IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & SICHALE, JJ.A)

CIVIL APPEAL NO. 62 OF 2018

BETWEEN

MOHAMED SHEIKH ABUBAKAR .....APPELLANT

AND

ZAKARIUS M. MBAYA.....RESPONDENT

(An appeal from the judgment of the Environment and Land Court of Kenya

at Mombasa (Omollo, J.) dated 18th July, 2017

in

E.L.C Civil Appeal No. 6 of 2016)

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JUDGMENT OF THE COURT

1. The dispute culminating in this appeal revolves around the parties competing interests over L.R No. 5054/1463 (suit property). Both the appellant and respondent claim that they are entitled to the suit property. The appellant's claim stems from the fact that on 8th November, 1996 he was allotted an unsurveyed industrial plot situated in Kilifi. Thereafter, on 25th February, 1998 he discovered that the respondent had trespassed onto the said plot and commenced construction therein without any colour of right. Subsequent notices to the respondent to stop the construction and vacate the suit property fell on deaf ears.

2. The foregoing state of affairs provoked the appellant to file suit against the respondent in the Chief Magistrate's Court at Mombasa being Civil Suit 1432 of 1998 seeking *inter alia*:

> ***i. An injunction restraining the defendant (the respondent herein), his servants and/or agents from trespassing, remaining, entering, constructing or in any other manner howsoever from interfering with the plaintiff's ownership of the suit property.***
>
> ***ii. Vacant possession.***
>
> ***iii. General damages for trespass***.

3. In his defence, the respondent averred that he had purchased the plot from Jackson Nzaro on 8th September, 1996 at a consideration of Kshs.10,000. He took vacant possession of the plot and only learnt of the appellant's claim when he was about to complete the construction.

4. Be that as it may, the appellant was able to obtain an interlocutory injunction restraining the respondent from continuing with the construction or trespassing on the plot. The appellant also went ahead to lodge a complaint at the then Ministry of Lands and Settlement. Pursuant to the said complaint, the Commissioner of lands in consultation with other key government agencies directed the subdivision of the plot in two portions; registration of the portion wherein the respondent's house stood in his favour and registration of the other portion in favour of the appellant. This turn of events did not please the appellant who believed he was entitled to the entire plot.

5. Subsequently, during the pendency of the suit the appellant obtained a title under the ***Registration of Titles Act, Cap 281 (repealed)*** over the plot (suit property)

6. After hearing and weighing the evidence tendered by the parties, the trial magistrate, Honourable Mushelle, in a judgment dated 6th December, 2001 found that at the time the suit was filed on 27th March, 1998 none of the parties had title over the suit property. In the circumstances, it would be unfair to allow the appellant's suit and as a result, he adopted the Commissioner of Lands decision to the extent that he ordered:

> ***a) The defendant be allotted the portion on which his house stands.***
>
> ***b) The plaintiff be allotted the remaining portion.***
>
> ***c) The defendant be reinstated into the house forthwith***.

7. As would be expected, the appellant was aggrieved and he filed an appeal in the High Court raising several grounds in his memorandum of appeal. Of concern, is that he challenged the trial court's jurisdiction to entertain the suit in his written submissions. The long and short of his argument was that since the suit property had been brought under the provisions of the ***Registration of Titles Act*** the magistrate's court was divested of any authority to entertain the suit. Towards that end, the High Court (Omollo, J.) in a judgment dated 18th July, 2017 dismissed the appeal with costs. In doing so, she expressed:

> ***"The trial magistrate observed this in his judgement when he analysed the evidence of both sides that as at 1996, none of the parties had title. As at 1998 when the construction the subject of this dispute began still no one had title to the suit property. The trial Court therefore reached the right conclusion based on the evidence presented to him especially Dex 2 & 3. In light of these letters, it would have been unfair to enter judgement in favour of the plaintiff/appellant. The result of dismissing the appellant's suit is that there was nothing stopping the defendant from taking possession of his portion of the plot. The magistrate merely stated the resulting position with the dismissal of the suit therefore there is nothing wrong in ordering the defendant being restored to possession. The only mistake he did was to direct for sub-division of the property.***

This order on subdivision did not however change the findings that the Respondent was entitled to the portion he was occupying. I have analysed the evidence presented by both sides and I also come to the same conclusion that the Respondent is entitled to his portion of the land he occupies being a purchaser for value without notice therefore a prayer for vacant possession or trespass could not issue. Accordingly I find no merit in this appeal and hereby dismiss it with costs to the Respondent."

8. It is that decision that provoked the appeal before us which is anchored on four grounds all of which fault the learned Judge for finding that the trial court had jurisdiction to entertain the suit.

9. In his opening remarks, Mr. Munyithya, learned counsel for the appellant, submitted that the appeal turned on two issues namely, jurisdiction and the appellant's right to title.

10. Counsel posited that jurisdiction is a fundamental question of law and whenever a court is devoid of the same all it can do is to put down its tools. In his view, the High Court erred in failing to find that the trial court lacked jurisdiction to hear and determine the suit. This is because as far as he was concerned, at the time the suit was filed the suit property had been brought under the operation of the then ***Registration of Titles Act.*** As such, only the High Court was clothed with the jurisdiction to deal with the dispute.

11. He went on to argue that contrary to the learned Judge's assumption, the appellant had raised the issue of jurisdiction as a ground of appeal in his memorandum of appeal. Besides, even if the appellant had failed to do so, jurisdiction was a point of law capable of being raised at any stage of the proceedings. Counsel argued that in as much as the learned Judge agreed that the trial court made a mistake in directing the sub division of the suit property she still misapprehended the fact that the trial court could not find as it did, that the respondent was entitled to the suit property.

12. It was counsel's contention that the learned Judge erred in disregarding the appellant's title to the suit property and in the application of the doctrine of *lis pendens*. He believed that judgment should have been in his client's favour for the reason that the title over the suit property was in the appellant's name. The learned Judge was also faulted for invoking the doctrine of *lis pendens* which had not been raised by the respondent.

13. Mr. Asige, learned counsel for the respondent, intimated that the appellant's grievance was centered on the fact that the trial court did not allow his suit and not that it lacked jurisdiction. Otherwise, the appellant would not have filed the suit in the magistrate's court to begin with. It followed therefore that the appellant was forum shopping for a court it hoped would determine the suit in his favour. Counsel claimed that the issue of jurisdiction had not been raised in the trial court but the same was strangely raised in the High Court through written submissions. In the alternative, Mr. Asige submitted that the High Court had dealt with the issue of jurisdiction exhaustively. The cause of action was based on trespass and not ownership of the suit property placing the suit within the confines of the trial court's mandate.

14. In conclusion, Mr. Asige postulated that the appeal before us was an abuse of the court process in light of the multiple suits instituted at the instance of the appellant with respect to the suit property. He urged us to dismiss the appeal with costs.

15. We have considered the record, submissions made on behalf of the parties and the law. The significance of jurisdiction was spelt out in the often cited case of ***Motor Vessel M.V. Lillian S vs. Caltex Oil (Kenya) Limited*** **1989 KLR 1**. In a nutshell, jurisdiction is paramount in any matter which is before a court because it is what clothes a court with the power to entertain and render a decision in a dispute before it. Without it a court would be acting in vain.

16. Ideally, an objection touching on jurisdiction should be raised at the earliest opportunity. Nevertheless, an objection on jurisdiction can be raised at any stage of proceedings even at the appellate stage because of the pivotal role that jurisdiction plays. This much was appreciated

by this Court in ***Adero & Another vs. Ulinzi Sacco Society Limited*** **[2002] 1 KLR 577**, when it aptly summarized the law on jurisdiction as follows:

> "***1. …***
>
> ***2. The jurisdiction either exists or does not ab initio …***
>
> ***3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.***
>
> ***4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal."***

17. In this case the appellant's challenge was premised on the ground that the trial court had no jurisdiction to entertain the suit based on the title issued under the ***Registration of Titles Act***. Like the two courts below, we find that when the appellant filed the suit on 27th March, 1998 the suit property had not been surveyed let alone registered under any registration regime that existed then. This placed the matter squarely within the magistrate's court jurisdiction. What is more, the cause of action was based on trespass and the appellant sought vacant possession as well as injunctive orders which were within the trial court's mandate.

18. The suit property's status changed when the appellant obtained title during the pendency of the suit. Did this take away the trial court's jurisdiction? We do not think so. Our position, like the High Court, is fortified by the doctrine of *lis pendens* which is based on the legal maxim '***ut lite pendente nihil innovetur'***. It simply means that during litigation nothing new should be introduced. See the Supreme Court of India decision in **KN Aswathnarayana Setty (D) Tr. LRs. & Others vs. State of Karnataka & Others [2013] INSC 1069.**

19. The essence of said doctrine is that it prohibits a party to a suit from transferring or as in this case, altering the status of the suit premises, while the suit is pending. See this Court's decision in ***Maithene Malindi Enterprises Limited vs. Kaniki Karisa Kaniki & 2 others*** **[2018]** eKLR.

20. All along the appellant was aware of the respondent's claim over the suit property before he went ahead to obtain the title during the pendency of the suit. As such, he could not use the title to defeat the respondent's claim and/or steal a match from him. Accordingly, we concur with the learned Judge's sentiments that:

> "***The appellant was made aware of the Respondent's interest before he obtained his title. He cannot therefore claim a better title merely because he has obtained a certificate of title which he did during the pendency of this suit. This went against the doctrine of lis pendens and doctrines of equity. In the case of Maivji vs US International University & Another (1976) KLR 185, Madan JA stated thus:-***
>
> "***The doctrine of lis pendens under section 52 of the TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the Court. The doctrine of lis pendens is necessary for final adjudication of the matters before the Court and in the general interests of public policy and good effective administration of justice. It therefore overrides section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to property in dispute so as to prejudice the other…"***
>
> ***The doctrine though not stated by the parties was called into play by the virtue of evidence adduced when the appellant obtained the title pending hearing & determination of the dispute."***

Consequently, we find that the learned Judge did not err in dismissing the appellant's appeal.

21. Last but not least, we cannot fault the learned Judge for holding that the respondent was entitled to be restored to possession of his portion of the suit property. In doing so, the learned Judge simply reinstated the status quo as it existed prior to the appellant's suit which was equally dismissed.

22. In the end, we find that the appeal lacks merit and is hereby dismissed with costs.

Dated and delivered at Mombasa this 14th day of February, 2019.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR