IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 1 OF 2014

BETWEEN

JOSEPH MZUNGU NYOKA………………….…………………. APPELLANT

AND

VROS PRODUCE LIMITED …………..……………..….1ST RESPONDENT

DEW REALITY LIMITED…………………………..…….....2ND RESPONDENT

THE CHIEF, LANDS REGISTRAR…………….……….3RD RESPONDENT

THE ATTORNEY GENERAL…………………...………..4TH RESPONDENT

OCS, KIJIPWA POLICE STATION……………......…....5TH RESPONDENT

COUNTY POLICE COMMANDER, KILIFI COUNTY......6TH RESPONDENT

I.G. NATIONAL POLICE SERVICE………....…………..7TH RESPONDENT

VROS PRODUCE LIMITED……………………………8TH RESPONDENT

LUCAS OWITI…………………………….………………9TH RESPONDENT

LEWIS GOGO & 516 OTHERS…………....………...10TH RESPONDENT

(An appeal against the decision of the High Court of Kenya at Malindi (Angote,J.) dated 20th December, 2013,

in

ELC No. 171 of 2013.)

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JUDGMENT OF THE COURT

[1] ***Joseph Mzungu Nyoka*** (*hereinafter referred to as "**the appellant**"*) was the 9th defendant in the ***Environment and Land Court Case No. 171 of 2013*** at Malindi (ELC No. 171/2013). Apart from the appellant, there were 525 other defendants who are now respondents to this appeal. These included ***the Chief Land Registrar*** (3rd respondent), ***the Attorney General*** (4th respondent), ***the Officer in Charge, Kijipwa Police Station*** (5th respondent), ***County Police Commander, Kilifi County*** (6th respondent), ***the Inspector General, National Police Service*** (7th respondent), ***Lukas Owiti*** (9th respondent) and ***Lewis Gogo*** (10th respondent). ELC No. 171 of 2013 was filed by ***Vros Produce Limited*** and ***Dew Reality Limited*** who are now the 1st and 2nd respondent to this appeal (*hereinafter referred to as* **Vros Ltd** *and* **Dew Ltd** *respectively*).

[2] The dispute in ELC 171 of 2013 related to a parcel of land formerly registered as ***Sub Division No. 150/Section IV/Mainland North CR No. 13080/1*** *(hereinafter referred to as "**the suit property**").* The prayers sought in the plaint in that suit are many. Suffice to note that the prayers included declarations; that Vros Produce Limited incorporated through certificate No. C27992 on 16th August 1984, is the only genuinely incorporated company in that name; that certificate of incorporation No. C64998 belongs to a different company Leisure Wash Limited; that 7th and 8th respondents are not directors of Vros Produce Limited; that the petitioner in No. 12 of 2013 is not a legal entity with capacity to institute any proceedings; that the consent dated 5th July, 2013 entered in Petition 9 of 2013 is a forgery; that any transfer of the suit property and or any provisional certificate of title issued in respect of MN/Section IV/271-MN/Section IV/309 to the appellant on his own behalf and on behalf of 508 others be set aside and cancelled; and that an order do issue directing the Land Registrar to issue fresh certificate of title in favour of Vros Produce Limited in respect of the suit property.

[3] By a Notice of Motion dated 30th September, 2013 filed in ELC No. 171 of 2013, Vros Ltd and Dew Ltd moved the court under ***sections 1A, 1B, 3, 3A*** and ***63 (e)*** of the Civil Procedure Act; ***Order 40*** of the Civil Procedure Rules; and ***Article 40*** of the Constitution, for interim orders of injunction restraining the 3rd respondent from registering any new titles and or effecting, alienating, subdividing or transferring the following sub- divisions of the suit property:

CR N0. 29323

MN/Section IV/274 CR No. 29234- MN Section IV/272 CR No. 29325

MN/Section IV/271 CR No. 29226- MN Section IV/275 CR No. 29327

MN/Section IV/ 276 CR No. 29328- MN Section IV/273 CR No. 29329

MN/Section IV/278 CR No. 29330- MN Section IV/277 CR No. 29331

MN/Section IV/ 280 CR No. 29332- MN Section IV/279 CR No. 29333

MN/Section IV/ 282 CR No. 29334- MN Section IV/281 CR No. 29335

MN/Section IV/284 CR No. 29336- MN Section IV/ 283 CR No. 29337

MN/Section IV/286 CR No. 29338- MN Section IV/285 CR No. 29339

MN/Section IV/288 CR No. 29340- MN Section IV/282 CR No. 29341

MN/Section IV/290 CR No. 29342- MN Section IV/289 CR No. 29343

MN/Section IV/286 CR No. 29344- MN Section IV/291 CR No. 29345

MN/Section IV/294 CR No. 29346 - MN Section IV/293 CR No. 29347

MN/Section IV/296 CR No. 29348- MN Section IV/295 CR No. 29349

MN/Section IV/298 CR No. 29350 - MN Section IV/297 CR No. 29351

MN/Section IV/300 CR No. 29352- MN Section IV/299 CR No. 29353

MN/Section IV/302 CR No. 29354- MN Section IV/301 CR No. 29355

MN/Section IV/304 CR No. 29356 - MN Section IV/303 CR No. 29357

MN/Section IV/305 CR No. 29358 - MN Section IV/306 CR No. 29359

MN/Section IV/307 CR No. 29360 - MN Section IV/308 CR No. 29361

MN/Section IV/309

[4] Vros Ltd and Dew Ltd also sought orders consolidating ELC 171 of 2013 with ***Malindi High Court Petition No. 9 of 2013 (Petition 9 of 2013)*** and ***Malindi High Court Civil Case No. 12 of 2013***, (***Civil Case No. 12 of 2013***); orders staying the judgment and decree in Petition 9 of 2013; an order of injunction restraining the respondents from selling the suit property; and finally an order that pending the hearing and determination of the suit property all trespassers on the suit premises vacate the premises or be forcefully evicted.

[5] As is evident from the orders that were sought in the motion, there are various other suits relating to the suit property. In Petition 9 of 2013, the appellant (Joseph Mzungu Nyoka) and 508 petitioners all of whom are now respondents in the appeal before us, filed a petition challenging the title of Vros Produce Ltd to the suit property. They contended that the same had been procured through fraud, misrepresentation, illegality or corrupt practices. They claimed to have been in occupation of the suit property for a long time, and prayed for declaratory orders that the title of Vros Ltd to the suit property was null and void.

[6] Vros Ltd who was the 2nd defendant in Petition 9 of 2013 entered appearance through the firm of Nabwana Nabwana & Co., Advocates. Subsequently a consent was signed by Mogaka Omwenga & Mabeya Advocates for the petitioners, Nabwana Nabwana & Co. Advocates for the 2nd respondent and Richard Ngari State counsel for the Chief Land Registrar (who was sued as the 1st respondent). The terms of the consent which compromised the suit included the issuance of declaratory orders declaring the title issued to Vros Ltd for the suit property null and void; an order for cancellation of that title; an order for rectification of the title by cancelling the name of Vros Ltd and replacing it with that of the appellant on his own behalf and on behalf of the other 508 petitioners; and an order for issuance of title deeds to the petitioners. The consent was duly adopted as a judgment of the court in Petition 9 of 2013. Subsequently, a decree was issued and registered against the aforementioned sub divisions of the suit property. Provisional certificates were also issued.

[7] The consent recorded in Petition 9 of 2013 was challenged by the 9th respondent (*Lucas Owiti*) who claimed to be a director of Vros Ltd under certificate of incorporation No. C64998. He sought to set aside the consent judgment contending that the same was procured through fraud and misrepresentation. Vros Ltd and Dew Ltd then filed an application in petition 9 of 2013 seeking to set aside the consent judgment contending that the same was procured by fraud. This application was opposed by the appellant and ***Lewis Gogo Mtepe*** (*10th respondent*) who also claimed to be a director of Vros Ltd.

[8] In the meantime, on 24th January, 2013, Stephen Macharia Kimani advocate filed Civil Case No. 12 of 2013 on behalf of Vros Ltd (incorporated under certificate No. C64998), seeking *inter alia*, an order that it is the registered owner of the suit property and that the 29 defendants sued were trespassers who had forcefully invaded the suit property and against whom injunctive orders should issue. The verifying affidavit filed in support of the plaint was signed by Lucas Owiti and Lewis Gogo as directors of that

company. Subsequently, the two directors filed a notice of change of advocate appointing Nabwana Nabwana & Co., Advocates, who on 12th September, 2013 filed a notice withdrawing the entire suit against the defendants.

[9] It is at this stage that Vros Ltd and Dew Ltd filed ELC. 171 of 2013 through *Njogu, Omwanza & Nyasimi* Advocates. Filed contemporaneously with the plaint was the notice of motion dated 30th September, 2013, which was accompanied by an affidavit sworn by *John Harun Mwau* who swore that he was a director of both Vros Ltd and Dew Ltd; that Vros Ltd was incorporated through certificate No. C27992; that certificate No. C64998 claimed to be a certificate of incorporation in respect of Vros Ltd was a certificate incorporating a different company "Leisure Wash Ltd". Upon application, leave was granted to Vros Ltd and Dew Ltd to serve the plaint, application and summons to enter appearance in regard to ELC 171 of 2013 on all the defendants in the suit by substituted service through advertisement in the Standard Newspaper.

[10] The application was opposed by the appellant on the ground that Dew Ltd had no *locus standi* in the suit having disposed of its proprietary interest in the suit property; that the prayer for consolidation of the three suits was irregular as Petition 9 of 2013 had already been concluded and decree executed; and that the application for setting aside the consent judgment in Petition 9 of 2013 ought to have been made in that petition and not in a new suit. On the other hand, the State counsel who appeared for the 3rd 4th 5th, 6th and 7th respondents did not oppose the application.

[11] In his ruling delivered on 20th December, 2013, the learned Judge *(Angote, J.)* held that although Dew Ltd had transferred the suit property to Vros Ltd and therefore no longer had any proprietary interest in the suit, it was a necessary party to the proceedings. As regards consolidation of the suits, the Judge noted that ELC 171 of 2013 was anchored on the consent letter that was recorded in Petition 9 of 2013 and that the two suits were intertwined and raised common questions of facts and law, and therefore it was appropriate that the suits be consolidated. As regards the injunctive orders, the learned Judge noted that there was an issue regarding the directorship of Vros Ltd as two registration certificates had been produced and it was unclear as to who the genuine directors of the company were, or whether the suit property belonged to the company.

[12] The learned Judge found the consent order irregular and held that a prima facie case had been established. Noting that the 39 subdivisions of the suit property had been registered in the name of the appellant (***Nyoka***) on his behalf and on behalf of the other 509 petitioners, and that provisional certificates had been issued, the learned Judge held that there was a likelihood of Vros Ltd and Dew Ltd suffering irreparable loss should the appellant and other petitioners deal with the suit property. Consequently, the learned Judge allowed the application and issued orders as follows:

> ***"(a) Malindi High Court Petition No. 9 of 2013 be and is hereby consolidated with this instant suit.***
>
> ***(b) Pending the hearing and determination of this suit, an order of injunction be and is hereby issued restraining the 1st Defendant from registering any new titles and/or effecting, alienating, subdividing or transferring:***
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> ***CR N0. 29323***
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> ***MN/Section IV/274 CR No. 29234- MN Section IV/272 CR No. 29325***
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> ***MN/Section IV/271 CR No. 29226- MN Section IV/275 CR No. 29327***
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MN/Section IV/302 CR No. 29354- MN Section IV/301 CR No. 29355

MN/Section IV/304 CR No. 29356 - MN Section IV/303 CR No. 29357

MN/Section IV/305 CR No. 29358 - MN Section IV/306 CR No. 29359

MN/Section IV/307 CR No. 29360 - MN Section IV/308 CR No. 29361

MN/Section IV/309

(c) Pending the hearing of this suit an injunction be and is herebyissued restraining the 6th to 526th Defendants from selling, offering for sale and/or trespassing on the suit property in any manner whatsoever.

(d) Pending the hearing of this suit, the decree by consent dated 15th day of July, 2013 and issued on the 15th July, 2013 in Land Petition No. 9 of 2013 be and is hereby set aside.

(e) Pending the hearing and determination of this suit, the trespassers who have already entered the suit premises do vacate forthwith and in case of resistance be forcefully evicted by the 3rd, 4th and 5th Defendants/Respondents and the OCS Mtwapa Police Station do assist in the eviction.

(f) The costs of this application to be paid by the Defendants."

[13] It is the ruling of 20th December, 2013 and the orders issued therein that aggrieved the appellant and led to the memorandum of appeal dated 14th January, 2014 in which the appellant challenged the ruling on thirteen grounds. The grounds include the Judge having erred: in finding that the respondents in that suit were duly served with summons and all pleadings; in concluding that the 2nd respondent was properly enjoined as plaintiff in ELC 171 of 2013; in setting aside the judgment and decree issued in Petition 9 of 2013 before service of summons and pleadings on all parties affected by the judgment; in consolidating ELC 171 of 2013 with a previously concluded suit that is Petition 9 of 2013; in applying ***section 3A*** of the Civil Procedure Act notwithstanding the provisions of ***Order 11 Rule 3(1)(h)*** of the Civil Procedure Rules; in concluding that the consent filed in Petition 9 of 2013 was procured through fraud and or

misrepresentation; in concluding that the appellant is a trespasser on the suit property without any evidence having been availed to him; in ordering the forceful eviction of the appellant from the suit property at an interlocutory stage and in circumstances that do not warrant the issuance of such mandatory orders; in prematurely determining ELC 171 of 2013, through the issuance of eviction orders, and in issuing orders placing Vros Ltd and Dew Ltd in possession of the suit property.

[14] The appellant filed skeleton submissions in support of the appeal. These submissions were duly highlighted before us by ***Mr. Buti*** counsel for the appellant. In brief Mr. Buti submitted that although there was an order for the defendants in ELC 171 of 2013 to be served by way of advertisements and although there was an advertisement in the Standard Newspaper of 7th October 2013, which stated that the summons and other pleadings were to be collected from the Environment and Land Court Registry at Malindi, none of these documents were deposited in the registry for collection by any of the named defendants; and that the said documents were not availed despite letters from the advocates for Vros Ltd and Dew Ltd addressed to the appellant's counsel; that following complaints made to the court, the court made an order on 31st October, 2013 that the advocate for the defendants be served on behalf of his clients.

[15] Mr. Buti pointed out that the copy of summons finally received by him was dated 14th October, 2013 confirming that the summons were issued a week after the advertisement that appeared on 7th October, 2013. He argued that the issue of service upon the defendants in ELC 171 of 2013 was a central issue in the proceedings and it was wrong for the Judge to conclude that all persons were served and to use the non-appearance of some of the parties as a reason to attribute fraud. Further, Mr. Buti submitted that Dew Ltd who was the 2nd Plaintiff in ELC 171 of 2013 had no *locus standi* to bring the suit on behalf of Vros Ltd who was the 1st plaintiff (in the same suit) or against any party in the suit, as Dew Ltd had no proprietary interest in the suit property having sold its interest and transferred the suit property to Vros Ltd. Therefore the learned Judge ought to have excluded Dew Ltd from the proceedings.

[16] In regard to consolidation of the suit, counsel cited ***Stumberg & Another v Potgieter* [1970] EA 323** in which a motion for consolidation of two suits was rejected on the grounds that there were deep differences between the claims and defences in the actions sought to be consolidated. He argued that in this case there were no common questions of law in the actions, or any questions having sufficient importance in proportion to the causes of action in the two suits to render it desirable that the whole of the matter should be consolidated and disposed of at the same time.

[17] Mr. Buti faulted the learned Judge for invoking the inherent power of the court under ***section 3A*** of the Civil Procedure Act to justify consolidation of ELC 171 of 2013 with Petition 9 of 2013 which had been fully concluded. He relied on the following statement made by ***Trevelyan J. in Taparu v Roitei* [1968] EA 618**:

> ***"A court's inherent jurisdiction should not be invoked where there is specific statutory jurisdiction which would meet the necessity of the case."***

Counsel also cited ***ICDC v. Otachi* [1978] KLR 69** where ***Sachdeva, J.*** cautioned that, ***section 3A*** of the Civil Procedure Act should not be used as a panacea for all ills.

[18] In addition, Mr. Buti faulted the learned Judge for making conclusive findings on matters of fact that were not canvassed before him, and using those findings to set aside the consent judgment recorded in Petition 9 of 2013 as well as the decree which had been fully executed; that in view of the conflicting nature of the pleadings in ELC 171 of 2013 where Vros Ltd featured as the 1st plaintiff and also as the 6th defendant, with its directors as 7th and 8th defendants, it was not open to the Judge to conclude that the petitioners in Petition 9 of 2013 were aware that the identity of the legitimate Vros Ltd was being investigated in ***H.C.C. No. 131 of 2010*** a suit which was withdrawn by the 9th defendant; and that the learned Judge erred in concluding that there was fraud and misrepresentation committed by all the defendants in the suit before him including the appellant; in setting aside the consent orders and decree in Petition 9 of 2013 without affording the appellant the benefit of a full trial the learned Judge denied the

appellants their proprietary rights and right to a fair hearing as provided under ***Articles 25(c), 40*** and ***51(1)*** of the Constitution of Kenya 2010. In response to the submissions made by the 2nd respondent, Mr. Buti relying on ***Osebe v Kenya Commercial Bank*** and ***section 96*** of the Civil Procedure Act maintained that a document is valid from the date of stamping and not when fees are paid.

[19] Vros Ltd opposed the appeal through learned counsel ***Mr. Omwanza*** who filed written submissions. During the highlighting of the submissions ***Mr. Ngatia*** held brief for Mr. Omwanza. It was maintained that the appellant was duly served through substituted service as provided under ***Order 5 Rule 17*** of the Civil Procedure Rules after attempts to effect personal service were futile. It was pointed out that the appellant who was also served through his advocate on record, filed a memorandum of appearance, grounds of opposition and list of authorities, and did not at any point move the court to set aside the summons on account of non-service nor was any application made to examine the Process Server on oath. It was further submitted that there was evidence before the learned Judge that justified the granting of the mandatory injunction as particulars of fraud were given showing that the appellant, the 8th, 9th and 10th respondents were involved in activities of disposing of the suit property, and that there was continued trespass and waste of the suit property hence the need to preserve or restore the *status quo* until the suit was heard and determined.

[20] On the issue of service, reliance was placed on ***Wanjiru v Mwangi [1990] KLR 348*** for the proposition that the irregularity of service is cured by the entry of unconditional appearance. As regards the consolidation of the suit, it was submitted that the learned Judge cannot be faulted as he correctly applied the overriding objective. Further, it was argued that in granting the mandatory injunction, the learned Judge properly considered and applied the principles for granting injunctions of a prohibitory and mandatory nature. In particular, that the suit property having been transferred by virtue of an impugned fraudulent consent order, the appellant would steal a march on the plaintiffs if the orders of injunction were not issued. The case of ***Attorney General v Guardian Newspaper Limited [1987] 1WLR 1248*** was relied upon for the proposition that, public interest requires a legal system and courts which command public respect, and the court should not therefore make orders which would be ineffective. It was submitted that the appellant and his associates had fraudulently continued to disobey court orders by continuing construction on the suit property and therefore the orders issued were appropriate. The court was thus urged to dismiss the appeal.

[21] Dew Ltd was represented by ***Mr. Musyoki*** who filed and highlighted written submissions urging the court to dismiss the appeal. On the issue of service of summonses Mr. Musyoki argued that the validity of summonses cannot be raised as an issue in the appeal, as it was not an issue for determination in the application dated 30th September, 2013; that in any case, the appellant was duly served with summonses to enter appearance which summonses have been duly exhibited in the record of appeal; that given the large numbers of the defendants and the wide discretion given to the court under ***Order 5 Rule 17*** of the Civil Procedure Rules 2010, the order for substituted service was reasonable; that the appellant is precluded from raising the issue of service on appeal as he participated in the proceedings in the High Court and had the opportunity to pursue the issue but did not do so; and that the appeal is against the issuance of injunctive orders and the setting aside of the consent judgment, and not the order of substituted service.

[22] Mr. Musyoki reiterated that the learned Judge was right in holding that a suit cannot be defeated by a misjoinder of parties; that Dew Ltd who had transferred the suit property to Vros Ltd had the right to be joined in the suit as the issues in the suit transcended the issue of ownership of the suit property; that the Judge was right in setting aside the consent judgment as the Attorney General who was said to be party to the consent disowned the consent; that the 9th and 10th respondents had no legal capacity to compromise the suit, as they were directors to a phantom company.

[23] Further Mr. Musyoki submitted that the setting aside of the consent order did not finalize Petition 9 of 2013 but merely reopened the suit to enable the court to do justice in an expeditious manner, regardless of procedural technicalities. He added that this was in line with the spirit of ***Article 159(2)(d)*** of the Constitution of Kenya. He cited the case of ***Kamau Muchua v. The Ripples Limited Civil Appeal No. 186 of 1992*** where it was stated:

"A party, as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act and, without any way attempting to pre-decide the intended appeal or to influence a decision thereon, I am of the view that the order of the learned Judge granting the prohibitory and mandatory injunction ought not to be disturbed at this stage"

[24] Finally, he submitted that by issuing the mandatory injunction, the Judge rightly denied the appellant and his cronies the opportunity to retain the position of advantage, acquired through a planned and blatant unlawful act i.e. forgery of a consent order and obtaining of an irregular decree.

[25] The 9th and 10th respondents (***Lucas Owiti*** and ***Lewis Gogo***) supported the appeal and urged the court to grant it. They were both represented by ***Mr. S.M. Kimani*** who filed summary submissions which he highlighted before us. In short Mr. Kimani submitted that the 9th and 10th respondent had not entered appearance in ELC 171 of 2013 as the attempts to collect their summonses to enter appearance from Malindi Land and Environment Court Registry as directed in the notice of substituted service were unsuccessful. This is because the Registry maintained that there were no summonses to enter appearance issued in the names of the 9th and 10th respondents. It was submitted that the plaintiffs in Malindi ELC 171 of 2013 did not comply with ***Order 5 Rule 1(2)*** & ***(5)*** of the Civil Procedure Rules as although they paid for 526 summonses for service on all the defendants in the suit, only 5 summonses were prepared and delivered to the Registry for signature.

[26] Mr. Kimani faulted Vros Ltd and Dew Ltd (the plaintiffs in ELC 171 of 2013) for putting the cart before the horse by obtaining leave to serve by substituted service before preparing and filing all the summonses to enter appearance; that the advertisement regarding the substituted service was published before the summonses were prepared and therefore the summonses were not available for collection by the defendants as advertised. Mr. Kimani maintained that the omission to prepare and file the summonses with the plaint as required by the rules, and the failure to serve the summonses on the 9th and 10th respondents vitiated the jurisdiction of the court and rendered the proceedings taken by the court *null ab initio.* He argued that ***Order 5 Rule 17*** of the Civil Procedure Rules requires that attempts be made at service before an order for substituted service is issued.

[27] Although the 3rd, 4th, 5th, 6th and 7th respondents were duly served, there was no appearance for them during the hearing of the appeal nor were any submissions filed on their behalf. ***Mr. Atancha*** counsel appearing for respondents number 11-525 (excluding 57,126,184,187,295,467,502 and 507), did not file any written submissions or make oral submissions in response to the appeal. Mr. Atancha was present in court during the hearing of the appeal, and claimed to have learnt of the matter through a notice served upon him by the 1st appellant. Apparently he did not take any action.

[28] Respondents' number 57,126,184,187,295,467,502,507 and 526 were represented by ***Mr. Kithi Ngombo.*** These respondents also supported the appeal. Written submissions were duly filed and highlighted by Mr. Kithi who also adopted the submissions made by Mr. Buti and Mr. Kimani. Mr. Kithi pointed out that no summonses to enter appearance were filed within thirty days from the date of filing as requiring under ***Order 5(1)*** & ***(2)*** of the Civil Procedure Rules; that the suit in the lower court was therefore null and void; that his client did not participate in that suit as they were not served; that there was no evidence in support of the submissions made that the summonses were delivered to the Registry; and that substantial justice required that the issue of service be properly addressed and the fact that the appellant participated in the proceedings in the High Court cannot prejudice the interest of the other 525 defendants. The court was therefore urged to allow the appeal.

[29] Having considered this appeal, the submissions made by counsel and the authorities cited, we note that several issues arise for determination. The issues include service of summons, that is, whether this has been properly raised as an issue in the appeal; if so whether the appellant and the other defendants in ELC 171 of 2013 were properly served; whether the hearing of the application was vitiated by want of service; whether the order for consolidation of the suits was proper; whether Dew Ltd had *locus standi* to file the suits in ELC 171 of 2013; whether the learned Judge prematurely made conclusive findings of

facts in an interlocutory applications; whether it was proper for the learned Judge to entertain and make an order in ELC 171 of 2013 in regard to the prayer for setting aside the consent judgment, made in Petition 9 of 2013; and finally whether the principles for granting a prohibitory and mandatory interlocutory injunction were satisfied.

[30] On the issue of service of summons, it is not disputed that the learned Judge made an order in ELC 171 of 2013 for the summons, plaint and the notice of motion to be served by way of substituted service. There is evidence that in accordance with that order an appropriate advertisement was placed in the Standard Newspaper of 7th October 2013, directing the named defendants to collect a copy of the summons, pleadings and other documents filed in the suit, from the High Court Land and Environment Division Registry at Malindi or the plaintiffs advocates' office. That advertisement provided appropriate notice to all the defendants of the existence of the suit.

[31] It does appear that Mr. Buti for the appellant was the only person who made efforts to get the summons, pleadings and other documents. Having failed to get the same from the court registry or the advocates' office, Mr. Buti raised the issue before the Judge who made appropriate orders on 31st October, 2013 for the defendants to be served with the documents through their counsel. This seems to have resolved the matter as Mr. Buti subsequently on 4th December, 2013 proceeded with the application without raising any further issue on the service of summons or accompanying documents. In our view, although the learned Judge referred to the issue of service in the introductory part of his ruling, the issue was not one for determination in the application, nor did the learned Judge make any definitive finding at that stage on service that could be a subject of the appeal. We therefore concur with the submissions that the issue of service of summons was not properly raised as an issue in this appeal.

[32] Be that as it may, we have considered the issue and note that the summons, pleadings and other documents which were to be availed through the court registry or the advocates' office were not available to the appellant on the stated date, and therefore the substituted service was defective. This was raised by the appellant and addressed by the learned Judge before the hearing of the application. In light of the order made by the learned Judge, for the appellant to be served with the documents through his advocates, and the appellant not having raised the issue again during the hearing of the application, it must be assumed that service of the documents was effected as directed by the learned Judge. Thus any irregularity in the original service was cured and the appellant cannot rely on the issue of service to impugn the ruling made pursuant to the hearing of the application.

[33]As regards the other respondents, although Mr. Kimani and Mr. Kithi Ngombo also raised the issue of service of summons during the hearing of this appeal, it is evident that none of their clients complained in the High Court during the hearing of the application about the defective service. The advertisement in the Standard Newspaper of 7th October 2013, bore the names of all the defendants and was intended for service on all the defendants. It must therefore be assumed that they were aware of the suit and made appropriate efforts to collect the necessary documents and had no complaints at that stage. The allegations of want of service is therefore nothing other than an attempt to rely on technicalities which is against the spirit of ***Article 159 (2)(d)*** of the Constitution. Thus, we find no substance on this ground of appeal.

[34] On the issue of consolidation, the learned Judge applied *Stumberg & Another v Potgieter* (supra), and used his inherent powers under ***section 3A*** of the Civil Procedure Act in granting the orders to consolidate the suits. The *ratio decidendi* of *Stumberg & Another* vs *Potgieter* (supra), is that consolidation of suits is appropriate where there are common questions of law or facts cutting across the suits intended to be consolidated, and the common questions are of sufficient importance to justify the suits being disposed of at the same time. This is in line with the overriding objectives of the Civil Procedure Act and the Rules made thereunder as stated in ***section 1A*** of the Civil Procedure Act, that is, to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. As noted by the learned Judge consolidation of suits is provided under ***Order 11 Rule 3(h)*** of the Civil Procedure Rules 2010 as a case management strategy. This supports the position taken by the learned Judge that the principle enunciated in *Stumberg & Another v. Potgieter (supra)* is good law. However, an order for consolidation presumes that the matters that are being consolidated are matters that are still pending and

that there are common questions or issues which are yet to be determined. Thus, it is desirable that consolidation be made at the earliest opportunity. In a situation where the issue of consolidation arises at the tail end, as it did in this matter, the Judge cannot fold his hands but must use his inherent powers to achieve the overriding objective.

[35] In this case, there were common questions of law and facts cutting across ELC 171 of 2013, Petition 9 of 2013, and Civil Case No. 12 of 2013. All the three suits involved Vros Ltd, and the subject of the suit in the three suits was the same, that is, the suit property. The issues in the suit as revealed from the pleadings, included ownership of the suit property; the incorporation and directorship of Vros Ltd (i.e. which is the genuinely incorporated company and who are the bonafide directors); and the propriety of the consent order dated 5th July, 2013 filed in Petition 9 of 2013 giving ownership of the suit property to the appellant.

[36] Of interest, is that Petition 9 of 2013 was concluded pursuant to the consent judgment arising from the consent order now being questioned. Civil Case No. 12 of 2013 was also withdrawn pursuant to instructions given by directors whose bona fides is being questioned. It is therefore evident that although Petition 9 of 2013 and Civil Case No. 12 of 2013 appear to be finalized, the process leading to the finalization of these two suits is in issue. This is the substratum of ELC 171 of 2013 where fraud in the finalization of Petition 9 of 2013 and Civil Case No. 12 of 2013 is being alleged. While it would have been desirable for the application to set aside the consent judgment to have been made in Petition 9 of 2013, where the consent dated 5th July, 2013 was filed and adopted as a judgment of the court, this would not have been appropriate given the confusion surrounding the incorporation and directorship of Vros Ltd and the allegations of fraud. Thus the order for consolidation was proper as it was expedient and just that the three suits be consolidated and all the issues be addressed and dealt with together, so that the bonafide parties could be identified and the issue of the ownership of the suit property resolved once and for all.

[37] The learned Judge was faulted for setting aside the judgment and decree in Petition 9 of 2013, by making conclusive findings on the allegations of fraud and misrepresentation without affording the appellant the benefit of a full trial. This complaint was not without foundation. At paragraph 81 of the ruling, the learned Judge stated as follows:

> ***"Considering that the Petitioners and the Respondents in Petition No. 9 of 2013 were aware that the identity of the legitimate Vros Produce Limited was being investigated by the court in Mombasa HCCC No. 131 of 2010 which suit was withdrawn by some of the Petitioners herein before the court could make a determination, and in the absence of the affidavits by the 6th ,7th , 8th and 9th defendants in response to the allegations of fraud by the plaintiffs' herein, I can only arrive at one conclusion that the consent that was recorded in petition No. 9 of 2013 was irregular and was obtained by misrepresentation. In the circumstances, the consent order and the subsequent decree that was obtained in Petition No. 9 of 2013 should be set aside and the two suits be consolidated."***

[38] It is evident from the above that the learned Judge made a conclusive finding that the consent order was irregular and obtained by misrepresentation, as a result of which he proceeded to set aside the consent judgment. The issue of the propriety of the consent order was key in the three suits, and one which ought to have been determined upon the consolidation of the suits. The application before the learned Judge was an interlocutory application which sought interim or conservatory orders. Indeed at paragraph 74 to 76 of the judgment, the learned Judge had appropriately noted as follows:

> ***"…The plaint in the current suit seeks for several declaratory orders which includes a declaration that the 7th and 8th Defendants are not directors of a company incorporated in the name of Vros Produce Limited and a declaration that the consent dated 15th July, 2013 in Petition Number 9 of 2013 is a forgery.***
>
> ***It is obvious from the averments of the plaintiffs in the current suit that the prayers in***

the plaint and the application are principally hinged on the consent that was recorded in petition number 9 of 2013.

The issue that the court will determine at trial is whether the suit property belongs to Vros Produce Limited, the 2nd Respondent in the Petition and whose directors are the 7th and 8thDefendantrs herein or it belongs to Vros Produce Limited, the 1st plaintiff herein…"

This means that the identified issues remained alive for conclusive determination during the substantive hearing of the suit. Therefore assuming that the learned Judge was satisfied as he seemed to have been, that there was *prima facie* evidence of misrepresentation, he could at best only stay the consent judgment and decree in Petition 9 of 2013 to await the hearing and final determination of the issues in ELC 171 0f 2013. We find that the learned Judge erred in setting aside the consent judgment, thereby, prematurely determining the issue of the propriety of the consent dated 5th July 2013 and adopted in Petition 9 of 2013.

[39] Further, in ELC 171 of 2013 the directors of Vros Ltd and Dew Ltd, swore affidavits in which they maintained that they were the bonafide directors and further maintained that the suit property belonged to Vros Ltd. No affidavit was filed by the respondents to the Notice of Motion dated 30th September, 2013 and therefore the learned Judge cannot be faulted for accepting the affidavit evidence and holding that a prima facie case had been established. However, in granting the interlocutory orders, the learned Judge directed himself as follows:-

" In view of the event that led to the filing of Petition number 9 of 2013 and the subsequent consent order, which I have found above should be set aside and considering the serious allegations of fraud raised by the plaintiffs in the current suit against the Directors of Vros Produce Limited in Petition Number 9 of 2013 and the 9th Defendant herein, which allegations have not been responded to, the interests of justice demand that status quo ante the consent order of 15th July, 2013 should be maintained pending the hearing and determination of the suit."

[40] We have considered the orders issued by the learned Judge which have been reproduced at paragraph 12. In light of the prima facie evidence that was available before the Judge, the order for injunction issued as (b) restraining the Land Registrar from registering any new titles or effecting any alienations, or sub-dividing or transfer of the suit property and (c) restraining the appellant and respondents No. 9th – 516th respondents from selling or offering the suit property for sale were appropriate as conservatory orders pending the hearing and finalization of the matter. There appears to be a typographical error in the judgment concerning the date of the consent signed by the parties in Petition No. 9 of 2013. Indeed, order (d) refers to the date of the consent as 15th July, 2013. However, the correct position is that the consent letter was dated 5th July, 2013 and the decree issued in Petition No. 9 of 2013 pursuant to that consent is dated 15th July, 2013.

[41] However, we note that in order (c), the learned Judge issued an injunction restraining the appellant and the other respondents from trespassing on the suit property; order (d) setting aside the decree issued on 15th July, 2013 pursuant to the consent dated 5th July 2013 and (e) ordering the trespassers who have already entered the suit property to vacate the premises forthwith or be forcefully evicted. The question is who are the trespassers? Without the suit being heard, the propriety of the consent dated 5th July 2013 could not be conclusively determined. This means that the issues of who had trespassed onto the suit property remained unresolved as the appellant and his colleagues were on the suit property pursuant to orders issued in Petition 9 of 2013. Thus it was premature to issue eviction orders at the interlocutory stage. All that was necessary was conservatory orders to maintain the status quo and to preserve the subject of the suit pending the hearing and determination of the suit.

[42] The orders that were issued by the learned Judge were orders of a mandatory nature. As was stated

by ***Mustill L.J, in Locaball International Finance Ltd v Agro export*** ***[1986] 1ALL ER*** quoted with approval in ***Civil Application No. 29 of 1997*** ***Kenya Ports authority v Paul Njoga Mungai and 2 Others***

> ***"The matter before the court is just an application for a mandatory injunction but is an application that would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case".***

[43] We find that the learned Judge failed to exercise the required caution in considering and granting the reliefs sought in regard to the mandatory injunction. In effect the learned Judge went beyond preserving the subject matter of the suit and prematurely addressed and determined substantive issues which were for determination at the main trial. For these reasons we partially allow the appeal to the extent of setting aside orders (d) and (e) (that is the order setting aside the decree arising from the consent dated 5th July, 2013 and the eviction order), issued on 20th December 2013, and substituting thereof an order staying execution of the decree issued on 15th July, 2013 arising from the consent dated 5th July 2013 in Petition No 9 of 2013, pending the hearing and determination of ELC 171 of 2013. As the main suit is yet to be determined we direct that each party shall bear their own costs.

Those shall be the orders of the Court

Dated and delivered at Mombasa this 12th day of February, 2015.

H. M. OKWENGU

………………………

JUDGE OF APPEAL

ASIKE-MAKHANDIA

………………………

JUDGE OF APPEAL

F. SICHALE

………………………

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR