IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 91 OF 2017

BETWEEN

I N N..APPELLANT

AND

M S C...RESPONDENT

(An appeal from the judgment of the Environment and Land Court

at Mombasa (Omollo, J.) dated 12th July, 2017

in

***E.L.C No. 230 of 2010*)**

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JUDGMENT OF THE COURT

1. The parties herein were entangled in some form of relationship, the nature of which is a point of contention. However, from the record it is clear that at one point the two lived together. It is during this period that the dispute which is the subject of this appeal arose.

2. ***M S C*** (the respondent), a Swiss national got married to one R C K in the year 1987. They not only frequented Kenya but also made investments therein. Of relevance, they purchased parcels described as Plot No. subdivision No.1538 (Original No. 651/11) registered as CR. No.21814/1 and Plot No. subdivision No.1538 (Original No. 651/12), registered as CR. No. 21815/1. On these parcels stood a three bedroom house. They also purchased Plot No.539/III/MN wherein a structure described as a Swahili house was erected; it was ultimately developed into a guest house and a bar referred to as [Particulars withheld] (guest house).

3. It seems that Robert stopped making trips to Kenya but the respondent continued doing so. During such a visit, on or about the year 2000, she met ***I N N*** (the appellant) who according to her, she engaged to look after her properties until the year 2010. It is at that point in time that she discovered, upon carrying out a search at the lands registry, that CR. No.21814 and 21815 had been transferred to the appellant on 18th November, 2010. The register of both parcels reflected the appellant and the respondent as the proprietors of the same to the exclusion of R.

4. This came as a surprise to the respondent who maintains that she had not executed the transfer documents which gave rise to the alteration of the titles in question. Determined to get to the bottom of the matter, the respondent instructed her advocate to write to the advocate (Hassan Abdi) who allegedly prepared the transfer and witnessed execution of the same. In response, the said advocate explained that he had neither prepared the transfer in question nor seen the persons alleged to have executed the same. What was more, the respondent contended that her husband was not in Kenya at the time the said transfer was supposedly executed.

5. Armed with the foregoing revelation, the respondent lodged a complaint with the police which culminated with the appellant being charged with several criminal offences. In addition, the respondent filed suit in the Environment and Land Court (ELC) seeking *inter alia*:-

> ***a) A declaration that each and every transaction purporting to divest the plaintiff and the other registered owner of Plot No. Subdivision No. [Particulars withheld] (Original No. [Particulars withheld]) Section III Maindland North and Plot No. Subdivision No. [Particulars withheld] (Original No. [Particulars withheld]) Section II Mainland North Mombasa and [Particulars withheld] Guest House Bar & Restaurant is null and void.***
>
> ***b) A declaration that the plaintiff and the other registered owner namely R C K are still the registered owners of the land known as Plot Subdivision No. [Particulars withheld] (Original No. [Particulars withheld]) Section III Mainland North and Plot No. Subdivision No. [Particulars withheld] (Original No. [Particulars withheld]) Section II Mainland North Mombasa.***
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> ***c) An Order directing the Registrar of Titles, Mombasa to rectify the Land Titles register by the cancellation and/or amending the entire registration and/or entries against the suit properties that include the Defendant's name on the said Title No. Subdivision No. [Particulars withheld] (Original No. [Particulars withheld]) Section III Mainland North and Subdivision No. [Particulars withheld] (Original No. [Particulars withheld]) Section II Mainland North Mombasa.***
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> ***d) A prohibitory injunction do issue against the Defendant whether directly or through his agents servants and/or employees and any person who are claiming or may claim through the Defendant from dealing, alienating or in any other manner whatsoever disposing of the suit properties known as Plot No. Subdivision No. . [Particulars withheld] (Original No. [Particulars withheld]) Section III Mainland North and Plot No. Subdivision No. . [Particulars withheld] (Original No. . [Particulars withheld]) Section II Mainland North Mombasa.***
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> ***e) A permanent injunction do issue restraining the Defendant, his agents and/or servants and/or assigns and any persons who are claiming or may claim through the Defendant from interfering with the Plaintiff's quiet possession, occupation enjoyment and/or ownership of the suit property known as Plot No. Subdivision No. [Particulars withheld] (Original No. [Particulars withheld]) Section III Mainland North and Plot No. Subdivision No. [Particulars withheld] (Original No. [Particulars withheld]) Section II Mainland North Mombasa.***

6. In response, the appellant's version was that he met the respondent in the year 2000 while he was operating a tour business. They struck a friendship which developed into an intimate relationship. Later on, in the year 2002 they began living together in the three bedroom house. In August, 2003 they celebrated a Kikuyu customary marriage and continued living as husband and wife. Out of affection and on her own volition, the respondent transferred the two parcels in his favour. After the said transfer, he embarked on renovating the three bedroom house which was in deplorable state and even furnished the same at his own expense. He went on further to develop the Swahili house into a guest house and bar. Thereafter, he took out a liquor license and continued meeting the utility bills over the said premises without any assistance from the respondent.

7. In addition, during the course of their relationship they jointly acquired two parcels described as

Mombasa/Mwembe-Legeza/[Particulars withheld] and Mombasa/Mwembe-Legeza//[Particulars withheld] (Mwembe-Legeza plots) as proprietors in common. He also owned two motor vehicles namely, a Range Rover Station Wagon registration number [Particulars withheld] and a Pontiac Sunbird registration number [Particulars withheld] which were parked on the suit parcels. As far as he was concerned, he was entitled to an equal share of the suit parcels as well as the guest house in light of his extensive contribution towards their development. He was also entitled to an equal share of the Mwembe-Legeza plots. To that extent, he filed a counterclaim praying for:

> ***a) Division of the property held in common and preservation orders till full division.***
>
> ***b) An injunction restraining the plaintiff from evicting him or dealing with the property in dispute.***
>
> ***c) Dismissal of the suit with costs***.

8. The respondent called a total of five witnesses in support of her claim while the appellant only relied on his testimony. The trial court (**Omollo, J**.) after weighing the evidence before her entered judgment on 12th July, 2017 in the following terms:

> ***"In conclusion it is my finding that each of the parties claim succeeded partially. I do grant the plaintiff the orders as per her plaint in terms of prayers (a) – (e). In respect of the counter – claim, the defendant only gets one plot Mwembelegeza/1068 and any motor vehicles as specified above. The rest of the prayers in the counter – claim is not proved and is hereby dismissed. The totality of my findings is that the defendant's name should be removed from title No CR 21814 & CR 21815. He should also surrender vacant possession of the suit premises known Magisa Guest house to the plaintiff. The defendant is entitled to plot No Mwembelegeza/[Particulars withheld] and any motor vehicles as specified in (sic) the rest of his claim in the counter claim is dismissed. Having completely denied the plaintiff's claim, it is my considered opinion that plaintiff be awarded costs which I hereby do."***

9. It is that decision that instigated the appeal before us which is anchored on a total of 13 grounds. The gist of the appellant's complaint is that the learned Judge erred, in delving into issues not pleaded and taking into account irrelevant matters thus arriving at the wrong conclusion; by purporting to distribute chattels without jurisdiction; by finding that the allegations of fraud as against the appellant had been established; failing to consider the extent of the appellant's contribution in the acquisition and development of the suit properties; by granting the respondent costs.

10. Learned counsel, Mr. Akanga appeared for the appellant while learned counsel, Mr. Ali appeared for the respondent. Counsel relied entirely on the written submissions filed on behalf of the parties.

11. Making reference to this Court's decision in ***Kenya Airports Authority vs. Multi-Bell Welfare Society & 2 Others*** ***[2016] eKLR***, the appellant argued that just as parties are bound by their pleadings, the court is equally obliged not to divert from such pleadings and make findings on issue(s) not raised. If a court does so, it would be tantamount to it descending into the arena of litigation. Contrary to this settled principle, the respondent diverted from her pleadings by laying claim to the Mwembe-Legeza plots and the appellant's motor vehicles yet her claim was based on CR. No.21814, 21815 and the guest house. The learned Judge also fell into this error by making findings on the same.

12. In the appellant's opinion, there was no evidence to support the respondent's claim based on fraud. To begin with, there was no evidence to show that Robert had not executed the transfer which led to the registration of the parcels in the appellant's favour. Furthermore, the document examiner did not indicate that the appellant was guilty of forgery. In any event, the document examiner's evidence was not impartial for the reason that he had been engaged by the respondent. Emphasizing that the document examiner's testimony was of no probative value, we were referred to the High Court decision in ***Stephen Kinini Wang'ondu vs. The Ark Ltd*** ***[2016] eKLR***.

13. It was also submitted that the appellant had demonstrated that he had made substantial contribution towards the development of the suit properties in question hence, was entitled to a share in the same. The appellant also faulted the learned Judge for granting costs to the respondent yet his counterclaim had partially succeeded. Lastly, we were urged to allow the appeal based on the foregoing grounds.

14. In opposing the appeal, the respondent argued that the learned Judge considered the evidence before her and arrived at the right conclusion. There was no reason for this Court to interfere with her finding. The allegations of fraud as against the appellant were established to the required standard.

15. We have considered the evidence on record, submissions made on behalf of the respective parties and the law. This is a first appeal and as such, we are enjoined by law to proceed by way of re-appraising all the evidence and re-examining the same in a fresh and exhaustive way before arriving at our own independent conclusions. See ***Rule 29*** of the ***Court of Appeal Rules***.

16. It is common ground that the respondent's cause of action was based on fraud. In particular her claim was that the registration of CR. No.21814 and 21815 in favour of the appellant was fraudulent. It is trite that fraud should be specifically pleaded and strictly proved. **Tunoi, JA.** (as he then was) succinctly discussed this principle in ***Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another [2000] eKLR*** as follows:-

> ***"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."***

17. From the record, it is clear that the respondent pleaded fraud against the appellant and also set out the particulars thereof in her plaint. Did she prove those allegations to the required standard? Owing to the serious nature of an allegation of fraud, the standard of proof is higher than a balance of probabilities but not beyond reasonable doubt. See ***Central Bank of Kenya Limited vs. Trust Bank Limited & 4 Others [1996] eKLR***. Having perused the record, we believe that the respondent discharged this burden.

18. Firstly, it was the respondent's uncontroverted evidence that at the time the said transfer was effected the title documents of the suit parcels were in the house she shared with the appellant. Secondly, Hassan Abdi denied preparing the transfer and witnessing its execution and he also testified as much in the criminal proceedings against the appellant. The appellant did not counter this piece of evidence, he simply stated that he neither presented the documents to him nor knew him.

19. Thirdly, Emanuel Kenga (PW2), a forensic examiner testified that upon examining the signature alleged to have been affixed by the respondent on the transfer documents and her specimen signatures, he found that they differed. He went on to produce a report which set in detail the manner in which the examination was conducted, the differences noted and the conclusion. Being an expert witness and there being no evidence contradicting his observations, we, like the trial court, find no reason for rejecting his evidence. The fact that he was retained by the respondent, to us, did not water down the probative value of his evidence. Unless there was more to substantiate the appellant's contention that he was biased or partial, there was no basis to discount his evidence. Our position is fortified by the case of ***Dhalay vs. Republic (1995 – 1998) EA 29*** where this Court expressed:

> ***"Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it."*** *[Emphasis added]*

20. Fourthly and most importantly, Suleiman Mchombo (PW4) connected the appellant to the transfer documents in question. His evidence was to the effect that sometime in the year 2003 while he was

working as a freelance clerk he met the appellant. The appellant engaged him to assist him in lodging the transfer documents at the lands registry. While he was presenting the said documents for registration, he noticed that they were not dated and informed the appellant of the same. The appellant then instructed him to date the documents 5th November, 2003 which he did. He was categorical that he had never met the respondent or R. The learned Judge who had an opportunity to observe Suleiman perceived him as an honest witness and we see no reason to interfere with that observation.

21. Having found that the registration of the suit parcels in favour of the appellant was fraudulently done, the learned Judge correctly canceled the said registration in line with ***Section 23(1)*** of the ***Registration of Titles Act (repealed).***

22. We also understood the appellant's argument to be that he was entitled to an equal share of the above suit parcels due to the developments he had undertaken. In our view, this argument falls short because the appellant did not lead any evidence to show that the respondent had agreed to give him a share thereof proportionate to the developments he alleges to have made. We also do not think his claim was based on division of matrimonial property because apart from the appellant's allegations that they celebrated a Kikuyu customary marriage there was no evidence of the same. Be that as it may, we concur with the learned Judge that as far as the contributions he made towards development of the parcels, if any, were concerned, he could only seek the same as a recovery of a debt which was not an issue in this suit.

23. With regard to Plot No. [Particulars withheld] wherein the guest house is located, the appellant's claim was also based on the developments alluded to. Similarly, there was no evidence that the parties had agreed he would be entitled to a share thereof based on the developments he undertook. Further as posited by the learned Judge, he could only seek the same as a recovery of a debt. Nevertheless, the appellant's claim did not stop there; he contended that the person who sold the said property to the respondent and her husband, one Mama Moza Tobana had no capacity to do so since she was not the owner of the property. We do not see how this helps the appellant's case. Moreover, he did not prove this allegation which falls flat on its face.

24. The appellant also argued that the respondent departed from her pleadings in laying claim to the Mwembe-Legeza plots and the vehicles. As a general rule a court ought not to make pronouncement on issues not raised in the pleadings filed by parties. The rationale for this principle is to ensure that parties to a suit will know with certainty the points in issue between them, so that each may have full information on the case he/she has to meet and prepare appropriately. It follows therefore that relief not founded on the pleadings will not be given. See this Court's decision in ***Billey Oluoch Okun Orinda v Ayub Muthee M'igweta & 2 Others*** ***[2017] eKLR.***

25. This is certainly not the case here. It is instructive to note that it was the appellant who introduced the said properties in his counterclaim thus making them subject of the suit before the learned Judge. He is the one who sought division of the properties held in common with the respondent. Therefore, he cannot turn around and say the same did not fall for consideration by the learned Judge.

26. We note that Mwembe-Legeza plots are jointly registered in the parties favour. The respondent's contention was that these properties were registered in their joint names because the appellant had misrepresented to her that she could not be solely registered as the proprietor without a Personal Identification Number. We, like the learned Judge, find that contention less than plausible. This is because these properties were apparently acquired after the respondent had acquired CR. No. 21814 and 21815. Consequently, she could not feign ignorance of the procedure of obtaining registration. Where property is registered, in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition See ***Kivuitu vs. Kivuitu*****, *[1991] KLR 248***. For that reason, we also agree with the following sentiments of the learned Judge:-

> ***"However on the basis that the registration of this property into joint names was not shown to have been done under any irregular manner or coercion and given that it was acquired during the subsistence of their relationship, I will take the position that the defendant is entitled to some shares by virtue of his name having been included. Further the plaintiff having acquired a***

property earlier even without a P.I.N must have known the process involved in acquisition of title deeds. In any event, obtaining a P.I.N document in Kenya does not require a long time. Therefore it is my finding that they are both entitled to the suit property in Mwembe-legeza in equal shares."

27. As for the vehicles, we find that the learned Judge being an ELC Judge had no jurisdiction to deal with the same. The ELC was created as a specialized court, with equal status to the High Court. It was conferred with the jurisdiction to hear and determine disputes relating to, among others, use, occupation, title to land and "*any other dispute relating to land*". See ***Article 162 (2) (b)*** of the ***Constitution***. The Supreme Court in ***Republic vs. Karisa Chengo & 2 Others [2017] eKLR*** succinctly discussed the distinction of the jurisdiction exercised by the specialized courts and the High Court:

"From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. <u>The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.</u>" *[Emphasis added]*

28. Last but not least, the Supreme Court in ***Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others [2014] eKLR*** while considering the issue of costs held:

"It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice."

29. Applying the above principle to the circumstances surrounding this case, we see no reason to interfere with learned Judge's discretion on the issue of costs. Albeit noting that the appellant's claim had partially succeeded the learned Judge also noted that he had disputed the respondent's claim which succeeded in its entirety. Accordingly, it was just for the appellant to bear the costs of the suit.

30. The upshot of the foregoing is that the appeal partially succeeds to the extent of the issue of distribution of the motor vehicles. We hereby set aside the orders relating to the motor vehicles in the judgment dated 12th July, 2017. We direct each party to bear his/her costs of this appeal.

Dated and delivered at Mombasa this 27th day of June, 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