IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 34 OF 2017

BETWEEN

MERRY BEACH LIMITED.....APPELLANT

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

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

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

THE DISTRICT LAND REGISTER, KILIFI.....4TH RESPONDENT

THE DIRECTOR OF PHYSICAL PLANNING.....5TH RESPONDENT

THE DIRECTOR OF SURVEYS.....6TH RESPONDENT

THE DIRECTOR OF LAND

ADJUDICATION AND SETTLEMENT.....7TH RESPONDENT

THE COUNTY GOVERNMENT OF KILIFI.....8TH RESPONDENT

THE OFFICER COMMANDING

POLICE DIVISION, MALINDI.....9TH RESPONDENT

GIMALOWI COMPANY LIMITED.....10TH RESPONDENT

EXEMPLER LIMITED.....11TH RESPONDENT

SHARIFF M. MOHAMED.....12TH RESPONDENT

P.M. NDOLO.....13TH RESPONDENT

LA MARINA LIMITED.....14TH RESPONDENT

MALINDI MUSKETEERS LIMITED.....15TH RESPONDENT

SHARIFF N. HABIB.....16TH RESPONDENT

HILDEGARD JUNG.....17TH RESPONDENT

DANIEL RICCI.....18TH RESPONDENT

ITAKEY INVESTMENTS LIMITED.....19TH RESPONDENT

(An appeal against the ruling of the Environment and Land Court at Malindi (Angote, J.) dated 16th September, 2016

in

***E.L.C Petition No. 5 of 2011*)**

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JUDGMENT OF THE COURT

1. The right to be heard before an adverse decision is taken against a party is fundamental and permeates our entire justice system. This Court in ***Mbaki & Others vs. Macharia & Another [2005] 2 EA 206***, at page 210, while underscoring the significance of that right expressed:

> ***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."***

2. It is for that reason that our legal system has embedded relevant provisions in the ***Constitution*** and legislative texts to ensure the realization of that right. Of relevance to the appeal before us is ***Rule 5 (d) (ii)*** of the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*** (popularly known as Mutunga Rules) which provides-

> ***"5.***
>
> ***(d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just-***
>
> ***(i) order that the name of any party improperly joined, be struck out; and***
>
> ***(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.*** Emphasis added

3. As to what point in time such joinder can be made this Court in ***J M K vs. M W M & Another [2015] eKLR*** while discussing ***Order 1 Rule 10(2)*** of the ***Civil Procedure Rules*** which is in *pari materia* with ***Rule 5 (d) (ii)*** of the Mutunga Rules stated in its own words:-

> ***"We would however agree with the respondent that Order 1 Rule (10) (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in Tang Gas Distributors LTD. vs. Said & Others [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage."***

4. It follows that ideally a court can either on its own motion or by an application only enjoin a party before passing judgment in the matter before it. This Court appreciated as much in ***Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 others [2016]*** by holding that:-

> ***"Black's Law Dictionary 970 (10th ed. 2014 states that in law, a judgment is a decision of a court regarding the rights and liabilities of parties in a legal action or proceeding. A judgment is the final court order regarding the rights and liabilities of the parties; it resolves all the contested issues and terminates the law suit; it is the court's final and official pronouncement of the law on action that was pending before it. A judgment has the effect of terminating the jurisdiction of the court that delivered the judgment. Save as expressly provided for by law (for example in revisionary jurisdiction or under the slip rule) a judgment makes the court functus officio and transfers jurisdiction to an appellate court if appeal is allowed. It marks the end of litigation before the court that pronounced the judgment. When used in relation to a court, functus officio means that once a court has passed a judgment after a lawful hearing, it cannot reopen the case. The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter."***

5. However, there are exceptional circumstances that could justify a court to enjoin a party even after judgment has been passed. One such exception is where a matter has been determined and adverse orders have been issued against a party who was neither given notice of the suit nor heard on the issue in dispute. In joining such a party a court would also have to set aside the judgment entered to give him/her an

opportunity to be heard. See ***J M K vs. M W M & Another (supra)***. Convinced that it fell within this exception the 19th respondent filed an application dated 5th November, 2015 before Environment and Land Court (ELC) seeking inter alia:-

> ***i. The honourable court be pleased to order that the applicant, Itakey Investments Limited, be joined as a party to the suit for the reason that it is the owner of all that parcel of land known as Chembe/Kibabamshe/549 & 599 (suit properties).***
>
> ***ii. The honourable court be pleased to set aside its judgment and decree dated 30th October, 2015 as the hearing proceeded without the applicant against whom the judgment of the court is directed and whose properties may be demolished by virtue of the said judgment despite it not having been accorded any hearing and the honourable court do order the matter be heard a fresh to enable the applicant participate in the hearing.***

6. A brief background would place the appeal in perspective. Following boundary disputes within the registration section known as Chembe/Kibabamshe several suits were filed involving the appellant and 1st to 18th respondents. In particular in H.C.C.C No. 52 of 2007 the 11th respondent sued several parties alleging encroachment on its property. Pursuant to a court order therein dated 10th December, 2010 the Land Registrar prepared a report on the boundary disputes in the said registration section and demarcated the boundary between the suit properties which were then registered in favour of the 10th respondent and the 11th respondent's property.

7. According to the appellant, sometime in April, 2011 the Land Registrar and surveyors in the company of police officers and armed locals stormed into its property described as Chembe/Kibabamshe/374 and erected fresh beacons. It is then that it became apparent that 50% of the appellant's property had been hived off and granted to the 10th respondent. As if that was not enough both the 10th and 11th respondents erected structures blocking access roads from the appellant's property to the sea and Watamu. As far as the appellant was concerned this state of affairs lowered its property's value. As a result, the appellant filed a constitutional petition being ELC Petition No. 5 of 2011 claiming that its fundamental right to property as enshrined under the ***Constitution*** had been infringed. Towards that end, it joined all the parties it considered necessary for the adjudication of the boundary disputes and sought several injunctive and declaratory orders. By a judgment dated 30th October, 2015 the learned Judge (Angote, J.) entered judgment in favour of the appellant by directing the demolition of structures erected on public access roads by the 10th respondent.

8. Turning back to the application before the ELC it was anchored on the grounds that the 19th respondent purchased the suit properties from Kenya Commercial Bank which sold the same in exercise of its statutory power of sale after the 10th respondent failed to settle its loan facility. The suit properties were transferred to the 19th respondent on 18th July, 2014. The 19th respondent only learnt about the existence of the suit and the orders thereunder on 5th November, 2015 when it saw the appellant and surveyors on the suit properties. If the execution was to take place the 19th respondent would be condemned unheard and its right to property would be infringed. It has also expended a colossal sum of money towards developing the suit properties. It was in the interest of justice for the 19th respondent to be allowed to ventilate its case in a fresh hearing.

9. In opposing the application, it was deposed on behalf of the appellant that all throughout the proceedings the 10th respondent was served with hearing notices and court processes. Nonetheless, the 10th respondent never mentioned or brought to the appellant's notice the transfer of the suit properties to the 19th respondent. Rather it was peculiar that Johnson Mwisho Fondo who was a director of the 10th respondent was also a director of the 19th respondent. Even so, before the conclusion of the suit the appellant had sent a surveyor into the suit properties to make the necessary measurements. Hence all who were present therein including the 19th respondent as it claims were informed of the said surveyor's purpose and by extension the boundary dispute. The 19th respondent's aim was to scuttle the execution process which was underway.

10. The learned Judge in his ruling dated 16th September, 2016 held that:-

> ***"Considering that the mandatory order that was issued by this court is final in nature, the applicant's buildings will be demolished without being heard.***
>
> ***The rules of natural justice and the provisions of Article 50(1) of the Constitution dictates that a party should not be condemned unheard. In view of the seriousness and ramifications of the judgment of this court, the applicant has a right to be heard on the petitioner's petition.***
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> ***The court has inherent jurisdiction to set aside its judgment if it is convinced that the said judgment will affect a party who should have been heard but was not heard. It cannot be said that once the court delivers its judgment, then it folds its hands and cannot re-open the case under whatever circumstances. Such a holding would be a travesty to justice especially in a case where a party who should have joined in the proceedings was not joined.***
>
> ***In the circumstances and considering that the only issue in the petition is whether the suit properties have encroached on a public road, …***
>
> ***Suffice to say that the applicant has demonstrated that the judgment of the court shall adversely affect him. Having not joined Kenya Commercial Bank to these proceedings when the petition was filed, and in view of the ramification of the orders of this court, I find and hold that the applicant is a necessary party in these proceedings and ought to have been heard.***
>
> ***Consequently, the applicant should be joined in these proceedings and be given an opportunity to ventilate its case."***

11. It is that decision that has provoked the appeal herein which is premised on the grounds that the learned Judge erred in law and fact by:-

i. Failing and/or avoiding to address all issues of law and facts that were brought to his attention.

ii. Ignoring the applicable law on joinder of parties and at what stage of a suit can a party be joined as a necessary party.

iii. Misinterpreting the provisions of Article 50(1) of the Constitution.

iv. Failing to appreciate that the 19th respondent had not demonstrated any valid reason for setting aside a valid judgment.

v. Failing to appreciate that Kenya Commercial Bank could not sell the suit properties while the suit was still pending by virtue of the doctrine of lis pendense.

12. At the hearing of the appeal, Mr. Otara appeared for the appellant, Mr. Kilonzo appeared for the 8th respondent while Mr. Mkombi appeared for the 13th & 14th respondents. There was no appearance for the other respondents.

13. The appellant faulted the learned Judge for failing to address himself on issues brought to his attention. Firstly, that the 10th and 19th respondents shared a common director. Secondly, that the petition was advertised in the Daily Nation of 4th July, 2011 calling on all interested parties to enter appearance. This was in the public domain. By setting aside the judgment the learned Judge went against the cardinal principle that litigation ought to come to an end. Moreover, the 19th respondent had not advanced any reason to justify the judgment being set aside. It was argued that the learned Judge failed to appreciate that the only remedy available to the 19th respondent was to sue for damages against Kenya Commercial Bank.

14. Supporting the appeal, the 13th and 14th respondents contended that a party could not be joined after judgment is delivered. In support of that argument, they cited persuasive High Court decisions in ***Lilian Wairimu Ngatho & another vs. Moki Savings Co-operative Society Limited & another [2014] eKLR*** and ***Moses Wachira vs. Niels Bruel & 3 others [2014] eKLR***. They also did not accept the allegation that the 19th respondent was not aware of the suit given that the 10th respondent was a common director in both companies. The respondents added that the findings in the judgment not only bound the litigants but also their successors in title and the general public because the subject matter was public roads and access roads to the sea. To the respondents, the only avenue open to the 19th respondent was to file objection proceedings or appeal to this Court.

15. Opposing the appeal, the 8th respondent posited that the parameters within which an appellate court can interfere with learned Judge's discretion are settled. Setting out those parameters, the 8th respondent relied on ***Mrao Ltd. vs. First American Bank of Kenya Ltd. & 2 others [2003] eKLR*** wherein it was held:-

"An appellate court may only interfere with exercise of judicial discretion if satisfied either;

a) The judge misdirected himself on law, or

b) That he misapprehended the facts or,

c) That he took account of considerations of which he should not have taken an account, or

d) That he failed to take account of considerations of which he should have taken account, or

e) That his decision, albeit discretionary one, was plainly wrong."

16. In its view, the joinder of the 19th respondent would aid the trial court to determine the issues in dispute with finality since all concerned parties would be on board. In that regard, we were referred to this Court's decision in ***Onyango vs. Attorney General [1986-1989] CAK***.

17. We have considered the record, submissions by counsel and the law. The appeal herein challenges the learned Judge's exercise of discretion in favour of the 19th respondent. As such, we are guided by the parameters set out in ***Mrao Ltd. vs. First American Bank of Kenya Ltd. & 2 others (supra)***. In our view the appeal turns on whether the 19th respondent had notice of the suit.

18. It is not in dispute that the suit properties were transferred to the 19th respondent on 18th July, 2014 during the pendency of the suit. Bearing in mind that the petition subject of these proceedings was advertised in the Daily Nation on 4th July, 2011 the same cannot be deemed as notice to the said respondent. This is simply because that advertisement was made way before the 19th respondent had any interest in the suit properties. Be that as it may, we cannot help but note that the 10th and 19th respondent shared a common director, Mr. Johnson Mwisho Fondo. Surely, the said director was abreast with the suits affecting the 10th respondent and the suit properties in question. It is clear that the 10th respondent was served with the petition and even entered appearance. In light of that fact, unlike the learned Judge, we are not convinced that the 19th respondent was not aware of the suit when it purchased the suit properties. Furthermore, we find that the 19th respondent was not forthcoming with the truth regarding its knowledge of the suit and that alone ought to have made the learned Judge decline to exercise his discretion in its favour.

19. We also find that the 19th Respondent being the 10th respondent's successor in title was bound by the outcome in the judgment. In finding so, we agree with the sentiments of Madan J.A in ***Mawji vs US International University*** & ***another*** ***[1976] KLR 185*** that:-

> ***"Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit."***

See also ***Sir H. S. Gaur's Transfer of Property Act, 7th Edition pg. 579***.

20. In the end, we think we have said enough to demonstrate that the learned Judge erred in joining the 19th respondent to the suit and setting aside the judgment therein. Consequently, the appeal herein has merit and is hereby allowed. We set aside the learned Judge's ruling dated 16th September, 2016 and substitute it with an order dismissing the 19th respondent's application for joinder. Taking into account the public interest nature of these proceedings we make no orders as to costs both in the trial court and this appeal.

Dated and delivered at Mombasa this 25th day of January, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR