



**IN THE COURT OF APPEAL**

**AT MALINDI**

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

**CIVIL APPEAL NO. 107 OF 2016**

**BETWEEN**

**FRESCO BUSHLANDS (K) LIMITED.....APPELLANT**

**AND**

**WARSAME MOHAMED ISSAK.....1<sup>ST</sup> RESPONDENT**

**MOHAMMED YUSUF HORAR.....2<sup>ND</sup> RESPONDENT**

**MOHAMED ALIP MAHAT.....3<sup>RD</sup> RESPONDENT**

**NASTE DAUD.....4<sup>TH</sup> RESPONDENT**

**AGRICULTURAL DEVELOPMENTCORPORATION.....5<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Ruling of the Environment & Land Court*

*at Malindi (Angote, J). dated 16<sup>th</sup> September, 2016*

*in*

*(E & LCC No. 5 of 2015)*

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**JUDGMENT OF THE COURT**

1. This appeal is against a 2 page Ruling rendered by **Angote J.** on 16<sup>th</sup> September,2016 in respect of the appellant’s interlocutory application dated 25<sup>th</sup> February,2016 in which the appellant sought a singular order of injunction against the 1<sup>st</sup> to 4<sup>th</sup> respondents herein. The injunction was to restrain the 4 respondents from evicting or in any way interfering with the appellant’s structures or houses on **Land Reference No.14248** situated within Kilifi County pending the hearing and determination of the main suit which was pending hearing before the court.
2. According to the appellant it had leased 95,000 acres of land from the 5<sup>th</sup> respondent while Vital-Bioenergy which was said to be the 1<sup>st</sup> to 4<sup>th</sup> respondents’ principal, was claiming to have leased 70,000 acres from the 5<sup>th</sup> respondent. The appellant’s grievance was that the 1<sup>st</sup> to 4<sup>th</sup> respondents were grazing on its land illegally and had refused to heed the appellant’s demand to stop trespassing on its property. The respondents on the other hand denied trespassing on the appellant’s property and maintained that they were grazing on the 70,000 acres they had leased from the 5<sup>th</sup> respondent.
3. Along with their affidavits, both parties filed the survey report which clearly displayed the layout of these parcels of land and others leased to other parties. The GPS coordinates exhibited in court also attested to the boundaries in respect of the two portions.
4. After considering the material before him, the learned Judge found that the respondents herein had actually leased land from the 5<sup>th</sup> respondent, and further that from the GPS coordinates “UTM ARC 1960” which were annexed to the affidavits filed in court, the boundaries

were clear and since each party knew its boundaries, then the issue of one encroaching into the others plot should not arise. In other words, the learned Judge in allowing the application told each party to remain within its boundaries and not to encroach into the other's portion. The learned Judge nonetheless allowed the application and granted the injunction sought. Any other issues were to be canvassed and determined in the main suit.

5. This is the order that aggrieved the appellant prompting it to file this appeal in which it has proffered six grounds of appeal. The learned Judge is faulted for *inter alia*, finding that the respondents had proprietary rights in the land in question contrary to the court's earlier decision in **Malindi ELC Case No. 95 of 2014**. We are grappling to find what the appellant's grievance is all about. We say so because the application that was the subject of the said ruling was filed by the appellant and the only order it sought was allowed.

6. From the grounds of appeal, it is evident the appellant is challenging the proprietary rights of Vital-Bioenergy over the land in question and the status of the 1<sup>st</sup> to 4<sup>th</sup> respondents herein as agents of Vital-Bioenergy. That was not an issue in the application giving rise to the impugned ruling. Nor was it mentioned in the ruling appealed against. One of the prayers in the appellant's Memorandum of Appeal is for this Court to affirm the orders of Angote, J. in **ELC Civil Case NO. 5 of 2015**.

7. The jurisdiction of this Court on appeal is delineated by the Notice of Appeal. Matters that are outside the Notice of Appeal, and which are not part of the impugned decision cannot be litigated through the back door. We note that the ruling or judgment in ELC Civil Case No. 5 of 2015, is not before us and we can neither affirm nor set it aside. We also observe from the Notice of Appeal herein that although the same says the appeal is against part of the ruling, it does not mention which part of the ruling it was appealing against.

8. If we were to allow this appeal as per prayer 1 in the Memorandum of Appeal, the only logical effect would be to set aside the order of injunction which was in favour of the appellant. There are no adverse orders against the appellant in the ruling appealed against which are amenable to being set aside. Issues as to who has proprietary rights over what part of the 5<sup>th</sup> respondent's land should be canvassed in the main suit which is still pending. We hold the view that this appeal is totally devoid of merit. The same is hereby dismissed with no orders as to costs as the same was not defended.

**Dated and delivered at Malindi this 27<sup>th</sup> day of September, 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**