IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 63 OF 2016.

EMMANUEL NGADE NYOKA …….....APPELLANT

AND

KITHEKA MUTISYA NGATA …….……....…RESPONDENT

*(Being an appeal against the Judgment of the Environment and Land Court of Kenya at Malindi (**Angote, J.**) delivered on 19th December, 2013*

in

E. L.C. Civil Appeal No. 5 of 2009)

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JUDGMENT OF THE COURT

The cause of action in this second appeal arose on or about 10th March, 1999 with the alleged execution of a sale agreement between the appellant and the respondent alongside a third party, one, **Mudhia Ngata Nzui** for the purchase of **Land Parcel No. 173, Kijipwa Settlement Scheme** "*the suit premises*". The consideration was Kshs.450,000/= which the appellant duly paid but the respondent and the third party for reasons unknown to the appellant failed and or refused to obtain the necessary Land Control Board consent for the transaction and to execute the transfer forms within the 90 days agreed upon in the sale agreement aforesaid. This compelled the appellant to lodge a claim against the respondent in the Senior Resident Magistrate's Court at Kilifi in which he prayed for:

> **"(a) Specific Performance of the agreement dated and executed on 10th day of March 1999;**
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> **(b) Mesne Profits in respect of plot No. 173 Kijipwa Settlement Scheme, being the suit property measuring 2½ acres or thereabouts from the 19th day of June, 1999 until the date of such aforesaid specific performance;**
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> **(c) Costs and interest of this suit; and**
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> **(d) Any other or further relief that this honourable court may deem fit to grant."**

In his defence the respondent denied entering into any sale agreement in respect of the suit premises. He also denied receiving Kshs.450,000/= or at all from the appellant. Instead he claimed that the said

agreement was procured through fraud, the appellant having taken advantage of his illiteracy to defraud him and the third party of their interest in the suit premises.

The appellant in his testimony stated that the respondent and the third party who was the respondent's father approached him with a view to selling to him the suit premises.The suit premises were registered in the name of Nduku Charo Martha, the appellant's grandmother and the mother of the third party. However they had to obtain at first a grant of letters of administration intestate for her estate. It was then that the appellant agreed to fund the succession cause through his lawyer, Charles Okumu Nyaboye. Upon obtaining the grant the suit premises were transferred into the joint names of respondent and the third party. The two then executed a sale agreement with regard to the suit premises and received the full purchase price in the presence of the lawyer aforesaid. The two thereafter it would appear had a change of mind and refused to go through with the transaction.

As for the appellant's lawyer, his testimony was that he was engaged by the appellant to take out a grant of letters of administration on behalf of the respondent. He successfully filed and prosecuted the same resulting in the grant being issued on the 4th December, 1997. Thereafter the parties appeared before him to execute a sale agreement in respect of the suit premises in favour of the appellant. Upon receipt of the full purchase price the respondent and the third party undertook to obtain the relevant consents and execute the transfer within 90 days thereof. The parties were well known to him having interacted with them during the prosecution of the succession cause. The appellant later came back to him complaining that the two had refused to obtain and execute the necessary transfer documents, whereupon he advised him to file suit.

On the other hand the case for the respondent was that the appellant only assisted him in obtaining a grant of letters of administration intestate but he did not sell him the suit premises. He denied selling and or signing the sale agreement dated 10th March 1999, or ever having been to the offices of the appellant's lawyer. Finally, he claimed that the appellant was just being fraudulent. It would appear that the third party subsequently passed on during the pendency of the suit.

Having considered the submissions by counsel and evaluated the evidence on record the learned magistrate believed the evidence of the appellant and returned the verdict in his favour, holding thus:-

> **"In a nutshell, l find that the plaintiff has proved his case on a balance of probability. I find that the defendant's defence is a mere denial that is only meant to buy time. I dismiss the same and enter Judgment for the plaintiff against the defendant in the following terms:-**
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> > **1. An order for specific performance of the agreement dated and executed on the 10th day of March 1999 within the 7 days failing which the executive officer of the court will execute the transfer documents in favour of the plaintiff.**
> >
> > **2. Costs and interest to the plaintiff against the defendants."**

The respondent was aggrieved by the decision and opted to appeal the same in the Environment and Land Court at Malindi on the grounds that the trial court erred in not finding that the relief of specific performance was not available to the appellant given that the suit property was agricultural land thus bringing into play the provisions of **section 6** of the Land Control Act; in not finding that the respondent's only other witness, the lawyer was incompetent and impartial; and finally in failing to correctly evaluate the evidence on record and misdirecting himself in all his findings relating to the true facts in the matter.

Whilst the appeal was pending in the Land and Environment Court, the appellant subdivided the suit premises and sold the resultant three portions to the interested parties, who have since been enjoined in this appeal being **Kilifi /Kijipwa/1333** to the 1st interested party, **Kilifi/Kijipwa /1334** to the 2nd interested party and **Kilifi/Kijipwa/1335** to the 3rd interested party.

Angote, J. subsequently, heard the appeal and in a reserved judgment delivered on 19th December 2013,

allowed the same on the grounds that the suit premises being agricultural land the consent of the Land Control Board should have but was not obtained and that the order of specific performance could not have been granted in the absence of the consent of the Board. Secondly, that on the doctrine of *lis pendens* the appellant was mischievous to subdivide and transfer the suit premises during the pendency of the appeal. He went on to hold that a purchase made of a property *pendente lite* for valuable consideration affects the purchaser in the same manner as if he had notice and will be bound by the judgment or decree in the appeal. Therefore the interested parties in this appeal were equally bound by the judgment of the court in the appeal. On that basis he ruled that:-

> **"(a) The Judgment and Decree of the Honourable Senior Resident Magistrate made on 5th February 2009 in Kilifi SRMCCC No. 188 of 2009 be and is hereby set aside .**
>
> **(b) The Register in respect of Kilifi/Kijipwa/137 be rectified by cancellation of titles Kilifi/Kijipwa/1334 and Kilifi/Kijipwa/1335 and parcel of land number Kilifi/Kijipwa/137 be restored in the name of Kidheka Mutisya Ngata.**
>
> **(c) The Respondent to pay the Appellant the costs of this appeal and the costs in the lower court."**

It was now the turn of the appellant to be aggrieved by the decision and he lodged the instant second and perhaps last appeal. The appellant has advanced a total of nine grounds. In summary, he complains that the learned Judge erred in law and fact in holding that the record of appeal was competent in the absence of the formal decree appealed from; in holding that the suit premises were subject to **section 6** of the Land Control Act whereas the same were exempted under **section 6 (3)** of the Land Control Act; in holding that specific performance was not available to the appellant as the agreement had become void for want of the consent of the Land Control Board; in holding that the principle of *lis pendens* was applicable when it was never raised as a ground of appeal; by solely relying on the submissions of the respondent and delivering a judgment on a parcel of land other than the suit premises which judgment was therefore irregular, and could not be cured by amendment; by ordering that the register in respect of Kilifi /Kijipwa 173 be rectified by cancellation of titles Kilifi/Kijipwa/1333, Kilifi/Kijipwa/1334 and Kilifi /Kijipwa/1335 and parcel of land number Kilifi/ Kijipwa 173 be restored to the respondent; and finally by setting aside the judgment and decree of the Senior Resident Magistrate made on 5th February, 2009 in Kilifi SRMCCC No 188 of 2009.

In a case management conference presided over by the Deputy Registrar of this Court on 15th February 2017, parties agreed to canvass this appeal by way of written submissions without oral highlights. The appeal was then fixed for mention before us on 28th March, 2017 for purposes of setting a date for judgment. Come that day and only the appellant and interested parties had filed their respective written submissions. The respondent had not and did not even bother to attend court. Accordingly, in determining this appeal we do not have the benefit of the respondent's submissions.

In his submissions in support of grounds one and two of the appeal the appellant claims that it is a mandatory requirement that a certified copy of the degree appealed from should form part of the record of appeal. Relying on the provisions of **Order 42 rule 2** of the Civil Procedure Rules, the appellant urged that since a certified copy of the decree was lacking in the record of appeal that was before the first appellate court, the appeal was thereby rendered incompetent and ought to have been struck out.

With regard to grounds 3 and 4 of the appeal, it was submitted that the suit premises were subject to the provisions of **section 6 (3)** of the Land Control Act as it was a transmission by virtue of intestacy succession. Secondly, that the suit premises were in a settlement scheme, to which the Settlement Fund Trustees was a major player but it was not enjoined in the proceedings and further that the consent of the Land Control Board was not required in transactions involving land under its jurisdiction.

As to ground 5 of the appeal the appellant submitted that it was a misdirection for the Judge to have held that the doctrine of *lis pendens* was applicable while there was absolutely no evidence placed before him to show that the suit premises had been sold to the alleged third parties, when the appeal was pending in

the first appellate court. Basing his argument on the case of **Kiruga v Kiruga & Another [1988] KLR 348**, the appellant urged us to reverse that finding.

Urging grounds 7 and 8 together, the appellant submitted that from the judgment it was clear that it was in respect of a different parcel of land from the suit premises the subject of the lower court case and the appeal in the first appellate court. That the suit premises in the lower court and in the first appeal were known as plot no 173 Kijipwa Settlement Scheme. However, the first appellate court pronounced its judgment in respect of land parcel No Kilifi /Kijipwa/173. So that the pronounced judgment is incapable of enforcement in that the land ordered to revert to the appellant is nonexistent and if it exists, it probably belonged to another person, not a party to the proceedings.

For the interested parties, they submitted that they were caught up in these proceedings by coincidence and non-disclosure of material facts in respect of their purchase of the suit premises by the appellant and respondent. That they were innocent purchasers for value and without notice. That they entered into genuine contracts with the appellant to purchase the various parcels of land forming part of the suit premises without notice of any dispute or litigation. The appellant presented to them mutation forms showing the subdivision of the suit premises into independent titles viz; Kilifi/Kijipwa/1333, 1334 and 1335 respectively which he sold and transferred to them. That as all this was going on nobody raised any objection nor were the court proceedings brought to their attention. Given the circumstances they urged that the actions of the appellant and respondent should not be visited upon them. They also submitted that in the circumstances of this case the doctrine of *lis pendens* should not apply so as to punish them based on facts that were not disclosed to them. That there was no evidence of collusion or fraud between them and the appellant as to cast doubt on the application of the principle of innocent purchaser for value, without notice.

As already stated, this is a second appeal and as such only issues of law call for our determination (See **sections 72** and **79D** of the Civil Procedure Act). The issues of law that we have flagged in this appeal are threefold; whether the appeal in the first appellate court was incompetent for want of a certified copy of the decree in the record; whether the suit premises were subject to the provisions of the Land Control Act and the applicability of the doctrine of *lis pendens.*

Starting with the first issue, it is true that the record of appeal before the first appellate court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of **Order 42 rule 2** of the Civil Procedure Rules which provides *interlia*:

> **"Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the act until such certified copy is filed."**

However, the respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from. Was this omission fatal to the appeal? The appellant thinks so as according to him the requirement is couched in mandatory terms. The Judge did not agree with him reasoning that:

> **"The word "Decree" has been defined by the Civil Procedure Act, Cap 21 to include judgment. In fact, the Civil Procedure Act has provided at section 2 that the judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up".**

This is the essence of the proviso to the definition of the term "**decree.**"

According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court. Consequently, he reasoned, the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.

We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in **sections 1A** and **1B** of the Civil Procedure Act. Finally, one would ask what prejudice did the appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any.

The other issue concerns whether the suit premises were agricultural land, and if so, whether the consent of the relevant Land Control Board was required. In this regard the starting point should be the plaint as filed by the appellant in the Senior Resident Magistrate's Court. In paragraph 5 thereof the appellant pleaded thus: -

> **"By a further term of the aforesaid agreement, the defendant and the said NZUI each agreed and each made undertakings to obtain the necessary consent of the Land Control Board and effect transfer by duly executing the transfer forms and/or documents in respect of the suit property within 90 days from the date of executing the aforesaid agreement."**

With this unequivocal averment how can the appellant turn around and claim that the transaction was not subject to the consent of the Land Control Board? A party is bound by his pleadings. The sale agreement itself in clause 2 provided *inter alia*:

> **"2. The vendors undertake to obtain the consent of the Land Control Board and effect transfer to the purchaser within 90 days of signing this agreement"**

Then there was the evidence of PW1, the appellant's advocate who drew up the sale agreement. He was categorical that the suit premises were agricultural land. He further testified that the appellant had informed him that the respondent had refused to obtain the necessary consent of the Land Control Board whereupon he advised him to file suit. The appellant himself testified that the seller, meaning the respondent, was to effect the transfer by obtaining consent within 90 days. From the pleadings and the evidence of the appellant and his advocate it is quite clear that the suit premises were agricultural land and therefore the consent of the Land Control Board was necessary for the transaction to go through. Indeed, the suit in the lower court was filed primarily because the respondent had refused to obtain the necessary consent pursuant to the provisions of the sale agreement. It was never the appellant's case that the suit premises were being transmitted to him so as to invite the application of **section 6 (3)** of the Land Control Act that ousts the need for the consent of the Land Control Board, nor was it his case that the suit premises were within a settlement scheme to which the Land Control Act did not apply.

Further, it is the appellant who initiated the suit in the trial court. He cannot blame the respondent for failure to join the Settlement Fund Trustees as parties to the suit. The appellant's myth regarding the inapplicability of the Land Control Board's consent to the transaction is debunked by the interested parties written submissions in which they are categorical that "…***The purchase of the property from the appellant was done in good faith, with the strict adherence to all the procedures and law of the land, including the obtaining of the consent of the Land Control Board."*** In view of the fact that the suit premises were agricultural land, the consent of the Land Control Board was supposed to be obtained within 6 months of the execution of the sale agreement. That is what the provisions of **section 6** of the Land Control Act require of parties who enter into sale agreements in respect of agricultural land. Failure to comply renders the sale agreement void and incapable of enforcement. **See Onyango and Another v Luwayi [1986] KLR 513**. On the basis of the foregoing, we agree with the learned Judge's finding that the order of specific performance that had been sought by the appellant in the lower court could not issue in the absence of the consent of the Land Control Board. There was no agreement left that the trial court could have ordered to be performed as it had been rendered void by the operation of the law. The trial court therefore erred when it granted the appellant an order of specific performance for an agreement which had become void as the learned Judge correctly found.

It is not in dispute that while the appeal from the trial court was pending hearing, the appellant subdivided the suit premises and sold the subdivisions to the interested parties. What the appellant has said in his

defence on this score is feeble, totally mischievous and misleading. He claims that there was no evidence placed before the appellate court to show that portions of the suit premises were sold to the interested parties. Yet we have interested parties in this appeal who have in their own written submissions detailed how they acquired their respective portions of the suit premises from the appellant. The 1st interested party acquired his on 3rd December 2010, whereas the 2nd and 3rd interested parties got theirs on 16th May 2011. From the record, the appeal in the first appellate court was lodged on 12th February 2009 with the current appellant as the respondent. It was not until 19th December 2013 that it was concluded. So that by the time he was subdividing, selling and transferring portions of the suit premises to the interested parties he was well aware that litigation regarding the suit premises was still ongoing in the first appellate court. This state of affairs obviously attracts the application of the *lis pendens* doctrine. It is a doctrine of law and thus it matters not when it is raised. The doctrine simply prohibits a party to a suit from transferring the suit premises to a third party while the suit, with regard to the suit premises is pending. The purpose of the doctrine is of course to preserve the suit premises until the finalisation of the ongoing litigation.

Madan, JA. echoing the words of **Turner LJ** in **Bellamy vs Sabine [1857] 1 De J 566,** expounded on the purpose of the doctrine thus in the case of **Manwji vs U. S International University and Another [1976-80] KLR 229:-**

> **"It is a doctrine common to the courts both of law and equity, and rests, as I apprehended, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation** *pendente lite* **were permitted to prevail. The plaintiff would be liable in every case to be defeated by the Defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceedings."**

As already stated the appellant was well aware of the pending appeal when he purported to subdivide, sell and transfer to the interested parties portions of the suit premises. This being the case the interested parties cannot be heard to argue that they were innocent purchasers for value without notice. As correctly observed by the learned Judge purchase of a property *pendente lite* for valuable consideration affects the purchaser in the same manner as if he had notice and will be accordingly bound by the judgment or decree in the suit. It does not matter that at the time of purchase there was no order stopping the selling or subdivision of the suit premises as the interested parties have argued. Nor was there need to tender evidence to show that the interested parties were never parties to any collusion or fraud in their acquisition of portions aforesaid. What is pertinent is that the appellant well knowing of the pending litigation involving the suit premises nonetheless went ahead to mischievously subdivide and transfer portions thereof to the interested parties. In the circumstances the learned Judge did not err in invoking the doctrine.

Nothing much turns on whether or not the decree issued by the first appellate court is capable of enforcement. Those are minor omission or errors capable of correction.

In the upshot the appeal lacks merit and it is accordingly dismissed with costs to the respondent.

Dated and delivered at Mombasa this 22nd day of June, 2017.

ASIKE MAKHANDIA

…….……...

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