



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 67 OF 2016

BETWEEN

DR. SARAH JELANGAT SIELE.....APPELLANT

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

REMO LENZI.....2ND RESPONDENT

SEVEN ISLANDS WATAMU LIMITED.....3RD RESPONDENT

POSTAL CORPORATION OF KENYA.....4TH RESPONDENT

(An appeal from the judgment of the Environment and Land Court at Malindi (Angote, J.) dated 13th May, 2016

in

ELC No. 43 of 2005)

JUDGMENT OF THE COURT

1. By a Grant number CR. 20405 a leasehold interest over Plot No. 103 Watamu (the plot) was registered under the **Registration of Titles Act (RTA (repealed))** in favour of **Dr. Sarah Jelangat Siele** (the appellant) for a period of 99 years from 1st May, 1989. It seems that the appellant neither resided nor developed that plot. However, she charged it as security for a loan facility advanced by Transnational Finance Limited which charge was discharged on 25th July, 2001. Sometime in April 2005 she noticed that a perimeter fence which was erected around a neighbouring parcel had also enclosed her plot. Upon inquiring from the area chief she was informed that that area had been redrawn for a settlement scheme.

2. Apparently on 17th March, 2003 the Chief Land Registrar had directed the Kilifi District Land Registrar to issue a title under the **Registered Land Act (RLA (repealed))** being Kilifi/Jimba/1125 (suit property) to **Seven Island Watamu Limited** (the 3rd respondent) within the same registration section as the appellant's plot. According to the appellant, that title not only subsumed and/or extinguished her title over the plot but was also fraudulently issued. It was null and void for the reason that firstly, the suit property purportedly acquired by the 3rd respondent had already been surveyed in the year 1984 under the **RTA**. Secondly, her title was a first registration thus no other title could be issued with regard to her plot even under a different registration regime. Thirdly, there was an embargo on transactions relating to the Kilifi/Jimba registration section which had not been lifted by the time the title in question was purportedly issued. All in all, the plot was not available for alienation to a third party.

3. As a result, the appellant filed suit in the Environment and Land Court (ELC) seeking *inter alia*:-

i. A declaration that the plaintiff (appellant herein) has a valid title over Plot No. 103 Watamu.

ii. A declaration that Plot No. 103 was not available for alienation by the State after 2nd August, 1990.

iii. An injunction restraining the 2nd and 3rd defendants (2nd and 3rd respondents herein) from trespassing, alienating, developing or in any way manner dealing with Kilifi/Jimba/1125 as to prejudice the plaintiff's rights over Plot No. 103.

iv. Rectification of Kilifi/Jimba/1125 by cancellation of the same.

v. In alternative compensation for the suit property.

4. The **Attorney General** (the 1st respondent) who was sued on behalf of the Chief Land Registrar and Kilifi District Land Registrar, in its statement of defence averred that the suit property was situated within an area previously registered through the adjudication process and the said area had been affected by the 1986 land embargo issued against properties within the coastal region. Subsequently, the suit property amongst others was allocated through a Settlement Fund Trustee Squatter Programme whose objective was to settle squatters. The allocations thereunder are valid and subsist at least at the time the defence was filed. The 1st respondent further averred that the original title over suit property was issued to Swaleh Athmani, Abdinasir A. Mohamed and A. A. Nasir on 6th October, 2000. The title was then transferred to Abbas Lali Ahmed on 28th January, 2003 and ultimately to the 3rd respondent on 17th March, 2003.

5. In their joint defence **Remo Lenzi** (the 2nd respondent) and the 3rd respondent maintained that they were not aware of the existence of the appellant's plot or that it had been extinguished or subsumed by the title held by the 3rd respondent. They claimed that the 3rd respondent was an innocent purchaser without notice thus its title was indefeasible.

6. It is instructive to note that **Postal Corporation of Kenya** (the 4th respondent) was subsequently joined in the suit as an interested party. It, like the appellant, had instituted a suit being H.C.C No. 75 of 2007 seeking cancellation of the title to the suit property which it believed had unlawfully incorporated its parcels namely, Plot Nos. 96 and 110 situated within the same registration section and registered under the **RTA**. The 4th respondent neither filed pleadings nor gave any evidence at the trial.

7. Pursuant to a court order Peter Mwaura Karanja (PW2), a licensed surveyor, accompanied by the Deputy Registrar of the ELC visited the suit property on 30th March, 2012 for purposes of surveying the same. His task was to point out where Plot No. 103 was situated in relation to the suit property. He confirmed that the plot was reflected in the survey plan number FR. No. 133/46 for the area which had been prepared and registered by the District Surveyor in the year 1976. On the ground beacons for the said plot were missing but he was able to identify the plot with the aid of the survey plan and some of the beacons of Plot No. 102 which were still intact. It was clear the plot was within the suit property.

8. He testified that indeed a settlement scheme had been introduced within the Kilifi/Jimba registration section for purposes of settling squatters on government land. The said scheme did not affect all the parcels under the said section but only government land. Survey plan FR. No. 133/46 was already in existence by the time allocation under the settlement scheme commenced. Consequently, the plot which had been demarcated under the survey plan could not form government land for purposes of the settlement scheme since it had already been allocated to the appellant. According to him, the suit property did not exist simply because it was not reflected on the Registry Index Map Sheet No. 12 for that registration district. Be that as it may, this was a case of double allocation.

9. Roberto Lenzi, a director of the 3rd respondent gave evidence on behalf of the 2nd respondent and the 3rd respondent. He stated that together with the 2nd respondent they purchased the suit property from Abbas for a consideration of £220,000 and registered the same in favour of the 3rd respondent as their nominee. Their advocate, Tukero Ole Kina (DW3) exercised due diligence prior to the purchase of the suit property and established that the title was clean. At no time were they aware of the appellant's interest, if any, on the suit property prior to filing of the suit. The 3rd respondent has since put up a five star tourist resort on the suit property.

10. Faced with the foregoing the learned Judge (Angote, J.) by a judgment dated 13th May, 2016 dismissed the appellant's suit with costs. In doing so he expressed in his own words that-

“Notwithstanding the fact that the survey for the entire government block was surveyed in 1976, thus F/R No.133/46, the Plaintiff's interests in plot number 103 only crystalized on 2nd August, 1990 when a grant was issued to her.

However, by the time the Plaintiff was issued with the Grant for plot 103 in 1990, the land was already governed by the Registered Land Act (repealed) when the Registry Index Map (sheet) No. 12 was prepared in June 1979, which, as stated by PW2, incorporated the entire block represented in F/R No. 133/46.

...

It therefore follows that the Government, by 1979, had set aside the land represented in survey plan number F/R 133/46 as a settlement scheme to be managed by SFT, and the only title documents that could be issued were only in respect to the people who were to be identified by the SFT either as squatters on the land or landless.

Furthermore, having placed FR 133/46 under the Registered Land Act, the Government could not purport to sub-divide the land and issue grants under the Registration of Titles Act in 1990 or at all before cancelling Sheet No.12 that was prepared pursuant to the provisions of Section 18(1) and (3) of the RLA.

The Plaintiff could not have therefore legally acquired a Grant in respect of plot number 103 in 1990 in view of the fact that the land had already been set aside by the Government for a settlement scheme known as Kilifi/Jimba Settlement Scheme and the Title Deeds that were to be issued could only have been issued pursuant to the provisions of the RLA (repealed).

...

The evidence before me shows that Swaleh and others were allocated the suit property within the Jimba Registration Section by the SFT. The Title Deed for parcel of land number Kilifi/Jimba/1125 shows that it falls within that section, otherwise known as Registry Map Sheet 12 which was produced by PW2. The Jimba Registration Section was established in June, 1979, way before the Plaintiff was issued with a grant for plot No.103, which in my view should not have been issued in the first place.”

11. It is that decision that is subject of the appeal before us which is premised on the grounds that the learned Judge erred by-

a) Misapprehending the evidence before him thus arriving at a wrong conclusion.

b) Relying on documents which he had ruled as being inadmissible in evidence without the makers thereof being called to testify.

c) Finding that Kilifi/Jimba/1125 was registered in the name of the Settlement Fund Trustee and the legal requirements for such an allocation had been met.

d) Failing to find whether the transaction resulting in the registration of the suit property in favour of the 3rd respondent was a controlled transaction.

e) Failing to appreciate the context in which the issue of understatement of the purchase price was raised by the appellant.

f) Holding that the 3rd respondent was protected under Section 39(1) of the Registered Land Act as innocent purchaser.

g) Totally misunderstanding the evidence in regard to the maps and survey records produced before him.

12. Mr. Otieno, learned counsel for the appellant, faulted the learned Judge for finding that there existed a settlement scheme known as Kilifi/Jimba settlement scheme and more so that the title over the suit property emanated from that scheme without any evidence to support such a finding. Mr. Mwaura (PW2), a licensed surveyor gave uncontroverted evidence that the suit property was not amongst the parcels identified either in the survey plan FR 133/146 or Registry Index Map No. 12. The evidence by the appellant to the effect that she was informed by the area chief that the land in the area had been redrawn for a settlement scheme did not in any way establish the existence of such a scheme let alone the alienation of the appellant's plot to that scheme. The learned Judge failed to appreciate that not a single document from the settlement scheme was produced by the respondents showing how the suit property was allocated. In that regard, he submitted that several questions arose which required the court's consideration *to wit*, how did the Settlement Fund Trustee acquire the land it allocated? How was Swaleh identified as a beneficiary under the scheme? Where was the evidence of allocation?

13. The learned Judge was criticized for relying on letters from the Chief Land Registrar and District Land registrar which indicated that the title to the suit property had been issued through the Settlement Fund Trustee. This is because he had declared them inadmissible earlier on during the trial. By basing his findings on those letters the learned Judge denied the appellant a chance to interrogate the same in the belief that they had not been admitted as evidence. Moreover, the High Court in Misc. Application. No. 29 of 2002 ruled with the concession of the 1st respondent that the suit property was not reflected in the records of the Commissioner of Land, Chief Land Registrar and did not exist.

14. It was urged that the learned Judge failed to appreciate that the appellant in her amended plaint challenged the legality of the 3rd respondent's title by virtue of being fraudulently obtained. It followed that the process by which the same was acquired was subject to inquiry. The contention that the Land Control Board consent was not obtained prior to the transfer of the suit property to the 3rd respondent was not an ambush to the 2nd and 3rd respondents who were at all times aware of the appellant's claim.

15. Mr. Otieno contended that the learned Judge was wrong in holding that the 3rd respondent's title was protected under **Section 39(1)** of the **RLA**. Expounding on this argument he claimed that it was not in dispute that the 3rd respondent was not a party to the sale agreement hence it did not give any consideration thus could not enjoy the protection extended to an innocent purchaser for value without notice. Still the evidence on record suggests that 3rd respondent was registered as proprietor of the suit property on 17th March, 2003 before the sale agreement in respect of the same was executed on 15th August, 2003. Furthermore, Roberto (DW1) had testified that the purchase price of the suit property was £220,000 which was equivalent to Kshs. 25,000,000 yet the purchase price declared under the transfer document was Kshs.8,000,000. This was a clear indication that the 3rd respondent was not as innocent as it portrayed itself.

16. Mr. Otieno went on to submit that the issue in dispute was the validity of the 3rd respondent's title and its location on the ground and not the appellant's title. The learned Judge went off track by finding that the plot had been created in 1990 after the Kilifi/Jimba registration section had already been brought under the settlement scheme. For that reason the plot was not available for allocation to the appellant. According to him, there was no evidence to support those findings. We were urged to allow the appeal on those grounds.

17. Supporting the appeal Mr. Munyithya, learned counsel for the 4th respondent, associated himself with the submissions made on behalf of the appellant. He argued that the learned Judge contrary to **Section 23** of the **RTA** reversed the burden of proof by calling upon the appellant to prove the root of her title. The provisions of **Section 23** were clear that a certificate of title issued thereunder was conclusive proof of ownership save where fraud or misrepresentation is established. The learned Judge totally ignored the evidence of Mr. Karanja, a licensed surveyor and went on a speculative foray to justify the legality of the 3rd respondent's title. Mr. Karanja's evidence was crystal clear that the plot existed and the title over the suit property resulted in double registration.

18. On his part, Mr. Wagara, learned counsel for the 2nd and 3rd respondents, began by stating that the appellant had admitted that the suit

property was sold to the 2nd respondent and registered in favour of the 3rd respondent. He added that the 3rd respondent was a bonafide purchaser who had no notice of the appellant's title over the alleged plot. To that extent he submitted that the appellant in her evidence admitted that the 2nd respondent was surprised when she told him about her interest in the plot which had allegedly been subsumed by the suit property. In any event, he never saw the appellant on the suit property after purchasing the same.

19. In as much as the 3rd respondent did not give any consideration it was registered as a nominee for the 2nd respondent and Mr. Roberto who paid the purchase price. Accordingly, the protection afforded to the two as innocent purchasers extended to the 3rd respondent. Buttressing that proposition reliance was placed on the definition given to a 'nominee' under **Black's Law Dictionary** –

“ 2. A person designated to act in place of another...3. A party who holds bare legal title for the benefit of others.”

20. As to whether the transaction between the 2nd respondent and Mr. Roberto, on one hand and Abbas (DW3), on the other hand, was a controlled transaction requiring Land Control Board consent was never raised by the appellant in her pleadings. In light of the foregoing the learned Judge was right in holding that the same was not an issue for determination.

21. It was submitted that the 2nd and 3rd respondents did not participate or collude with Abbas or their advocate, Mr. Ole Kina to understate the stamp duty payable. The respondents were not aware of the understatement, if any. In total the appellant did not prove any fraudulent dealings with respect to the 2nd and 3rd respondents. The title document over the suit property, the search certificate and the letters from the Chief Land Registrar and the District Land Registrar confirmed the existence of the suit property contrary to the appellant's allegations.

22. With regard to the sale agreement, Mr. Wagara contended that the law on contracts only requires that a sale contract be reduced in writing and there is no requirement that such an agreement be done before transfer of the property. He argued that the appellant's interest over the plot were cancelled by the government once the Kilifi/Jimba registration section was brought under the provisions of the **RLA** and appropriated to squatters. Likewise, the ruling in Misc. Application. No. 29 of 2002 could not sway the learned Judge's decision. The appellant's remedy, if any, lay in damages.

23. This being a first appeal, the Court is enjoined to reconsider the evidence, evaluate it and draw its own conclusions. Nevertheless, we ought to give due deference to the findings of the trial court unless they fall foul of proper evaluation in line with the evidence on record or the trial Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. See **Ephantus Mwangi vs Duncan Mwangi Wambugu (1982-88) 1 KAR.**

24. It is trite that parties are bound by their pleadings and the issues for determination in a suit generally flow from the pleadings. A court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination. See this Court's decision in **Galaxy Paints Co. Ltd. vs. Falcon Guards Ltd. (2000)2 EA 385**. However, a court may base its decision on an unpleaded issue if in the course of the trial the issue has been left for the decision of the court. An issue is deemed to have been left for the court's decision when a party addresses the court and leads evidence on the issue. See **Vyas Industries v Diocese of Meru[1976] eKLR**. Applying these principles to the matter at hand we agree with the trial court that the issue of whether the transaction between the 2nd and 3rd appellants and Abbas was a controlled transaction was neither pleaded nor left for determination by the trial court. Apart from the appellant's counsel cross examining Mr. Roberto and Mr. Ole Kina on the same no evidence was led by the appellant in that regard. In fact the appellant's cause of action was based on the allegation that the 3rd respondent's title was fraudulently obtained. The particulars of fraud set out did not include that the Land Control Board consent was not obtained prior to registration of the title over the suit property in favour of the 3rd respondent.

25. In our view, the suit at the trial court as well as this appeal turns on the issue of the validity of the 3rd respondent's title *vis-à-vis* the appellant's title to the plot. The learned Judge did not seem to doubt the existence of the plot as reflected on the survey plan but he deemed that the incorporation of that survey plan in the registry index map no. 12 indicated that the entire registration section including the plot had been set aside by the government for the settlement scheme.

26. To begin with, it is clear that the government had established a settlement scheme within the Kilifi/Jimba registration section. As to the extent of the parcels thereunder which were incorporated into the scheme is another issue altogether and the answer to which is unclear. Perhaps if the Chief Land Registrar or the District Land Registrar tendered evidence in this suit the issue would have been clarified.

27. What is clear is that the survey plan which was registered in 1976 established that the plot had been surveyed by the time of such registration. Further, the survey plan was incorporated as it was in the registry index map drawn in the year 1979. No changes were made to the survey plan indicating that the surveyed plots thereunder remained intact. We believe that the incorporation of the survey plan in the registry index map by itself did not demonstrate that the entire registration section reflected in the survey map had been set aside for the settlement scheme or was subject to the provisions of the **RLA** as suggested by the 2nd and 3rd respondents. More cogent evidence was required to establish the same. Nevertheless, contrary to the 2nd and 3rd respondents' contention nothing prevented the registration of the plot in favour of the appellant on 2nd August, 1990.

28. We, unlike the learned Judge, find that it is not clear whether the original title to the suit property, that is, the one issued to Swaleh Athmani, Abdinasir A. Mohammed and A. A Nasir on 6th October, 2010 emanated from the settlement scheme in question. To us the letters from the Chief Land Registrar and District Land Registrar indicating that the title was issued pursuant to the settlement scheme ought not to have been considered. This is because at the trial, the appellant's counsel objected to the 2nd and 3rd respondents attempt to produce those letters which were annexed to an affidavit sworn by Mr. Roberto as evidence. In upholding the objection the learned Judge held,

“An objection has been raised on the issue of the replying affidavit that was sworn by this witness during the hearing of inter partes application for injunction. Affidavits that have been relied on by the court can only be produced at the trial by the consent

of the parties or to show what a witness had stated during the hearing of the interlocutory application. However, the annexure of those affidavits cannot be produced as exhibits just because they are on record. Each document has to be produced at trial by the maker ... The replying affidavit makes reference to documents which this witness is not competent to respond to in this trial.

Having expressed himself as herein above it was not open for the learned Judge to turn around and rely on those same letters he had declared inadmissible simply because they were contained in an affidavit produced by the appellant. As the saying goes what is good for the goose is good for the gander. It is also not clear whether by the time the original title over the suit property was issued the embargo on the registration section had been lifted.

29. The learned Judge should have considered the evidence tendered by Mr. Karanja who surveyed the suit property and filed a report pursuant to a court order to establish the physical location of the two properties. As per the evidence of Mr. Karanja the suit property was not reflected either in the survey plan or the relevant registry index plan suggesting that it did not exist. This piece of evidence was not challenged but the learned Judge in a rather unusual manner held,

“Although PW2 attempted to impugn the Title Deed for parcel of land number Kilifi/Jimba1125 on the ground that it is not reflected on sheet number 12, it follows that due to the nature of the boundaries under the RLA, which are usually general boundaries and not fixed boundaries, allocation of land is usually done first and the Registered Index Map is amended later to reflect the allocations, especially in a settlement scheme.

What is important during the allocation process is the creation of a map for every registration district or section and the opening of a register. That is what happened in this matter when sheet number 12 for the Jimba Registration Section was prepared in 1979. Parcel of land number 1125 need not be in the R.I.M for it to be valid. But again, whether plot 1125 is on the R.I.M or not was not one of the issues that was pleaded in the Plaint.

Those sentiments were not supported by any evidence on record. In any event, the registry index map on record which is the 4th edition contains amendments thereto up to 16th July, 2012. No explanation was given as to why the suit property is still not reflected in that edition.

30. Even assuming that the existence and the origin of the suit property is not in doubt we are not convinced that the 3rd respondent's title is indefeasible by virtue of being an innocent purchaser for value without notice. We say so because it is not in dispute that the suit property was registered in favour of the 3rd respondent before the sale agreement was executed. The explanation given by the 2nd and 3rd respondent's counsel is that the law of contract only required that a sale agreement relating to disposition of land be in writing and that it did not prescribe that the same should be executed before the transfer of the land in question. In our view, this amounted to putting the cart before the horse. A question that lingers in our minds is what then was the basis of the transfer of the suit property? Similarly, it was the 2nd and 3rd respondents' evidence that the suit property was purchased at Kshs. 25,000,000 yet the amount declared in the transfer is Kshs.8,000,000. The respondents cannot feign ignorance of the understatement because the transfer document itself bears witness that it was executed on behalf of the 3rd respondent. Waki J., (as he then was) in *Kenya National Highway Authority vs. Shalien Masood Mughal & 5 others [2017] eKLR* quoted with approval *Chemei Investments Limited vs The Attorney General & Others Nairobi Petition No. 94 of 2005* wherein it was held,

“The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumar Shah & 2 Others vs. City Council of Nairobi & Another (supra) where the Court stated as follows,

“We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

31. In the end, we find at best the appellant's title over the plot was registered first in time on 2nd August, 1990 before the original title for the suit property was registered on 6th October, 2000 and the 3rd respondent's title which was registered on 17th March, 2003. Her title was not cancelled by the titles over the suit property and as such was protected under *Section 23 (1)* of the *RTA* which gave an absolute and indefeasible title to the owner of the property. As was aptly put by this Court in *Dr. Joseph Arap Ngok vs Justice Moijo ole Keiwua & 5 Others, Civil Applic No. Nai. 60 of 1997 (unreported)* -

“The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

32. For the reasons outlined herein above the appeal has merit and is allowed with costs to the appellant. We hereby set aside the learned Judge's judgment dated 13th May, 2016 in its entirety and substitute the same with the following orders:-

a) A declaration is hereby issued that the appellant has a valid title over Plot No. 103 Watamu.

b) Rectification of Kilifi/Jimba/1125 by the cancellation of the portion relating to Plot. No. 103 subsumed thereunder.

c) Re-establishment of the beacons in respect of Plot No. 103.

The appellant shall also have costs of the suit before the ELC.

Dated and delivered at Mombasa this 8th 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