



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, M'INOTI & MURGOR, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 240 OF 2015

BETWEEN

SUNPALM LIMITED.....APPLICANT

AND

MOHAMED SIAKA ALI (THROUGH MOHAMMED SHAIBU

SHOSI- PERSONAL LEGAL REPRESENTATIVE.....1ST RESPONDENT

ISSA TIMAMY T/A TIMAMY & COMPANY ADVOCATES.....2ND RESPONDENT

STEWERT MADZAYO T/A

MADZAYO & COMPANY ADVOCATES.....3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

(Being an application for enjoinder, injunction and for stay of execution

pending the hearing and determination of the appeal from the Judgment

award and decree of the Mutungi, J. delivered on 31st July 2015

ELC Case No. 663 of 2005

RULING OF THE COURT

This motion is concerned with an application by *the applicant, Sunpalm Limited*, seeking to join Mr. David Pius Mugambi, learned counsel for the 1st respondent as an Interested Party to the appeal.

Following case management on 13th December 2017, this appeal was set down for hearing on 19th February 2018, but on the day of the hearing, learned counsel for the applicant, Ms. Muriithi, informed us that there were two pending applications. Following the consent of the parties, it was agreed that the applications be heard and determined instead.

By a Notice of Motion filed on 19th January 2015, the applicant sought the following orders;

1. That---

2. That the firm of Mugambi & Company Advocates be restrained by an order of *injunction from representing the 1st respondent in this suit or any other proceedings therefrom*;

3. David Pius Mugambi be enjoined to these proceedings as an Interested Party.
4. There be a stay of any consequential orders herein pending the hearing and determination of this application.
5. The Interested Party be granted leave to defend this suit unconditionally.
6. This Honourable Court do grant further orders, directions as it may deem fair and just in the circumstances.
7. The cost of the proceedings be provided for.

The application was made on the grounds that this appeal arises from the judgment of the Environment and Land Court which nullified registration of the Title Number Kilifi/Jimba/669 (*the disputed property*) in the applicant's name; that the dispute concerns the validity of the sale and transfer of the disputed property which was initially registered in the names of Mohamed Saibu Shosi, the personal representative of Mohamed Saika Ali (the 1st respondent); that Mr. Mugambi represented the 1st respondent in the suit in the trial court and had sworn numerous affidavits in this regard; that the title of the disputed property was subsequently transferred to Mr. Mugambi, who despite a conflict of interest continued to represent the 1st respondent; that as the disputed property was now registered in his name, it was proper for Mr. Mugambi to become an Interested Party in the appeal, so that he could testify as to the validity of the agreements entered into between the parties, and provide details on the sequence of events upto the time the title was registered in his name, and the circumstances surrounding the transactions. It was further contended that as the new owner, Mr. Mugambi will be required as a witness to give evidence whether verbally or by declaration of affidavits, and as such he cannot continue to appear as the advocate for the 1st respondent, and that without the input of Mr. Mugambi as an Interested Party in this suit, it will be impossible for the court to make a clear determination in the appeal based on its merits.

The application was supported by the affidavit of **Eleonora Cozzi** sworn on 1st January 2018 on behalf of the applicant, where it was deponed that after the judgment of the trial court, the title of the disputed property was registered in the name of Mohamed Saibu Shosi, who is the personal representative of the deceased; that subsequently thereto, the title was on 18th July 2017 transferred to Mr. Mugambi who at all times was the advocate on record for the 1st respondent. The deponent averred that having become the registered owner, it was imperative for him to be joined as an Interested Party to the appeal, as this raises a serious question of conflict of interest; that as an officer of the court, Mr. Mugambi owes an allegiance to a higher cause than that of merely serving the interests of his clients. It was further argued that following the transfer of the disputed property, Mr. Mugambi became a witness and therefore should not continue to appear as an advocate in these proceedings; that without joining Mr. Mugambi as an Interested Party, it would be impossible for this Court to determine the appeal on its merit, and further the applicant stands to suffer extreme prejudice should the application be denied.

In his replying affidavit sworn on 26th January 2018, **David Pius Mugambi** deponed that the judgment in respect of this appeal on 31st July 2015, following which the applicant neglected to obtain conservatory orders; that by a letter dated 6th December 2017 the firm of Mugambi & Company Advocates informed the Registrar of the Court of Appeal that the ownership of the disputed property had since changed and has since been registered in the name of David Pius Mugambi.

