IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KOOME, MAKHANDIA & KIAGE, JJ.A)

CIVIL APPEAL NO 167 OF 2018

BETWEEN

FRANCIS MUNYAO MULINGE.....1ST APPELLANT

ZIPPORAH MUKONYO KIMEU.....2ND APPELLANT

FREDRICK MUTUA MULINGE.....3RD APPELLANT

AND

GLADDYS MPONDA.....1ST RESPONDENT

THE COMMISSIONER OF LANDS.....2ND RESPONDENT

THE DIRECTOR OF SETTLEMENT.....3RD RESPONDENT

THE DIRECTOR OF SURVEY .....4TH RESPONDENT

THE REGISTRAR OF LANDS KILIFI .....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

(Being an appeal from the decree of the Environment and Land Court at Mombasa (Omollo, J.) dated 24*th October, 2018)* in E & LC Case No 120 of 2011)

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JUDGMENT OF THE COURT

1. The dispute before the Environment and Land Court that has spiralled to the present appeal was over ***Tittle No. Kilifi/Mtwapa/536*** (suit property). The three appellants claimed that sometimes in 1996, they applied for allocation of government land and they were duly allotted several plots being ***Nos. 615, 616, 617, 618, 619, 627, 628, 630, 611, 622, 614, 621, 607, 608, 609*** and ***610 Section IV/MN*** (subject plots) by the Commissioner of Lands. That notwithstanding, they claimed in the amended plaint that through conspiracy, fraud or acts of forgery the 2nd to the 4th respondents registered the title over some of the said plots to the 1st respondent thereby depriving them of the same. The appellants therefore sought a declaration that title to the suit property be nullified and a mandatory injunction do issue compelling the 1st respondent to demolish and pull down the fence erected on the suit properties and to give vacant possession thereto.

2. The suit was resisted by the 1st respondent who denied the claim in *toto* and insisted that she was in occupation of the suit property which was registered in the name of her late father one ***David Mitchell*** who was allocated the suit property in 1969 and it was within Mtwapa Settlement Scheme then known as ***Plot No. 242*** which number changed during the registration of title from Settlement Fund Trustees. She further claimed that the appellants attempted to illegally make an excision and/or subdivide the suit property through fraud and misrepresentation. She also launched a counter-claim that a declaration or findings be made to the effect that the parcel of land that she is occupying and residing was the suit property and costs of the suit. Similarly the 2nd to the 6th respondents mounted their own defence in which all the allegations were denied.

3. The matter fell for hearing before Omollo, J. who heard evidence from a total of eight (8) witnesses that is four (4) from each side. Basically the appellants' case as told by ***Francis Munyao Mulinge*** **(PW1)** who testified how he and some other people saw a vacant land which in their view was a non-committed Government land. They decided to apply and they therefore made a formal application to have it allocated to them. Apparently, the appellant are related being husband, wife and brother respectively. They were issued with letters of allotment, they paid the requisite fees and titles in respect of a total of sixteen (16) plots measuring twelve (12) acres were issued to them. However the 1st respondent trespassed on the plots and fenced them off while claiming that they were part of the suit property which belonged to her late father.

4. The evidence by the 2nd and 3rd appellants basically corroborated that of the 1st appellant as all the did was to go over the same documents that were produced in evidence. The appellants also called one ***Clyde Umaye Silas,*** **(PW2)** wo was at the material time working as a surveyor with the Ministry of Lands time based in Kilifi. What was significant in **PW2's** testimony was an admission that the suit property was part of the Mtwapa Settlement Scheme and the allocation thereto was done within the ***Settlement Fund Trustee*** **(SFT)** by the Director of Land Administration. Confronted with the titles in respect of the suit property during cross examination, **PW2** admitted that he was not the one who prepared the area index map and the survey which he said was done by his senior based in Nairobi and that the two plots in dispute fall on the same spot on the ground.

5. The appellants claim was supported by following documents:

i. Application form received on 11.1.1996 and approved by the Minister on 25.6.96 for plot measuring 0.4 ha.

ii. Letter of allotment to Francis Mulinge dated 19.1.1996 for unsurveryed plot No. 9 - Majengo Trading Centre, Kilifi for area measuring 0.3 ha on attached plan given as No 31380/111.

iii. Letter of allotment for unsurveyed plot No K - - Majengo dated 5.8.1996 measuring 0.3349 ha dated 5.8.1996.

iv. Letter of Allotment dated 5.8.1996 for unsurveyed plot "E" ***Majengo measuring 0.4 ha.***

v. Letter of Allotment dated 5.8.1996 for plot "1" measuring ***0.4 ha.***

vi. Letter of Allotment dated 5.8.1996 for plot "C" measuring ***0.4 ha.***

vii. Letter of Allotment dated 5.8.1996 for plot "F" measuring ***0.4 ha.***

viii. Letter of Allotment dated 19.1.1996 for plot No 4 Majengo Trading Centre Kilifi measuring 0.3 ha.

ix. Letter of Allotment dated 5.8.1996 for plot A measuring 0.4 ha.

x. Receipts for payments made in respect of plots numbers ***"G"; "D"; 4, 2; 12; 1.***

xi. Certificate of title for plot No. MN/IV/607 issued on ***27.3.1998.***

xii. Title No MN/IV/608 issued on 5*th* *September 1997.*

xiii. Title for MN/IV/616 issued on 27.10.2000.

xiv. Title No MN/IV/610 issued on 16*th* *September 1997.*

xv. Title for MN/IV/61.

6. On the part of the respondents, ***Gladys Mponda*** (**DW1**), her mother ***Harriet Mitchel Mponda*** (**DW2**), ***Felix Mwawasi Kiteto*** (**DW3**) and ***Joseph Taura Bao*** (**DW4)** testified. According to them, the suit property falls within the Mtwapa Settlement Scheme which was established in 1977 with 600 plots. ***Plot No. 242*** was allotted to ***David Mitchel*** who was the father and husband to ***Gladys*** and ***Harriet*** respectively. The late ***David Mitchel*** paid the loan to **SFT** and was issued with a certificate of outright purchase and thereafter a freehold title after the survey was done thus the plot number changed to ***Plot No. 536*** which was given by the survey department. The suit property was being occupied by the family of the late ***David Mitchel***. The 1st respondent also relied on the following documents which the learned trial Judge fastidiously compared and contrasted in her well-reasoned judgement.

1. An agreement dated 5.8.1975 with SFT

2. Letter of offer dated 8.8.1978

3. Charge dated 28.10.1978

4. Receipt dated 4.12.1986

5. Certificate of outright Purchase dated 23.2.1988

6. Discharge of charge dated 29.7.1991

7. Map (sketch plan)

8. Copy of Title deed for Kilifi/Mtwapa/536

9. Copy of schedule of Numbers

10. Letters dated 28.4.1992 and 29.4.1992

11. Certified copy of final area list

12. Letter from adjudication & settlement office dated 4.2.2000

13. Official search for plot 536 dated 19.6.2014

7. After doing so the Judge made the following conclusions which is the subject of the instant appeal; -

> **"Therefore I conclude that the plaintiffs' prayer (a) in the plaint lacks merit because of the evidence adduced showing the plots were not available for allocation. Further and in the alternative is that the David Mitchel's title being the 1*st* *in time and fraud having not been proved to vitiate it, it takes priority over the plaintiffs' claim. Secondly, the prayer (c) does also failure in view of conditions stated*** (sic) **at page 2 of the letters of allotment that the government "shall not accept liability in case of prior commitment or otherwise". The claim of loss as particularised under paragraph 15 of the plaint automatically collapses. So does prayer (b) on grant of mandatory injunction/vacant possession. The result is the plaintiffs' suit is dismissed with costs to the defendants.**
>
> ***Whether or not I enter judgment for the 1st*** **defendant as prayed in the counter-claim, her use & occupation of plot 536 remain undisturbed. Therefore for completeness of record, I do issue an order of permanent injunction restraining the plaintiffs from interfering with the 1*st* *defendant's quiet possession, use and/or occupation of plot No Kilifi/Mtwapa/536."***

8. Aggrieved by the said judgment, the appellants mounted this appeal that is predicated on some nine (9) grounds of appeal which can be summarized thus; that the learned Judge erred in law and fact for; relying wholly on the evidence of the respondent and in total disregard of the evidence by the appellants; misdirecting herself as to the circumstances surrounding the appellants' case, that the documents produced by the appellant's in evidence were casually treated; failing to find that the appellants were innocent purchasers and allottees for value without notice and for failing to order in the alternative that the appellants be compensated as a result of fraudulent allocations. The Judge was also faulted for making a substantive finding on the sanctity of tittle and letters of allotment that were issued by the 5th respondent; for addressing extraneous matters and finally for failing to appreciate the dispute was only restricted to trespass.

9. During the plenary hearing, both parties wholly relied on their written submissions and ***Mr. Engunza*** learned counsel for the appellant opting not to make any oral highlights. According to the appellants, they were allotted the subject plots in 1996 upon making an application which was approved by the Permanent Secretary Ministry of Lands. They produced Tittle deeds for ***Plot No. 616, 608, 610***, and ***615*** as well as letters allotment for ***Plot No. 613***, and ***620*** and deed plans for Plot "C". The appellants however discovered in 2010 that there were some people claiming ownership of the subject plots. The appellants instructed a surveyor working with the Ministry of Lands who testified that according to the Index Maps and the mutation forms that are kept at the District Land offices at Kilifi, the acreage of the land was altered and not countersigned. The surveyor also confirmed that ***Plot No. 242*** and the suit property are on the same ground. According to counsel for the appellant this was sufficient evidence that was backed by various documents that were never challenged and demonstrated that the appellants had acquired the parcels of land procedurally.

10. Counsel for the appellant went on to poke holes on the evidence by the 1st respondent that the parcel of land being ***Plot No. 242*** was acquired by her late father in 1969. That he paid for it in 1975 and the Tittle thereto was issued on the 9th April, 1992. That the schedule changed the plot from ***No. 242*** to the suit property but the Judge failed to consider that when the appellants were issued with their titles, the 1st respondents' land was not on the map sheet of the area. It was counsel's submission that since the 1st respondent's plot was missing, it never existed but was fraudulently fixed in the map thereby interfering with the ownership by the appellants. He went on to state that according to the surveyors report ***Plot No. 536*** encroached and/or overlapped the appellant's parcels of land and it was therefore irregularly obtained.

11. Opposing the appeal was ***Mr. Wafula*** learned counsel for the 1st respondent. In addition to written submissions, counsel orally submitted that ***Plot No. 242*** was bought by the late ***David Mitchel*** as per the agreement dated 5th August, 1975 which is evidenced by a letter from **SFT** as well as a charge over the same plot and a certificate of outright purchase by SFT. Subsequently SFT informed ***David Mitchel*** that the charge over ***Plot No. 242*** Mtwapa Settlement Scheme had been discharged by a letter dated 16th August, 1991. Accordingly, in counsel's view the Judge was right to conclude that ***David Mitchel*** was the absolute owner of ***Plot No. 242***; that the said plot was not available for allocation in 1996 and the Commissioner of Lands had no mandate to allocate the land to the appellants. Counsel cited the case of **Nelson Kazungu Chai & 9 Others vs. Pwani University College Civil Appeal No 78 of 2016** where it was held that once the land was allotted to

the Institute it ceased being unalienated land as defined under ***Section 2*** of the repealed **Government Lands Act**. Thus the Commissioner of Lands could not cause allocation to issue over the same land.

12. On the submission that ***Plot No. 242*** Mtwapa Settlement Scheme was missing on the map, counsel submitted that the omission was as a result of mistakes or negligence on the part of the survey department. However it was confirmed on the ground that the property existed as per the letter dated 28th April, 1992 produced in evidence. The said letter provided the data on the exact location of the plot on the area map. During registration of all the plots in the Mtwapa Settlement Scheme, the plots were given new numbers and that is how ***Plot No. 242*** changed to the suit property. This was confirmed by the District Surveyor who testified as **PW2** that ***Plot No. 242*** is the same as the suit property also on the ground and is registered in the name of the late ***David Mitchel***. Therefore the 1st respondent who is the daughter of ***David Mitchel*** and was in possession of the suit property cannot be a trespasser and the suit was properly dismissed for lacking in merit.

13. The appeal was also opposed by ***Mr. Makuto*** learned counsel for the 2nd to the 6th respondents. He relied on the written submissions which rehearsed the evidence before the trial court. It was emphasised that the ***David Mitchel*** the father of the 1st respondent was allotted the suit property in 1969 under the Mtwapa Settlement Scheme which was owned by SFT. The loan was paid and the said ***David Mitchel*** was issued with a certificate of outright purchase and a discharge of charge. It was also common ground that Plot No. 242 was missing from the Mtwapa Settlement Scheme but the map was rectified following a letter dated 28th April, 1992, this mistake which was attributed to a human error was admitted by the surveyor who testified as **DW2**. This mistake was rectified and the suit property was introduced in the map of Mtwapa Settlement Scheme. Counsel urged us to dismiss the appeal.

14. We have considered the record of appeal and deliberated on the submissions by respective counsel. This being a first appeal we have the primary duty of subjecting the entire evidence to fresh re-evaluation so as to determine whether the conclusions drawn by the learned trial Judge can stand and whichever way to give our own independent view of the matter. The only caveat however is that we must always bear in mind that unlike the trial court we neither saw nor heard the witnesses testify, and give allowance for that. This was succinctly propounded by this Court in the case of **Kenya Ports Authority vs. Kuston (Kenya) Ltd, (2009) 2 EA 212** in the following words;

> **"This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion *though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect…".***

15. The bone of contention in this appeal is whether the appellant established their claim that they were the legitimate owners of the suit property; that the 1st respondent was a trespasser thereon having obtained tittle by collusion, fraud or through forgeries with the 2nd to the 5th respondents. We think that the facts regarding the chronology of how the titles to the suit property were issued were not highly contested. The appellants claim is that in 1996, they successfully applied for allocation of government unallocated land; they were issued with the requisite title which turns out to be the same land that was allocated to the father of the 1st respondent by the **SFT** in 1977. Therefore the issue remains whether the appellants proved their case that the 1st respondent was a trespasser on the suit property which is in the name of the late ***David Mitchel***. The appellant's crescendo is the claim that that the 2nd respondent, the Commissioner for Land issued them with a tittle which is indefeasible.

16. The Learned trial Judge found and rightly so that the evidence by the Land Registrar, Kilifi that ***Plot No. 242*** was part of the Mtwapa Settlement Scheme allocated to the late ***David Mitchel*** and upon payment of the STF loan and a discharge of charge was issued and the title was registered as the suit property which is the same one on the ground as the title claimed by the appellants. was unchallenged. This is how the learned Judge posited in a pertinent portion of the judgement;

> **"It is the evidence of the defendants that Mtwapa Settlement Scheme plots were created from title No 452 which neighboured Majengo village recorded as plot No 453. The plaintiffs did not demonstrate to the court the location of plot no 242 on the ground to contradict the documentation by the defendants that plot no 536 occupied the same position as plot no 242. PW2 in his evidence conceded that the mutation drawn in the year 2000 referred to picking of boundaries and not subdivisions. The defendants witnesses have shown the Court that the suit plots {since plot 242 or 536 sits on the same place as plaintiffs' plots} was already committed prior to 1996 when the plaintiffs were allocated the plots, it follows that the suit land was not available for allocation as per the provisions of section 3 of the Government Lands Act (repealed). Further with the many paper trails by different government departments for the 1st defendant's title Kilifi/Mtwapa/536 issued on 9.4.1992, the allegation that the same was backdated is hollow and not supported by any evidence"**

17. The Judge found that this was a case of double allocation because when the appellants applied to be allocated government land in 1996, that was presumed to be unallotted, the land in question had been allocated to the 1st respondent's father in 1977 through **SF**T and was not available. Was it a case of one government department not knowing what another one was doing, or was it a case of a mistake by an innocent applicant for allocation of land who was duped to pay for non-existing or was it negligence or collusion? With the evidence before us, we may not be able to pin point the actual problem. Suffice it to say that the 1st respondent's documents of title also went missing from the Lands Office for a considerable amount of time and it took her concerted efforts of writing endless complaints. Eventually the area registry maps were traced and they were issued with title to the suit property which is on the same ground that was allocated to the 1st respondent's father by SFT.

18. The 1st respondent's evidence that her family were in occupation of the suit land from 1977 and that the suit property was allocated to the late ***David Mitchel*** by **SFT** was not seriously challenged by the appellants. The appellants did not claim to have taken possession of the suit property. The evidence by the 1st respondent was that he noticed the 1st respondent was fencing the land and constructing chicken coops and he termed her trespasser. Since the appellants' allocation came much later we have posed the question as to whether they carried out any due

diligence. In ***Mwangi & Another vs. Mwangi, (1986) KLR 328***, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land. It is our view that the 1st respondent's family having been in possession of the suit property since 1977, their rights were binding on the suit property and the 2nd respondent had no mandate to dispossess them of their rights that were overriding to a subsequent allottee. The 1st respondent's position in law is further strengthened and placed beyond question by the fact that ***David Mitchel*** obtained outright ownership after repaying the loan from **SFT**.

19. We think it is rather obvious that the suit property was not available for allocation to the appellants and the letters of allotment and subsequent issuance of title were nullities. Our view is supported by the decision in the case of; ***Republic* vs. Kenya Revenue Authority, ex parte Aberdare Freight Services Limited, *[2004] 2 eKLR 530*** where it was held:

> **"…a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others….**
>
> **Purported authorization, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims…"**

20. We have also considered the entire submissions by counsel, the record of appeal and authorities cited and in view of the preceding findings, we have no hesitation to state that we concur with the findings and decision of the trial court. The Commissioner of Lands had no power to alienate as unallocated land the suit property which had already been allocated, and paid for by the 1st respondent's father through the **SFT**. This was not un-allocated land and the appellants were misled to apply for it. The purported subsequent or later allocation of the suit property to the appellants by the Commissioner of Lands was an act done outside the mandate, without any legal justification and therefore amounted to nothing. See the case of **Said Bin Seif vs. Shariff Mohammed Shatry, (1940)19 (1) KLR 9**, we reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity, and not only voidable but void with no effect, either as legitimate expectation, estoppel or otherwise.

21. Just like the learned Judge we are not persuaded that the 1st respondent should be penalised simply because someone at the Ministry of Lands decided to allocate to the appellants a parcel of land that was not available for allocation. The question of who should bear the blunt of the mistake that led to double allocation was not canvassed before the High Court; the appellants did not seek for compensation or refund of their purchase price. It is trite law that a party is bound by their own pleadings.

22. For the various reasons stated, the totality of our evaluation of the evidence and the law in this matter, the learned Judge did not err in dismissing the appellant's suit. This appeal has no merit and is hereby dismissed. The judgment of the trial court dated 24th October, 2018 is hereby confirmed and upheld with costs to the respondents.

Dated and delivered at Mombasa this 26*th* day of September, 2019.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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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