



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 216 OF 2018

BETWEEN

ZARA PROPERTIES LIMITED (CPR/2010/24490).....APPELLANT

AND

ZARA PROPERTIES LIMITED (C.106174).....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at

Nairobi (F. Tuiyott, J.) delivered on 8th June, 2017 in H.C.C.C. No. 700 of 2010)

JUDGMENT OF THE COURT

1. This appeal revolves around an unusual incident of double registration of a Company, Zara Properties Limited. By a plaint dated 19th October, 2010 the 1st respondent, which was formerly known as **Prompt Fire Protection Limited**, stated that on 14th October, 2009 it wrote to the Registrar of Companies (the Registrar) requesting for reservation of the name Zara Properties Limited; that the name was confirmed as available on 2nd December, 2009; that all the requisite documents including a Special Resolution of the change of name were submitted but the Registrar did not issue the certificate confirming the change of name.

2. The 1st respondent further pleaded that on 5th June, 2010 the Registrar incorporated another company the appellant, by the name Zara Properties Limited and issued it with a certificate of incorporation number CPR/2010/24490; whereas the 1st respondent had been issued with a certificate of change of name dated 2nd December, 2009.

3. In the circumstances, the 1st respondent sought a mandatory injunction to compel the Registrar (the 2nd respondent) to direct the appellant to change its name from Zara Properties Limited; the 1st respondent also sought a permanent injunction to restrain the appellant from using the said name.

4. The appellant opposed the suit. It stated that its incorporation was legal as the due process for its registration was followed. The 2nd respondent denied that there was any violation of the law in the incorporation of the appellant.

In particular, the 2nd respondent stated that during the trial he would demand and require the following:

“(a) Proof of strict procedural laws undertaken pursuant to the issuance of the certificate confirming the plaintiff’s change of name;

(b) Expert witness proof of the authenticity of the documents tendered in evidence in court;

(c) The reflection of the same in the data maintained in the Companies Registry; and

(d) The establishment of the good root of a title document in proof of the actual registration and ownership of the disputed company, if at all.”

5. At the case management conference, parties agreed that the sole issue for determination by the trial court was: **“who between Zara Properties Limited (C.106174) and Zara Properties Limited (CPR/2010/24490) is the properly and legally registered entity?”** The parties also agreed that an officer from the Registrar of Companies would testify for and produce the relevant documents pertaining to incorporation of the two companies. In that regard, **James Musee Nduna**, (PW1) a Senior Deputy Registrar of Companies testified.

6. The witness testified that the original name of the 1st respondent was Prompt Fire Protection Limited but it changed its name to Zara Properties Limited on 2nd December, 2009 when a certificate of change of name was issued; that the appellant was registered on 5th June, 2010; and that the registration of the appellant was inadvertent as the Registrar had not detected the existence of another company that bore the same name.

7. In cross examination by **Mr. Gachie**, the appellant’s learned counsel, PW1 told the Court that the original file for Prompt Fire Protection Limited could not be traced; that the reservation for the change of name could not be traced; that apart from the certificate of change of name he also did not have any written evidence that the Registrar had approved the request for change of the 1st respondent’s name; that the 1st respondent’s advocates, Njenga Mbugwa & Nyanjua, had written to the Registrar on 23rd August, 2010 complaining that the 1st respondent had not been issued with a certificate of change of name; that however the certificate of change of name had been issued on 2nd December, 2009, the very day the resolution for change of name was presented and paid for, although the receipts for the payments made could not be traced.

8. Upon cross examination by **Mr. Nyamodi**, the 1st respondent’s learned counsel, PW1 stated that a letter dated 14th October, 2009 addressed to the Registrar by M/S Njenga Mbugwa & Nyanjua Advocates requesting confirmation of availability of the name Zara Properties Limited which was not sufficient to enable the Registrar issue a certificate of change of name.

9. The trial court permitted the appellant’s counsel to put further questions to PW1 to clarify an issue that had arisen in his cross examination by Mr. Nyamodi. The issue was to do with the appropriate format for the Registrar’s letter of acknowledgement of reservation of proposed names for incorporation of companies. The witness told the court that by a letter dated 19th May, 2010 the Registrar, at the request of the appellant, had reserved some three names that had been presented to his office by the appellant, being Zhara Properties, Zara Properties and Zahira Properties.

The Registrar had even cited the receipt numbers for the payments made for each name. The letter was signed by the Assistant Registrar and a **Mr. Frank Kinya**. PW1 said that the same format of letter would equally have been required for Prompt Fire Protection Limited to change its name to Zara Properties Limited.

10. The appellant called one witness, **Inspector Gilbert Gitonga**, who produced a letter dated 29th July, 2016 from the Director of Criminal Investigations to the appellant’s advocates. The letter was done pursuant to court ordered investigation to establish the owner of Zara Properties Limited. The letter read as follows:

“RE: INQUIRY FILE NO. 28/2016

Refer to your letter dated 23rd June 2016, on the above captioned matters.

This case originated from a Civil Case No. 700 of 2010 where the plaintiff was Zara Property Limited formerly Prompt Fire and the Attorney General was the 1st defendant and Zara Properties as the 2nd defendant.

The Plaintiff in this case was asking the court to issue a temporary injunction to 2nd respondent from using the name of Zara Properties Limited until the hearing of suit and dealing with in any way with the applicant property known as LR No. 209/12261 is concluded.

In this case the court ordered investigation to establish who are the registered owners of Zara Properties Limited. We wrote a letter to the Registrar of Companies on 18th April, 2016 and on 22nd April, 2016. We received a reply from the Registrar of General indicated that Zara Properties has three directors named below:-

1. Frank Kinya Kioni

2. Musa Kipsang Mibei

3. James Kipleting Ruto

We proceeded to record statement of the Directors and the surveyor who was initially mandated to survey and prepare a deed plan to the Commissioner of Land to prepare the title but instead he went on to Hon. George Oner MP for Rangwe Constituency who was a surveyor before he became an MP.

The second defendant was not able to pay the stamp duty of Ksh.4.8 million Hon. George Oner approached Mr. Deepak Kamani who paid the stamp duty and proceeded to prepare the title deed disregarding the earlier owner of Zara Properties. An officer will come to produce our report in court on 11th October, 2016.

(Signed)

JOHN KARIUKI (HSC)

FOR: DIRECTOR OF CRIMINAL INVESTIGATIONS.”

11. Counsel filed their respective submissions and the learned judge (Tuiyott, J.) proceeded to render his decision on 8th June, 2017. In his judgment, the learned judge observed, *inter alia*, that the 2nd respondent had departed from its statement of defence and aligned himself with the 1st respondent; that the appellant had in its submissions impeached the certificate of change of name issued to the 1st respondent on grounds that it was wrongfully and fraudulently issued, yet fraud had not been specifically pleaded and distinctly proved.

12. The learned judge found that the two companies were incorporated in accordance with the law and that the two certificates were conclusive that all requirements of the Companies Act (now repealed) were met. However, the court went on to cite **Section 20(2)** of the repealed Act which stated:

“(2)(a) If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name is registered by a name which, in the opinion of the registrar, is too like the name by which a company in existence is previously registered, the first-mentioned company may change its name with the sanction of the registrar and, if he so directs within six months of its being registered by that name, shall change it within a period of six weeks from the date of the direction or such longer period as the registrar may think fit to allow.

(b) If a company makes default in complying with a direction under this subsection, the company and every officer of the company who is in default shall be liable to a fine not exceeding one hundred shillings for every day during which the default continues”.

13. The learned judge then held as follows:

“43. The Certificate of Change of Name in favour of the plaintiff is dated 2nd December 2009 while the Certificate of Incorporation issued to the 2nd Defendant is dated 5th June, 2010. In salutation to the provisions of Section 20(2) of the Act, the first in time prevails and the plaintiff’s claim must naturally succeed.”

Consequently, the learned Judge made the following orders:

“50.1 The 2nd Defendant’s name is hereby declared as undesirable.

50.2 The Registrar (or his/her Successor in Title) shall within 14 days hereof issue the Notice under Section 20(2) of The Act to the 2nd Defendant to Change its Name from Zara Properties Limited.

50.3 At the lapse of the Notice issued under Order 50.2 above the 2nd Defendant shall be restrained by way of Permanent Injunction from using the name Zara Properties Limited.

50.4 Each of the Parties shall bear their own costs.”

14. Being aggrieved by that decision, the appellant preferred an appeal to this Court. The memorandum of appeal raises four grounds of appeal which are:

“1. THAT the Honourable Learned Judge erred and misdirected himself in law and in fact and got it completely wrong when he failed to make a proper finding on the issue raised by the Applicant despite well elaborating the proper process leading to registration of a company in half of his ruling, but ended up not addressing his mind at all on the evidence as tendered showing that the name was stolen by the 1st Respondent in an attempt to grab land belonging to the Applicant being Land Reference Number 209/12261, and which by stroke of the pen, the good Judge handed the 1st Respondent a lifeline to grab the land.

