hence neither the appellant nor the respondents availed any witness. Counsel placed reliance on Order 11 Rule 3 of the Civil Procedure Rules which gives a court the power to admit statements without calling the makers and relied on the decision of **David Sironga Ole Tukai vrs Francis Arap Muge & 2 others [2014] eKLR** for the proposition that the consent of the Land Control Board is mandatory, absent which a controlled transaction is null and void.

We have considered the record, the rival submissions, the authorities cited and the law. The appeal before us is a 1st appeal and our mandate is as set out in **Selle vs. Associated Motor Boat Co. of Kenya & others [1968] EA 123** wherein it was stated:

“1) an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955)22 EACA 270”.

Suffice to state that the documents filed by the 2nd respondent before the trial court included the sale agreement dated **22nd October, 1996** (which indicated the purchase price as Kshs 5 million out of which Kshs 600,000/= was paid as a deposit), a letter of consent dated **24th October 1996** signed by **L.K. Kosilbet** the then District Commissioner, Kilifi and chairman of Malindi Land Control Board (the consideration indicated thereon being Kshs 2 million); the Transfer of Land form dated **22nd October, 1996** (indicating that the consideration was Kshs 3 million). Then there was a letter dated **29th October, 1996**, written by the 2nd respondent to the 3rd respondent. It stated:

“S.18/1/II/ZA 29th October, 1996

Mr. S.M.Madzayo

Advocate

Ambalal House

Po Box 88709

MOMBASA.

Dear Sir

RE: KILIFI/JIMBA/669

Further to our letter of 28th October, 1996, we write to confirm that we presented the transfer at Kilifi. It then transpired that the above plot is on the beach front and thus we require presidential consent to the Transfer.

It is not in dispute that on **24th October, 1996**, both the appellant and the 1st respondent attended a meeting of the local Land Control Board. The application in respect of the suit land was listed as No. 8 and the minutes of the meeting reflect that the issue of consent in respect of the suit land was “deferred”.

Further, it is also not in dispute that the meeting of **24th October, 1996** was chaired by **Mr. Hiribaye** and not **Mr. Kosilbet** contrary to the purported letter of consent.

As the minutes of the meeting of **24th October, 1996** indicate that the application seeking the consent of transfer of the suit land was “deferred”, clearly, therefore, there was no consent of the Land Control Board issued on **24th October, 1996**.

Secondly, we note that in the application made by the 2nd respondent on behalf of the appellant seeking presidential consent for the purchase of a beach plot, (the suit land being a beach plot), it was indicated thereon that the two directors of the appellant were Italians. If this be the case, then Section 9 (1) (c) of the Land Control Act required presidential exemption. It states:

“In deciding whether to grant or refuse consent in respect of a controlled transaction, a Land Control Board shall-

(c) refuse consent in any case in which the land or share is to be disposed by way of sale, transfer, lease exchange or partition to a person who is not-

(i) A citizen of Kenya, or

(ii) A private company or co-operative society all of whose members are citizens of Kenya”.

From what we have stated above, the directors of the appellant were Italians and not Kenyans. The subsequent presidential consent for the purchase of a beach plot is not what is envisaged under S. 9 (1) (c) of the Land Control Act.

Indeed, as stated by the learned judge, the then requirement of a presidential consent for purchase/sale of a beach plot is distinct from the requirements of S.9 (1) (c) of the Land Control Act forbidding purchase of land by foreigners. Accordingly, we are in agreement with the learned judge in his conclusion that:

“It is thus my holding and finding that no valid consent of the land control board was obtained from the Malindi Land Control Board under the provisions of the Land Control Act, Cap 302, Laws of Kenya and that owing to the fact that the 1st defendant was a foreign owned private company the Malindi Land Control Board could not give any consent under the Act to the transaction”.

It is in view of this that we find that in the absence of the consent of the Land Control Board for the sale/purchase of the suit land and in the absence of a waiver of the provisions of S. 9 (I) (c) of the Land Control Act, the transaction of sale/purchase between the appellant and the 1st respondent was null and void.

As regards the appellant’s contention that the learned judge erred as he placed reliance on documents not tendered in evidence as no witness was called, again, the learned judge analyzed the provisions of the Civil Procedure Rules that provide for the filing of witness statements and supporting documents at the time of filing a plaint. Indeed, in the instant matter, a pre-trial conference was conducted and none of the parties objected to the production of the documents relied upon by either of the parties. It is equally true that none of the parties wanted to tender oral evidence and the learned trial judge cannot therefore be faulted in placing reliance on the tendered documents.

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed with costs to the 1st, 2nd and 4th respondents.

It is so ordered.

Dated and Delivered at Nairobi this 7th Day of February, 2020.

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR