



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: NAMBUYE, WARSAME & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 100 of 2018

BETWEEN

ESTATE SONRISA LIMITED.....APPELLANT

AND

SAMUEL KAMAU MACHARIA.....1st RESPONDENT

LAND REGISTRAR KWALE.....2nd RESPONDENT

AND

FIDELITY COMMERCIAL BANK LIMITED.....INTERESTED PARTY

(Being an appeal against the Ruling and order of the Environment and Land Court

at Mombasa (A. Omollo. J.) dated 5th July, 2016

in

ELC Case No. 30 of 2014)

JUDGMENT OF THE COURT

1. At all material times in this matter, the suit property is **Title No. Kwale/Galu/Kinondo/50**. Two certificates of title exist over the property one in the name of one **Ali Khan Ali Muses** and the other in the name of the 1st respondent in this appeal who was the plaintiff before the Environment and Land Court.

2. By a plaint dated 17th February 2014, the 1st respondent filed suit against the appellant, the 2nd respondent and one **Ali Khan Ali Muses**. The 1st respondent prayed for a permanent injunction restraining the appellant and the said **Ali Khan Ali Muses** from encroaching, trespassing, developing, alienating, selling or transferring or in any way dealing with the suit property in a manner that violates the 1st respondent's rights over the property. A declaratory order was also sought to declare the 1st respondent as the legal owner of the suit property and an order to evict the appellant and **Ali Khan Ali Muses** from the suit property. The 1st respondent sought a further order to declare the title held by **Ali Khan Ali Muses** over the suit property to be null and void and the title to be cancelled forthwith.

3. In support of his claim, the 1st respondent averred that on 21st May 1981, he acquired a certificate of title over the suit property. Subsequently, he applied for a loan facility and charged the property to **Daima Bank Limited** - now under liquidation with the **Deposit Protection Fund Board** (DPFB). That upon clearing the facility, the DPFB discharged the property and issued a discharge dated 14th August 2013. That with a view to registering the discharge, the 1st respondent was frustrated as the land registry file could not be found. That consequently, the 1st respondent visited the suit property and discovered that the appellant had encroached the same and had commenced construction. Upon inquiry, the 1st respondent discovered that one **Ali Khan Ali Muses** had been issued with a title deed over the suit property. He also discovered that the appellant's encroachment over the suit property was done with the knowledge, collusion and fraud of the 2nd respondent herein.

4. In his plaint, the 1st respondent itemized the particulars of fraud of the appellant and 2nd respondent *inter alia* as follows:

“(i) Fraudulently tampering with land records relating to Title No. Galu/Kinondo/50.

(ii) Fraudulently procuring and issuing a title deed to one Ali Khan Ali Muses notwithstanding that the 1st respondent had never executed a transfer or surrendered his land certificate.

(iii) Fraudulently and through collusion ensuring that the file and relevant records relating to the suit property could not be traced.

(iv) Fraudulently colluding to dispossess the 1st respondent of the suit property.”

5. The appellant in its defence denied encroaching on the suit property and stated that it is the registered proprietor of an adjoining parcel of land **Title No. Kwale/Galu/Kinondo/48**. The appellant averred that when it purchased its property Kwale/Galu/Kinondo/48, the 1st respondent had already constructed a boundary wall around the suit property; that the appellant then proceeded to construct its own wall; that its wall was constructed on the boundary of its property Kwale/Galu/Kinondo/48 and along the boundary beacons. The appellant denied it had encroached on the 1st respondent’s suit property.

6. In his statement of defence, the said **Ali Khan Ali Muses** averred that he was the registered proprietor of the suit property **Kwale/Galu/Kinondo/50** on which is erected an incomplete hotel building put up by the appellant. He denied being privy to any of the fraud and collusion alleged in the plaint.

7. In this matter, the record of appeal shows that a transfer of land was registered on 19th April 2007 indicating that the said **Ali Khan Ali Muses** of P. O. Box 82691 Mombasa purchased the suit property from one **Joseph Mwangi Ndiritu** of P. O. Box 3421 Nairobi at a consideration of Ksh. 9,000,000/=.

8. Upon hearing the parties, the learned Judge S. Mukunya, J. (as he then was) in a judgment delivered on 13th October 2014 made a finding that the certificate of title issued in favour of the said **Ali Khan Ali Muses** over the suit property was a fraud. The Judge held that the legitimate owner of the suit property was the 1st respondent in this appeal who is **Samuel Kamau Macharia**. As regards the boundary dispute between the appellant and the 1st respondent, the learned Judge made the following orders:

(i) Land Parcel Kwale/Galu/Kinondo/50 is 1.7 hectares.

(ii) Land Parcel Kwale/Galu/Kinondo/48 is 0.9 hectares.

(iii) That the beacon between land parcels Kwale/Galu/Kinondo/50 and Kwale/Galu/Kinondo/48 be fixed by a Surveyor as per the Land Act and taking into account the area in the respective title deeds.

(iv) The survey fees shall be paid by the owners of the said properties equally.

(v) Any party found to have encroached on the other party’s land shall have sixty (60) days to demolish structures that might have been erected thereon and move and vacate it. If the party encroaching fails to move and vacate, the party whose land has been encroached shall be at liberty after the said sixty (60) days to demolish such encroaching with the help of the court bailiff who will be assisted by the nearest Police Officer.

(vi) The cost of demolition shall be borne by the party that has so encroached.

(vii) A public path between the land parcels numbers 50 and 47 accessing the sea shall not be blocked.

(viii) The said Mr. Ali Khan Ali Muses’s title to the suit property is a fraud. He shall move and vacate the suit property within sixty (60) days and remove any and all his structures and debris thereon. In default, the 1st respondent in this appeal shall with the help of a court bailiff and assistance of police demolish all structures thereon. The cost of such demolition shall be borne by the said Mr. Ali Khan Ali Muses.

9. In making the determination that the 1st respondent was the legitimate owner of the suit property, the learned Judge stated:

“I have traced the history of this land Galu/Kinondo/50 in detail from its inception and allocation to Bakari Mohamed Mwatete to its transfer to Peter Nganga Kamande and Wilson Burugu Gitau and transfer of ½ share of the same from Wilson Burugu Gitau to Peter Nganga Kamande on 20th May 1981 and transfer of Peter Nganga Kamande to Samuel Kamau Macharia on 20th May 1981 both entries being shown as entry five (5) and six (6) in the land registry...The plaintiff still has the original title deed.....”

10. Dissatisfied by the judgment of the trial court, two separate and substantive appeals have been filed. The two appeals are: **Malindi Civil Appeal No. 14 of 2015 (Estate Sonrisa Limited -v- Samuel Kamau Macharia & another; Malindi Civil Appeal No. 32 of 2016 (Ali Khan Ali Muses -v-Samuel Kamau Macharia & another)**. The two appeals have been consolidated and are pending hearing before this Court sitting at Nairobi.

11. At the outset, it must be pointed out that the instant appeal is not against the judgment delivered on 13th October 2014 (Mukunya, J.). It is an appeal against the ruling delivered on 5th July 2016 (Omollo, J.).

12. Following the delivery of judgment of the trial court, on 25th January 2015, the 1st respondent allegedly in compliance with the orders of the court commenced demolition of the boundary wall and structures between the two properties i.e. **Kwale/Galu/Kinondo/50** and **Kwale/Galu/Kinondo/48**.

13. Distressed by the 1st respondent's demolition of the boundary walls and structures on the suit property, the appellant herein filed a Notice of Motion dated 26th January 2015 before the Environment and Land Court seeking an injunction to restrain the 1st respondent from demolishing the boundary wall and any structures on the property. The specific prayers sought in the Motion were:

“(a) That the 1st respondent through its servants, agents or any other person be stopped and or restrained from demolishing and or continuing with the demolition of any buildings on Kwale/Galu/Kinondo/48 until the conditions and terms of the judgment of the trial court is complied with and or beacons between land parcels Kwale/Galu/Kinondo/50 and Kwale/Galu/Kinondo/48 is fixed.

(b) That the purported execution of the judgment of the trial court exercised by the 1st respondent and or actions taken in demolishing structures on 25th January 2015 be declared a nullity and or illegal.”

14. Upon hearing the parties to the Motion, the learned Judge (Omollo, J.) delivered a ruling dated 5th July 2016 dismissing the Motion. This ruling is the subject of the instant appeal. In dismissing the Motion, the Judge expressed herself as follows:

“10. It is not in dispute the 2nd defendant/applicant has filed an appeal against the judgment that was delivered. That appeal is pending hearing and determination. In the instant case, the applicant is challenging the execution process undertaken by the plaintiff. It does not question the judgment passed in any way.... The issue of execution of the decree can only be questioned before a court that issued the decree.

11. The next question is whether the orders can be granted. Mr. Orenge submitted the same cannot be granted for the twin reason that this Court is functus officio and that the remedy is substantive thus requiring filing of a separate suit. The applicant sought an order:

That the purported execution of the judgment of the trial court exercised by the 1st respondent and or actions taken in demolishing structures on 25th January 2015 be declared a nullity and or illegal.

12. Can this order be granted in this suit or the applicant ought to have commenced a fresh suit? ... My finding is that the prayer is properly before the court and the 2nd defendant/applicant needed not to have filed a fresh suit to contest whether execution process was legally taken or otherwise..... The decree issued has not been set aside and if the execution process was premised on it, then I have no reason to find that the execution process is a nullity or illegal.....The applicant has not sought an order to set aside that decree for not conforming with the terms of the judgment. On that basis, I find no merit in the orders sought.”

15. Aggrieved by the ruling delivered on 5th July 2016, the appellant filed the instant appeal citing the following abridged grounds in its memorandum.

(i) The judge erred in failing to make a finding on whether the 1st respondent complied with the judgment delivered on 13th October 2014 by commencing demolition of the boundary wall between the suit properties and the structures thereon before beacons were fixed as was ordered by the court in its judgment.

(ii) The court erred in law in not considering the evidence adduced and the submissions made on behalf of the appellant and further erred in failing to make a declaration on whether the actions of the 1st respondent were illegal.

(iii) The judge erred in the analysis and evaluation of the evidence and pleadings.

(iv) The decision of the court was contrary to the weight of evidence placed before it.”

16. In its memorandum of appeal, the appellant prays for a declaration that the actions of the 1st respondent in commencing demolition on the appellant's property and or purported execution of the court's judgment is illegal and contrary to the judgment of the trial court.

17. At the hearing of the instant appeal, learned counsel **Mr. Oluoch Wambi** appeared for the appellant. Learned counsel **Mr. Emmanuel Makuro** for **Ms. Waswa** appeared for the 2nd respondent and held brief for **Mr. Orenge** for the 1st respondent.

18. Counsel for the appellant filed written submissions and list of authorities in the appeal. Counsel for the 1st respondent filed written submissions in the appeal. Counsel for the 2nd respondent stated that the issues in this appeal do not affect the 2nd respondent and as such, no written submissions were filed.

APPELLANT'S SUBMISSIONS

19. The appellant in its written submissions rehashed the background facts leading to the judgment of the trial court and the orders made therein. In support of the instant appeal, it was submitted the 1st respondent commenced execution of a decree which was irregularly obtained; that the 1st respondent went ahead to demolish the appellant's structures and developments on the suit property even before the beacons between the two parcels of land had been fixed by a surveyor as had been directed in the judgment; that the purported execution of the decree was done before any party was found to have encroached on the other's land; that sixty (60) days' notice to demolish had not been given. For the foregoing reasons, the appellant contends the learned judge erred in failing to declare that the 1st respondent's actions of demolishing the boundary wall and structures on 25th January 2015 were illegal, null and void.

20. The appellant further submitted the 1st respondent has never denied that demolition of the boundary walls and structures indeed took place on 25th January 2015. That the 1st respondent has not denied he commenced demolition without a survey having been done. That the 1st respondent has not denied that he demolished the wall and structures before the Surveyor had confirmed who had encroached on whose land.

21. The appellant faults the learned Judge for upholding a decree which was allegedly extracted illegally. That the 1st respondent's advocates attempted to extract the decree of the trial court that was not in conformity with the judgment of the court; that the appellant did not approve the decree as extracted; that it remains unclear how the 1st respondent got the court to certify a decree that had not been approved by counsel for the appellant. That in this appeal, the learned Judge erred in failing to find that the decree as extracted by the appellant and executed vide demolition of the boundary wall and structures was an illegal decree. Grounded on the illegality of the decree as extracted, the appellant submitted the action of police officers accompanying the 1st respondent to demolish the boundary wall and structures on the suit property was also illegal.

22. In concluding its submissions, the appellant urged that the Judge erred in failing to evaluate the evidence on record to find that the decree as extracted was illegal and thereby further erred in finding that the appellant's application had no merit.

1st RESPONDENT'S SUBMISSIONS

23. In his written submissions, the 1st respondent avers that it would be a miscarriage of justice if this Court were to declare the demolitions done on 25th January 2015 as illegal since such an order was not sought before the learned Judge. It was submitted the learned Judge properly considered and evaluated the evidence on record and arrived at a correct determination. That the ruling by the judge is well thought out and correctly founded on evidence.

24. On the alleged illegality of the decree as extracted, it was submitted that it is misleading to assert that the decree was unlawfully extracted; that the decree has not been set aside by the trial court or this Court and it remains a valid decree. That in any event, the judgment and decree of the trial court is the subject of an appeal now pending before this Court as **Civil Appeal No. 14 of 2016** between the same parties. That the issues raised in the present appeal form the substance of the pending **Civil Appeal No.14 of 2016**.

25. The 1st respondent in answer to the assertion that the demolition of the boundary walls was illegal submitted that the beacons of the two plots were already fixed and therefore the condition set in the judgment is an act which the appellant had concealed to the trial court. That the appellant carried out survey of its property in 1990-1991 and fixed the beacons. That the survey map/plan tendered in evidence before the trial court was deposited with the Land Registrar and is duly signed. For the foregoing reasons, the 1st respondent urged us to dismiss the instant appeal.

ANALYSIS and DETERMINATION

26. The instant appeal is not an appeal against the judgment of the trial court (Mukunya, J.) delivered on 13th October 2014. Rather, the present appeal is against post-judgment ruling. In this appeal, there is no prayer to set aside the judgment of the trial court.

27. As already stated, there are two consolidated appeals arising from the judgment of the trial court that are pending for hearing before this Court in Nairobi. Considering that the consolidated appeals are pending for hearing, we refrain from determining any issue that may compromise or prejudice the outcome of the pending appeals.

28. The focus in this appeal is the ground that the learned Judge erred in failing to find the purported execution of the judgment of the trial court done by the 1st respondent and the action in demolishing the boundary wall and structures on the suit property on 25th January 2015 be declared a nullity and or illegal.

29. We have considered this ground in support of the instant appeal and the written submissions by both counsels. Central to the determination of this appeal is the validity of the decree extracted and the alleged execution of the judgment of the trial court.

30. At the risk of repetition, the substantive appeal against the judgment of the trial court is pending for hearing. The appeal shall determine the validity of the judgment and final orders of the trial court as well as the ensuing decree therefrom. We thus find it inappropriate to determine the validity of the decree extracted from the judgment of the trial court. For this reason, we find the learned judge did not err when she made a finding and expressed that the decree issued had not been set aside and consequently there was no reason to find that the execution process undertaken by the 1st respondent was a nullity or illegal.

31. We are further convinced that if the judgment of the trial court were to be set aside in the pending consolidated appeals, it would follow that the action of demolition of the boundary wall and structures on the suit property undertaken by the 1st respondent on 25th January 2015 would be without legal foundation. Conversely, if the judgment of the trial court is upheld on appeal, the final orders and decree of the trial

court will be confirmed. Once again, we are convinced that this Court should not act to prejudice the outcome of the pending consolidated appeals.

32. We note that the instant appeal arises from a ruling delivered in a post-judgment application. The prayer sought in this appeal is for determination of rights of the parties arising from execution of a judgment of the trial court. The rights of parties cannot be determined in a post-judgment ruling. The rights of parties are to be determined with finality through a judgment of the court. We cannot in an appeal founded on a ruling in a post-judgment application determine the rights of the parties when a substantive appeal is pending before this Court. We must refrain from making any concluded views on the matters in dispute to avoid prejudging, embarrassing or prejudicing the outcome of the pending substantive consolidated appeals. (See **David Kamau Gakuru -v- National Industrial Credit Bank Ltd, Civil Appeal No. 84 of 2001**).

33. Further, the prayers sought by the appellant in the Notice of Motion dated 26th January 2015 and dismissed by the learned Judge were discretionary in nature. The appellant prayed for injunctive and restraining orders which are discretionary in nature. The Judge in dismissing the application declined to exercise her discretion to grant the injunctive reliefs sought.

34. The circumstances under which this Court will interfere with the exercise of discretion by the trial court are limited and were well articulated by Madan, JA (as he then was) in **United India Insurance Co. Ltd -v- East African Underwriters (Kenya) Ltd [1985] E.A 898**, as follows:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

35. In this appeal, the appellant has not demonstrated to our satisfaction that the learned Judge erred and exercised her discretion in a wrong manner. On our part, we find that the validity of the decree as extracted cannot be a subject of consideration and determination in this appeal and also in the pending consolidated appeals. We are convinced that the pending consolidated appeals against the judgment and orders of the trial court is the appropriate forum for determining the final orders and decree of the trial court.

36. For the foregoing reasons, we find this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Malindi this 17th day of July, 2019

R. N. NAMBUYE

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JUDGE OF APPEAL

M. WARSAME

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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