IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO.25 OF 2014

BETWEEN

ALI MBWANA & 11 OTHERS ……..APPELLANTS

AND

MOHAMED ALI ASKUL ……...……RESPONDENT

(Being an appeal from the Judgment and decree of the High Court of Kenya at Mombasa (Tuiyott,J.) dated 6th December, 2013

In

HCC.No.271 of 2007)

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JUDGMENT OF THE COURT

The eleven (11) appellants and the respondent stake competing claims to some six (6) sub-divisions of unsurveyed **Plot No.284/111/MN KANAMAI-MTWAPA, KILIFI** namely 4601,4602,4603,4604,4605 and 4606. The respondent's claim is summarized in paragraphs 3,4,5 & 6 of his amended plaint as follows;

> ***"3. The plaintiff is and was at all material times the registered owner entitled to the possession of lands comprised in the titles known as CR, 42311 and 42309 and or portions Nos.4601,and 4606 Section III.M.N.***
>
> ***4. The plaintiff further states that he purchased the Suit premises property as a share of 5.09 acres in the years 1999, 2000 and 2001 of the unsurveyed Plot No.284/III/MN.***
>
> ***5. Pursuant thereto, the Plaintiff identified the suitable area for possession whereby he agreed with the Defendants that he would assist them in obtaining titles for the portions they occupied.***
>
> ***6. In pursuance thereof the Plaintiff did subdivide the property and caused to be prepared deed plans for portion Nos.4602,4603, 4604 and 4605 occupied by the Defendants and has been ready, able and willing to surrender them to the Defendants."***

It was the respondent's case that by a written agreement executed on 15th March, 1999 between himself and Zena Juma Mbwana, the administratrix of the estate of the late Juma Mbwana Maru at a consideration of Kshs.50,000/= he purchased 5.09 acres of the undivided share of 11.24 acres of suit property transmitted to the said to Zena Juma Mbwana. The late Juma Mbwana Maru, according to the respondent was the registered proprietor of the entire land (**No.284/111/MN**)-**KANAMAI-MTWAPA,KILIFI** measuring 1,590 acres and that when he purchased the property the appellants were living on it. The respondent thereafter, in 2001, engaged the services of Edward Kiguru Land Surveyors to sub-divide the suit property. Because the appellants were on the property, and had been on it for many years, the respondent averred that he offered to take into consideration their homes in the course of the survey and sub-division, but the appellants were to settle the survey charges. Toward this end he entered into two agreements with the two families on the land (Mbwana & Hiro families) dated 22nd August, 1999 and by sheer coincidence, 22nd August 2001, respectively in which they agreed that the two (2) plots (Nos.4601 & 4606) measuring 2 ¼ acres would be retained by the respondent and the balance be shared between the two families in the ratio of 1½:¾ acres, respectively.

The process of sub-division commenced and six plots were created from the portion purchased by the respondent. The respondent in accordance with the two aforementioned agreements and the above ratio, to retain two of the six plots and surrender to the appellants Plot Nos.4602 (the Hiro family) 4603 4604 and 4605 (the Mbwana family).

However after the sub-division, the respondent caused all the six plots to be registered in his name, eliciting a dispute between him and the appellants regarding the construction of the two agreements. According to the appellants they did not appreciate the import of appending their signatures on the two agreements; that they believed that by the terms of the agreements and because they are poor, they allowed the respondent to help them in the survey and sub division of the suit property by engaging and paying a professional surveyor and that the agreements went against the oral understanding. For instance, they maintain that they had agreed that the respondent would retain only ½ acre out of the surveyed six parcels in appreciation for helping them with the sub-division, but the respondent short-changed them by retaining a lion's share. They alleged that the agreements were not signed by all members of the two families and therefore unenforceable.

The respondent for his part is of the view that the appellants are driven by greed; that the terms of the agreements were clear and arrived at by consensus by all parties. In the amended plaint the respondent asked the court to order, by a mandatory injunction the eviction of the appellants from the two plots-Nos.4601 and 4606(erroneously indicated only as No.4601), a permanent injunction to restrain the appellants or their servants or agents from interfering with the two plots (again erroneously reflected as No.4601, 4606, 4603 & 4605), and finally a declaration that the two plots namely Nos.4601 and 4606 (now properly identified) belong to the respondent who is entitled to their possession.

The appellants, however, in their further amended statement of defence and counterclaim prayed that they be declared the legal and beneficial owners of all the six plots (Nos.4601,4602,4603,4604,4605 & 4606); that as a result respondent be prohibited by an injunction from evicting them from the suit properties or harassing them or interfering with their occupation of suit properties, and finally, that the title deeds to the six plots issued to the respondent be revoked and fresh ones issued to them.

The High Court heard these competing claims, with the respondent and five of the appellants testifying. At the end of the trial the learned Judge (Tuiyot, J) found as a fact that the transfer of the suit property to the respondent by Zena Juma Mbwana was not impeached hence the former was lawfully the registered proprietor of the six (6) plots; that his interest is superior to that held by the appellants who do not have any title to the plots; that although the appellants had been in occupation of the property since 1989, they failed to invoke the defence of limitation **under Order VI rule 4 (1)** of the repealed Civil Procedure Rules in order to base their claim on adverse possession; that the appellant's denial of the two agreements was not credible and that they signed them voluntarily and knowingly, that the appellants merely had a change of heart; and that the sum of Kshs.57,500 paid to the respondent was not a refund of the money he spent to engage a surveyor so as to forgo his claim to the property but was in fact the appellants' contribution towards the charges of the surveyor.

In conclusion, the learned Judge stated that as a demonstration of good faith the respondent offered four parcels to the two families to continue living in and was ready to transfer those four parcels in the names of the appellants. In conclusion the learned Judge ordered that;

> ***"1. ……plot numbers No.4601 and 4606 are the property of the plaintiff and he is entitled to possession thereof.***
>
> ***2. …….. the defendants shall grant vacant possession of plots No.4601 and 4606 to the plaintiff and in default thereof they shall be evicted in the manner prescribed by the law.***
>
> ***3. Upon possession by the plaintiff, the defendants shall be restrained by way of permanent injunction from interfering in any way with the plaintiff's quiet possession of plots No.4601 and 4606.***
>
> ***4. Given the history of this contest, I order that each party bears its own costs.***
>
> ***.....***
>
> ***However, minded that the defendants have lived on the suit land for long periods of time, they are given 90 days from today to give vacant possession."***

Before the expiration of the ninety (90) days for their eviction, the appellants lodged a notice of appeal evincing their intention to challenge that decision Subsequently they brought this appeal on eight grounds contending as follows;

> ***"1. The learned Judge erred in law and infact in failing to consider the evidence adduced by the appellants and their witnesses.***
>
> ***2. The learned Judge erred in law and infact in dismissing the appellants' counter-caim merely on the failure by the Appellants to plead limitation.***
>
> ***3. The learned Judge erred in not considering that the Appellants had a good claim by way of counter-claim which the Learned Judge ought not to have dismissed.***
>
> ***4. The learned Judge erred in law and infact in failing to consider the claim of fraud as pleaded and exhibited in the evidence by the appellants.***
>
> ***5. The learned Judge erred in law and infact in failing to consider the submissions and authorities filed by the appellants.***
>
> ***6. The learned Judge erred in law and infact in failing to consider and apply the provisions of the Law of Contract Act.***
>
> ***7. The learned Judge erred in failing to consider and apply the provisions of the Land Control Act.***
>
> ***8. The learned Judge erred in failing to consider and apply the provisions of Succession Act (sic)"***

The duty of this Court on first appeal was considered in the oft-cited **Selle** v **Associated Motor Boat Company Limited & Others** (1968) EA 123 and bears repeating by paraphrase. An appeal to this Court on first appeal is by way of a retrial. As such the court must reconsider the evidence and reassess it before drawing its own conclusion. In doing so it must bear in mind and give due allowance to the fact that it neither heard nor saw the witnesses. The Court is not necessarily bound by the findings of fact of the trial court if it is clear to it that that court failed to consider material facts or took into account irrelevant facts.

Bearing these considerations in mind the broad question raised in this appeal is the ownership of the six sub-divisions. It is a common factor that the appellants have, for a long time lived (others were born) on the suit property. They have sworn that some of their relatives are buried on the property. They explained their possession as follows;

(i) Mbwana family;

Ali Mbwana (1st appellant) Mwalimu Mbwana (2nd appellant) and DW3 Zuleha Mbwana testified that their grandmother, Mwanamkuu Binti Hassan bought the land from Hiro Bin Maalem on 14th November, 1961, when the 1st appellant was 16-17 years old. Although he and the rest of the Mbwana family have lived on the property, he conceded they have not taken steps to obtain the title documents.

(ii) Hiro family;

Rashid Hiro (the 10th appellant) testified that his father, Hiro Mwalimu (Maalim) and mother died about 20 years before this dispute and were buried on the land; that the 1st appellant is his uncle and therefore by that affinity, the property belonged to them.

Forcas Charo Mramba the 9th appellant aged 60 years asserted that he was born on the property. According to him his father purchased the property from Hiro Mwalimu on 29th June, 1964.

We have in evidence that Parcel No.284/111/MN measured 1590 acres before this dispute relating to sub-division of only a portion measuring 5 acres. The appellants rely on a sale agreement, in Kiswahili language dated 14th November, 1961, two letters of consent dated 13th January, 2003 and 4th June 2003 resepectively for the sale of 4 acres of parcel No.**284/111/MN** by Hiro Maalim Hiro to Ali Mbwana Ali and excision of the 4 acres from the main 1,590-acre parcel, 2 other letters of consent dated 14th January, 2003 and 4th June 2003 in respect of ¾ acres and another ¾ acres in favour of a sale by Hiro Maalim Hiro to Chanzera Angore (the father of DW5-Forcas Charo Mramba) and a consent to Forcas Charo Mwamba to sub-divide and curve out 0.75 acres from the 1,590 acres of the main parcel. The appellants also rely on a receipt dated 29th June, 1964 issued to Hiro Bin Maalim for Kshs.150 as evidence of purchase of a property that is not identified.

On the other hand the respondent relies on a letter of consent issued on 26th October, 1995 by Bahari Land Control Board, a transfer duly executed before an advocate and registered, a grant of probate in respect of the original owner Juma Mbwana Maro (deceased) issued to the vendor, Zena Mbwana Juma, a certificate of title issued in his name under the Registration of Titles Act (repealed) and certificates of official search, all of which confirm that, in contrast to the documents the appellants relied on, his interest over of the suit property is superior. A claim to land cannot be based on the kind of evidence presented by the appellants, more so when that evidence cannot be linked to the property in dispute.

If the appellants intended to base their claim on the long use of the land, they ought to have made a specific claim under **Sections 7, 37, & 38** of the Limitation of Actions Act for adverse possession. **Order VI rule 4** of the revoked Civil Procedure Rules (today **Order 2 rule 4**) requires, in mandatory terms, that statute of limitation be specifically pleaded in a claim brought under the Limitation of Actions Act. This Court in **Stephen Onyango Achola & another** v **Edward Sule Hongo & Kisumu Municipal Council**, Civil Appeal. No.209 of 2001, emphasised this point by adopting the following passage in the **Halsburys Laws of England**, 4th Ed.Vol.36 paragraph 48.

> ***"Matters which must be specifically pleaded: The defendant must in his defence plead specifically that which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise, or which raises issues of fact not arising out of the statement of claim. Examples of such matter are performance, release, and any relevant statute of limitation, fraud or any act showing illegality. Other matters which must be so pleaded are***

the statute of Fraud, and the provision of the law of property Act, 1925 which requires contracts for the sale or disposition of land to be in writing, and, it seems, any ground of objection to the jurisdiction of the court."

We can only add the oft-repeated phrase, "parties are bound by their pleadings" and reiterate the words of the Court in **Gandy** v **Caspair** (1956) EACA 139 that;

"unless pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute clearly amounts to an error on the face of the record."

In any case the appellants all along knew that the respondent was in the process of registering the suit property but failed to invoke the elaborate provisions under the Registration of Titles Act to forestall the registration. The stringent requirement for proof of adverse possession cannot be achieved through the vehicle the appellants adopted to present their claim. In the first instance they ought to have complained to the Registrar under the special powers and duties provided for in Part **XV** and **Section 60** of the Act. Their inaction signifies their acknowledgment of the respondent's title. But of great significance is the provisions of **Section 23**, that;

"23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

(2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original." (*emphasis supplied****)***

Following the repeal of the Registration of Titles Act and the enactment of the Land Registration Act, **Section 26** of the latter bears significant distinction with the former. Whereas the former describes the certificate of title under the Act as "conclusive evidence" of ownership, the latter provides that a certificate of title is only *prima facie* evidence of ownership. It is however **Section 23** of the Registration of Titles Act that is relevant to this appeal.

In **Joseph Arap Ng'ok** v **Justice Moijo Ole Keiwua** Civil Application No.60 of 1997, the Court emphasised the indefeasibility of a title under **Section 23** stating that;

"Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity to title otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy."

Essentially the main question before the trial court and indeed before us is whether the certificate of title issued to the respondent in respect of the six sub-divisions conferred upon him an indefeasible and unimpeachable title. Put differently, whether the respondent's title was obtained through fraud or misrepresentation. The appellants pleaded that the respondent fraudulently obtained from them Kshs.60,000/; fraudulently caused the property to be registered in his name and fraudulently obtained title to the property. Before the trial court the appellants concentrated their testimonies on the execution of the two agreements and did not present any evidence in support of these particulars of fraud.

The learned Judge set out the grounds of fraud as pleaded but failed to make specific finding on the

question-Instead he said;

> ***"..the transfer from Zena to the purchaser effected on 4th September, 2001 has not been successfully impeached and it stands. … the plaintiff is the registered proprietor of land described as LR. Nos.4601, 4602, 4603, 4604, 4605 & 4606. That interest is superior to those of all the defendants who do not hold any title to the land."***

We understand this holding to mean that the learned Judge found no proof of fraud on the part of the respondent. In our own assessment of the matter and bearing in mind the definition of "fraud" in the Registration of Titles Act and standard of proof required we come to the same conclusion as the learned Judge that, a part from merely listing particulars of fraud, the appellants did not present any evidence of fraud either in their pleading, reproduced earlier, or in evidence. Remember, the entire parcel of the land before the sub-division was 1,590 acres. It is a fact that part of the appellants' homes were subsumed into the parcel the respondent had purchased. The respondent himself acknowledged that the appellants had been in occupation of those portions for some time. Having appreciated the appellants' interest the respondent proposed to exclude those portions from the 5 acres he had purchased. In a Letter dated 11th August, 2007 to the Chairman of the Task Force appointed to address various interests arising from the original parcel No.**284/III/MN**, the respondent wrote;

> ***"CHAIRMAN 11/8/07***
>
> ***TASK FORCE***
>
> ***KIKAMBALA***
>
> ***Dear Mr.Gerald Mbela,***
>
> ***RE: SURVEY AGREEMENT TO FAMILIES OF MWALIMU HIRO, RASHID HIRO AND MOHAMED MATANO, KATANA MATANO***
>
> ***Due to economical difficulties in day to day life, it would not be easy to be able to shift four to five houses from one area of a plot to another. That was my original plan I had discussed it with them. Later I have realized that it would be wise to allow the above two families to remain where they are living now. Until that ¼ of an acre I have offered them is surveyed within that area where their houses are situated.***
>
> ***I hope this noble idea is justifiable and acceptable to all.***
>
> ***Yours faithfully,***
>
> ***MOHAMED ALI ASKUL***
>
> ***CC.***
>
> ***D.O. - Kikambala Division***
>
> ***Chief - Mtwapa Location***
>
> ***Assistant Chief - Kanamai Sublocation***
>
> ***ADVOCATE***
>
> ***MONGAKA OMWENGA***
>
> ***SECURITY HOUSE MOMBASA"***

But even before this stage, the respondent had agreed with the appellants that he would not interfere with their homes. Although the appellants later on disowned the agreements, we are of the view that they were entered into voluntarily. The terms of the two agreements were very clear; that appellants were to raise the money for the purpose of survey which would be given to the respondent to engage a surveyor. It was not, as claimed by the appellants a refund to the respondent to forgo his claim over the suit property.

The respondent's actions in the circumstances, in our view, does not constitute fraudulent conduct. He made a specific averment in the amended plaint that he was ready, able and willing to surrender to the appellants the six parcels. Up to the moment the appeal was heard the respondent has been ready and willing to abide by the decision of the High Court, to surrender the certificates of title in respect of Nos.4602,4603 4604 and 4605 to the appellants. It is the appellants who have acted in bad faith, first reneging on their undertaking and instead purporting to sell to third parties the two parcels earmarked for the respondent even before the determination of this dispute.

All the grounds raised in this appeal have no merit. We accordingly uphold the decision of the High Court, dismiss this appeal and award costs to the respondent. The trial court gave the appellants ninety (90) days from 6th December, 2013 to vacate the suit property. Because of this appeal they have had more than 1½ years.

We order that the appellants and any other person in occupation of parcel Nos.4601 and 4606 shall within a further ninety (90) days from thedate of this judgment vacate the suit property.

Dated and delivered at Malindi this 31st day of July,2015

ASIKE-MAKHANDIA

……

JUDGE OF APPEAL

W. OUKO

……

JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR