



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 88 OF 2016

BETWEEN

KURSHED BEGUM MIRZA.....APPELLANT

VERSUS

JACKSON KAIBUNGA.....RESPONDENT

(Being an appeal against the judgment and decree of the High Court at Malindi, (Angote, J.) delivered on 2nd October, 2015 in Malindi ELC Case No. 147 of 2014)

JUDGMENT OF THE COURT

[1] This is a first appeal against the decision of the Environment and Land Court at Malindi. That being the case, this Court is enjoined by law to proceed by way of re-appraising all the evidence and re-examine the same in a fresh and exhaustive way before arriving at its own independent conclusions. See **Rule 29** of the **Court of Appeal Rules**. The approach taken ought to recognize this Court's limitations and its deference to the factual findings by the trial Judge who had the advantage of hearing and seeing the witnesses as they testified. The parameters of interference therefore are as aptly summed up in the case of **Selle vs. Associated Motor Boat & Co. [1968] EA 123**; where the predecessor of this Court put it thus:

“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 v. Ali Mohamed Sholan [1955], 22 E.A.C.A.270).”

[2] A brief restatement of the factual background information will suffice to place the entire appeal in perspective. The appellant, **Kushed Begum Mirza** is an administrator to the estate of her late husband, **Mirza Shah Mazar Baluchi** (the deceased), who died on 16th June, 1997. According to the appellant, she and her late husband separately bought shares in a parcel of land described as Plot No. 21 Watamu, (the mother title) which was originally owned by one Suleiman Bin Ali. There are other people who purchased

various shares including the respondent. During his lifetime, the deceased is said to have purchased 4/48 shares within the same title, which shares, later devolved to the appellant upon the demise of her husband. In addition to those shares and following the deceased's demise, the appellant contended that she purchased an additional 7/48 shares in her own name within the same Plot No 21. All these shares were definite but undivided, as no survey was ever done.

[3] It is the appellant's assertion, that all the subject parcels so purchased were contiguous, thus forming one big parcel on the ground and that the deceased had even developed his portion by building some *makuti* sheds which he later converted into a cinema and a bar. Apart from the appellant and the deceased shares, the rest of the mother title had also been purchased by several other buyers in equally definite but undivided shares. Trouble for the appellant which snowballed into the present dispute began when the appellant sold her 7/48 shares to one Roberto Manganelli (a third party), who upon purchase moved to take possession thereof but he was stopped in his tracks by the respondent who claimed he had valid title to the land.

[4] Matters escalated on 10th July, 2014 when the respondent in the company of others moved onto the land and demolished the structures thereon and proceeded to erect what appeared to be a stone wall, thereby rendering the appellant unable to deal in the land. In light of the above, the appellant moved the Environment and Land Court seeking orders *inter alia*;

a. 'A declaration that the defendant's action in invading, by use of force, the portion of Plot No. 21 Watamu, owned by the estate of Mirza Shah Mazar Baluchi and that owned by her (sic), is unlawful, illegal and an affront to sanctity of ownership.

b. Mandatory injunction compelling the defendant, his servants, workers, hirelings and/ or any person(s) claiming right under or through him to pull down the structure already constructed on the subject portion of Plot No. 21 Watamu

Alternatively, the Plaintiff be granted leave to pull down the same by herself, at a cost to be recovered from the defendant.

c. A permanent injunction restraining the defendant by himself, his servants, workers, hirelings and/ or any other person(s) claiming under him or through him, from going into, or in any way whatsoever, entering, constructing, alienating or interfering with, or part of the portion of Plot No. 21 Watamu owned by the estate of Mirza Shah Mazar Baluchi and the Plaintiff.

d. Damages....'

[5] The aforesaid suit was defended, with the respondent contending that his occupation of the suit land was lawful. Further, that he was the registered proprietor of the land he so occupied, being Plot No. 670 (Original 21/18) Watamu CR. 24159 and Plot No. 809 (Original 21/20) Watamu CR. 27630, which were all borne out of undivided shares of Plot No. 21 Watamu. It was his contention that while the appellant and the deceased had bought shares of their own, their land remained undivided and unidentifiable. As a result, and in purporting to sell her shares, the appellant had encroached on his parcel, hence the dispute.

[6] Whilst admitting that Plot No. 21 Watamu is owned by several people in definite but undivided shares, the respondent asserted that his portion had been surveyed, beacons installed and title thereto issued. Further, that since he had never disposed of the land, the appellant could not claim valid title thereto. To buttress this argument, was the contention that unlike the appellant's vague and undivided land, the respondent had already had his shares surveyed, divided and marked using beacons. The respondent added that there were even previous proceedings instituted by himself against the deceased, namely, **Malindi PMCC No. 71 of 1996**; whereby the deceased was restrained from interfering with the respondent's Plot Nos. 607 and 809 aforesaid. However that suit abated upon the deceased's demise, as no letters of administration were taken to enable the estate defend the same. As such, the respondent was of the view the present suit was devoid of a cause of action against him and urged it be dismissed with costs. The matter fell for hearing before **Angote J.**, who, in a judgment delivered on 2nd October, 2015,

found no merit in the appellant's claim and dismissed it with costs, hence this appeal.

[7] In the instant appeal, the appellant faults the findings by the trial Judge on four grounds in that he erred; firstly, by holding that there was no evidence showing that any of the shares purchased from the owners of Plot No. 21 were identifiable as at the time of purchase; secondly that the learned Judge is said to have erroneously treated the appellant's case as being against the respondent's Plots Nos. 670 and 809 and making it appear that the portion where the construction was being carried out was on these plots yet it was not; thirdly, by holding that any purchaser who bought an undivided share could settle on any part of the suit property until such a time that their shares were identifiable by way of beacons; and lastly, for holding that PMCC No. 71 of 1996 abated due to the failure by the appellant to take out letters of administration with a view to defending the same.

With the leave of Court, parties filed written submissions, which they adopted but the Court convened a further plenary hearing where counsel for both parties made some oral highlights and clarified specific issues raised by the Court.

[8] For the appellant, learned Counsel, **Mr. Odongo**, began his submissions by addressing the identifiability of the appellant's parcels. He submitted that contrary to the judge's finding, the appellant's land was proven as having been easily identifiable; the testimony of two of the appellant's witnesses clearly established there were structures that were constructed on the portion occupied by the appellant; moreover, the suit property was held on terms reflected in the mother title, with each shareholder having taken occupation in terms of their shareholding thus each plot although not surveyed is identifiable. As a result, the parcels the respondent was claiming to have title to had no connection whatsoever with those claimed by the appellant. To buttress this, was the fact that since the entire mother title had not been surveyed, it remained unclear how the respondent had obtained separate titles from the mother title.

[9] In view of the above, counsel submitted that, the Judge should not have based his decision on Plot Nos. 607 and 809 for those were the respondent's parcels which were separate and distinct from the appellant's. Further, that the issue was never about the validity of the appellant's title, but about the respondent's unlawful invasion of the appellant's land. That had the respondent confined himself to his land, there would be no dispute. With regard to the third ground of appeal, counsel for the appellant further submitted that the finding by the trial Judge that the purchasers could settle on any part of the land was erroneous as no evidence was adduced supporting such a finding. To the contrary, he pointed out that, the evidence showed the appellant's portion had beacons. Lastly, that the Judge erred in holding that Malindi PMCC No. 71 abated as a result of the death of the defendant therein. This is because, the death of a defendant cannot cause the abatement of suit and in any event, the said suit had no relation to the suit herein. As a result, the learned Judge was faulted for misapplying the provisions of **Order 24** of the **Civil Procedure Rules** when he held that the demise of the suit abated upon failure of the appellant to take letters of administration following the demise of the deceased. He thus urged the Court to find the case to have been merited and allow the appeal.

[10] **Mr. Kilonzo**, learned counsel for the respondent, opposed the appeal; he fully supported the findings of the learned trial Judge arguing that the net total of the evidence proved that the parcels were unidentifiable. He submitted that although the appellant had developed her undivided shares and those of her late husband, she did not have any survey done and the shares therefore remained unidentifiable. Additionally, the suit property falls under the regime of land law known as co-tenancy, within the meaning of **section 91(1)** and **94(2)** of the **Land Registration Act** No. 3 of 2012. As such, the shares are held in common as units in trust and are thus not identifiable. The same can only become identifiable upon survey and division or partition, which was never done. Counsel contended that occupation and development of the land alone do not constitute a basis of identification of an undivided interest in land and the Judge can thus not be faulted for holding that the land was unidentifiable.

[11] Secondly, counsel termed the allegation that the judgment was based on Plot Nos. 607 and 809 as baseless and unmerited. In this regard, he submitted the judgment was also based on other facets of the evidence and it was for the appellant to prove the trespass and encroachment into her alleged plots which she failed to do. Thirdly, that having claimed to each have undivided shares on the mother title, the

appellant and the respondent each held an unidentifiable share in common and had unity in possession until such a time as subdivision was done. For this reason, counsel supported the Judge for holding that in the absence of such partition, any purchaser could settle on any part of the mother title according to proportionate to their shares. In conclusion, counsel submitted that the comments made by the learned Judge with regard to the abatement of Malindi PMCC No. 71 of 1996 were *obiter dicta* and thus did not influence the outcome of this case. For those reasons, counsel implored this Court to dismiss the appeal with costs.

[12] We have considered the rival submissions, the record of appeal and the grounds of appeal; therefore, we have distilled the following issues for determination:

- a. Whether the appellant's shares on Plot No 21 Watamu, the mother title herein, particularly were identifiable and the effect thereof.
- b. Whether the learned Judge erroneously based his decision on plot No.s 607 and 809 Watamu.
- c. Whether Malindi PMCC No. 71 of 1996 was erroneously considered.
- d. What is the effect of a subdivision of a parcel of land by one shareholder without the participation of the other co- owners?

[13] We will deal with the first and second issues conjunctively; it is common ground that the initial proprietor to the mother title was one **Suleiman Bin Ali**, who sold undivided portions thereof to various people, among them, the appellant, her deceased husband and the respondent herein. Also undisputed is the fact that while the respondent had his share surveyed, subdivided and subsequently registered as Plot Nos. 670 (Original 21/18) Watamu CR. 24159 and 809 (Original 21/20) Watamu CR. 27630, no survey or subdivision was ever conducted on the appellant's share of the land within the mother title. As a result, the appellant's description of the suit property as per the plaint was simply that it was '*a portion of Plot No. 21 Watamu.*' As such, the learned trial Judge found the shares sold to the purchasers to have been unidentifiable and to have been held in common.

[14] The appellant has taken issue with an aspect of this finding, in particular, the fact that the learned Judge recognized, all the shareholders held their shares in the mother title as tenants in common, nonetheless, her suit was dismissed. By definition, a tenancy in common is a tenancy by two or more persons, in equal or unequal undivided shares, with each person having the right to possess the whole property but no right of survivorship. The central characteristic of a tenancy in common is that each tenant is deemed to own by himself, a physically undivided part of the entire parcel (see. **Black's Law Dictionary, 9th Edn** and **Thomas F. Bergin & Paul G. Haskell, 'Preface to Estates in Land and Future interests 54 2nd Edn, 1984).**

The **Land Registration Act** recognizes this form of land ownership under **section 91(2)** which provides that:

'Except as provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights, there shall be a presumption that they hold the interest as tenants in common in equal shares.'

In the instant appeal, the transfer documents produced by the appellant for the respective parcels, indicated that the interest conferred was an '*undivided share*' hived off from the mother title. No evidence was led to the contrary. Neither beacon certificates nor survey reports were produced to prove her land was divided or identifiable as the appellant now asserts.

[15] If anything, even the plaint itself spoke of shares having been undivided. It is trite law that pleadings are not only binding on the parties, but on the court as well. A party is thus disallowed from departing from the contents of its pleadings in the course of trial (See **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**). In addition, the

appellant's own witness, one Mohamed Suleiman Ali (PW3) who is an administrator to the estate of the original vendor admitted that he had no beacon certificates to support the assertion that the land had been demarcated. All this lends credence to the finding by the learned trial Judge that the shares were undivided hence held in common and that what existed was a co-tenancy or a tenancy in common. There is no reason why this Court should depart from that finding. Consequently, the first and third grounds of appeal fail.

[16] Turning to the second issue; according to **section 107** of the **Evidence Act**, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

"13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues." (emphasis added)

[17] *The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rests upon the claimant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.*

[18] *In this case, the incidence of both the legal and evidential burden was with the appellant. She was the one to prove that the suit land existed, that she was the proprietor thereto and that the respondent had unlawfully interfered with her possession and/or enjoyment thereof. Looking at the record of appeal, however, no proof of her divided share of the land was ever furnished. Her share has always remained part of a whole, part of the mother title. As earlier stated, it was in fact common ground that the land she claimed as hers was never surveyed. On the other hand, the respondent discharged his evidential burden by placing before court the title documents in respect of the parcels he claimed to be his, as well as certificates of search thereof, thus proving that his share was ascertainable on the ground.*

[19] *Notwithstanding her failure to discharge her evidential burden of proof, the appellant now contends that the Judge ought not to have considered the respondent's contestations or even borne in mind Plot Nos. 607 and 809. However, even if the Judge had disregarded the respondent's evidence, this could still not have salvaged the appellant's suit. This is because, the failure of the appellant's suit was occasioned not by the respondent's ownership of Plot Nos. 607 and 809 but by the appellant's failure to prove the existence of her parcels. It is clear from the judgment of the trial court that Plot Nos. 607 and 809 were never the basis of the judge's determination. The pertinent part of the judgment shows the reasons for the judge's findings was failure by the appellant to prove her case. He had this to say on this aspect:*

"41. There is no evidence placed before me to show that the owner of plot number 21 Watamu objected to the excision of the two plots by the Defendant as proposed in the sub-division (sic) plan.

42. Indeed, there is no evidence to show that the shares the purchasers were buying from the owner of plot no. 21 were identifiable as at the time of the purchase.

43. Although the denominator of all the shares was 48, there is no evidence before me to show

that plot number 21 Watamu was formally subdivided into 48 plots before the said sub-divisions were sold. That explains why the shares that were registered against the title are referred to as undivided.

44. It therefore follows that all the people who purchased the said undivided shares could settle on any part of the suit property until such a time that their shares were identifiable by way of beacons.

45. Before an individual acquired a separate title document for his share, he only held such a share as a tenant in common.”

[20] Besides, the consequences of a party's failure to discharge its burden of proof have been laid out by **section 108 of the Evidence Act**. Under the said provision, the fate of such a party lies in the failure of their suit. (see **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another** [2014] eKLR). This is because even under **section 3(4) of the Evidence Act**, a fact is not proved when it is neither proved nor disproved. The appellant could therefore not obtain reprieve in a case where she has failed to prove her assertions.

[21] The learned Judge can thus not be faulted for finding that in the absence of proof of subdivision and demarcation, the land remained unidentifiable. In equal measure, he can also not be faulted for basing his judgment on the wrong parcels of land because as demonstrated above, the basis for his finding was the appellant's failure to discharge her burden of proof a finding that is sound in law. Consequently, the first and third grounds of appeal should fail.

[22] On the issue of whether the learned Judge erred in holding that Malindi PMCC 71 of 2016 had abated. As stated earlier, the respondent had previously sued the appellant's late husband in Malindi PMCC NO. 71 of 1996 for trespass; where the respondent successfully sought for an injunction to restrain the deceased from trespassing Plot Nos. 607 and 809. The respondent also alleged that the said suit abated upon the deceased's demise for the appellant never took out letters of administration with a view to defending it. This was not controverted by the appellant, leading to the judge's conclusion that indeed that suit must have abated. As to whether this conclusion was erroneous is neither here nor there because as stated before, the basis of the dismissal of her suit herein was principally predicated on her failure to discharge her burden of proof. Just like the respondent's parcels of land, these previous proceedings were only mentioned tangentially and had little bearing on the outcome of her case.

[23] The last issue caused us considerable anxiety as we wondered the fate of the appellant's undivided share in the mother title. It is common ground as aforesaid, the appellant purchased and her shares in addition to the shares that belonged to her late husband which were noted in the mother title. Although the specific issue of how the respondent obtained a subdivision of a title held by many people in common was not pleaded, we find it was a germane or central issue in this case and has a bearing with the appellant's allegation that her share was subsumed when the respondent partitioned and registered his share. However as stated above, since the appellant's share is unidentified it is very difficult to establish the extent if any of the encroachment. This is part of the issues we sought to clarify when we recalled parties for oral highlights of the submissions.

[24] What is evident and all parties agreed is the fact that the appellant's undivided share as noted in the mother title is available and can only be identified when the parcel of land is partitioned. What did not become clear to us and there is nothing we can do about it at this appellate level, is how the respondent's undivided share was isolated from a common title without obtaining the consent and participation of the other co-owners. That question was not pleaded, no evidence was led on it and similarly, the learned trial Judge seems to have alluded to it but wondered how he could resolve it when there were no allegations of fraud on the part of the respondent. Where matters regarding Plot No. 21 Watamu or the mother title were left when the appellant's suit was dismissed, it will require the owners, including the appellant to attend to sub-division/partition and registration of their individual titles, according to their shares. Although we sympathize with the plight of the appellant, we lack jurisdiction to grant any orders especially on that basis.

[25] Accordingly, the appeal is dismissed, but bearing in mind both parties were tenants in common in the mother title, and the appellant's claim was not frivolous although slovenly presented, we do not wish to award any costs but order each party to bear their own costs in this appeal.

Dated and delivered at Malindi this 5th day of October, 2017

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