



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 58 OF 2018

BETWEEN

ROBIN ANGUS PAUL.....1ST APPELLANT

KINGFISHER BOAT LIMITED.....2ND APPELLANT

ESTATE OF HERBERT JAMES ANDREW PAUL.....3RD APPELLANT

AND

MIRIAM HEMED KALE.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Malindi (Angote .J.) delivered on 22nd July, 2016

in

Land Case No. 137 of 2011

Consolidated with

High Court Succession Cause No. 11 of 2010)

JUDGMENT OF THE COURT

1. In a suit filed before the Environment and Land Court at Malindi (the trial court), the respondent sued the appellants by way of Originating Summons dated 30th August, 2011, seeking the following reliefs:-

(a) A declaration that the deceased, Hemed Kale Hemed was adjudicated as the lawful owner of land Titles No. Ngomeni/Squatter Settlement Scheme/577 and Kale Shabwana Mjahid, adjudicated as the owner of Ngomeni/Squatter Settlement Scheme 576, though the two plots belong to the deceased Hemed Kale Hemed.

(b) That the Honorable court be pleased to issue order for cancellation of the Registration of Land Titles Ngomeni/Squatter Settlement Scheme/576 and 577 in the name of the 4th and the 5th Defendants/Respondents herein and order fresh registration of the said Titles Ngomeni/Squatter Settlement Scheme/576 and 577 in the name of the Plaintiff/Applicant herein as the Administratrix of the Estate of HEMED KALE HEMED.

(c) THAT the Honourable court be pleased to order the District Land Registrar Kilifi to register the Plaintiff/Applicant MARIAM HEMED KALE the Administratrix of the Estate of HEMED KALE HEMED as the rightful and/or lawful owner of land Title NGOMENI/SQUATTER SETTLEMENT SCHEME/576 and 577 in place of REUBEN ANGUS PAUL and HERBERT JAMES ANDREW PAUL.

(d) Costs of this suit be borne by the Defendants/Respondents.

2. The respondent moved the trial court in her capacity as the administratrix of the Estate of the late Hemed Kale Hemed

(deceased) who died on 7th April, 2006; she alleged that the deceased was the lawful owner of parcel of land number Ngomeni Squatter Settlement Scheme/576 and 577 (suit land) and that it was the deceased who was in occupation of the said parcels of land before he died; that however, due to some fraudulent dealings, the land had been subsequently registered in favour of the appellants to the detriment of the estate.

3. As would be expected, the appellants denied the claims and asserted legitimate interest in the land; they stated that they had purchased the same from the deceased and that it was duly registered in their names. In a judgment delivered on 22nd July, 2016, the learned trial Judge (**Angote, J.**) found the sale agreements relied on by the defendants questionable; as no consideration for the land appears to have been paid. Consequently, the court declared the Title Deeds held by the appellants in respect of the suit land invalid, null and void.

4. Dissatisfied with that decision, the appellants mounted this appeal, in which they assert *inter alia* that the learned trial Judge erred by;

- *Finding for the respondent who never adduced any evidence to prove her claim on a balance of probabilities.*
- *Relying on extraneous matters which were never pleaded or adduced in evidence by the respondent, to draw an erroneous conclusion, with far reaching effects to the rights of the appellants as the registered proprietors of the suit land.*
- *Concluding that the sale agreement entered into on 26th May, 1999 was null and void without any reasonable grounds for such a finding.*
- *Ignoring the respondent's openly false testimony in court yet justifying her unfounded claim later in the Judgment.*
- *Finding that both parcels of land Nos. Ngomeni S/S/S 576 and 577 were the property of the respondent's late father and that the respondent were to surrender them to the appellants; yet failing to realize that PW 3's only duty was to surrender 576 to the appellants as and when directed by the deceased.*

- *Failure to realize that the two 'agreements' dated 19th August, 2005 were in reality acknowledgements and handing over documents by the deceased with a non-committing amendment to the nominal roll to reflect the changes.*
- *Taking issue with the registration of the property in the appellants' names on the ground that the sale agreement had not been between the deceased and the appellants while erroneously concluding that in the absence of a resolution to that effect, such registration was invalid.*
- *Concluding that the purchase price for land parcel No. Ngomeni S/S/S/577 could not have been paid, notwithstanding documented acknowledgment by the deceased who signed an informal transfer before the same advocate who witnessed the sale agreement.*
- *Failure to realize that the acknowledgment vouchers signed by the deceased were in respect of the second property, namely Ngomeni S/S/S 576 which still had an outstanding balance of Kshs.175,000.00 by the time of his demise.*
- *Concluding that the additional payment of Kshs. 1.050,000.00 negotiated by Dilmore was made to make up for unpaid purchase price; a conclusion based more on conjecture than evidence.*
- *Concluding that the alleged fraud by the appellants had been proved when no evidence was led in this regard.*
- *Finding that the appellants were fraudulently registered as the proprietors and ordering their ejection from the land; which finding was unsupported by the evidence on record.*

- *Failing to deliver a ruling in the appellants' concluded application for revocation of grant.*
- *Ignoring the lies peddled in court by the respondent's witnesses.*

5. Urging the appeal was learned counsel **Mr. Omagwa** for the appellants, who submitted that the respondent had filed suit seeking to have her late father declared the legitimate owner of the suit land and for the cancellation of the appellants' title deed which had been issued in respect of the suit land. As per the respondent, there was no sale agreement executed in respect of the land in favour of the appellants and their acquisition of the title thereto was thus fraudulent. However, contrary to these assertions, counsel submitted, the appellants had duly executed valid sale agreements in 1999 with the deceased; which agreements, they duly produced in evidence before court. Following the deceased's demise, the respondent approached the appellants who gave her a sum of Kshs.1,050,000 as further consideration for the land. Nonetheless, she and her brothers continued demanding more money to the tune of Kshs.150,000,000. She later obtained a grant of letters of administration; upon which the appellants lodged a complaint with court as the land in question was already registered in their names.

6. Counsel submitted that the respondent had failed to prove her case and that the learned trial Judge relied on extraneous matters to reach a decision. Citing the case of **IEBC & Another vs. Stephen Mutinda Mule & 4 others, Civil Appeal No. 219 of 2013**; Mr. Omagwa submitted that a decision based on extraneous matters cannot hold and ought to be set aside. Further, that fraud is a serious allegation that must be proved to a standard beyond balance of probability. In this regard, counsel relied on the authority in the case of **Ardhi Highway Developers Limited vs. West End Butchery Limited and 6 others (2015) eKLR** and stated that the onus is always upon the person who alleges fraud to prove it. Having failed to do so in this case, the respondent was disentitled to the orders granted by the learned trial Judge. Counsel also submitted that given the respondent's receipt of the monies paid to her by the appellants, the respondent ought to have been held accountable and made to take responsibility for her actions. Counsel contended that in this case, the respondent was allowed to

renege on her word and that this was a case emotively decided by the learned Judge out of sympathy. He added that the respondent had harassed the trial Judge; which harassment swayed the court's findings over the matter. Counsel concluded by stating that courts should not be swayed by extraneous matters and should instead endeavour to treat all parties equally.

7. On her part, the respondent acted in person in this appeal and her brief submissions in opposition to the appeal were confined to the propriety of the appeal. She submitted that there was no valid appeal before court, as both the memorandum and the record of appeal were lodged out of time and without leave of court. In particular, she pointed out that the time for the lodging of an appeal had lapsed on 22nd August, 2016 and that the appellants had not demonstrated whether any leave was granted to allow the lodging of the appeal out of time. She states in her written submissions that the Notice of Appeal was filed on 2nd July, 2018, two years out of time. Consequently, she urged the striking out of the appeal with costs.

8. This being a first appeal, this Court is enjoined to re-analyse and re-evaluate the evidence afresh and arrive at its own conclusions and findings. However, prior to embarking on that duty, the court must first address itself on the issue of whether there is a valid appeal before it. Under **Rule 75** of this Court's rules, it is provided *inter alia* that:

“1. Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

(Emphasis added)

The impugned ruling in this case was delivered on 22nd July, 2016. By application of Rule 75 (2) aforesaid, this meant that the appellants had until 2nd August, 2016 to institute an appeal by lodging the relevant Notice of Appeal. Contrary to the respondent's submission, from the record of appeal before us, the appeal herein was instituted vide the notice of appeal lodged in court on 28th July, 2016 which was within time and in compliance with Rule 75(*supra*). This appeal is therefore properly before the Court and deserving of a merit determination.

9. As stated earlier, on first appeal this Court is enjoined to re-evaluate, re-assess and re-analyse the entire evidence adduced before the trial court and then determine whether the conclusions reached by the learned Judge are to stand or not and give reasons either way. See the case of **Kenya Ports Authority vs. Kustron (Kenya) Limited (2009) 2EA 212** wherein this court held, *inter alia*, that:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

With this in mind, we embark on giving a brief background of the dispute herein in order to place this appeal in perspective.

10. We wish from the outset to acknowledge that the submission by the appellant's counsel that the respondent who appears in person, has always tried to invoke sympathy from the courts by bringing in extraneous matters in an attempt to manipulate the court to view her as the disadvantaged victim of the judicial process, is not misplaced given her conduct on the few occasions when she has appeared before us. However, we would like to assure both parties that this appeal will be determined strictly in accordance to the facts before the Court, as contained in the record of appeal, and the applicable law. In addition to **being blind, justice is also deaf and impervious to any emotional theatrics that may be played before the court. She sees no difference in the parties concerned and she has but one scale and weight, for the rich and the poor, great and small.**

11. The respondent is the daughter of the late Hemed Kale Hemed and the administratrix of his Estate. He died in the year 2006. For reasons that will become apparent in the course of this judgment, we shall not delve too deep into the evidence presented to the court below.

12. At the heart of this dispute is the ownership of the two parcels of land mentioned earlier. It is common ground that Title No. Ngomeni/Squatter Settlement Scheme 577 was adjudicated to the deceased during adjudication. On the other hand plot No. 576 was adjudicated to one Kale Shebwana Mjahid. Evidence was adduced before the trial court that plot No. 576 was to revert to the deceased upon payment of Kshs.34,000/= to the said Kale Shebwana. The respondent's father died before the said refund but according to the respondent, the same was paid and so the plot reverted to their late father. It was the respondent's case that by the time their father died in 2006, Title Deeds to the two properties had not been issued. That was the reason she included those properties in Succession Cause No. 11 of 2010. The Grant of Letters of Administration issued to the respondent was confirmed on 3rd March, 2010 and a certificate issued to that effect.

13. From the record however, we observe that, there is a sale agreement dated 26th May, 1999 whereby the respondent's late father is said to have sold the plots in question to the 1st appellant's late father. We have also seen on record Title Deeds in respect of both properties showing that they were both transferred to the 1st appellant on 27th July, 2007 and Title Deeds issued to him. There is various correspondences on record relating to the period between 1999, when the sale agreement for the first property was entered into, and July 2007 when the Title Deeds for the two parcels were issued. As stated earlier, we are treading carefully not to make any determinations on the veracity or probative weight of the said documents.

14. What is not in doubt however is that by the time the respondent filed Succession Cause No. 11 of 2010, the properties in question were already registered in the names of the 1st appellant and one Herbert James Andrew Paul (deceased). They were clearly not registered in the names of the respondent's father. Did they form part of the deceased's free estate?

15. It would appear that the appellants wanted the above question answered by the court and that is the reason why the 1st appellant filed an application under **Section 76** of the **Law of Succession Act** to have the said Grant revoked. Among the grounds raised in support of the application was that the two properties were not available for distribution as part of the deceased's estate. That application is dated 17th August, 2011 but court stamped 23rd August, 2012. Given however, that Mr.

Omagwa Angima who filed the same on behalf respondent came on record for the appellants on 17th August, 2012 the date on the application could be erroneous.

16. Be that as it may, armed with the Certificate of Grant, the respondent moved to the court and filed Civil Case No. 137 of 2011 (O/S). Seeking the orders we have outlined earlier. It was that originating summons that the learned Judge (**Meoli, J.**) directed should be heard along with the application for revocation of Grant. The learned Judge (**Angota, J.**) heard the two as per Meoli, J.'s directions and rendered the impugned judgment. In the judgment, the learned Judge declared the Title Deeds for the two properties which had been issued in the names of the appellants herein invalid, null and void; and directed that the titles should revert to the respondent for distribution to the estate of her late father.

17. As submitted by Mr. Omagwa, and rightly so in our view, the learned Judge failed to address the issues raised in the succession matter and determine the pertinent issue of whether the land in question formed part of the deceased's estate. Unfortunately, that was a pertinent issue which the court should have addressed before making orders that the properties revert to the respondent. We hold that the application for revocation raised pertinent points of law that invited the court to make a determination on and which were left hanging.

18. There were also issues of the monies paid to the children of Kale Shebwana, to complete the sale transaction of the Plot No. 576 to the deceased. The court found the said children had no capacity to receive the money or complete the transaction, yet the court seems to have upheld the transaction thus awarding the property to the respondent. They could not have lacked capacity to receive the money, but on the other had have capacity to complete the transaction.

19. We have considered the entire record as we are enjoined to do; submissions by both sides and the law. There were too many issues left hanging in this matter. We cannot also fail to note that there have been many complaints filed against several persons who have dealt with the matter at different stages to different law enforcement organs. There have also been criminal proceedings arising from this matter. There are serious allegations of fraud, and unconscionable conduct that are apparent from the proceedings. The law is clear on the duty imposed by law on persons making allegations of fraud against other parties. The incidents of alleged fraud must be particularised and specifically proved to a standard beyond reasonable doubt. We are unpersuaded that such burden of proof could have been discharged through the originating summons before the court, more so because particulars of fraud were not pleaded.

20. In our view, in order to give the parties herein opportunity to fully canvass all the issues arising from the parcels of land in question, and for the just determination of the rights of all the parties herein (who are all equal in the eyes of the law), the impugned judgment, needs to be set aside. Accordingly, for the foregoing reasons, we are satisfied that the appeal herein has merit. We allow the same and set aside the judgment delivered on 22nd July, 2016 in Land Case No. 137 of 2011 as consolidated with High Court Succession Cause No. 11 of 2010 in entirety.

In view of the respondent's impecuniosity, we order that each party bears its own costs of this appeal and also in the court below.

Dated and delivered at Mombasa this 9th day of May, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR