



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KARANJA, OKWENGU & SICHALE JJ.A]

CIVIL APPEAL NO. 61 OF 2017

BETWEEN

ZAKAYO MATHEKA MUTISYA

SUBSTITUTED FOR DAVID MUTISYA

MUMO(Deceased).....APPELLANT

AND

ESTHER MBAIKA.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Machakos (Angote J.A) dated 27th January, 2017 in **The Environment and Land Court ELC Cause No. 47 of 2013**)

JUDGMENT OF THE COURT

This is an appeal against the judgment and decree of the High Court of Kenya at Machakos (**Angote J.**), dated and delivered on **27th January, 2017**, where the learned Judge found in favour of the respondent herein and dismissed the appellant's case which sought a declaration that parcel of land known as Mavoko

Township/Block 2/112 and Township/Block 2/8 are his properties.

The original appellant, **David Mutisya Mumo** (now deceased but substituted by his son **Zakayo Matheka Mutisya**) filed a claim in the Environment and Land Court vide an amended Plaintiff dated **18th February, 1999** against his daughter-in-law, **Esther Mbaika**, the respondent herein. The dispute revolved around 70 acres of land known as **Mavoko Township/Block 2/112 and Mavoko Township/Block 2/8 (the suit properties)**. According to the appellant, in 1986, Mitaboni Katani Company Limited carried out a plot allotment exercise by ballot.

Being a shareholder, **David Mutisya** (the deceased) requested the respondent to represent him in the process, where he was entitled to be allotted 70 acres of land and be issued with title deeds for 50 acres and 20 acres. According to the appellant, the respondent had deceitfully managed to have the titles registered in her name.

In response to this claim, the respondent filed her defence dated **17th March, 1995** denying the allegations levelled against her.

At the trial, the appellant (PW1) produced his father's share certificate and a bundle of receipts showing the payments made by the deceased to purchase the suit properties. He also relied on the testimony of **Joseph Mutua Muinde** (PW2), the chairman of the company who testified that the deceased was a member of the company whilst the respondent was not a member.

On her part, the respondent contended that her husband, **Joston Muli Mutisya** who disappeared in Uganda during the Amin-Obote war, had sent money to her father-in-law to buy shares on their behalf. In addition, she took a loan of Kshs. 6,000.00 and gave her father in law to pay for the suit properties.

She consequently went to ballot but when she went to collect the titles she was informed that they had been withheld due to a dispute. She then filed **Nairobi HCCC No. 6660 of 1992, Esther Mbaika vs Mitamboni Katani Company Limited**, where the issue of ownership was

determined in her favour albeit in the absence of the appellant who was not a party to the suit. Consequently, she obtained titles of the two plots which were registered in her name. As far as she was concerned, the suit giving rise to this appeal was *res judicata*.

Upon weighing the evidence before it, the Court observed as follows:

“18. ...PW1 stated that the Defendant went and misrepresented herself and got registered as the owner of the suit lands. That testimony by PW1 is hearsay. PW1 agreed that he never witnessed the same.

19. PW2 never produced an authenticated register of the Mitaboni Katani Co. Ltd. PW2 only produced a cash book which never proved anything in support of the Plaintiff’s case.

20. The evidence on record did not prove the Plaintiff’s claim on a balance of probabilities. The defence on the other hand proved through credible evidence that the deceased bought shares for the Defendant’s husband. The Defendant was then registered as the owner of the land. She was entitled to be so registered. She had given the deceased Plaintiff Kshs. 6,000/= for the shares.

21. The deceased Plaintiff failed to enjoin Nairobi HCCC. 6660/1994 nor challenge the decrees which gave the Defendant the titles to the suit land. He did not even sue Mitaboni Katani Co. Ltd which transferred the suit lands to the Defendant.

22. The two decrees in Nairobi HCCC. No. 6660 of 1992 are still undisturbed...

23. The upshot is that there was no proof of fraud or misrepresentation or mistake in the registration of the Defendant as the owner of the suit land.

24. Finally, as far as the decrees in HCCC.6660/1992 are undisturbed, the same vindicate the Defendant’s right to the suit land as the registered owner. The end result is that the Plaintiff’s suit is dismissed with costs.”

