IN THE COURT OF APPEAL

AT MALINDI

(CORAM: KOOME, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 90 2015

BETWEEN

CHRISPUS CHENGO MASHA……1ST APPELLANT

CHARO MWANDIMA TUNJE.....2ND APPELLANT

JOSEPH KASENA YERI.....3RD APPELLANT

KATANA MWANDIMA MWANJE.....4TH APPELLANT

MWANJE MWANDIMA FINYANGE.....5TH APPELLANT

GEORGE KATANA YERI.....6TH APPELLANT

YERI FREDRICK CHANGAWA.....7TH APPELLANT

THOMAS HINZANO NGONYO.....8TH APPELLANT

AND

DANIEL RICCI.....…….RESPONDENT

(Appeal from the judgment and decree of the High Court at Malindi, (Meoli, J.) dated 28th May 2015 in HCC No. 87 of 2009)

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JUDGMENT OF THE COURT

The 8 appellants in this appeal are aggrieved by the judgment and decree of the High Court at Malindi, ***(Meoli, J.),*** dated 28th May 2015 by which the learned judge dismissed, with costs, their suit for a permanent injunction to restrain the ***respondent, Daniel Ricci,*** from erecting a perimeter wall on the parcels of land known as ***Ngomeni Squatter Settlement Scheme Nos. 1379, 1386, 1390, 1391, 1393, 1394, 1395 and 1757 (the suit property)***. Although sued as the defendant, it turned out that the respondent is merely a director of a company known as ***Kenland Enterprises Limited (the Company)***, which claims ownership of the suit property and was responsible for construction of the wall that the appellants sought to stop. The appellants claim that it was for the respondent to apply to join the company

in the suit, while the respondent retorts that he had no such duty, it being the responsibility of the appellants to institute the suit against the correct party.

Be that as it may, in their suit filed on 8th September 2009, the appellants averred that at all material times they were the beneficial owners or registered proprietors under the ***Registered Land Act*** (repealed), of the suit property, and that on or about 4th September 2009, the respondent, without any colour of right or justification, trespassed thereon and started constructing a perimeter wall. Accordingly, they prayed for only one substantive remedy, namely a permanent injunction to stop the construction.

By a defence filed on 24th November 2009, the respondent countered that the suit property was registered in the name of the Company, in which he was a director. He averred that neither himself nor the Company had trespassed on the suit property, because it belonged to the Company. From the evidence that he adduced subsequently, the respondent's maintained that the suit property was registered in the name of the Company under the ***Registration of Titles Act (repealed)*** prior to the purported registration of the same in the appellant's name under the ***Registered Land Act (repealed)*** and that accordingly the appellants were not entitled to the injunction they had sought. An interlocutory application for injunction pending the hearing and determination of the suit was heard and granted by ***Omondi, J.*** on 23rd February 2010.

The suit was ultimately heard partly by Omondi, J. and Meoli, J., with the appellants calling 7 witnesses and the respondent 4 witnesses. Of the 11 witnesses Omondi, J. heard 8, while Meoli J. who wrote the judgment, heard 3 witnesses.

The substance of the appellants' case was that in the 1990s the Government of Kenya established the ***Ngomeni Squatter Settlement Scheme*** in ***Ngomeni*** and ***Mambrui*** areas of ***Kilifi County***, in which the suit property is situate. Adjudication was duly carried out under the ***Land Adjudication Act*** during which the appellants identified the portions of land that they allegedly occupied and cultivated as squatters. After survey was conducted in 1994, they were allocated plots in the suit property and after duly paying the requisite fees some of them were issued with title deeds in 2007 while others are still awaiting theirs. Of the appellants in this appeal, only four, namely Joseph Kasena Yeri (3rd appellant - Plot No 1884), George Katana Yeri (6th appellant – Plot No.1390) Yeri Frederick Changawa (7th appellant – Plot No. 1380) and Thomas Hinzano Ngonyo (8th appellant – Plot No. 1393), were issued with title deeds on 27th July 2007 under the repealed Registered Land Act.

It was the appellants' case that thereafter, they were surprised to see the respondent, in September 2009, delivering building material to the suit property and begin to build a perimeter wall thereon. To forestall the respondent's trespass to their land, they instituted the suit that has led to this appeal. They contended that if the respondent had any land in the Ngomeni/Mambrui area, it was certainly not the suit property, which lawfully belongs to them.

On the other hand the respondent's case was that the Company purchased the suit property, known as parcel ***Nos. 624/26, 624/27, 624/28, 624/30, 624/31, 624/32, 624/34, 624/35, 624/36, 624/37,*** and ***624/38***, from one ***Ali Islam Said*** in 1992. As of the date of purchase and transfer of the suit property to the Company on 6th October 1992, the suit property was registered under the repealed Registration of Titles Act. It was the respondent's contention that the suit property claimed by the appellants is one and the same property that the Company purchased and that no Squatter Settlement Scheme could be validly established over private property. Upon complaining to the Lands Office regarding the overlap of the appellants' purported titles over the Company's land, the respondent maintained, the Land Registrar placed restrictions on the appellants' titles on 7th July 2009 because the titles to the appellants were erroneously issued.

One of the respondent's witnesses, ***Maritim Weldon (DW2)*** was the ***District Land Surveyor, Malindi/Magarini***. He confirmed the registration in favour of the Company under the Registration of Titles Act was in 1992, whilst the appellants' registration under the Registered Land Act was later, in 2007. It was also his evidence that during the adjudication of the Ngomeni Squatter Settlement Scheme,

some people already held titles under the Registration of Titles Act and that it was subsequently discovered that some properties under the Registration of Titles Act had been erroneously included in the Settlement Scheme. What ought to have happened, he explained, was to curve out all the properties registered under the Registration of Titles Act before declaration of an adjudication area because properties already registered under the Registration of Titles Act cannot be included in an adjudication area.

It is apt to point out too that Omondi, J. and Meoli, J. visited the suit property separately and established that the appellants were not living on it. In her ruling dated 23rd February 2010 granting the interlocutory injunction, Omondi, J. stated:

> ***"Then there is the question of whether they (the appellants) are in occupation and would suffer irreparable loss-the court visited the locus in quo-certainly there was no homestead or family living on the land and to that extent the applicants were not honest..."***

On her part Meoli, J. observed in her judgment:

> ***"Claims by the plaintiffs (appellants) to have utilized or occupied the suit land since the 1980s were not authenticated by any credible evidence. A visit of the site by the court before and during the trial revealed that the area is primarily sandy beach land covered by bushes, with no evidence of cultivation or settlement***.

After hearing the evidence adduced by the parties, Meoli, J. framed three issues for determination as follows:

> ***"i) Whether the plaintiffs are the respective beneficial and or registered owners of the land parcels described as Ngomeni Squatter Settlement Scheme 1393, 1386, 1390, 1395, 1757,1379, 1394 and 1391 which they occupy or utilize with their respective families***
>
> ***ii) Whether the defendant has wrongfully commenced construction of a perimeter wall around the plaintiff's properties.***
>
> ***iii) Whether the plaintiffs are entitled to an order of permanent injunction against the defendant."***

By her judgment dated 28th May 2015, the learned judge concluded that the appellants had failed, on a balance of probabilities, to establish a case entitling them to an order of permanent injunction against the respondent. She also found that the appellant's cause of action was against the Company rather than the respondent. Aggrieved by that decision, the appellants lodged this appeal, which by consent was heard through written submissions.

In support of the appeal, the appellants submitted that the learned judge erred by failing to resolve the central question in dispute and to determine, who between the appellants and the company was the real owner of the suit property. In the appellants' view, the learned judge ought to have issued an order revoking either the appellants' or the respondent's title to the suit property or at the very least given directions on the way forward. In the absence of such determination, the appellants contended, the High Court had perpetuated tension on the suit property between the contending parties.

It was the appellants' further submission that the respondent had not adduced any evidence, such as survey maps, to prove that the suit property was one and the same property as the company's property. It was also contended that under section 28 of the repealed Registered Land Act, the appellants' titles were sacrosanct and only the High Court rather than the Land Registrar, had the power to revoke such titles, where they were not first registrations. In this case it was contended, the appellants' registration was first registration and could not be challenged under any circumstances. The appellants also urged that in any case the respondent had not filed any counter-claim for revocation of their titles.

Next, the appellants impugned the judgment on the ground that the learned judge had failed to evaluate or properly evaluate the evidence of the District Land Registrar, Kilifi, who confirmed during the visit by the court to the scene that the suit property claimed by the appellants was the same property that was allocated to them in the Settlement Scheme.

Lastly the appellants faulted the company for failure to apply to be joined in the suit and for failing to raise any objection during the adjudication process. For good measure, they complained that the learned judge took more than two years to deliver the judgment and in their view, "she must have forgotten so many things, including the demeanor of witnesses."

The respondent opposed the appeal contending that the evidence on record indicated that the validity of the appellants' title to the suit property was put in serious doubt by PW2 who admitted that they were issued erroneously and that is the reason why restrictions were placed on them. Accordingly, it was submitted, the learned judge properly found that the appellants had not established a case to warrant an order of permanent injunction in their favour. It was also the respondent's submission that the appellants' claim to the suit property was put in doubt when the two judges visited the scene and confirmed that the appellants had never lived on the suit property, contrary to what they claimed.

Lastly the respondent maintained that the appellants had no cause of action against him because the suit property is registered in the name of the Company, which was responsible for construction of the perimeter wall. We were urged to find the appeal lacking in merit and to dismiss the same.

We have carefully considered the record of appeal, the judgment of the High Court, the grounds of appeal and the submissions by counsel for both parties. In our view this appeal turns on whether the appellants, who bore the burden of proof, adduced evidence on a balance of probabilities, to justify an order of permanent injunction in their favour. The learned judge could not be expected to determine issues that were not raised by the pleadings, but which the appellants have raised in their grounds of appeal, such as whom between the parties was the true owner of the suit property or whether or not one of the titles should be revoked. (See ***Gandy v. Caspar Air Charters Ltd [1956] 23 EACA, 139*** and ***Baber Alibhai Mwaji v. Sultan Hashim Lalji & Another, CA No 296 of 2001).*** The remedy that the appellants prayed for and the evidence that they adduced did not require the trial court to pronounce itself on the matters that the appellants are now raising. If indeed they wanted the court to determine the genuineness of the titles or to revoke one of them, nothing would have been easier than to amend their pleadings to seek appropriate declarations and consequential orders. Instead, they applied only for a permanent injunction in respect of which the learned judge was only required to determine whether the appellants had proprietary rights over the suit premises, which were violated or likely to be violated by the respondent.

It is common ground that the company was registered as the owner of the property that it claims on 6th October 1992 under the repealed Registration of Titles Act. The Company purchased that property from one Ali Islam Said in whose name it was registered at the material time. The appellants were not registered as owners of the property they claim until 27th July 2007. It is instructive to note that in 1992 the 1st appellant, together with other persons who are not involved in this appeal, filed ***Mombasa HCCC No 646 of 1992, Zimba Bawa & Others v Ali Islam Said & Another*** in which they claimed that the Commissioner of Lands had wrongfully allocated the property known as ***Plot No 624***, on which they had resided long before 1960, to Ali Islam Said and prayed for *inter alia*, an order nullifying Ali Islam Said's title. ***Wambilyangah, J***. struck out that suit vide a ruling dated 22nd November 1995 in an application for amendment of pleadings in circumstances that are not entirely clear to us. Although we do not agree with the learned judge and the respondent that the striking out of the HCCC No 646 of 1992 rendered the appellants' suit *res judicata*, in our view, the filing of and the pleadings in that suit gives credence to the respondent's assertion that the suit property claimed by the appellants is one and the same property that is registered in the name of the Company.

The evidence of DW2 further supports the respondent's contention that the appellants' title under the Registered Land Act were erroneously issued over the suit property, which was already registered in the name of the Company under the Registration of Titles Act. It is precisely for that reason that on 7th July

2009, the Land Registrar placed restrictions on the appellants' titles, indicating the reason for the restriction to be the erroneous issue of the title deeds. The evidence on record also indicates that the process of issuing titles in the Squatter Settlement Scheme was very hurried, no doubt for political purposes, because, as ***Anthony Tune Karani, the Assistant Land Registrar, Kilifi (DW1)*** explained, the former president had to personally present the titles to the beneficiaries shortly before the 2007 general elections. The titles were prepared in Nairobi and hurriedly brought to Kilifi. This is what DW1 testified at page 439:

> ***"The titles were supposed to be given to wananchi and be issued by the president and due to the time factor the preparation had to be done in Nairobi, because they were about 2,500 titles. There was great haste in getting the titles prepare so as to be issued by the President."***

The burden of proof, on a balance of probabilities, was upon the appellants. (See ***Delphis Bank Ltd v. Channan Singh Chatthe & 5 Others, CA No 179 of 2008).*** To have entitled them to the order of permanent injunction that they had prayed for, they were obliged to satisfy the learned judge that on a balance of probabilities the suit property was properly registered in their names and that the respondent had wrongfully trespassed into the suit property or had otherwise wrongfully interfered with their rights thereto. The evidence on record shows that as between the appellants and the Company, the latter's registration was first in time while the appellants' was fraught with questions and doubts.

It is evident too that the appellant's claim ought to have been against the Company, which the evidence on record shows is the registered owner of the suit property, rather than the respondent who is only one of its directors. The construction of the wall, which aggrieved the appellants and which they sought to stop by injunction, was being undertaken by the Company as proprietor of the suit property rather than by the respondent. No wrong doing by the respondent was established to justify a permanent injunction against him. It is trite law that a Company is a distinct legal personality from its directors and shareholders. (See ***Macaula v Northlife Assurance Co. Ltd & Others [1952] 94 LJ PC 155*** and ***A. L. Underwood Ltd v Bank of Liverpool & Martins [1924] All ER 230***).

In sum, the evidence on record shows that the suit property was already registered in the name of the Company under the Registration of Titles Act before the declaration of an adjudication area; that after declaration of the Squatter Settlement Scheme some private properties registered under the Registration of Titles Act were found to be erroneously incorporated within the Scheme; that the Land Registrar declared the titles that were issued to the appellants under the Registered Land Act to have been issued erroneously; and that subsequently and arising from the said errors, restrictions were placed on the appellants' titles. In these circumstances, we cannot fault the learned judge for declining to grant the appellants an order of permanent injunction to protect titles whose validity was seriously contested.

The answer to the appellants' claim that their title under section 28 of the repealed Registered Land Act was indefeasible is answered by the provisions of section 28 (a) of the Act, which made titles under the Act subject to encumbrances, conditions and restrictions shown in the register. In this case there were express restrictions placed on the appellants' title by the Land Registrar. The argument is further evened out by section 23 of the repealed Registration of Titles Act, which protected and made indefeasible the prior title of the Company.

Lastly the record does not bear out the appellant's complaint that the judgment was delayed for more than two years. After the parties filed their written submissions, the learned judge indicated to them on 25th September 2014 that judgment would be delivered on notice. It appears that in the intervening period the learned judge was transferred from Malindi to Naivasha and the judgment was dated in Naivasha on 28th May 2015, some eight months later, before it was delivered on 9th July 2015. We are not in any way excusing a delay of eight months before delivery of judgment; it should not be forgotten that the Constitution demands that justice shall not be delayed. We are however not persuaded that the remedy, in the circumstances of this appeal is nullification of the judgment as contended by the appellants. An explanation by the learned judge for the cause of the delay would have sufficed. In addition, contrary to what the appellants claim, this is not a judgment that turns purely on the demeanor of witnesses. The substantive evidence on record is clear by itself that the appellants did not establish the basis for award of

the permanent injunction they had prayed for.

In the circumstances we are persuaded that the learned judge did not err by declining to grant an order of permanent injunction. Accordingly, this appeal is hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Mombasa this 17th day of February, 2017

M. K. KOOME

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JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR