



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 71 OF 2015

BETWEEN

MORRIS NGUNDO.....APPELLANT

AND

LUCY JOAN NYAKI

TUA BENYAMBO NYAKI (suing in their capacity as the

administratrix and administrator of the estate of

GILBERT MBONI NYAKI (DECEASED)..... RESPONDENTS

*(Being an appeal from the Judgment of the Environment and Land Court of Kenya at Malindi (Angote, J.)
dated 15th May, 2015*

in

E.L.C. C. No. 12 of 2013.)

JUDGMENT OF THE COURT

By a plaint dated 14th May, 2009, the appellant brought an action in the Principal Magistrate's Court, Malindi, against **Gilbert Mboni Nyaki**, now deceased, seeking the following prayers:-

- “1. Eviction orders against the Defendant from the suit premises Plot No. Kilifi/Mtwapa/424;**
- 2. A permanent injunction restraining the Defendant, by himself, his servants and/or agents from entering and or trespassing into the Plaintiff's Plot No. Kilifi/Mtwapa/424; and,**
- 3. Costs of this suit.”**

The appellant's suit was anchored on these facts; that he was the beneficial owner and registered

proprietor of all that piece or parcel of land known as **Plot No. Kilifi/Mtwapa/424**, (“*the suit premises*”); that the deceased trespassed onto the suit premises without colour of right and built temporary structures thereon; that he was allocated the suit premises by the Government and had been living on the same since 1970; that in 2006, he acquired a Title Deed for the suit premises; that the respondent used to work with him and had advanced him a loan of Kshs.135,000/- that was secured by the suit premises; that he had yet to re-pay the loan; and that efforts to meet the deceased to clear the loan had been unsuccessful as he had not been keen to discuss and resolve the dispute. Finally, he denied any suggestions that he had sold the suit premises to the deceased.

On 1st December, 2010 during the pendency of the suit the deceased passed on. His widow, **Lucy Joan Nyaki** and one **Tua Benyambo Nyaki** obtained a Grant of Letters of Administration Intestate in respect of the estate of the deceased. They subsequently sought and were granted leave by the trial court to be joined in the suit in place of the deceased. Subsequently, they filed an Amended Defence and Counter - Claim on 26th November, 2012.

In defending the suit, the respondents averred that the deceased was the bona fide owner of the suit premises having purchased it from the appellant for the sum of Kshs.135,000/-. That the sell was reduced into an agreement that was signed by the appellant and the deceased on 21st March, 1983. The respondent further alleged that a transfer was later executed on 25th April 1983, in the presence of the District Settlement Scheme Officer, Kilifi, on 30th May 1983, and after the consent of the relevant Land Control Board had been obtained.

By way of the Counter-Claim, the respondents contended that despite this well documented transaction, the appellant had fraudulently proceeded to submit his name for the issuance of a Title Deed for the suit premises. They further averred that on 21st July, 2008, the District Land Registrar wrote to the appellant informing him that he was erroneously issued with a Title Deed and requested him to surrender it to him for cancellation. However, the appellant refused and or neglected to do so and up to the time of filing of the suit he had yet to do so. Further, the respondents denied that the deceased had trespassed upon the suit premises. They therefore prayed that the suit be dismissed with costs.

With respect to the counter claim, the respondents sought the following prayers:-

- “1. An order compelling the plaintiff to deposit the title deed to the suit property Plot No. Kilifi/Mtwapa/424 (originally Plot No. 250) in court for the onward transmission to the Ministry of Lands for their further action;**
- 2. Permanent injunction restraining the plaintiff by himself, servants or agents from interfering with the defendant’s possession of the suit property;**
- 3. Status quo be maintained pending determination of this suit;**
- 4. Costs and interest.”**

Having carefully considered the appellant’s and the respondents’ case and the written submissions filed by advocates for both parties, **Hon. Obura**, learned Principal Magistrate determined thus:-

“In the end, I find that the Plaintiff’s claim lacks merit. It is hereby dismissed with costs to the Defendants. I also find that the counterclaim is meritorious. Accordingly, I hereby enter judgment in favour of the Defendants (Plaintiff’s in the counterclaim) and do hereby make orders as follows:

- 1. The Plaintiff is hereby ordered to deposit the title Deed to the suit property Plot No. Kilifi/Mtwapa /424 (originally Plot No. 250) in court within the next fourteen (14) days from the date hereof, for onward transmission to the Ministry of lands for their further action.**

2. A permanent injunction is hereby issued restraining the plaintiff by himself, servants or agents from interfering with the Defendant's possession of the suit property.

3. The Defendants shall have costs of this suit and interest thereon.

Orders accordingly."

Unhappy with the judgment and decree of the trial court, the appellant lodged an appeal in the Environment and Land Court at Malindi. That appeal was heard and in a judgment dated and delivered on 15th May, 2015, **Angote, J.** dismissed the appeal holding that:-

"57. The evidence that was placed before the trial court shows that the Title Deed in respect to the suit property was obtained by mistake, the Appellant having sold and transferred the same to the deceased. Consequently, the order by the learned Magistrate that the Appellant should deposit in court the Title Deed for onward transmission to the Ministry of Lands for further action could only have meant one thing, that the title was to be forwarded to the Ministry of Lands for cancellation pursuant to the provisions of Section 80(1) of the Land Registration Act.

58. For those reasons, I dismiss the Appellant's Appeal with costs and uphold the judgment of Hon. A. N. Obura of 9th October, 2013."

Undeterred, the appellant has moved to this Court by way of a second appeal on a multiplicity of grounds totaling eighteen but in our view, they can be condensed into six broad grounds; to wit:-

1. error in the enlargement of time and substitution of the respondents;
2. failure to apply limitation of time;
3. irregular admission and or production of documents in evidence;
4. infringement of the Constitution;
5. indefeasibility of the appellant's title; and,
6. failure to grant to respective counsel a chance to highlight their written submissions.

We have identified these issues on account of the fact that this is a second appeal, and that being the case, only matters of law fall for our consideration. The rest of the grounds deal with matters of fact. It must be taken that those matters were settled by the two courts below. In other words, this Court cannot deal with matters of fact which have concurrently been settled by the trial court and the first appellate court. Further, it is not also lost on us that the appellant even on the basis of the above grounds of appeal has introduced issues which were neither canvassed in the trial court nor in the first appellate court which is improper. Lastly and importantly, the appellant had an opportunity to object at the trial to some of the issues he is now raising in the above grounds but opted not to do so.

The appeal was argued through written submissions and limited highlights. We shall now turn to the consideration of the specific grounds of appeal that we have isolated.

On the issue of enlargement of time and substitution of the respondents, the appellant submitted that the first appellate court erred in upholding the lower court's finding on enlargement of time; that the abatement of the suit was underpinned by statute; that by the time the application for substitution was made, the suit had already abated by operation of law; that the trial court had no jurisdiction to enlarge time fixed by statute. It was therefore a gross miscarriage of justice for the trial court to have allowed the substitution of the respondents in the circumstances.

In countering the above submissions, the respondents took the view that the issue was raised before the trial court and though the appellant objected to the substitution, he was nonetheless overruled. Accordingly, the joinder was by an order of the trial court against which the appellant did not prefer an appeal. That the appellant having failed to appeal against the interlocutory order cannot now purport to raise the issue in this appeal.

Our take is that indeed the issue arose during the trial and the magistrate ruled in favour of the respondents, on account of **Article 159(2) (d)** by holding thus:-

“...I find that it is only fair and just to grant the Defendant’s legal representative an opportunity to come on board so that the suit and counter-claim are determined on merits..... I further order that the Defendant’s legal representatives regularizes their position by complying with order 24 Rules 4(1) and (2) within the next 21 days failing which the suit against the Defendant and counter-claim shall abate.”

This was in reaction to the appellant’s application dated 29th December 2011, in which he sought the dismissal of the suit as it had abated and judgment be entered in his favour as the deceased had passed on. Pursuant to the above holding, however, the respondents by way of an application dated 27th February 2012, sought to be joined in the suit.

In opposing the application, the appellant took the position that the application for joinder was in respect of a non-existent suit, the same having abated after the death of the deceased. Again in overruling the appellant’s objection, the trial court opined and rightly so in our view that the appellant should have preferred an appeal challenging her earlier order in which she had allowed the respondents to be joined in the suit. However, he did not do so. The appellant having failed to appeal against the interlocutory order could not raise the issue again before the trial court. The first appellate court was alive to that fact as well. It took the view and rightly so again in our thinking that having not filed an appeal challenging the decision of the trial court on joinder, he could not canvass the same after the delivery of the judgment. That the appeal before him was in respect of the judgment of the trial court and not the interlocutory ruling.

The appeal before the High Court and indeed before this Court stems from the judgment and not the interlocutory orders of the trial court. It may well be that the trial court erred in allowing the joinder. However, that was not the appeal before the High Court and indeed before this Court. The appeal before the High Court was against the judgment and decree of the trial court dated 9th October 2013, and not the ruling and order of the same court dated 8th February, 2012. The High Court was therefore right in dismissing that ground of appeal on the foregoing basis.

On limitation of time, the appellant faults the learned Judge for determining the counter-claim when the same was time barred by virtue of **Section 7** of the Limitations of Actions Act. Counsel submitted that by the time the respondents were filing the counter-claim, it was time barred by the operation of the law, that is to say, that the counter-claim was unsustainable pursuant to the aforesaid provisions of the Limitation of Actions Act. In response, the respondents submitted that this was not an issue that was raised in the pleadings nor during the trial. That in any event, the alleged limitation in fact works in favour of the respondents as they have been in continuous and uninterrupted occupation of the suit premises since 1983. If anything, it is the appellant’s proprietary interest in the suit premises that have been extinguished by the operation of the law.

A perusal of the plaint as well as the defence to the counter-claim clearly shows that this issue was never pleaded or made an issue for determination in the trial court. In our view, to allow this to be raised in an appeal would go against the rules of pleadings and the rules of natural justice. In the case of **Saggaf v Algeredi [1961] EA 767**, quoted with approval in the case of **Openda v Ahn [1982] eKLR** it was stated:-

“A new point which had not been pleaded or canvassed should not be allowed to be taken on appeal, unless the facts, if fully investigated, would have supported it.”

The exception to the general proposition of law aforesaid is inapplicable to the circumstances of this case. We doubt on the material before us whether the facts, if fully investigated could support the appellant's plea of limitation. In any event, and as correctly submitted by the respondents, the limitation period works in their favour. The appellant parted with possession of the suit premises to the respondent way back in 1983, a period in excess of 33 years. This was following the signing of the sale agreement and thereafter the transfer. The respondents have since been in possession and have dug a bore hole, put up a house and installed electricity on the suit premises. Indeed the appellant admitted parting with the possession of the suit premises thus:-

“...The Defendant is living on that shamba. I left the suit property to the Defendant. I do not stay on that shamba. This was after I got the money in 1983....”

With more than 33 years having lapsed since he surrendered the suit premises to the respondents, any claim by the appellant over the suit premises obviously is time barred by virtue of the Limitations of Actions Act.

On production of documents, we note that the documents impugned by the appellant are the agreement of sale, the application for the consent of the Land Control Board, the consent of the Land Control Board and the transfer documents. The objection to the production of these documents by the appellant during the trial was rejected by the trial court. The objection to the sale agreement was on account of non-payment of stamp duty. The issue was revisited in the High Court. It is trite law that non-payment of stamp duty pursuant to the provisions of the Stamp Duty Act does not in itself render the document inadmissible. The Judge in the High Court expressed himself as follows on the issue:-

“...I have perused the agreement that was produced in court as DEXB4. The said agreement is in its original form and shows that the deceased purchased the suit property for Kshs.135,000 from the Appellant. The agreement has not been stamped as required by the Stamp Duty Act. The non payment of stamp duty pursuant to the provisions of the Stamp Duty Act does not in itself lend the document inadmissible. There is a long chain of authorities by the Court of Appeal and the High Court in which it has been held that stamp duty can be paid on a document at any time even after the said document has been produced in evidence. Having produced the Sale Agreement in evidence, it was the duty of the Respondents to make payments of the requisite stamp duty, which they have not done. However, the fact that the Respondents have not made payment of the stamp duty in respect of the agreement does not disentitle the trial court from considering the contents of the agreement with a view of understanding the agreement that the Appellant had entered into with the deceased *inter se*...”

The trial court and the High Court were therefore perfectly entitled to consider the agreement in view of the fact that the appellant had even admitted in cross-examination to have signed the agreement. The issue of payment of stamp duty is still a live issue though and even up to this stage it can be paid. The objection to the production of the application for the consent of the Land Control Board was on account of it being a carbon copy. As the learned Judge correctly held, the carbon copy of the application had the original signatures of the appellant and the deceased. The said carbon copy was in the premises procedurally tendered in evidence considering that the originals of such documents are always left with the relevant Land Control Board. In any event, the originals of those documents were tendered vide the evidence of the Settlement Officer as well as Land Adjudication Officer and their production of the original files in their possession regarding the suit premises. With regard to the consent of the Land Board and the transfer documents nothing much really turned on this objection since once again both the Settlement Officer as well as Land Adjudication Officer tendered in evidence their entire files in respect of the suit premises which proved that these documents were procured and executed properly.

On the constitutional question, the appellant's submissions are quite interesting. He faults the High Court for having upheld the trial court's judgment which amounted to the limitation of his constitutional right to own and enjoy the suit premises under **Article 24** of the Constitution of Kenya (2010) without either the lower court or the Environment and Land Court having any or proper jurisdiction to interpret the said

Constitution. How does interpretation of the Constitution come into play if we may ask? The Judge only dismissed the appeal following plenary hearing and nothing more. That cannot be unconstitutional. Suits are determined on the basis of the evidence and law. It does not matter whether the dispute involves a property. A court's determination cannot be unconstitutional merely because a party has lost property in the litigation. It even gets more interesting when the appellant further faults the Judge for failing to consider facts which limit the appellant's fundamental rights and freedom under the said **Article 24** of the Constitution. To that extent, it is hard to understand what the appellant really means. Is he suggesting that the Judge should have only interpreted the Constitution in his favour? If the submission by the appellant was to be sustained, then he was obviously in the wrong forum. In any event, he never made such submission before the High Court.

We agree with the appellant's submissions that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right and fundamental freedoms. Save that the appellant has misquoted the Article. The appellant has cited **Article 26(2)** instead of **Article 20(2)** of the Constitution. However, these rights apply equally to all citizens of this Country including the respondents. They are not a preserve of specific individuals. More so, it is the rightful owner of the property who is protected. That is why both the trial and the High Court ensured that the respondents were not deprived of such rights. The Constitution being the grundnorm and supreme land of the land takes away the immunity and or alleged indefeasibility of title where it is established by the court that the title was unlawfully or illegally acquired and or obtained. The right to property afforded by virtue of **Article 40** of the Constitution is indeed fettered and taken away in respect of properties which have been unlawfully acquired like in the instant case by virtue of **Article 40(6)** of the Kenyan Constitution. **Article 40** of the Constitution protects the right to property but **Article 40(6)** provides that the rights under the said Article do not extend to any property that is found to have been unlawfully acquired. Article 40 must be read as a whole so that protections afforded therein which protect the right to property must be read to exclude property found to be unlawfully acquired under Article 40(6). This requirement is a realization and appreciation of the fact that the Constitution protects the higher values found in the preamble to the Constitution and **Article 10**.

In the memorandum of appeal, the appellant has repeatedly faulted the Judge on the grounds that he denied the parties the right to highlight the written submissions after they had been filed by respective parties. It appears from the record that parties agreed to submit by way of written submissions. They were allowed to do so and subsequently each party filed their respective written submissions. The Judge had initially directed that the respective written submissions be highlighted on the 26th February, 2015. Come that day and the respondents' submissions were not on record. They pleaded for more time. On 18th March, 2015, when all the written submissions were on record, none of the advocates for the parties present revisited the issue of highlighting the written submissions. They all settled for a date for judgment. There is nothing on record to suggest that the High Court unilaterally went against its earlier order and refused parties to highlight. It is self-evident that the advocates opted not to highlight. The appellant cannot now turn around and blame the High Court for his own inadequacies. That notwithstanding, the appellant has not demonstrated any prejudice suffered or shown anything which he feels was not appreciated by the High Court and the same could have impacted on the outcome of the appeal.

In view of the foregoing, we uphold the judgment of the first appellate court which was sound and well reasoned, both on facts and law. The appeal fails and is accordingly dismissed with costs to the respondents.

Dated and delivered at Malindi this 1st 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