It is this decision that gave rise to the appeal before us wherein the appellant in a Memorandum of Appeal dated **2nd March, 2017** raised 8 grounds of appeal which can be summarized as follows; that the learned Judge erred by:

- i. basing his decision on the doctrine of *res judicata* on the strength of HCCC No. 6660 of 1992.
- ii. holding that the respondent was the shareholder of Mitaboni Katani Company Limited and finding that the respondent gave Kshs. 6,000 for shares; which was unsupported by credible evidence.
- iii. failing to appreciate that the purpose of a company members’ register is to keep record of the names, addresses and shares held by shareholders and the type of book where they are recorded doesn’t vitiate the purpose.
- iv. holding that PW1’s testimony was hearsay whilst it included documents like receipts for shares and share certificates.

On **11th November, 2019**, the appeal came up before us for plenary hearing when **Mr. Ngolya**, learned counsel for the respondent appeared and there was no representation on behalf of the appellant although the hearing date had been taken by consent. However, given that the appellant’s counsel, **F.M Mulwa Advocate** had filed his written submissions on **8th May, 2019** while the respondent’s counsel, **L.N Ngolya & Co. Advocates** filed their written submissions on **15th May, 2019**, this court is now called upon to determine the appeal based on those submissions, (**Mr. Ngolya**) opted to wholly rely on the respondent’s written submissions). The appellant submitted that the titles in question were derived from the membership and shareholding of Mitaboni Katani Company Limited and that he had provided evidence of the deceased’s share certificates and receipts of payment while the respondent had not. It was therefore clear that the respondent had never been a shareholder and hence was not entitled to the suit properties.

On the issue of *res judicata*, the appellant relied on the cases of **Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 others [1996] eKLR** and **Nicholas Njeru vs Attorney General & 8 Others [2013] eKLR** which outline the scope of the doctrine of *res judicata*, that is, the matter must be “directly and substantially” in issue in the two suits, the parties must be the same or parties under whom any of them claim, litigating under the same title and the matter must have been finally decided in the previous suit. It was contended that none of the parties in Nairobi HCCC No 6660 of 1992 were claiming under the same title through which the appellant would claim and that no evidence was tendered to suggest that the appellant was aware of the case.

Opposing the appeal, the respondent submitted that the decrees emanating from Nairobi HCCC No. 6660 of 1992 established that she is the legal owner of the suit properties; that no appeal was preferred in respect of the outcome in Nairobi HCCC No. 6660 of 1992; that the question of ownership of the suit properties could not be re-litigated. Agreeing with the trial court’s decision, the respondent also pointed out that the evidence adduced by the appellant failed to prove fraud as against her.

We have considered the record, the written oral submissions, the authorities cited and the law.

The appeal before us is a first 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:

“ 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”.

In our view, the facts of this appeal are fairly straight forward. The original plaintiff filed suit against the respondent and alleged deceit and /or fraud against her. However, as rightly pointed out by the trial judge, the appellant failed to prove deceit and /or fraud on the part of the respondent.

However, be that as it may, of fundamental concern is the fact that the respondent filed Nairobi **HCCC No. 6660 of 1992** against the company. In that suit, the court found that the respondent was the rightful owner of the suit properties, comprising of a total of 70 acres. It is noteworthy to point out that the judgment in that suit remains undisturbed. The learned judge observed that:

“The deceased plaintiff failed to enjoin Nairobi HCC 6660 of 1994(sic) nor challenge the decrees which gave the defendant the titles to the suit land. He did not even sue Mitaboni Katani Co. Ltd which transferred the suit lands to the defendant”.

In view of the unchallenged outcome in Nairobi **HCCC No. 6660 of 1992**, it is our considered position that no amount of litigation outside that suit will avail the appellant. There is no way that the outcome of this appeal (even if the appellant was to be successful) would impact on the outcome of HCCC No. 6660 of 1992, which decreed that the respondent is the lawful owner of the suit properties.

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed. However, given the close relationship between the parties, we make no order as to costs.

Dated and Delivered at Nairobi this 6th Day of March, 2020.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR