IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 61 OF 2014 (UR. 3/15)

BETWEEN

JAPHETH PASI KILONGA

ONESMUS MBOGO KIMERA

JUMA KAPANGA

NDAHE NDAZE

MZEE MWANGONDE

ZOMOLO WANJE

NZAI KAZUNGU MBUZI

MAJANI RAJABU

MZEE MDARIS …..……..…..... APPELLANTS

AND

MOMBASA AUTOCARE LIMITED …… RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Malindi (Angote, J.) dated 25th July 2014 in E&LCC No. 19 of 2013)

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JUDGMENT OF THE COURT

Two suits, being **H.C.C.C. No. 8 of 2009** and **ELC Case No. 19 of 2013** were brought by **Mombasa Autocare Limited** (the respondent) against a group of persons (the appellants) seeking to evict the latter and to restrain them by an order of permanent injunction from trespassing, interfering or wasting parcel of land known as **No. 123/MTANGANI, MALINDI**, measuring approximately 96.01 acres "*the suit property*". The appellants claimed that they were entitled to be registered as proprietors by operation of the law of limitation. The two suits were consolidated and set down for hearing. As this appeal turns on the proceedings of the trial court we shall take some time to consider how the hearing was conducted. On

3rd March 2014 the respondent through its director, **Mohamed Salim Ali Mohamed** led evidence in support of the claim that it is the registered proprietor of the suit property and that in 2012 the appellants, without any colour of right occupied the suit property, started constructing illegal structures and felling trees planted thereon. The hearing was then adjourned to enable the respondent call its second and last witness and to enable the appellants to commence their case.

At the resumed hearing on 3rd April 2014 **Mr. Matini**, learned counsel for the respondent decided to close the respondent's case without calling the last witness. **Mr. Angima** & **Mr. Otara** learned counsel for the respondents sought and were granted time to present their clients' case the next day on 4th April 2014. On that day the learned Judge (**Angote, J**.) rejected an application for adjournment made by **Mr. Otiende,** advocate, on behalf of both Mr. Angima and Mr. Otara. The Judge then declared the closure of the appellant's case. He further directed parties to file and exchange submissions. The matter was to be mentioned to confirm compliance with orders as to filing and exchange of submissions and to take a date for judgment.

In the meantime the appellants brought a motion on notice premised on the provision of **Article 159** of the Constitution for the reopening of their case. On the date set for the mention of the suit the attention of the learned Judge was drawn to this pending application. But seeing that the application was brought after he had given directions on written submissions, the learned Judge found no purpose for considering the application and said nothing about it. He instead gave 18th July 2014 as the date for the delivery of the judgment.

From the pleadings and the evidence of the sole witness in the trial, it is a common factor that the respondent purchased the property in 2008 from the previous registered owners and that at the time some of the appellants lived on the land. The respondent agreed with these appellants to remain in occupation of only 3 acres of the 96.01 suit property and fenced off that portion separately. At some point in time the appellants turned hostile, destroying the main fence enclosing the respondent's remaining 93.01 acres, leading to the filing of the consolidated suits, the subject of this appeal. The appellants, for their part contended that for over 60 years they have been in occupation of the suit property and therefore were surprised to learn that some people were infact registered as proprietors.

From the record it is apparent the judgment which was slated for 18th July 2014 was instead delivered on 25th July 2014. In the judgment the court found in favour of the respondent and dismissed the appellants' adverse possession claim over the suit property.

The court noted that when it visited the disputed property it observed that on the three (3) acres, stood mud-walled houses, the concrete pillar and wire fence had been destroyed, two houses within the three (3) acres had encroached beyond that limit into the rest of the suit property reserved for the respondent, and three other houses had been erected in the middle of the suit property. One of those houses was permanent in nature, while two were mud-walled with iron sheet roofs. The iron sheets appeared new with no indication that they were occupied, according to the learned Judge. On the basis of the foregoing he observed:-

> ***"55 … the court concluded that none of the defendants or anybody else was in actual occupation of the suit property, except the people who had constructed their houses on the three acres that was curved out of the suit property. It was not possible for the court to ascertain how long the people who were occupying the three acres had stayed there during the site visit ….***
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> ***78 … on the other hand, the defendants have not proved that they are entitled to the suit property by continuously and exclusively occupying it in a way that is inconsistent with the right of the plaintiff or its predecessors for a period of over 12 years."*** (our emphasis)

With that the learned Judge ordered that the appellants be compelled by an order of a mandatory injunction to demolish and remove all the illegal constructions on the suit property, except those on the three acres delineated and described in the deed plan as **No. 123/67**.

The appellants have challenged that decision in this appeal on 8 grounds arguing, *inter alia*, that the learned Judge erred by shutting them out from participating in the proceedings. For the reason that will become clear shortly, we are of the considered opinion that this appeal only turns on this question and because of the outcome we are bound to reach, in the circumstances, we do not intend to make any definitive findings on the merit of this impugned judgment.

Mr. Obaga learned counsel representing the appellants invited us to find that the subject of dispute being land, the learned Judge ought to have given the appellants an opportunity to present their case.

Mr. Karage for the respondent was, however of the opinion that the appellants were given an opportunity to be heard but failed to take the opportunity; that the appeal challenges interlocutory decisions made on 4th April 2014 and 6th June 2014 for which no notice of appeal was filed; that in any event the judgment itself did not deny the appellants a chance to present evidence; that there would be a serious absurdity if this Court was to set aside the judgment and direct that the matter be heard *de novo* having dealt with the merits of the dispute. Our answer to this last ground is that we have warned ourselves that our determination will not impact on the merit of the dispute. But more significantly it is a normal practice that interlocutory determinations in the course of the trial save in few specific instances, are raised on appeal after conclusion of the trial, otherwise there would be a myriad of appeals.

We reiterate that the proceedings of 3rd March and 4th April 2014 as well as those of 16th June 2014 are relevant for consideration of the single ground we have earlier on identified. On 3rd March 2014 the respondent's case commenced, with the testimony of one witness. Counsel for the respondent intimated at the end of that testimony that he would be calling one more witness at the next hearing. The hearing was adjourned to 3rd April 2014 for that purpose, commence the case for the appellants and visit the *locus in quo*. When the matter came up on 3rd April 2014 it was apparent that the appellants were not prepared with their witnesses and sought time to organize them. Although the application for adjournment was granted, counsel for the respondent elected to forego the calling of the remaining witness but observed that the application for adjournment was a delaying tactic to encourage more people to invade the suit property. The application for adjournment was however allowed and next hearing set for 4th April 2014, the next day.

When the matter was called out for hearing on that day **Mr. Otiende**, holding brief for both Mr. Angima and Mr. Otara sought an adjournment on the ground that both advocates had been called to attend to an urgent application in Mombasa in the **Court of Appeal** being **Civil Application No. 5** of **2014**. The application for adjournment, as expected, was vehemently opposed by Mr. Matini who reiterated that it was another stratagem to delay the determination of the dispute as the suit property continued to be wasted.

The court was not persuaded by the reasons advanced in seeking adjournment. In dismissing the application the learned Judge stated that:

> ***"When this matter came up for hearing on 03/4/14, Mr. Angima informed the court that they were not ready to proceed with the matter because they were not prepared. Counsel sought for time to enable him together with his colleague to prepare for defence hearing. I gave counsels the hearing of today (sic) and Mr. Angima never informed the court that he will be in the court of appeal. Counsel did not even bother to call the Plaintiff's advocate to inform him that he will not be available today. Although I am informed that the two advocates are appearing before the Court of Appeal in Mombasa, a copy of the hearing notice has not been furnished to this court. In the circumstances and considering that this date was taken by consent and without any evidence that indeed Mr. Angima and Mr. Otara are before the Court of Appeal, I decline to adjourn the matter and proceed to close the Defendant's case in those two matters. The Plaintiff to file his submissions within 14 days and the Defendant to file his submissions within 14 days from the date of service. This matter to be mentioned on 20/5/14 for highlighting of submissions."***

The singlemost drawback in the administration of justice in this jurisdiction is the delay in the determination of cases, resulting in the overwhelming case backlog. Adjournment has been identified as the leading contributing factor to this. Lord Denning, MR in the oft-cited case of **Fitzpatrick v Batger & Co. Ltd** (1967) 2 A11 ER 657 warned that;

> ***"Public policy demands that the business of the courts should be conducted with expedition."***

Like never before today this policy is emphasized more as it is underpinned in the Constitution. Article 159(2) (b) & (d) enjoins courts to ensure justice is not delayed and is administered without undue regard to procedural technicalities. **Sections 14(5)** of the Supreme Court Act, **3A and 3B** of the Appellate Jurisdiction Act and **1A** and **1B** of the Civil Procedure Act have also enacted the overriding objective which require the courts to facilitate the just, efficient, expeditious, proportionate and affordable resolution of disputes. Order 17 rule 1 of the Civil Procedure Rules requires, as a general rule, that hearing of suits once commenced continue from day to day. It stipulates;

> ***"(1) Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment.***
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> ***(2) When the court grants an adjournment it shall give a date for***
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> ***further hearing or directions."***

It is therefore possible for the court to demand expedition in the disposal of cases and do justice at the same time; balancing the scales of justice.

Whether the learned Judge properly or improperly declined to grant the appellants' application for adjournment is a matter that goes to question the exercise of judicial discretion. That discretion is now firmly settled, should be exercised in a judicial and reasonable manner, upon proper material, after the court has considered in addition, the party's overall conduct in the case and the sufficiency of the reasons for seeking adjournment. See the Supreme Court of Uganda's decision in **Famons Cycle Agencies Ltd & others v Masukhalal Ramji Karia** (1995) Kampala Law Reports 100 cited with approval by this Court in **Peter M. Kariuki v Attorney General Civil Appeal No. 79 of 2012** in which the effect of refusal of an application for adjournment was extensively discussed. In **Savannah Development Company Ltd v Merchantile Company Limited CA No. 120 of 1992** this Court, relying on the decision of the Judicial Committee of the Privy Council in **H.K. Shah & Another v Osman Allu** (1946) 14 EACA 45 laid down the following rules:

> ***"The Court of Appeal will be very slow to interfere with the discretion of the trial judge on matters of adjournment of a trial but it will not hesitate if the result of the adjournment is to defeat the rights of the parties or injustice to one or other of the parties. In the instant case, the appellant has been denied the right to prosecute its suit and the learned trial Ag. Judge failed to consider the possibility of injustice or miscarriage of justice which might result to the appellant ….***
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> ***The reasons being given by the Ag. Judge (Supra) were limited to the conduct of the advocate (Mr. Sheth) and although quite deplorable, he did not consider all the other necessary matters. The principles to be applied for granting or refusal of the applications for adjournment were aptly summarized in the decision of the Judicial Committee of the Privy Counsel in*** *H.K. Shah and Another v. Osman Allu* ***(1946) 14 EACA p 45 at p. 49.***
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> ***'The granting or refusal of an application for adjournment is, of course, a matter of discretion, but the discretion must be exercised judicially. The authorities go to show that the elements to be taken into consideration are (1) the adequacy of reasons given for the application for adjournment; (2) how far, if at all, the other party is likely to be prejudiced by an adjournment; and (3) how far such other party can be suitably compensated by mulcting the applicant in costs'."*** (per **Muli, JA**)

The respondent, no doubt and quite understandably, was getting exasperated and desperate over what it saw as deliberate effort to keep it out of the suit property. The first suit **HCCC No. 8 of 2009** was instituted against eight defendants in the year 2009 while the second one, ELC No. 19 of 2013, against two persons, in 2013. The respondent purchased the property in 2008. At the time the application for adjournment was made the respondent had been kept out of the property for six (6) years. But it must be remembered, first and foremost that the dispute involved a question of ownership of land. The appellants have, in their statements of defence claimed that they inherited the suit property from their ancestors; that although they may not have title to the suit property, by reason of their long and exclusive history on it, having been born thereon, they are entitled to it by adverse possession. The appellants pursuant to **Order 3 rule 2** of the Civil Procedure Rules filed statements of three witnesses they intended to call at the trial.

After the consolidation of the two suits the case was, for the first time slated for hearing on 27th February 2014 and 3rd March 2014. That did not happen as the respondent's application to join in the proceedings one more defendant took a while before it was eventually withdrawn on the date the main suit was scheduled to be heard, that is, on 27th February 2014. The hearing, however commenced on 3rd March 2014 when the respondent's director testified. It was adjourned as explained earlier. Upto this stage, it should be apparent that the respondent had caused two adjournments – on **27th February 2014** when its application for joinder was withdrawn at the eleventh hour and when it sought time on **3rd March 2014** to call the second witness. We add that this was despite there being no witness statement filed for the proposed second witness. The respondent and the appellants were required to return to court on **3rd April 2014** on which date the court was to visit the *locus in quo*. On that day learned counsel for the appellants, sought and was granted for the first time an adjournment to prepare. Despite objection by learned counsel for the respondent, the case was adjourned to the following day. That is the day both counsel for the appellants failed to attend court but sent another counsel to hold their brief. To "*hold brief*" is an age old practice in court, where, as a matter of courtesy when an advocate is, for one reason or another unable to attend court, instructs another to appear on his/her behalf either to ask for adjournment, or proceed with the case or for any other purpose on his or her behalf. Where an advocate holds brief for another, as opposed to where there is no appearance at all by an advocate, the court ought to treat the two situations differently.

In this case the reason for the failure of the two advocates for the appellants to attend court was, in our view, adequately explained by their representative, **Mr. Otiende**. The two had been invited to attend an urgent application (No. 5 of 2014) in the Court of Appeal sitting in Mombasa. Again it is a normal and we can add, a good practice that where an advocate is required to appear before the High court and this Court at the same time this Court takes precedence. Many times, on account of mutual trust the advocate would be accommodated so long as the details of the matter before the Court of Appeal are furnished as was done in this case.

Balancing between the need for efficiency and expediency on the one hand and the need to accord all parties before it, a fair hearing, the court erred in failing to balance the scales of justice on the side of the appellants bearing in mind the factors we have enumerated earlier, namely that the dispute involved land and many families who claimed adverse possession, both sides of the dispute had equal shares of adjournment, the appellants had complied with all pre-trial requirements, and the reasons proffered for the failure of the appellants' advocates to attend court were not frivolous.

The right to be heard is no longer only a **rule** of natural justice but a constitutional imperative in Kenya under Article 50(1) thereof. The due process of the law as a landmark of our legal system requires the courts to ensure parties have their day in court.

We conclude, for all these reasons, that the appellants were denied, without reasonable justification the right to a fair hearing by the learned Judge. On that ground alone, this appeal must succeed and as we have explained earlier, we do not consider it necessary to address the other grounds.

This appeal is allowed and we order, pursuant to Rule 31 of this Court's Rules that the suit be tried anew before a judge of the Environment & Land Court at Mombasa other than **Angote, J**. In view of the delay

so far experienced, we further direct that the file be placed before that court within seven (7) days from the date of this judgment. As we have not attributed the error leading to this decision on any of the parties we make no orders as to costs.

Dated and delivered at Malindi this 3rd day of July, 2015

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

……...……..

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