



**IN THE COURT OF APPEAL**

**AT MALINDI**

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

**CIVIL APPEAL NO. 55 OF 2015**

**BETWEEN**

**VOI DEVELOPMENT COMPANY LIMITED .....APPELLANT**

**AND**

**AGAM INVESTMENTS LIMITED ..... RESPONDENT**

***(Being an Appeal from the Ruling of the High Court of Kenya at Mombasa***

***(Kasango J.) dated 30<sup>th</sup> July, 2015 in H.C.C.No.308 of 2007)***

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**JUDGMENT OF THE COURT**

The origin of the dispute that has culminated in this appeal is an agreement for sale made between the parties on 30<sup>th</sup> July 1997. It was alleged that by the said agreement the appellant, Voi Development Company Limited sold to the respondent, Agam Investment Company Limited some 8 plots of land, namely, 15031/41, 15031/42, 15031/118, 15031/119, 15031/120, 15031/121, 15031/123 and 15031/124 curved out of the mother title, LR.No.15031.

After payment of the purchase price the appellant executed transfer to the respondent of the first six of the eight plots, 15031/41, 15031/42, 15031/118, 15031/119, 15031/120, and 15031/121. No transfers were signed in respect of two plots Nos. 15031/123 and 15031/124, (the suit properties) which are the subject of the dispute, because despite, the respondent's assertion that it had purchased all the 8 plots, the appellant proceeded to sell to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the primary suit (but who are not parties to this appeal) the two suit properties and a third one, 15031/122 which was not part of the 8 plots. The appellant denied selling the suit properties or the 8 plots to the respondent or executing the transfers of the six plots in favour of the respondent. Before the trial court the following nine issues were identified for determination;

***“1. Did the 1<sup>st</sup> Defendant subdivide the plot known as Grant No. CR 13016/1, Land Reference No.9665 (originally part of Land Reference No.934/3) into numerous Plots?***

***2. Did the 1<sup>st</sup> Defendant agree to sell to the Plaintiff Plot Nos.15031/41, 15031/42, 15031/118, 15031/119, 15031/120, 15031/121, 15031/123 and 15031/124?***

**3. Who is the bona fide and legal owner of Plot Nos.15031/123 and 15031/124?**

**4. Could the 1<sup>st</sup> Defendant then proceed to offer Plot Nos.15031/123 and 15031/124 to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants for sale in the year 2007?**

**5. Were the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants innocent purchasers for value without notice?**

**6. Did the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant pay the full purchase price to the 1<sup>st</sup> Defendant?**

**7. Were the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants justified in blocking off and denying the Plaintiff access to the premises? Did the Plaintiff suffer any loss and/or damage thereof?**

**8. Is the Plaintiff entitled to an order for specific performance by transfer and registration of Plot Nos.15031/41, 15031/42, 15031/118, 15031/119, 15031/120, 15031/123 and 15031/124?**

**9. Is the Plaintiff entitled to the orders of injunctions both mandatory and perpetual as prayed for in the plaint?"**

Of relevance to this appeal are issues (2), (3), (4), (5) and (6). The learned trial Judge (Odero, J.) found sufficient evidence from which to conclude that the appellant agreed to sell and in fact did sell to the respondent all the eight plots in question; and that the suit properties were indeed part of the 8 plots intended to be sold and sold for valuable consideration. With that finding the learned Judge concluded, in answer to the third issue, that the respondent having fully paid for them, the suit properties lawfully belonged to it.

On whether the suit properties were available for sale by the appellant to third parties (the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the primary suit), the court found in the negative holding that, having already sold the suit properties to the respondent and having handed vacant possession of the same to the respondent, the appellant had no right, ten (10) years later to offer them to any third party for sale. Finally, combining the answer in the last two issues, the learned Judge came to the conclusion that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not innocent purchasers for value as they had full notice of the claim by the respondent of the suit properties. With that and the other findings, judgment was entered in favour of the respondent who was also awarded costs.

Following that decision the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed Civil Appeal No.150 of 2011 in this Court challenging the decision of Odero, J. The Court, differently constituted, agreed with and upheld the decision of the High Court in all respects. For instance, the court agreed with the trial Judge that there was a valid agreement for the sale of the 8 plots, including the suit properties for which the respondent fully paid the purchase price; that following the execution of the agreement and payment, the appellant permitted the respondent to occupy the suit premises; that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who were the 2<sup>nd</sup> and 3<sup>rd</sup> appellants in that appeal, could not claim the suit properties as the agreement between them and the appellant was null and void for want of consideration; that they knew of the prior sale of the suit properties to the respondent and as such they were not innocent purchasers without notice. Upon these conclusions the appeal was dismissed. That would have marked the end to the litigation. However what followed is what concerns us in this appeal.

Four applications were filed in the High Court and heard together by Kasango, J. The first application was brought by the appellant for the downward review of Kshs.1,832,056.40 being the taxed bill of costs, the second one was by the respondent seeking the opposite, that the sum be reviewed upwards, while the third one again by the appellant sought, the review of the decree directing it to transfer the suit properties to the respondent, and finally in the fourth application the respondent sought the issuance of a warrant of arrest of the appellant's director, Mr. Eliud Mwamunga and an order of sequestration of the appellant's property comprised in Grant No.CR/13016/1. Because in this appeal we are only concerned with the two question of review the decree and contempt of court application, we shall limit our consideration of the

appeal to those two issues.

In the first instance the appellant asked the court to review the order directing it to transfer to the respondent the suit properties on the ground that it had found a new and very critical evidence which would go to the core of the entire case; that although the suit properties were initially included in the agreement, they were subsequently substituted with Plot Nos.15031/116, 15031/117 and 15031/127; that due to the appellant's director's advanced age he misplaced the letters confirming the exchange transaction; and that he only came by that evidence after the determination of the case.

The reason for review did not persuade the learned Judge who noted that the issue of substitution of the suit properties was raised at the trial, considered by the learned trial Judge and finally determined by the Court of Appeal; that both the High Court and this Court made concurrent finding that although there was an offer to substitute the suit properties the negotiations fell through with the result that the ownership of the suit properties remained with the respondent; and that the court could not review a matter concluded by a judge of coordinate jurisdiction and by this Court.

The learned Judge turned her attention to the application for contempt after finding that no sufficient ground had been laid before her to warrant a review of the decree. The respondent contended in the application for contempt that the appellant's director had refused to comply with the order of the court issued on 4<sup>th</sup> December, 2014 requiring it to execute transfer documents for the suit properties in favour of the respondent, among other conditions.

The appellant's director denied disobeying the order contending that, in the decision of 4<sup>th</sup> December, 2014, the court gave the appellant three alternatives, one of which was that, in default of it signing, the Deputy Registrar would execute the transfer documents, and that the Land Registrar, on the strength of that execution, would duly register the transfer; that as such the application for a warrant of arrest and sequestration was unnecessary, the Deputy Registrar having already executed the transfer documents and the Land Registrar, having effected the transfer. The learned Judge found no evidence to support this assertion. At any rate, the learned Judge observed that, even if the Deputy Registrar had executed the transfers, that was independent of the order that the appellant's director nonetheless be committed to a jail term of six months.

The appellant challenges this determination on the grounds that the learned Judge erred in entertaining a matter in which she had no jurisdiction in terms of **Article 165(5)** of the Constitution; that the learned judge erred in declining to review the decree on the grounds advanced by the appellant; that without evidence of personal service the learned Judge made an error when he directed that, the appellant's director be committed to jail for a period of 6 months; and that the learned Judge unfairly rejected the appellant's application for review by erroneously stating that the Court of Appeal had determined the question yet that question was not a ground of appeal.

This appeal has been canvassed through written submissions, with parties reiterating in their highlights their respective positions as encapsulated in the foregoing paragraphs for which reason we find no need to rehash them. Of the two applications brought before the High Court by the appellant, it is only the one filed on 26<sup>th</sup> November, 2014 that concerns us. In it the appellant invoked the powers of that court under **Order 45 rules (1) and (2)** of the Civil Procedure Rules seeking to review the decree in respect of the order that the suit properties be transferred to the respondent essentially because the appellant had come by essential evidence to prove that the suit properties were not part of the 8 plots sold to the respondent, the same having been substituted with others.

The court's powers under **Order 45** aforesaid is to be exercised within the following parameters; where, after the exercise of due diligence, the applicant discovers a new and important matter or evidence that was not within his knowledge, and could not be produced at the trial, on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. The person aggrieved may, without delay apply for review of judgment or order to the court that passed it. The appellant premised his application on the ground that he had new and important piece of evidence. The evidence, according to him went to the core of the dispute; that as a matter of fact the suit properties were subsequently after the

execution of the agreement, exchanged with Plot Nos.15031/116, 15031/117 and 15031/127.

Applying the provisions of **Order 45 rule 1 (I)** to the facts in this dispute, the issue of substitution of the suit properties with three others could not have been a new discovery, the same having been alive before Odero J. and even on appeal to this Court. It is as strange as it is baffling that the appellant through its witness would deny specifically before the trial court any negotiations regarding substitution of the plots, and later before Kasango, J. that that issue is a new and important evidence.

Secondly the decision of Odero, J. was rendered on 11<sup>th</sup> March 2011, that of the Court of Appeal on 7<sup>th</sup> February, 2014 and the application for review was filed on 26<sup>th</sup> November, 2014. There are two infractions to be noted from this. The judgment sought to be reviewed was rendered some three years after the decision of the High Court, an inordinate and unexplained delay. Then there is the provision of **Order 45 rules 1(1) (a) and 2** to the effect that the remedy of review is only available where, either there is a right of appeal but no appeal has been brought, or where no appeal is allowed. The appellant exercised the option to appeal and therefore review was not available. That disposes of the first ground.

On the argument that it was in error for the trial court to find the appellant in contempt of court in the absence of evidence of personal service, we turn to the provisions of **section 5 (1)** of the Judicature Act, that, upto January 2016, when the High Court (Organization and Administration) Act came into force, donated to the High Court the jurisdiction to punish for contempt; as that power was to be exercised in the same manner “as is for the time being” exercised by the High Court

of Justice in England. The use of the phrase “for the time being” has been explained in a number of decisions to mean that the prevailing law and procedure of contempt in England must be ascertained at the time an application for contempt is brought before the courts in Kenya. See **Woburn Estate Limited v Margaret Bashforth**, Civil Appeal No.18 of 2015.

The Civil Procedure (Amendment No.2) Rules of England of 1<sup>st</sup> October, 2012, was the applicable procedure for contempt of court at the time the matter before us was decided. Those rules provide for service of the copy of the judgment or order on a company. **Rule 81.5** provides that unless the court dispenses with the requirement of service, a judgment or order may not be enforced by an order for committal, unless a copy of it has been served on the person required to do or not do the act in question. In the case of a company or other corporation, a copy of the judgment or order or a ‘writ’ of sequestration must be served on the director or other officer of that company or corporation. Personal service will however be dispensed with under **Rule 81.8** if the order was made or judgment passed in the presence of the contemnor or if the contemnor is subsequently notified of the terms of the order or judgment by telephone, e-mail or otherwise. It is the uncontroverted position of the respondent that, after failing to find the appellant, it sought and obtained an order to serve the decree by way of substituted service in the Daily Nation Newspaper of Monday, 2<sup>nd</sup> February, 2015. That service under the rules is acceptable. In any case, like the learned Judge, we are satisfied that, the appellant by its conduct had notice of the order.

The order was to the effect that should the appellant fail to transfer the suit properties, the Deputy Registrar would execute the transfer documents; and that notwithstanding by reason of the appellant’s failure in the first place to comply with that order, the appellant’s entire property known as Grant No.C.R.13016/1 measuring 8369 acres would be attached and sequestered “**for as long as will take**” the appellant to comply. In addition to these orders the court ordered the arrest and imprisonment of Mr. Eliud Timothy Mwamunga the appellant’s director for a term of six (6) months. In case of disobedience of an injunctive or any other order of the court, the court may make an order for;

- a) committal;
- b) sequestration; or
- c) the imposition of a fine in respect of contempt of court.

See **section 63 (c)** of the Civil Procedure Act, **Rule 81.2** of the Civil Procedure (Amendment No.2) Rules, 2012 of England and **Order 40 rule 3** of the Civil Procedure Rules.

The court having authorized the Deputy Registrar to execute transfer documents in favour of the respondent, it was not necessary to attach the appellant's property and, at the same time, commit its director to civil jail. Committal to civil jail, sequestration and a fine are all forms of punishment. We think that the learned Judge erred in imposing all the three punishments, at the same time, even after directing the Deputy Registrar to execute transfer documents. She also ought to have considered the appellant's plea that its director was over 80 years old. Under the rubric "for any other sufficient reason" in **Order 45 rule 1**, the court below ought to have corrected this irregularity.

Only to that limited extent, we set aside the order committing the appellant's director to jail and attachment of the appellant's property, Grant No.C.R.13016/1. In place thereof we substitute a fine of Kshs.100,000 or in default five (5) days

imprisonment in accordance with **section 36 (3)** of the High Court (Organization and Administration) Act.

The last but also least ground challenging the jurisdiction of the court lacks substance. What was before the court was a simple application for review filed in court by the appellant itself. The other two applications filed by the respondent were equally defended by the appellant. The appellant never raised, *in limine* the question of jurisdiction. Instead it waited until it lost all the four application to do so.

The learned Judge, we conclude, had the jurisdiction to entertain the four (4) applications. The appeal is bereft of merit and save to the extent mentioned above, is accordingly dismissed with costs.

**Dated and delivered at Malindi this 1<sup>st</sup> day of July, 2016**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**