Issa Timamy T/a Timamy & Company advocates, the 2nd respondent, also filed a replying affidavit which was sworn by Timamy Issa Abdalla on 1st February 2018 wherein, it was deponed that this Court did not have jurisdiction to grant the orders sought; that the applicant had not obtained any stay of execution orders of the judgment of the trial court nor any injunction orders restraining any party from dealing with the disputed property pending the hearing and determination of the appeal; that no claim had been made against David Pius Mugambi in the memorandum of appeal; and so he is not a necessary party in the appeal; that the appeal before the Court was made on the basis of the Record of Appeal and neither the appellant nor the respondent has made any application to adduce additional evidence. It was also deponed that **rule 9 of the Advocates (Practice) Rules** was not applicable, as David Pius Mugambi is neither a party nor a witness in the appeal, and therefore he was not required to testify or provide evidence by way of sworn affidavit or declaration in respect of the appeal.

In his submissions, learned counsel for the applicant, **Ms. Muriithi**, holding brief for Mr. Muriithi, submitted that the Notice of Motion dated 18th January 2018 was seeking to restrain Mr. Mugambi from the conduct of the appeal and instead to be joined as an Interested Party.

Counsel submitted that the disputed property was registered in the name of Mr. Mugambi on 18th July 2017. Counsel argued that the transfer gave rise to a conflict of interest as Mr. Mugambi continues to act for the 1st respondent, and having become the registered owner, there was still the possibility that he could be called upon to testify as a witness.

With respect to the application for stay of execution, counsel informed us that this had since been abandoned.

Learned counsel for the 1st respondent, **Mr. Mugambi**, submitted that the application could not be sustained as Mugambi & Company Advocates were not witnesses in the suit in the trial court, and therefore were not required to testify in this Court as the appeal was concerned with the grounds raised in the memorandum of appeal against the judgment. Counsel further submitted that the judgment was rendered on 31st July 2015, and as the applicant had not obtained any orders of stay of execution of the court orders, he was not estopped from transferring the disputed property to himself. Counsel finally submitted that there was no reason why Mugambi & Company Advocates could not represent the 1st respondent.

On his part, **Mr. Eredi**, learned counsel for the 4th respondent, submitted that there was no conflict with Mr. Mugambi representing the 1st respondent; that he was not a party to the proceedings or to the transactions. Counsel further submitted that during the appeal, the Court would be relying on the record of appeal, and not on fresh evidence.

As a brief background to the application, by a sale agreement dated 22nd November 1996, the 1st respondent, the deceased who died in the course of the proceedings and whose representative for the purposes of this appeal is Mohamed Shaibu Shosi, entered into a sale agreement for the sale of the disputed property measuring 8.1 acres at Kshs. 1,000,000 per acre. The 1st respondent contended that a vague agreement was drawn up with the intention of defrauding the 1st respondent of the disputed property. The 1st respondent denied having signed an agreement to transfer the disputed property to the applicant, and further contended that no Land Control Board consent was obtained in support of the transfer; that the consent that was used to transfer the title of the disputed property to the applicant was invalid, thereby rendering the transfer of the disputed property to the applicant illegal, null and void.

The applicant denied that it defrauded the 1st respondent of the disputed property, and maintained that it had paid the purchase price in full to the respondent, and that the transfer was regular and lawful.

In the judgment, the trial court found that no valid Land Control Board consent was obtained in respect of the transaction, and that the transfer of the disputed property to the applicant was irregular and illegal and therefore null and void.

We have considered this application together with the averments in the affidavits in support and in opposition. What we have before us is an application seeking to join David Pius Mugambi as an Interested Party in this appeal, the issue being whether Mr. Mugambi who was at all times the 1st respondent's advocate in the trial court and having since been alleged to have purchased the disputed property from the 1st respondent, should remain as counsel representing the 1st respondent in this appeal, or should instead be joined as an Interested Party in the appeal.

The applicant's contention is that being a purchaser of the disputed property, he can no longer continue to represent the 1st respondent, but must instead be joined in the appeal as an "...Interested Party so that he can be called upon as a witness to testify on the validity of the agreement entered into and the sequence of events till the point when the title was registered in his name and the circumstances under which the transactions were carried out."

It is not in dispute that Mr. Mugambi was the 1st respondent's counsel during the proceedings in the trial court, and by the time the judgment was rendered. It is not also disputed that since then, Mr. Mugambi is claimed to have purchased the disputed property from the 1st respondent.

This application is concerned with an appeal to this Court, **Article 164 3(a)** of *the Constitution* and the repealed Appellate Jurisdiction Act provides that;

“The Court of Appeal has jurisdiction to hear appeals from –

a. The High Court; and

b. Any other court or tribunal as prescribed by an Act of Parliament.”

As such, it should be borne in mind that the mandate of this Court is limited to hearing appeals from decisions of the High Court or other courts or tribunals prescribed by Parliament.

In the suit before the Environment and Land Court, the dispute concerned the validity of a sale and transfer to the applicant of the disputed property which belonged to the 1st respondent. The record is clear that when determining the issues in contention, the trial court relied on the documents that had been filed by the parties, all of whom opted not to testify. It is therefore apparent that Mr. Mugambi was not a witness during those proceedings, and therefore the contention that he was a witness in the trial court proceedings does not hold true.

In addition, the applicant's belief is that Mr. Mugambi may be called as a witness to testify in this Court. In this regard, the applicant has not sought to adduce new evidence, and there is no such application pending. It is not therefore clear on what basis the applicant asserts that Mr. Mugambi will be required to testify before this Court. In our view, the assertion is not only speculative, but rather farfetched, to say the least.

As to whether the alleged purchase by Mr. Mugambi of the disputed property requires that he be made an Interested Party to the appeal, the record shows that by the time judgment was rendered, the registered owner of the disputed property was the deceased. According to Mr. Mugambi's replying affidavit, the ownership of the disputed property was alleged to have changed hands on 18th July 2017 when the 1st respondent transferred it to Mr. Mugambi. By this time the applicant had not obtained any orders of stay of execution that would have estopped or precluded a transfer of the disputed property.

Such transfer having taken place subsequent to the judgment meant that it did not come within the remit of the judgment of the trial court, and therefore the issue not being comprised in the memorandum of appeal, it could not be a matter appealed from in the judgment. Similarly, Mr. Mugambi's alleged purchase of the disputed property was not a matter from which the appeal arose, and therefore it was not a matter that fell within the ambit of the memorandum of appeal, or within the jurisdiction of this Court.

Turning to the question of conflict of interest, the applicant has cited **rule 9** of the *Advocates (Practice) Rules* for the contention that having been the 1st respondent's counsel, now turned registered proprietor of disputed property which belonged to the 1st respondent, a conflict of interest had arisen.

In addressing this contention, an analysis of Mr. Mugambi's role in this matter is important. As stated earlier, Mr. Mugambi was appointed to

represent the 1st respondent's interest in a dispute between the applicant and the 1st respondent concerning the validity of a sale and transfer of the disputed property. He represented the 1st respondent until the conclusion of the trial, and until judgment was rendered. Subsequently, on July 2017, the 1st respondent transferred the disputed property to him. When this appeal was filed, Mr. Mugambi continued to represent the 1st respondent in the appeal after it was filed.

On these basic facts, we are unable to see how the question of conflict of interest arises, for reasons that, firstly, Mr. Mugambi has remained the 1st respondent's advocate in both the lower court and in this Court. Secondly, the question of his being considered a witness is otiose, as he did not testify in the lower court, and he will not be required to testify in this Court. As such we are of the view that the allegation that a conflict of interest has arisen in Mr. Mugambi's case is unfounded and misguided.

On the basis of the materials before us, we are not satisfied that the applicant has established a sufficient basis upon which to have Mr. Mugambi joined as an Interested Party in the appeal. It has not been shown that he testified in the Environment and Land Court, or demonstrated that following the transfer of the disputed property into his name that he will be testifying in this Court, and no conflict of interest between himself and the 1st respondent has been demonstrated. As a consequence, we do not see what purpose would be served by granting leave to the applicant to join Mr. Mugambi in the appeal as an Interested Party at this twilight stage of the dispute. We also do not see what prejudice would be visited upon it should we decline to join Mr. Mugambi as an Interested Party as, having regard to the materials before us, it is not bereft of adequate opportunities to institute other proceedings against any party in order to seek redress.

Our conclusion notwithstanding, the applicant is at liberty to serve Mr. Mugambi as the current registered owner, and a party directly affected by the appeal within the meaning of **Rule 77(1)** of the **Court of Appeal Rules** with a Notice of Appeal.

In the circumstances, the Notice of Motion dated 19th January 2018 is dismissed with costs to the 1st and 2nd respondents.

It is so ordered.

Dated and delivered at Nairobi this 20th day of July, 2018.

D.K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR