



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 113 OF 2016

BETWEEN

ROBERT GITHUA THUKU.....APPELLANT

AND

WILLIAM OLE NABALA.....1ST RESPONDENT

SAMMY NJUGUNA (DECEASED).....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

MWANATUMU ATHUMANI ARTHUR.....4TH RESPONDENT

RHODA MUGURE NGANGA.....5TH RESPONDENT

GRACE NYOKABI GITHOME.....6TH RESPONDENT

THE REGISTRAR OF TITLES, COAST.....7TH RESPONDENT

JASON KATHURIMA.....8TH RESPONDENT

IBRAHIM MUSA MOHAMMED.....9TH RESPONDENT

HENRY GATHUKA CHEWE.....10TH RESPONDENT

(Being an appeal from the Ruling and Order of the Environment and Land Court at Malindi (Angote .J.) delivered on 9th October, 2015

in Malindi Environment and Land Court Case No. 64 of 2007 Formerly Mombasa HCCC No. 11 of 2001)

JUDGMENT OF THE COURT

[1] By an application dated 18th May, 2015, the appellant alongside three others, sought *inter alia*, to be joined as co - defendants in **Malindi Environment and Land Court Case No. 64 of 2007 (Formerly Mombasa HCCC No. 11 of 2001)**. As at the time the application was filed, judgment in the matter had already been entered in favour of the 1st respondent (the then plaintiff).

[2] The suit in question was a dispute between the 1st respondent and some third parties, over the proprietorship of land described as plot No. 592 section III MN (*the suit land*). According to the appellant, and unknown to the 1st respondent, the third parties (defendants) had caused the subdivision of the suit land and had proceeded to dispose of the subdivided parcels. One such subdivision had been sold to the appellant by one **Grace Nyokabi Githome** (*the 6th respondent*). The appellant therefore felt that it was imperative that he be joined in the proceedings albeit post judgment; because the resulting judgment rendered on 6th May, 2015 effectively divested him of what he termed as his lawfully

acquired property without according him an opportunity to be heard.

[3] The appellant was therefore of the view that his joinder would pave way for the reopening of the matter to enable him be heard. Accordingly, through the application aforesaid, he (alongside other applicants) sought orders *inter alia*:

1. ...

2. That the applicants be joined in the suit as defendants.

3. Stay of further proceedings to prevent abuse of court process pending the hearing and determination of the application

4. Variation of the Judgment dated 6th March, 2015 based on the following grounds;

- The applicants were condemned unheard despite having registered/ possessory interests in plot no. 592/II/MN and the subdivisions created therefrom.
- There were previous proceedings between the 1st respondent and the 4th respondent which had dealt with the issue of partition of plot no. 592/II/MN and the issue was thus *res judicata*.
- Knowing that they had alienated their interests in the subdivisions to the suit land, the present defendants surreptitiously failed to participate in the proceedings, to the detriment of the applicants.
- The court was obliged to enquire into the other titles created upon the subdivision of the suit land as well as the fate of previous litigation over the land.
- The concluded proceedings were *contra statute* and offended natural justice principle of *audi alteram partem* as well as Article 40 of the Constitution.
- The defendants in the concluded proceedings purported to represent the interests of the purchasers of the various subdivisions, yet they did not seek leave to defend the claim in a representative capacity.

[4] In his supporting affidavit sworn on 19th March, 2015, the appellant reiterated that he had purchased plot no. 1351/III/MN (*appellant's land*) from the 6th respondent who had hived it off from the suit land *pendente lite*, and that the appellant only learnt of the concluded proceedings after judgment had been rendered. He averred that the judgment had the effect of nullifying all the titles in respect of the subdivisions and if allowed to stand, would unlawfully deprive him of his legally acquired property. The appellant argued that having never been joined in the proceedings, he was never accorded an opportunity to be heard in defence of his title. He also pointed out that there had been previous proceedings over the same parcel of land, being **Malindi ELC Case No. 158 of 2013** (*previous proceedings*) in which he had successfully litigated.

[5] By urging the trial court to reopen the concluded proceedings, the appellant contended that despite having acquired his land from the 6th respondent, she never informed him of the pending litigation. Further, that there were contradictory proceedings and judgment touching on the appellant's land and that at the time of judgment in this suit, none of the subdivisions to the suit land were actually held by any of the subsisting defendants. He deposed that despite having subdivided and sold the suit land, the said defendants not only failed to bring the transfer of the land to the court's attention, but also wilfully failed to participate in the concluded proceedings; with dire consequences to the innocent purchasers such as himself. In any event, the appellant argued, the concluded proceedings were prematurely brought before court, as any dispute ought to have been referred to the Registrar of titles under **Section 70** of the **Registration of Titles Act** (now repealed). For the foregoing reasons, he stated that the trial court lacked jurisdiction to entertain the concluded proceedings. Counsel thus urged the court to set aside the judgment and instead join the applicants to the suit and re open the proceedings for fresh trial.

[6] The 1st respondent opposed the application while relying on his replying affidavit sworn on 27th March, 2015 in which he termed the application an abuse of the court process and urged its dismissal. He deposed that the previous proceedings alluded to by the appellant were never about the proprietorship of the suit land, but rather, on trespass and consequently, the issue of *res judicata* did not arise. He added that the previous proceedings, were instituted after the proceedings herein were concluded and therefore, the latter proceedings could not be *res judicata* as claimed. The 1st respondent added that in the previous proceedings, the appellant never made a claim to the subdivision of land in issue herein, to the contrary, that he had simply claimed that the same was an access road and that it was most dishonest of him to now turn around and assert ownership. In any event, the 1st respondent contended, at all material times, the certificate of official search to the subdivision in question indicated that the land was registered in favour of the 6th respondent, not the appellant. As such, the appellant had no *locus standi* to be joined in the concluded matter.

[7] In addition, counsel submitted that the 6th respondent participated in the concluded proceedings and that the appellant had even accompanied her to court on several occasions and could thus not claim to have been unaware of the concluded proceedings prior to their determination. Consequently, if at all the appellant was entitled to recourse, under the doctrine of *lis pendens*, the same could only be as against the 6th respondent.

[8] Upon hearing the respective submissions the learned Judge (**Angote J.**) in a ruling delivered on 9th October, 2015 found the application

devoid of merit and dismissed it with costs. The learned Judge held that even though applications for joinder should ideally be made prior to conclusion of suit, the court, under its inherent powers may nonetheless set aside its decision and direct such joinder in cases where it is shown that a bona fide party who should have been joined and was adversely affected by the judgement without being accorded an opportunity to be heard. However, in the instant case he said, neither the appellant nor the other applicants had proven their interest in the land; that if at all the appellant had purchased the subdivision *pedente lite* from the 6th respondent, his recourse was against the 6th respondent and the ensuing judgment is thus binding on the appellant as well, having derived his title from the said 6th respondent who participated in the concluded proceedings.

[9] Unhappy with this ruling, the appellant lodged this appeal, in which he contends that the learned Judge erred by:

- Dismissing the application dated 18th March, 2015 on the ground that the purchased subdivisions were done *pedente lite*; yet there was an order on the bed of the court file, issued on 18th May, 2015, which revoked the 1st respondent's grant of letters of administration in respect of the estate of the late Juma Omar Abdalla; thus rendering the 1st respondent's entire concluded suit void *ab initio*.
- Denying the appellant the right to urge his claim, despite the fact that the ensuing judgment was glaringly incompetent and void for want of standing on the part of the 1st respondent.
- Holding that the doctrine of *lis pendens* applied in the circumstances.
- Failing to consider and determine all the other issues raised by the appellant to wit; whether or not the issue of subdivision of the suit land was *res judicata*; whether the case was contrary of the provisions of Sections 45, 48(2) and 93 of the Law of Succession Act as read with section 6 of the Civil Procedure Act and section 70 of the repealed Registration of Titles Act, whether leave was obtained under Order 1 rule 8 of the Civil Procedure Rules; whether or not the suit had abated against the 2nd respondent and if so, the legal effect thereof and lastly, whether the plaintiff's claim as to ownership of a half undivided share of the suit land was based on the doctrine of adverse possession.

[10] It is appropriate at this stage to mention that in the course of the proceedings, the 2nd respondent passed away, and the legal representative to his estate, one **Mary Wambui Njuguna**, made an application for joinder and was duly joined in the proceedings as a substitute. The said **Mary Wambui Njuguna**, lodged a notice of cross appeal dated 6th February, 2018; in which she urged the reversal of the impugned order on three grounds; The first being that the concluded proceedings were a nullity *ab initio*; that the action against her late husband had abated by operation of the law. Secondly, that there were many errors on the face of the record, particularly on the issue of abatement of suit which called for review of the judgment and lastly; that by refusing to review its judgment, the trial court had allowed an injustice to prevail.

[11] The appeal was canvassed through written submissions, with oral highlights at the hearing thereof. Appearing for the appellant, learned counsel **Mr. Kimani**, at the outset conceded that all along, the appellant did not wish to pursue review of the judgment in this matter; that the appellant had sought two things instead, that is to be joined in the proceedings and for the setting aside of the judgment. Counsel pointed out that there were various errors apparent on the face of the record. To begin with, he contended that the judgment was faulty because even though there were two administrators of the estate of the deceased, the 1st respondent had instituted the suit alone and failed to include his co administrator. It was argued that this was a fatal defect as it offended the provisions of **Order 31 of the Civil Procedure Rules**. Still on the issue of letters of administration, counsel pointed out that in any event, the suit was a nullity, as the 1st respondent's letters of administration were later revoked by the High Court. He faulted the trial Judge for failing to consider that revocation of grant whilst making the impugned ruling. To bolster that argument, counsel cited the case of; - ***Trouistik Union International & Another vs. Jane Mbeyu & Another, Civil Appeal No. 145 of 190***. Urging the point that a case premised on an invalidity cannot stand. This, coupled with the suppression of the existence of a co administratrix, were material facts that the Judge ought to have considered and set aside the judgment.

[12] On the other hand, it was contended, the appellant had litigated on the subject land in **Malindi ELC No. 158 of 2013** and by a judgment delivered on 28th November, 2014, the court had vindicated his proprietary interest in the sub division. Counsel asserted that the impugned proceedings were thus pre mature and frivolous. Consequently, in view of the subdivision of the mother title, the proper forum for the appellant's dispute should have been the Land Registrar, as provided under **section 70 of the repealed Registration of Titles Act**.

[13] Besides the foregoing, counsel also faulted the impugned proceedings for failure to disclose the true cause of action. According to the appellant, it was never clear whether the 1st appellant was pursuing the land as a purchaser for value or as an adverse possessor. Notwithstanding his earlier concession that the appellant was not interested in the application for review, counsel nonetheless stated that the court erred in failing to find that the appellant had demonstrated what he termed as apparent errors, namely; that the suit as against the 2nd defendant had abated one year after his death and was never revived; that the matter could therefore only proceed upon the joinder of the administrators to the said deceased's estate; that instead, the suit as filed was predicated on revoked letters of administration; the suit failed to include all the administrators to the estate of the said deceased; the judgment was plainly injurious towards the appellant; the suit was *res judicata*, given the proceedings in **Malindi ELC No. 158 of 2013** and **Kikambala Land Disputes Tribunal Case No. 2 of 2000**, as well as **Mombasa CMCC No. 2097 of 2012**; the subject matter of the impugned proceedings was also litigated on in three other suits, among them **Mombasa Chief Kadhi's Court Succession No. 26 of 2003**; the suit was instituted prematurely, given the provisions of **Section 70 of the Registration of Titles Act** (now repealed) and finally since the matter was *res judicata*, the sale of a subdivision of the mother title to the appellant could not be subject to the doctrine of *lis pendens*.

[14] In opposition to the appeal, **Mr. Jengo** learned counsel for the 1st respondent submitted that the appellant had failed to establish his interest in the subject land, therefore the impugned ruling was correct and properly supported by law and facts. In any case, he argued, even if the appellant were found to have proven his interest in the land, the concluded proceedings were instituted in 2001, way before the

appellant's alleged acquisition of the land; as such, the acquisition, if at all, was done *pedente lite*, thus subject to the doctrine of *lis pendens*. Citing the case of ***Mawji vs. USIU & Another (1976) eKLR***, counsel submitted that every man is presumed to be attentive to what goes on in the courts and that it was no defence for the appellant to claim that he had no notice of the concluded proceedings.

[15] In further arguments, counsel was emphatic that the appellant failed to establish that the concluded proceedings were *res judicata* and in any event, the cause of action in ***Mombasa RMCC No. 1683 of 1992; Mwanatumu Athumani vs. Juma Omar Abdalla*** was purely seeking orders of specific performance. Accordingly, the concluded proceedings the subject matter of this appeal, having been about proprietorship, could not be *res judicata*. As regards **section 70 of the Registration of Titles Act**, counsel stated that the appellant's contention that the concluded proceedings were premature is misplaced, as that provision deals with combinations and subdivisions and is not concerned with cancellation of titles. He emphatically stated that cancellation of titles could only be done by the High Court, not by any other forum as was being suggested by the appellant.

[16] On the issues raised concerning suppression of facts by the 1st respondent, counsel asserted that the same were neither pleaded nor proven before the trial court, yet they are issues which ought to have been discernible from the court record. Further, that the claim that the 1st respondent lacked capacity was contrived, since there was embedded in the court file, evidence of the grant that was issued following the revocation. In addition, even if the 1st respondent's grant had been revoked as claimed by the appellant that *per se*, would still not warrant his joinder to the suit. **Mr. Jengo** urged this Court to find the impugned ruling proper, adding that the doctrine of *lis pendens* overrides even the provisions of **Section 23 of the Registration of Titles Act**, by prohibiting the property owner from disposing any property that is subject of pending litigation.

[17] On whether the concluded suit violated the provisions of **sections 45, 48(2) and 93 of the Law of Succession Act**, counsel termed that an irrelevant issue; as was the contention that the suit should have been instituted in a representative nature. He concluded by stating that this Court is bound by the provisions of **section 79A of the Civil Procedure Act**; which requires that no decree should be altered on the basis of misjoinder or non-joinder of parties, or for any defect not affecting the merits of the case or the jurisdiction of the court. In this case he said, even if the appellant had been joined in the matter, the court's judgment would still not be any different. This Court was thus urged to dismiss the appeal.

[18] As this is a first appeal, this Court's duty is to analyze and re-assess the evidence on record and reach its own conclusions in the matter. As stated in ***Selle vs. Associated Motor Boat Co., [1968] EA 123***,

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”

That said, the issue that arises for determination is simply whether the appellant should have been joined in the concluded proceedings and if so, whether the judgment should be set aside.

[19] The appellant has contended both before this Court and the one below, that what he primarily sought was his joinder to the concluded proceedings. In rebuttal, the 1st respondent has argued that the appellant failed to prove his interest in the suit property and that therefore, his application for joinder was devoid of merit. **Order 1 Rule (10) (2) of the Civil Procedure Rules** empowers the court, at any stage of the proceedings, upon application by either party or even *suo motu*, to order the name of a person who ought to have been joined or whose presence before the court is necessary to be joined to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. However, joinder of a party may also be allowed post judgment. According to ***Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887)***:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

[20] Nonetheless, as with any inclusion to a suit, the party seeking to be joined must demonstrate an interest in the matter. The circumstances of the suit must justify the joinder. In addition, the joinder should not be intended to vex the other parties or convolute the matter (See ***Attorney General vs. Kenya Bureau of Standards & Another [2018] eKLR***). Consequently, the appellant was in this case required to first and foremost, demonstrate that he had an actionable interest and a right to be in the suit; what is otherwise known as *locus standi*. As per the decision of this Court in the case of ***Alfred Njau & 5 others v. City Council of Nairobi [1983] eKLR***; *locus standi* was defined thus:

“The term locus standi means the right to appear in court and, conversely, as is stated in Jolowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding”

[21] What gives a person a right to be heard or standing before Court is well defined by the **Black's Law Dictionary, 9th Edn**, which states that to have standing, one must show that:

- 1) The challenged conduct has caused him actual injury and;
- 2) The interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question.

Put simply, the party must not only show the injury suffered, but that the injury is being unfairly visited upon him as a valid holder of a legal, possessory or beneficial interest. In the present case, the appellant asserted his right as having derived from his purchase of a portion of the suit property, an assertion that was denied by the 1st respondent.

[22] In the circumstances, it behoved the appellant to substantiate his interest before the trial court. However, the record shows no such proof was provided as no title document was furnished as proof of the appellant's proprietorship in the land. At the very least, not even a sale agreement was ever produced to show that the purchase ever took place. As such, the appellant failed to establish his actionable claim or standing in the matter and the trial court cannot in the circumstances be faulted for declining the joinder. The appellant failed to prove that he was adversely affected and a *bona fide* party entitled to be joined in the suit and the trial court was right in declining to join him to the suit.

[23] Consequently, the appellant's contestations regarding the 1st respondent's failure to include his co administrator as a plaintiff in the suit, whether or not the suit was premature, or *res judicata*, or abated, or whether or not the 1st respondent had a valid grant; all fail to fall for determination the moment the prayer for joinder collapses. Having failed to succeed on joinder, the appellant was a stranger to the concluded proceedings, and his prayer for the setting aside of the judgment equally falls by the way side, since he lacked the *locus standi* to pursue that as well.

[24] For the foregoing reasons we find no merit in this appeal which is hereby dismissed. We are disinclined to award costs as there are clear similarities between this suit and Civil Appeal No. 100 of 2016 which were argued simultaneously and costs in the latter case were awarded to the 1st respondent. In this case, each party shall bear their own costs.

Dated and delivered at Mombasa this 15th day of November, 2018

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR