IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO 61 OF 2017

BETWEEN

SALIM JUMA ALI...1ST APPELLANT

RASHID ALI...2ND APPELLANT

AND

JOYCE NINGALA MWAMUTSI (As Administrator

of the Estate of DAVID MWAMUTSI MURIRA)...............RESPONDENT

(An appeal from the Ruling and Orders of the Environment and Land Court of Kenya at Malindi (J.O. Olola, J.) delivered on the 27th July 2017

in

E.L.C. Case No. 182 of 2016.)

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JUDGMENT OF THE COURT

[1] The dispute in this appeal is over the ownership of title number Mbwaka/Maereni/311 (suit land) between the families of David Mwamutsi Murira (deceased) who died in the course of the court proceedings and was substituted by Joyce Ningala Mwamutsi (respondent) and the family of Juma Ali Birwa who also died and was represented by Salim Juma Ali and Rashid Ali, the 1st and 2nd appellants respectively. The parties have been warring over the ownership of the suit land for the last four decades going all the way back from 1975 when they claim their fathers purchased the said land from the original owner one Katana Chiringa. After the father of the respondent purchased the suit land as aforesaid, the said Katana Chiringa nonetheless went on to sell the same land to the father of the appellants. The parties seem to have taken the dispute over the ownership before the local Land Adjudication Officer, the Land Appeals Committee by the Minister, the African court, and finally the suit that gave rise to the present appeal was filed in July 2016 before the Land and Environment Court Malindi.

[2] On the part of the appellants they also filed judicial review proceedings in the High Court and a suit by way of an originating summons seeking to be declared the owners of the suit land by way of prescriptive rights acquired by adverse possession. Nonetheless the appeal before us is in respect of an interlocutory Ruling delivered on 27th July, 2017 by Olola, J., wherein David Mwamutsi Murira, original plaintiff, sought *inter alia* orders that the appellants be evicted from the suit land and be compelled to hand over vacant possession thereto to the respondent. Upon hearing the application and the opposition thereto the Judge allowed the application by making the following orders that is the gravamen of this appeal;

> **a) "That the defendant/respondents be evicted and/or compelled to handover vacant possession to the plaintiff /applicant.**
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> **b) That the OCS Kizurini police station be ordered to supervise and/or implementation** (sic) **of these orders.**
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> **c) That the said orders will be stayed for a period of 45 days to allow the respondents to remove the structures they have built on the suit land and/ or seek alternative accommodation**

d) That the plaintiff shall have the costs of the application."

[3] Aggrieved by the said orders, the appellants appealed raising a total of 11 grounds of appeal to wit; that the learned Judge erred in law and fact in issuing eviction orders at an interlocutory stage thereby rendering the hearing of the suit moot; granting mandatory orders in nature when the evidence was not clear; in the pendency of HCCC No 44 of 2012 (OS) which was consolidated with the present suit; for making substantive findings of facts without interrogating the evidence; taking into consideration irrelevant matters and making draconian orders that divested the appellants and rendered them homeless by issuing an order of eviction before hearing the witnesses. Finally for determining issues not pleaded such as res- judicata and failing to dismiss the application for injunction filed by the original owner who died and therefore reliefs were sought in *personam* and died with him.

[4] This appeal was disposed of by way of written submission; both Mr Kilonzo, learned counsel for the appellant and Ms Mwania, learned counsel for the respondent filed very elaborate submissions and during the plenary hearing it is only Mr Kilonzo who made a brief highlight on a few issues, that, by issuing final eviction orders, the Judge made a final determination of the two suits before they were formally consolidated. The ELC No 44 of 2012 was a suit filed by way of an originating summons and was seeking orders of adverse possession by the appellants was rendered moot in view of the holding by the Judge that;-

> ***"Given the in and out- of – court disputes the parties have** (sic) **heard since 1977, I doubt that the plaintiff herein can be described as a party that has neglected to assert his rights over the suit land…"***

[5] According to counsel for the appellants there were no special circumstances to warrant the granting of final orders as the plaint by the original plaintiff sought a permanent order of injunction, vacant possession and in default eviction orders; simultaneously with the filing of the plaint, the notice of motion seeking similar orders was filed; the appellants defence and matters pleaded in ELC No 44 of 2012 which raised complex and disputed matters of facts which could only be determined at a hearing were ignored. The decisions in the case of; **Olive Mugenda & Another –vs- Okiya Omtata Okoiti & 4 Others NBI C.A 3 AND 11 OTHERS OF 2016** where the Court of Appeal cited with approval the case of **Ashok Kumar Rajpal vs Dr (Smt) Ranjama Baipai Air 2004 All 107, 2004 (1) Awc 88** at Paragraph 17 where the Indian Court expressed itself as follows was relied on;-

> ***"We have analysed the ruling of the trial court delivered on the 18th December 2015 and evaluated the same against the criterial in the persuasive dicta in the Indian decisions. Nowhere in the ruling does the trial judge give reasons for granting final orders at the interlocutory stage; no special circumstances have been explained to warrant the grant of final orders and on the balance of convenience and question of irreparable injury have not been addressed. In our view, then the ruling of 18th December 2015 does not pass the persuasive Indian threshold and criteria for grant of final orders at an interlocutory stage…***
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> ***Applying the decision of this Court in VIVO ENERGY KENYA LTD –VS- MALOBA PETROL STATION & 3 OTHERS (2015) e KLR and STEPHEN KIPKEBUT T/A RIVERSIDE LODGE & ROOMS –VS- NAFTALI OGOLA (2009) e KLR, where it was stated:-***
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> **'… it has often been stated that an order which results in granting of a major relief in the suit ought not be granted at an interlocutory stage. We have compared and contrasted the ruling and orders delivered on 18th December 2015 with the petition dated 21st October 2015. The ruling of 18th December 2015 effectively granted final orders in paragraph 62 (c), (d), (f), (g), (h) and (j) of the petition…'**

Counsel for the appellants went on to argue that matters that were not laid before the court were prematurely determined; especially disputed matters of fact. Finally counsel argued that the notice of motion was taken out by the original plaintiff who passed away, and although the respondent was granted leave to substitute him, the orders sought there in were in *personam* and *not in rem* therefore there was no competent motion as the prayers died with the original owner under the Latin maxim "*Actio personalis moritur cum persona* (i.e. all personal actions die with the death of the person).

[6] Ms Mwania, learned counsel for the respondent opposed this appeal; in her notice affirming the impugned Ruling she argued that the ownership of the title to the suit land was never challenged; it was registered in the name of the respondent's father; the facts spoke for themselves as the respondent's father claim for the suit land persisted therefore the appellants could not have had a peaceful occupation of a parcel of land that was permanently a subject of unending litigation. The Judge exercised judicial discretion in favour of the respondent as the case was clear and satisfied the conditions for granting the orders at an interlocutory stage. In her written submissions, counsel reiterated that the appellants were trespassing on the suit land despite the respondent's efforts to claim the land, they persisted and all the respondent's efforts are well documented and for that reason, viva voce evidence could not change the circumstances.

[7] There was sufficient evidence in the affidavits supported by official documents that could not be changed during cross examination. Moreover, according to counsel, prior judgments/decisions touching the suit land including the registration of the respondent as the first registered title owner, the documented history of the matter, the Judge was entitled to rule against the appellants so as to uphold the integrity of the court process that was bound to be abused by the appellants suit on a claim of adverse possession. She cited the provisions of ***section 19(1)*** of the Environment and Land Act No 11 of 2011 which provides that in any proceedings to which the Act applies, the Court shall act expeditiously without undue regard to technicalities of procedure. In this regard counsel submitted that the decision by the lower court that held the respondent was the legal owner of the suit land was never appealed against, the respondent is the registered owner of the suit land, it was the view of counsel that the Ruling of the Judge should not be interfered with.

[8] The above is the brief summary of the matter before us, which we have considered with some level of caution bearing in mind that this is an interlocutory appeal as the hearing of the suit on merit before the High Court is yet to take place. Accordingly and as this Court stated repeatedly, in an interlocutory appeal where the suit is yet to be tried this Court should refrain from expressing concluded views on any issue which it thinks may arise in the pending trial. In dealing with the notice of motion that gave rise to the impugned Ruling, there is no doubt the Judge was exercising judicial discretion which we cannot interfere with unless we are satisfied that the discretion was not exercised

judicially. In **Mbogo And Another v. Shah [1968] EA 93**, the Court held as follows (as per Newbold. P.):-

> ***"……. a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.."***

[9] We ask ourselves whether the High Court offended the principles stated in the **MBOGO** case (supra) and so many other cases some of which were cited by counsel for the appellants. In answering this, we have also taken into consideration the orders issued were final in nature in that the appellants were ordered to surrender vacant possession of the suit plot and in default they be evicted. The appellant's complaint that runs through all the grounds of appeal was that the Judge purported to determine with finality matters that were pleaded in the appellant's suit, which was yet to be heard, that was seeking orders of adverse possession. We think the facts in this case are different from the **VIVO** and **OLIVE MUGENDA** cases (supra) in that this was a long standing dispute which involved a dispute over ownership of the suit property. In the **VIVO** case the dispute was over a contract to lease land while the **OLIVE MUGENDA** case was a contract of work. We also need to remind ourselves that in matters involving exercise of discretion no case is precedent to another as each case depends on its own peculiar circumstances as was held in the case of **Lindsay Parkinton Ltd vs. Triplain Ltd [1973] 2 ALL ER 273 at 279:**

> ***"…. in matters of discretion no one case can be an authority for another. As Kay L.J. said in Jenkins vs. Bushby*** *"the court cannot be bound by a previous decision to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion."* ***A discretion necessarily involves a latitude of individual choice according to the particular circumstances and differs from a case where the decision follows ex debito justitiae, once the facts are ascertained."***

[10] The guiding principles are of course the same that for a party to succeed, he or she must persuade the Judge that the orders sought were deserved before the hearing and determination of the main suit. The Judge relied on the matters stated in the supporting affidavit sworn by David Mwamusti Murira in which he gave the chronology of how he purchased the suit land from Katana Chiranga. However the said Katana Chiranga also purported to sell the same land to the appellant's father. The respondent annexed documents to show that the matter was referred to the land Adjudication elders and the respondent was declared the rightful owner; and was subsequently registered as the owner and issued with the title under the Registered Land Act on 13th April 1987. The appellant's father resisted all the attempts made by the respondent to vacate the suit land; the respondent did not relent as he filed a suit seeking eviction orders in CMCS No 3153 of 1996 Mombasa which was never completed as unfortunately, the appellant's father passed away and the respondent was advised to halt the case to enable the appellants herein obtain letters of administration.

[11] As the respondent was pondering, what steps to take another person by the name Richard Mwalongo claimed ownership of the same property by filing a land claim vide LND/KAL/31 /2004 at Kaloleni which was decided in the respondent's favour. Eventually the respondent was now before the Judge with the above suit which was simultaneously filed with a notice of motion as the respondent complained that the appellants were busy constructing permanent structures and a mosque on his piece of land; that the appellants were taking advantage of the Mzee Mwamusti's old age; this is how he stated his case under paragraphs 4 and 5 of the said affidavit;-

> ***"That the defendants/respondents have been taking advantage of my old age and they once told me that I don't need the land in question because I have ten daughters and only one son unlike them who are many sons and this is against the spirit of constitution which is against discrimination.***
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> ***That from the foregoing this honourable court shall find out that I am the bonafide owner of Mbwaka/ Maereni/311 as I acquired the title legally and also in all the judicial proceedings I have pursued since 1976 I have always been declared as the bonafide owner of the parcel of land in question and hence the defendant/respondent should not be allowed to reap where they never sowed and ought to be stopped by way of injunction"***

[12] The Judge fastidiously went through the grounds of objection by the appellants and their sworn depositions as can be gleaned from paragraphs 3 and 4 of the Ruling:-

> ***…In the replying affidavit sworn by Salim Juma Ali on 8th November 2016, the defendants aver that this application and the entire suit is an abuse of the court process as the same is sub- judice Mombasa High Court Civil Case No 44 of 2012 (OS).***
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> ***It is the respondents/ defendants case that their late father Juma Ali Birya and their families have resided on plot no Mbwaka/ Maereni/311 for over 40 years starting from 13th September 1975 when their father purchased the same from one Katana Chiriga. They aver that since the said purchase, they have been in exclusive possession of the plot and have wholly developed the same as their ancestral home in which they have put up a trading centre with several shops, a public mosque and a public Islamic Madrassa."***

The Judge was also fully aware of the leading authorities in granting mandatory orders of injunction as he cited the case of **Kenya Breweries Ltd vs Washington Okeyo (2002) EA 109** where this Court held:-

> ***"A mandatory injunction can be granted on interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court think it ought to be decided at once, or if the act done is simple and a summary one which can be easily remedied, or if the defendant attempts to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application."***

[13] To answer the pregnant question we posed earlier on, on whether the Judge erred by granting mandatory orders; we are persuaded going

by the material that was before the Judge, a prima facie case was established as per the standard spelt in law. The respondent's father is the registered proprietor of the suit land; he was the first registered owner and; a long history of how he tried to take possession of the suit land from the appellants and how his efforts were always thwarted was demonstrated and we have recited the various cases that he filed which were determined in his favour. The Judge may have gone off the mark slightly by commenting on the merit of a suit filed by the appellant that is seeking orders that they are in adverse possession, again the Judge cannot be faulted because it was the appellants who introduced the issues that the claim by the respondent was time barred by the doctrine of re judicata, sub judice and a pending claim for adverse possession. What the Judge did in our view was to bring the legal issues in perspective and did not make any determination on facts. As matters stand, the appellants are at liberty to pursue the hearing of the matter in the said suit as indeed the record shows an order was issued to have it consolidated with the above suit.

[14] From the foregoing, we are satisfied that this appeal lacks merit we find no justifiable reasons to depart from the findings and the orders issued by the trial Judge. Accordingly, we hereby dismiss the appeal with costs to the respondent.

Dated and delivered at Mombasa this 10th day of May, 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