2. THAT the Honourable Learned Judge erred and misdirected himself in law and in fact when he wrongly, ignored to take into account the Defence filed by the 2nd Respondent and which was averse with the evidence given by the 2nd Respondent, and who by their Defence had challenged the registration of the name by the 1st Respondent but ended up supporting the same at trial, against a cardinal principle of law that a party is bound by its Pleadings and cannot depart. The learned judge approved the depth.

3. THAT the Honourable Learned Judge further erred and misdirected himself entirely in both law and fact when he stated that “the court will therefore accept that the two certificates are conclusive evidence that all requirements of the Act in respect to registration and of matters precedent and incidental thereto were complied with” when acts of fraud pleaded that it was yet to be issued with Certificate.

4. THAT the Honourable land Judge erred in law and misdirected himself both in law and in fact when he failed to consider and answer the only issue listed for determination as agreed by the parties and therefore he answered extraneous matters for which

no party had sought for determination.”

15. This being the first appellate Court, we have revisited the evidence as recorded. We shall now proceed to evaluate the evidence and draw our own conclusions, but bearing in mind that we neither saw nor heard the witnesses and should therefore make due allowance in that respect. See

SELLE v ASSOCIATED MOTOR BOAT COMPANY LIMITED [1968] E.A. 123.

16. All the parties filed submissions that were briefly highlighted by their respective learned counsel. **Mr. Gachie Mwanza** appeared for the appellant; **Ms. B. Ndong** for the 1st respondent; and **Mr. Motari Matunda** for the 2nd respondent.

17. From the record of appeal it is evident that at the centre of the dispute between the appellant and the 1st respondent is a prime property known as **L.R. No. 209/12261** situate along Mombasa Road. It appears that the plaint was contemporaneously filed with an application dated 19th October, 2010 seeking an interlocutory injunction intended to preserve the said property pending hearing and determination of the suit. When the 1st respondent's advocate appeared ex parte before Apondi, J. on 21st October, 2010, he told the Court that officers from the Criminal Investigations Department had been to the 1st respondent's premises looking for some documents and his clients were apprehensive that the appellant would get hold of the title of the aforesaid property.

18. Although the Court certified the application urgent, it declined to grant ex parte orders, and the Court remarked:

“..... the circumstances of this case do not add up at all. The Court does not understand why the Registrar of Companies registered two companies using the same names. Shortly, afterwards, the police are pursuing the title deed to the above quoted parcel of land. There seems to be a missing link somewhere”.

19. In the impugned judgment, the learned judge also made reference to the “missing link” when stated:

“44. But I will add as follows. As earlier pointed out, the 2nd Defendant had in its submissions connected this dispute to the ownership of Land Reference Number 209/12261 which is now registered in the name of Zara Properties Limited. Indeed in a Decision made on 17th February 2011 in answer to an interlocutory application herein, Mugo, J. had observed,

“I am quite convinced that the matters herein hinge upon the acquisition of by Zara Properties Limited, whoever that party may be, of the parcel of Land evidenced by the Grant NO. L.R 123523 currently held by the Applicants”.

And in his submissions the attorney General alluded to ongoing litigation (ELC Case No. 183 of 2011) in respect to that Land.

45. The Law is often a genius and the 2nd Defendant need not be anxious in respect to any rights or legal proceedings it may have over the aforesaid property or any other assets or rights because Sections 20(4) offers the following protection or insulation:-

“(4) A change of name by a company under this section shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name”.

20. In its written submissions before us, the appellant stated that the registration of the two names was not by default, mistake or error; but was by design calculated to “grab” the land which is registered in the name of Zara Properties Limited, whose title was registered on 9th June, 2010. That was as per Mugo, J. who heard the interlocutory application. The judge then directed the Directorate of Criminal Investigations to investigate the matter. That is the basis of the letter dated 29th July, 2016 that was produced by PW2. We have already reproduced the contents of the said letter at paragraph 10 above.

21. The appellant faulted the learned judge for disregarding the evidence of PW2. In our view, the learned judge, being aware that there was a pending suit over ownership of the said parcel of land before the Environment and Land Court, Case No. 183 of 2011, acted wisely in restraining himself from making any firm findings about the contents of the said letter. We shall, likewise, not go into the merits of PW2's evidence as that may be prejudicial to the parties in the land dispute or embarrass the Court that is hearing the matter. Nothing therefore turns on the first ground of appeal.

22. Turning to the second and third grounds of appeal, it is trite law that parties are bound by their pleadings. In **DAKIANGA DISTRIBUTORS (K) LTD v KENYA SEED COMPANY LIMITED [2015] eKLR**, this Court held that:

“.....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded”.

23. In his defence, the 2nd respondent had denied all the 1st respondent's allegations in the plaint, including the 1st respondent's averment at paragraph 8 of the plaint that the 2nd respondent had lawfully issued it with a certificate of change of name dated 2nd December, 2009. The 2nd respondent demanded of the 1st respondent, *inter alia*, strict proof that it had procedurally procured the certificate of change of name.

24. However, during the trial, the 2nd respondent change of tune and substantially supported the 1st respondent's case, even in the absence of crucial documents that would have been vital to authenticate the certificate of change of name. There was no sufficient evidence that the 1st respondent had procedurally sought reservation of the name Zara Properties as the letter dated 14th October, 2009 from Njenga Mbugua & Nyanjua Advocates seeking reservation of the aforesaid name could not be traced at the Companies Registry and PW1 also said that there was no receipt in the file to show that payment had been made for reservation of the name. If there had been a proper reservation of the said name by the 1st respondent there would have been a letter to that effect from the Registrar, as was the case with respect to the appellant's letter dated 19th May, 2010 seeking reservation of the said name.

25. The sum total of the evidence tendered by the 2nd respondent through PW1 was that the 1st respondent's certificate of change of name was issued without the requisite documents. That notwithstanding, the position that was taken by the 2nd respondent during the trial, and which was accepted by the trial court, as long as the two companies had each been given a certificate of incorporation (or of change of name), that was conclusive evidence that they had been properly incorporated. The respondents sought to rely on the provisions of **Section 17(1)** of the repealed **Companies Act** which states:

“17.(1) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under this Act”.

26. However, there was clear and uncontroverted evidence that as at 23rd August, 2010 the 1st respondent had not obtained a certificate of change of name. On the aforesaid date, the 1st respondent's advocates, Njenga Mbugua & Nyanjua, served a statutory notice upon the 2nd respondent threatening to commence legal proceedings unless they were issued with the certificate. In the statutory notice, the 1st respondent's advocates stated, *inter alia*:

“Our client has subsequently established that a company by the name ZARA PROPERTIES LIMITED was purportedly incorporated on 5th June, 2010 while our client's issuance of a certificate of change of name was pending”.

27. The evidence on record shows that on 2nd December, 2009 the 1st respondent submitted a special resolution for change of name and it was instantly approved and a certificate of change of name issued on the same day. If that was indeed so, the 1st respondent did not explain why it was complaining of non-issue of the certificate on 23rd August, 2010 in the letter that was addressed by his advocates to the Registrar. The Registrar did not respond to that letter. When the 1st respondent's advocates issued the statutory notice to the Attorney General, the latter wrote to the Registrar seeking instructions on the issue. However, from the tone of the correspondence between the two offices and the nature of the defence that was filed by the 2nd respondent, it was clear that the Registrar was not aware of any certificate of change of name that had been issued to the 1st respondent. Indeed PW1 confirmed that if the certificate had been in the file there would have been no reason not to release it.

28. All the above issues raise serious concerns about the manner in which the 1st respondent obtained the certificate of change of name, as compared to the well documented process through which the appellant was incorporated. The evidence tendered by the 1st and 2nd respondents had many gaps that were not explained.

29. This now leads us to the last ground of appeal. From the evidence on record, the trial court was to determine a single issue, who between the appellant and the 1st respondent was the properly and legally registered entity. In our view, preponderance of evidence demonstrates that the appellant was the properly and legally registered entity. The name was appropriately approved and reserved for registration on 19th May 2010, Memorandum and Articles of Association lodged and paid for and a certificate of incorporation issued on 5th June, 2010.

30. In view of that finding, we hereby allow the appeal, set aside the High Court judgment and decree dated 8th June, 2017; and substitute therefor a finding that Zara Properties Limited (CPR/2010/24490) is the properly and legally registered entity as opposed to Zara Properties Limited (C.106174)).

The respondent shall bear the appellant's costs of the appeal.

Dated and Delivered at Nairobi this 5th Day of April, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR