REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

CORAM: VISRAM, KARANJA & KOOME JJ.A)

CIVIL APPEAL NO. 85 OF 2016

BETWEEN

GARISSA MATTRESSES LIMITED.....APPELLANT

AND

MARGARET WALEGWA WAMWANDU.....RESPONDENT

BENSON LUSWETI WANYONYI.....RESPONDENT

PAUL KIZUMBI MAKANGA.....RESPONDENT

FRANCIS ABUNGU DIENYA.....RESPONDENT

CHITI MELE NYAWA.....RESPONDENT

ABUBAKAR FAKII YUNUS.....RESPONDENT

LUCY KINA.....RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Mombasa, Honourable Justice A. Omollo, dated and delivered on 21st July, 2016 in High Court ELC case no. 316 of 2014)

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JUDGMENT OF THE COURT

1. This appeal emanates from a ruling in Mombasa ELC case no. 316 of 2014 *(the pending suit)*, between the appellant and the 1st-6th respondents. In the suit, the 7th respondent had filed an application dated 9th September, 2015, seeking to be joined as a defendant therein, on grounds that the appellant had obtained warrants of eviction against her and some 300 others in a different suit, being Mombasa ELC Case No. 57 of 2010 *(the concluded suit)*; as a result of which, the 7th respondent stood to be evicted from land known as Plot No. MN/V/15 *(the suit land)*. More importantly, that the said warrants were procured without the knowledge of the existence of the suit by the potential evictees, meaning they were condemned unheard, their occupation of the suit land notwithstanding.

2. The 7th respondent reiterated that her joinder to the suit was necessary for the ends of justice to be met, considering that during the pendency of the concluded suit, the 1st -6th respondents herein, alongside 155 others had not served her with the suit papers despite being aware of her proprietary interest in the suit land. She indicated that the 1st- 6th respondents had purported to act on behalf of a group known as '*Kwa Punda Self Help Group'* which was ostensibly supposed to represent the interests of the occupants of the land, but which acted without their authority or consent. According to her, she had neither consented to the judgment nor participated in the proceedings, having been unaware of the same.

3. Consequently, if the eviction was allowed to proceed as planned, she would be rendered destitute. The 7th respondent had also filed an application dated 7th September, 2015 seeking stay of execution of the judgment which gave rise to the eviction orders. However, even as she sought to be so joined in the pending proceedings, the 7th respondent was quick to point out that the appellant (who was the plaintiff in the

pending suit) was a stranger to the concluded suit. She also elaborated that the reason she sought joinder in a different suit was because her efforts for joinder in the concluded suit had borne no fruit for time and again, she was denied audience in that suit by the learned Judge who ruled that she had no right of audience in a suit which had already been discontinued by consent of the parties.

4. According to the respondent, her application for joinder in that suit was not heard, and instead, the court adopted the said consent when her application was still pending. It was her case therefore, that the respondents could not be said to have withdrawn a case as her application was still pending. In the same vein, the respondents could not be said to have withdrawn a suit in which judgment had already been entered. In addition, that neither the agreement nor the consent was signed by all the parties, given that the respondent's authority to sign documents was only limited to pleadings and did not extend to entering into consents. It was the 7th respondent's contention therefore, that at the time the agreement and the consent were executed, the court was already *functus officio* and that neither the consent nor the agreement had any legal effect. She deposed further that not all the residents on the suit property were compensated by the appellant as alleged.

5. The application was opposed, vide a replying affidavit sworn on 18th September, 2015 and a further replying affidavit sworn on 28th January, 2016 by the appellant's director, one Ibrahim Mohammed Salat, as well as by a replying affidavit sworn on 14th December, 2015 by the 1st respondent on her own behalf and on behalf of the 2nd- 6th respondents. For the appellant, it was simply argued that the 7th respondent lacked *locus standi* to seek enjoinment in the pending suit, since she had no identifiable interest in the matter. Further, that since the 7th appellant was never party to the concluded proceedings, and in light of the judgment already issued in those proceedings, that she had no basis for instituting the application for enjoinment. The appellant asserted that she had lawfully acquired the suit property and that the 1st- 6th respondents had already been duly compensated for the same as the bona fide officials of *kwa punda self help group* and the 7th respondent, having missed out on those proceedings was now just a stranger and busy body with no right of audience.

6. Upon hearing the respective submissions by the parties, in a ruling delivered on 21st July, 2016, **Omollo J.,** allowed the application and set aside the consent judgment dated 18th December, 2014, with a corresponding order that the 7th respondent be joined as a defendant in the suit.

7. Dissatisfied with that ruling, the appellant lodged the present appeal, in which she impugned the decision on grounds that the learned Judge erred by: unilaterally consolidating the two applications dated 7th and 9th September, 2015; unlawfully setting aside the consent judgment; finding in favour of the respondent and joining her to the suit yet she lacked *locus standi;* finding that the respondent had resided on the property for over 30 years; referring to HCCC No. 57 of 2010 (O.S) and HCCC No. 187 of 2014 yet the 7th respondent was not a party thereto and; holding that the appellant had admitted that the respondent was one of the potential evictees from the suit property.

8. With leave of Court, parties filed their respective submissions, which they adopted during their oral highlights at the hearing of the appeal. According to **Mr. Omwenga,** learned counsel for the appellant**,** the 7th respondent lacked the *locus standi* to file the applications dated 7th September, 2015 and 9th September, 2015. In addition, that even upon filing the said applications, she was still unable to prove that she was a resident on the suit property and hence affected by the consent judgment. Counsel submitted that as per the decision in **Kenya Commercial Bank Limited v. Specialised Engineering Company Limited [1980] eKLR**, the setting aside and/ or variation of a consent can only be done on grounds similar to those for setting aside a contract. Counsel called in aid the decisions in **The Board of Trustees National Security Fund v. Michael Mwalo [2015] eKLR** and **Flora Wasike v. Destimo Wamboko [1988] eKLR** in support of the proposition that the only way a court can validly set aside a consent judgment is if it is demonstrated, that the consent was procured through fraud, collusion or connivance**.** Further, that as per **section 67(2)** of the Civil Procedure Act, no appeal can be instituted against a decree passed by the court with the consent of the parties. Consequently, that since the 7th respondent had failed to demonstrate her capacity and interest in the matter, or any of the grounds for setting aside a consent judgment, her applications ought to have been dismissed.

9. Still addressing the issue of the 7th respondent's *locus standi*, counsel referred to the case of **Culton v. Culton; Supreme Court of Carolina 398 S.E 2d 323,** while submitting that only a party aggrieved by an order or judgment may prefer an appeal against it. For avoidance of doubt, he said, an aggrieved party is one who is able to demonstrate that their rights have been directly or injuriously affected by the action of the court and the 7th respondent was no such party. In conclusion, it was submitted that the learned Judge misdirected herself when she found the 7th respondent to have occupied the land for over 30 years, even though no evidence was proffered to prove as much.

10. This being a first appeal, this Court is cognizant that its primary role is to reassess and re-evaluate the evidence tendered before the trial court and reach its own conclusions; bearing in mind that it neither saw nor heard the witnesses. This much was restated by the Court in **Musera -vs- Mwechelesi & Another (2007) KLR 159** as follows;

> **'We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial Judge's findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.'**

11. With that in mind, the main issue for determination herein is hether the 7th respondent had the *locus standi* to merit her joinder in the pending proceedings. Alongside that is the peripheral issue of whether, the learned Judge erred in consolidating and determining the applications dated 7th and 9th September, 2015 together without the consent of the parties.

According to the **Black's Law Dictionary, 9th Edition** at page 1026 *Locus standi* is defined as-

> **'The right to bring an action or to be heard in a given forum'**

Further, this Court in the case of **Alfred Njau & 5 others vs. City Council of Nairobi [1983] eKLR** defined it thus;

> **'The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding**.'

According to the appellant, the 7th respondent lacked *locus standi* for she was neither a party to the concluded proceedings nor to the pending suit. In addition, that having failed to prove her interest in the suit land, her contentions were mere allegations of a busy body. In light of this, the appellant argued, the learned Judge erred in holding that the 7th respondent had been in occupation for over 30 years and consequently allowing her joinder to the suit.

12. Under Order 1 rule 8 of the Civil Procedure Rules, upon which the 7th respondent's application was premised, a non party to a suit may apply to be joined in a suit. In particular, sub rule 3 thereof provides that:

> **'Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1)may apply to the court to be made party to such suit'**

As stated earlier, the 7th respondent's initial attempt was to be enjoined in the concluded suit, in which the rest of the respondents purported to act on her behalf. This much is apparent from two applications one dated 19th March. 2013 seeking joinder and another dated 16th September, 2013 seeking the court's directions on the status of registrations made pursuant to the judgment. There is no dispute that both applications though filed, were never heard. It is also common ground that pursuant to that judgment, the suit land was subsequently transferred in favour of the appellant. In light of the 7th respondent's claim that she was one of the uncompensated residents and that she was likely to be rendered homeless; and in light of her failure to be heard, the trial court rightly found that she was entitled to be joined in the proceedings as a co defendant. Barring her from the approaching the seat of justice even when it was evident that she was not a busy body in the matter negated the cardinal rules of natural justice. There was no injustice in our view which would have been occasioned to the other parties had the 7th respondent been heard. All the parties would have had an opportunity to ventilate their claim and leave it to the court to determine whether the 7th respondent's claim could succeed or not.

13. On the issue of consolidation of the two applications, the appellant faulted the learned Judge for unilaterally consolidating the application for stay of execution with that for joinder. According to the appellant, the Judge erred as the two should have been entertained separately or if consolidated, should have been with the consent of the parties. No provision of law was cited in support of this proposition. Even if the two applications were to be heard separately, the application for joinder in itself had a two prong approach. On one hand, the joinder of the 7th respondent and on the other, stay of execution of the judgment. Therefore, the fact that the learned Judge entertained the two applications conjunctively did not occasion any prejudice because even if the application dated 7th September, 2015 were to be ignored, the prayer for stay still found its way inside the application for joinder; meaning the court would still have dealt with the issue of stay of execution.

14. We think we have said enough to demonstrate that this appeal lacks merit. We dismiss it with costs to the 7th respondent.

Dated and delivered at Mombasa this 15th day of February 2018.

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