



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KIAGE, J.J.A)

CIVIL APPEAL NO. 82 OF 2018

BETWEEN

KENYA BROADCASTING CORPORATION.....APPELLANT

AND

HOUSING FINANCE

COMPANY OF KENYA LIMITED.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

KENSKO AGRO-PRODUCTS LIMITED.....3RD RESPONDENT

(An appeal from the Judgment of the Environment and Land Court at Mombasa

(Omollo, J.) dated 14th February, 2018 in E.L.C Suit No. 282 of 2013.)

JUDGMENT OF THE COURT

1. At the heart of this appeal is whether the appellant had established its case against the 1st respondent and if so, whether the learned Judge (**Omollo, J.**) erred in entering the judgment dated 14th February, 2018 in the manner she did. Essentially, what we are being called upon to do is to reconsider whether the evidence tendered by the appellant as a whole warranted the suit being determined in its favour as opposed to the 1st respondent.

2. The general rule of law is that whoever desires a court to enter judgment with respect to any legal right or liability on the basis of facts which he/she asserts to exist is required to prove those facts. In other words, as per the well-known aphorism, *'he who asserts must prove.'* See **Sections 107 & 108** of the *Evidence Act* and **Jennifer Nyambura Kamau vs. Humphrey Mbaka Nandi [2013] eKLR.**

3. The centrality of evidence in any case cannot be gainsaid and was succinctly appreciated by this Court in **Nation Media Group vs. Jakayo Midiwo [2018] eKLR** as follows:

“On the other hand, evidence is the cornerstone of any trial. Cases are won or lost on evidence presented and the applicable laws. That is why a whole statute was enacted, the Evidence Act, to provide for both the standard and burden of proof in a trial.”

Did the appellant's evidence meet the requisite threshold of establishing its case? The answer to this question lies with the facts and evidence before the trial court.

4. Basically, the dispute between the appellant and 1st respondent is centred on the proprietorship of parcels known as Mombasa/Block XXI/580, Mombasa/Block XXI/581 and Mombasa/Block XXI/582 (suit parcels). Each of them lays claim to the suit parcels to the exclusion of the other. According to the 1st respondent, it purchased the suit parcels from the 3rd respondent at a consideration of Kshs.44,000,000 as evidenced in the sale agreement dated 22nd February, 1995. Thereafter, it took possession of the suit parcels which were vacant and has since been meeting all statutory outgoings with respect to the parcels as and when they are due. Eventually, the suit parcels were transferred and

registered in the 1st respondent's name on 15th March, 1995 and the respective certificate of titles issued to that effect.

5. Subsequently, in the year 2005 the 1st respondent entered into an agreement with one Aukland Agencies leasing out the suit parcels for a period of 5 years and 1 month at a monthly rent of Kshs.25,000. Pursuant to the said agreement, Aukland Agencies moved into the suit parcels and commenced development thereon. Before the developments could be completed, the District Commissioner of the said area stopped the same and evicted Aukland Agencies. Immediately thereafter, the appellant trespassed into the suit parcels and erected a perimeter wall.

6. Perturbed by the turn events, the 1st respondent carried out a search and found that the titles to the suit parcels were still registered in its favour. Vindicated by the said finding the 1st respondent vide a demand letter dated 11th January, 2006 written under the hand of its advocate, asked the appellant to desist from trespassing and to demolish the perimeter wall which had been erected upon the suit parcels. It seems that the letter did not elicit any reaction from the appellant who remained put.

7. As such, the 1st respondent filed a suit in the High Court which was later transferred to the Environment and Land Court (ELC) as E.L.C No. 282 of 2013. The 1st respondent's cause of action was based on trespass and towards that end, it also sued the 2nd and 3rd respondents. The 2nd respondent was sued in his capacity as the legal adviser to the government while the 3rd respondent was enjoined in his own personal capacity. By its amended plaint, the 1st respondent sought as against the appellant:

(a) A declaration that the plaintiff (1st respondent herein) is entitled to exclusive and unimpeded right of possession and occupation of the suit property.

(b) A declaration that the 1st defendant (the appellant herein), whether by themselves or their servants agents or otherwise howsoever, are wrongfully in occupation of the suit property and are accordingly trespassers on same.

(c) A declaration that the 1st defendant whether by themselves or their servants or agents or otherwise howsoever are not entitled to remain on the suit property.

(d) A permanent injunction restraining the defendants, whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the suit property.

(e) A mandatory injunction requiring the 1st defendant to demolish the wall erected on the suit property.

(f) Vacant possession of the suit property.

(g) Loss of mesne profits.

(h) General damages for trespass.

8. In the alternative, the 1st respondent sought the following order against the 3rd respondent:

i. an order directing the 3rd party (3rd respondent herein) to refund to the plaintiff Kshs.44,000,000 being the purchase price of the suit property with interest thereon from 22nd February, 1995 at the current market value.

9. In its defence, the appellant denied the allegations made by the 1st respondent. It questioned the validity and/or legality of the 1st respondent's title over the suit parcels. The appellant challenged the propriety of the titles on the grounds that firstly, the suit parcels had been set aside in the year 1988 by the government for the benefit and use of its predecessor, Voice of Kenya. Its predecessor took possession of the suit parcels in the same year and made several developments including installation of underground cables. At the time, there was no requirement for titles over the parcels to be issued in favour of its predecessor because the parcels were held by the government. Be that as it may, on 1st February, 1989 the suit parcels were vested in the appellant by virtue of **Section 54(1)** of the **Kenya Broadcasting Corporation Act**.

10. It followed therefore that the suit parcels were not available for allocation to the 3rd respondent who allegedly transferred the same to the 1st respondent. Accordingly, the 1st respondent's title was fraudulently obtained. Additionally, the appellant's efforts to obtain title to the suit parcels were frustrated by government officials at the behest of the 1st and 3rd respondents. Secondly, that the appellant had already been in peaceful and uninterrupted occupation of the suit parcels for a period of over 12 years by the time it learnt of the 1st respondent's claim in the year 2006. Hence, the 1st respondent's title had been extinguished.

11. Apart from asking the trial court to dismiss the 1st respondent's suit the appellant by a counter-claim sought:

(a) A declaration that the suit properties, L.R Nos. Mombasa/Block XXI/580, Mombasa/Block XXI/581 and Mombasa/Block XXI/582 belong to the 1st defendant.

(b) An order that the plaintiff be deregistered as the owner of the suit properties but instead the 1st defendant be registered as the owner of the owner thereof.

(c) An order of permanent injunction restraining the plaintiff whether by themselves, their servants and/or agents from trespassing, alienating, fencing or otherwise dealing with the suit properties.

12. As for the 2nd respondent, he supported the appellant while the 3rd respondent took the 1st respondent's side. In his defence, the 3rd respondent maintained that he had obtained the title over the suit parcels within the confines of the law and had transferred the same to the 1st respondent.

13. On its part, the 1st respondent called two witnesses namely, Martin Machira (PW1), the then appellant's legal manager and Maina Chege (PW2), a registered valuer, in support of its case. On the other hand, only Charles Ndeto, the then appellant's administration manager testified on behalf of the appellant. It is noteworthy that save for filing their respective responses to the 1st respondent's suit and the appellant's counter-claim the 2nd and 3rd respondents did not testify at the trial.

14. At the conclusion of the trial, the learned Judge by a judgment dated 14th February, 2018 allowed the 1st respondent's suit and struck out the appellant's counter-claim. She expressed herself thus:

“In the absence of such evidence and in line with the provisions of section 24 & 25 of the Land Registration Act, the registration of the 3rd party remains conclusive proof that he was the owner of the suit parcels and therefore had a good title.

...

Has the plaintiff suffered damage or loss? Having found that the 3rd party's title was good and ownership having been passed to the plaintiff, the plaintiff was entitled to use and occupation of the suit parcels of land. By the 1st defendant denying their tenant occupation, they have indeed suffered loss as they were denied opportunity to get rental income from the lease from the date of their agreement which they pleaded in paragraph 9 of the plaint as from October 2005. The loss is therefore proved and is to be calculated from October 2005 up to the time vacant possession is handed over at a monthly rent of Kshs25,000 per month.

In conclusion, I am satisfied that the plaintiff's case is proved on the standards required under the law. Accordingly I enter judgement in its favour as prayed in prayers (a) – (d) of the plaint. I also find the 1st defendant has not proved its counter-claim which I hereby dismiss. The costs of the suit is awarded to the plaintiff.”

15. It is that decision that has provoked the appeal before us which is anchored on a total of 14 grounds all of which revolve around three issues namely, that the learned Judge erred by-

I. Finding that the appellant had not proved that the suit parcels had been allocated and/or reserved for its benefit prior to the 3rd respondent's allocation.

II. Finding that the appellant had not established the allegation of fraud in the registration of the suit parcels in favour of the 1st respondent.

III. Holding that the 3rd respondent held a good title over the suit parcels and passed the same to the 1st respondent.

16. At the plenary, Ms. Nyabonge, appeared for the appellant while Ms. Mango appeared for the 1st respondent. There was no appearance for the 2nd and 3rd respondents despite the hearing date having been taken by consent. Once again, like in the trial court, the battle was between the appellant and the 1st respondent. Their respective counsel relied entirely on the written submissions on record and opted not to make any oral highlights.

17. The appellant took issue with what it believed was a misapprehension by the learned Judge of its evidence with regard to its proprietorship of the suit parcels. Expounding on that argument, it was reiterated that the suit parcels were reserved for the appellant's predecessor and later vested in the appellant. In the appellant's opinion, the said reservation was evidenced by letters dated 29th December, 1988 and 30th December, 1994 from the provincial physical planning officer. The letters in question conveyed the Commissioner of Lands approval of the Physical Development Plan (PDP) for the proposed development and utilisation of the suit parcels in favour of the appellant.

18. The explanation given as to why the appellant did not hold title, was to the effect that at the time the suit parcels were reserved for the benefit of its predecessor they had not been surveyed; it was only after the survey of the suit parcels that an allotment letter could be issued in favour of the appellant; and it was for that reason that the appellant endeavoured to follow up on the survey but its efforts were thwarted by government officials who were acting at the behest of the 1st and 3rd respondents. In any event, neither has the allocation of the suit parcels to the appellant been revoked nor has the approved PDP over the suit parcels been cancelled. As far as the appellant was concerned, the foregoing evidence was sufficient to prove that the suit parcels had been allocated to it.

19. The appellant asserted that the suit parcels having been set aside for its benefit were not available for reallocation to the 3rd respondent. As a result, the allocation and registration of titles over the suit properties in favour of the 3rd respondent was illegal and unlawful. By extension the subsequent transfer of titles to the 1st respondent did not give rise to a good and/or an indefeasible title because the 3rd respondent could not give what he did not have.

20. It was the appellant's contention that it had tendered ample evidence to demonstrate that the transfer of the suit parcels was marred with

fraud and irregularities. In particular, the green cards of the suit parcels which were opened on 14th March, 1995 reflect the government as the lessor and the 3rd respondent as the 1st registered lessee; the transfer in favour of the 1st respondent was lodged on 15th March, 1995, a day after the green cards were opened and about a month after the sale agreement between the 1st and 3rd respondents was allegedly executed. To the appellant, the above not only raised questions over the genuineness of entries therein but also contradicted the 3rd respondent's evidence that he had been registered as a lessee on 1st May, 1994.

21. Moreover, the valuer who apparently carried out the valuation of the suit parcels prior to the sale agreement being executed testified that, at the time he did so and issued his report on 21st February, 1995, the registration of the suit parcels was yet to be done. Despite the foregoing inconsistencies as to the root of the 3rd respondent's title he did not tender evidence to clarify the same. On top of that, the suit parcels were adversely mentioned in the **Report of the Commission of Inquiry into the illegal/irregular Allocation of Public Land** (the Ndung'u Report), as having been illegally allocated to the 1st respondent. It was postulated that the 1st respondent could not claim to be an innocent purchaser who was unaware of the illegality set out in the said report which was a public document. To buttress that proposition, this Court's decision in **Kenya National Highway Authority vs. Shalien Masood Mughal & 5 Others** [2017] eKLR was cited.

22. Last but not least, while making reference to this Court's decision in **Sarah Jelangat Siele vs. Attorney General & 3 others** [2018] eKLR, the appellant argued that the 1st respondent's title which was fraudulently obtained was subject to only one fate that is, cancellation. The defence of indefeasibility of title was not available to the 1st respondent in light of the fraud. Any loss suffered by the 1st respondent could only be remedied by an award of damages as against the 3rd respondent.

23. Opposing the appeal, the 1st respondent submitted that the appellant did not tender any evidence in the form of an allotment letter or a reservation letter for that matter, from the Commissioner of Lands to support its allegation that the suit parcels were allocated to it. The PDP relied on by the appellant remained at its best a proposal for the utilization of the land it referred to since there was no evidence that the same was gazetted. Moreover, the appellant's witness initially testified that the appellant's claim was for a portion described as Part B in the PDP. The portion as reflected in the PDP measured 0.27 Hectares while the titles issued in favour of the 1st respondent indicate the measurement of the suit parcels as 0.0414 Hectares. It was rather curious that the said witness (Charles) during cross examination changed his stand by stating that the appellant was claiming the portion registered in favour of the 1st respondent.

24. Relying on **Section 107 & 108** of the **Evidence Act** as well as the case of **Kuria Kiarie & 2 others vs. Sammy Magera** [2018] eKLR it was the 1st respondent's contention that the appellant had not established that its title had been obtained through fraud. It was not enough to allege fraud the appellant was required to establish the same to the required standard of proof. All in all, the 1st respondent's evidence that it had obtained the title in accordance with the law was not displaced. For all intents and purposes, the 1st respondent was an innocent purchaser for value without notice as discussed in the case of **Weston Gitonga & 10 others vs. Peter Rugu Gikanga & Another** [2017] eKLR.

25. In respect of the Ndung'u report, the 1st respondent was steadfast that the property adversely mentioned therein was not connected to the suit parcels. It was emphasized that the evidence on record clearly depicted that the 3rd respondent had good title over the suit parcels capable of being transferred to the 1st respondent. Accordingly, the 1st respondent's title was indefeasible.

26. We have considered the record, submissions by counsel as against the law. As this is a first appeal, we have, in line with **Rule 29(1)** of the **Court of Appeal Rules**, reappraised the evidence on record in order to arrive at our own conclusions. In doing so, we have given deference to the findings of fact by the trial court for the reason that unlike the trial court, we did not see or hear the witnesses. Nevertheless, we are also cognisant that we are empowered to interfere with those findings if they are based on no evidence, or the learned Judge is shown demonstrably to have acted on wrong principles in reaching the findings she did. See **Selle vs. Associated Motor Boat Company** [1968] E.A 123.

27. It is discernible from the foregoing that the appellant's defence to the 1st respondent's suit as well the basis of his counter-claim was that the suit parcels were allocated to it thus, they were not available for re-allocation to the 3rd respondent. The appellant also imputed fraud against the 1st and 3rd respondents as far as the issuance of the titles thereon was concerned. Did the appellant prove these assertions?

28. To begin with the documentation the appellant relied on to substantiate that the suit parcels were allocated to it prior to the registration of the titles in favour of the 3rd respondent fell short of establishing that fact. Why do we say so? Save from establishing that a PDP had been approved for proposed developments in favour of the appellant over a plot situated in Mombasa Island, none of them mentioned or identified or at the very least, linked the suit parcels as being the parcels subject of the PDP or having been allocated to the appellant. To mention but a few; the letter dated 29th December, 1988 authored by the provincial physical planning officer read in part:

“P.D.P No. CT/12/11/88/1- MOMBASA ISLAND Proposed sites for (a) existing Voice of Kenya Offices (b) proposed extension to V.O.K c) Existing Mombasa Institute Sports Club (d) Existing Arvan Sports Club (e) Existing Coast Gymkhana Sports Ground ... Please find enclosed herewith a print copy of the above mentioned plan duly approved by the Commissioner of Lands for your records....”

Another letter dated 17th January, 1989 from the Provincial Commissioner also did not remedy the situation as it stated:

“RE: PLOT DEVELOPMENT

This is to inform you that the Commissioner of Lands has approved the proposed site for the:

(a) Existing Voice of Kenya offices.

(b) Proposed expansion to V.O.K

(c) Proposed extension to Extelcoms staff houses vide approved development plan No. 198 of 6th May, 1988...”

29. In point of fact, the appellant did admit that the land it alleges to have been allocated was unsurveyed at the time it was initially reserved for its predecessor and still remained as such even when ownership thereof vested in it. As it were, the land in question was not identifiable. This was confirmed by the provincial physical planning officer, who it appears in response to queries from the Permanent Secretary of the then Ministry of Information and Broadcasting, in a letter dated 30th December, 1994 expressed:

“Re: PDP NO CT/12/11/88/1- MOMBASA ISLAND

...

This is to inform you that as far as this office is concerned the above mentioned Part Development Plan was prepared and was accorded a final approval by the Commissioner of Lands on 6th May, 1988. However, on matters related to the documentation of the land it is only the Commissioner of Lands office Nairobi which can reply to your queries.” [Emphasis ours]

30. No other evidence was tendered by the appellant to show if indeed the Commissioner of Lands clarified the issue. Furthermore, the appellant’s witness, Charles, in his examination in chief testified that the parcel allocated to the appellant was identified as Portion B in the PDP which was produced at the trial. Likewise, there is nothing to back his evidence that portion B was allocated to the appellant or its predecessor. Nonetheless, we cannot help but note that Charles was not sure of the measurement of the said Portion B or whether the suit parcels emanated from the said portion. It is also not evident from the PDP that the suit parcels originated from the said portion.

31. In addition, it was Maina’s (the valuer) uncontroverted evidence that at the time he was engaged to carry out valuation of the suit parcels in the year 2005, Plot No. 577 Mombasa Island had been subdivided on the ground into five parcels, three of which are the suit parcels. Taking into account the foregoing, we find that more evidence was required to connect the unsurveyed land subject of the PDP and the suit parcels.

32. Did the PDP relate to the suit parcels or the entire original Plot or part of it, and if so, which part? Was the section identified as portion B in the PDP one and the same as the suit parcels? Perhaps, these questions could have been clarified by the Commissioner of Lands. Otherwise, the evidence as it stood raised more questions than answers and certainly could not be the basis of finding that the suit parcels were allocated to the appellant.

33. It is trite that allegations of fraud must not only be pleaded but must also be strictly proved on a higher standard of proof than that of a balance of probability. It was held as much in *Kinyanjui Kamau vs George Kamau [2015] eKLR*:

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo (2008) 1 KLR (G & F) 742* wherein the Court stated that:

‘...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...’

34. The appellant imputed fraud, firstly, in the manner that the 3rd respondent obtained titles over the suit parcels on account of entries made in the respective green cards. We understood the appellant’s argument to be that it was rather suspicious that the 3rd respondent claimed to have been allocated the suit parcels from 1st May, 1994 prior to the registration of the suit parcels.

35. In our view, we are unable to see any impropriety as alluded by the appellant in the green card entries. As per, the valuer in the year 2005, when he was carrying out the valuation of the suit parcels, the suit parcels had been subdivided on the ground and were awaiting registration. He went as far as giving evidence that the said parcels were identifiable and indicated as much in the valuation report which is on record. This piece of evidence, in our minds, verified that the suit parcels existed on the ground before their formal registration on 14th March, 1995. Besides, the green cards are crystal clear that the 3rd respondent was allocated the suit parcels as the 1st lessee for a term of 99 years from 1st May, 1994 which corroborated his position.

36. Secondly, the appellant based its allegation of fraud against the 1st and 3rd respondents on the supposedly adverse mention of the suit parcels in the Ndung’u report. Once again, the appellant did not prove the allegation because the parcel referred to in the report was described as Mombasa L.R 522/XX1 FR 126/85 and there is nothing to connect it with the suit parcels.

37. In the end, we like the learned Judge, find that fraud was not established with respect to the registration of the titles in favour of the 3rd respondent. It followed therefore, that he held a good title which he passed on to the 1st respondent, who we similarly find was not guilty of any fraud as pertains to the titles it holds.

38. Consequently, we find that the learned Judge appreciated the evidence before her and came to the right conclusion: that the appellant had

not established its claim. Therefore, having failed to do so the 1st respondent's title over the suit parcels was indefeasible as delineated under **Section 26 (1)** of the **Land Registration Act**.

39. This means that the 1st respondent's claim that the appellant had trespassed on the suit parcels was proved on a balance of probability. Equally, we find that the 1st respondent had demonstrated that it has suffered loss of rental income it would have derived from Auckland Agencies at the rate of Kshs.25,000 per month through the lease agreement on record. Hence, we see no reason to interfere with the assessment and award of *mesne* profits granted by the learned Judge.

40. The upshot of the foregoing is that we find that the appeal lacks merit and it is hereby dismissed with costs.

Dated and delivered at Mombasa this 7th day of March, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR