



IN THE COURT OF APEAL

AT MALINDI

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

CIVIL APPEAL NO. 20 OF 2015

BETWEEN

CHRISTOPHER IDD MOTO.....1ST APPELLANT

EVANS IDD KESI.....2ND APPELLANT

IDI CHARO IDI.....3RD APPELLANT

RASHID CHIWAI MALINGI.....4TH APPELLANT

BOTI MALINGI MOTO.....5TH APPELLANT

ALFRED ALI MALINGI.....6TH APPELLANT

MOHAMED KESI IDDI.....7TH APPELLANT

JASPA IDD MOTO.....8TH APPELLANT

CHAI IDDI MOTO.....9TH APPELLANT

CHIRIBA CHARO IDI.....10TH APPELLANT

BENEDICT CHAI MALINGI.....11TH APPELLANT

CHARO IDI CHARO.....12TH APPELLANT

DOMINICK CHAI IDDI.....13TH APPELLANT

GUNGU IDI MOTO.....14TH APPELLANT

ANTHONY CHIRIBA KESI.....15TH APPELLANT

MILTON CHIWAI IDDI.....16TH APPELLANT

AND

CHIRIBA NYAMBU BARUA.....1ST RESPONDENT

DUMA INVESTMENTS LIMITED.....2ND RESPONDENT

(Appeal from the judgment and decree of the Environment & Land Court at Malindi, (Angote, J.) dated 16th June 2014

in

E & L C C No. 112 of 2012)

JUDGMENT OF THE COURT

The dispute in this appeal is whether **Chiriba Nyambu Barua (1st respondent)** was, at the time he sold and transferred the parcel of land known as **Mwapula/Magogoni/489 (the suit property)** to **Duma Investments Limited (2nd respondent)**, the owner thereof or whether he held the same in trust for the 16 appellants who claim to be his relatives or members of his clan.

The relationship between the 1st respondent and each and every appellant is not readily apparent from the record. What is not in dispute however, is that they all trace their ancestry to a common patriarch known as **Barua Mtune** of Mwachipa clan, who once owned a large parcel of land of which the suit property is a subdivision. For convenience we shall refer to the said Barua Mtune as **“the patriarch.”** The patriarch had four sons named **Boti, Moto, Chai, and Nyambu**. The 1st respondent is the son of Nyambu while the appellants are mostly his cousins and/or off springs, of various generations, of the other three sons of the patriarch. The 1st appellant, who for all intents and purposes is the face of all the other appellants in these proceedings, is variously described as the son of Geji (in his submissions) or Iddi (in the judgment). In any event, both Geji and Iddi are the sons of Boti.

Be that as it may, simply put, the appellants’ contention is that the suit property was at all material times owned by the three people, namely the two sons of Boti (Iddi Moto and Geji Moto) and the 1st respondent. That was the thrust of their pleadings in **Malindi High Court Suit No. 112 of 2012**, which was commenced by a plaint, dated 21st June 2012 and amended on 13th July 2012. They contended that after one **Kalume Deri** encroached on the suit property in 2007, they sought redress from the Kilifi Land Disputes Tribunal, which, to their dismay, awarded the entire suit property to the said interloper.

By virtue of his status as the eldest member of the family, the appellants claimed, the 1st respondent was charged with the responsibility of reclaiming the family land. However, after he lost a string of legal battles, the family was alarmed that its jewel was slowly but surely slipping through its fingers. Accordingly, it asked the 1st respondent to step aside and let younger, dynamic and educated members of the family wage the battle to recover the land. For that purpose, the 1st respondent donated a special power of attorney to the 1st appellant, to assume charge of the legal battle, and to take it to the next level.

On the strength of the special power of attorney the appellants contended that the 1st appellant lodged **Appeal Case No. 15 of 2009** with the **Minister’s Panel, Kilifi Adjudication Area** chaired by the District Commissioner, Kilifi. That appeal was successful and by a decision dated 27th March 2012, the Panel directed the suit property to be registered in the name of the 1st respondent **“on behalf of other family members as confirmed by the appellant (Christopher Iddi Moto) in his statements.”** To their consternation, the appellants further pleaded, the 1st respondent ignored the decision of the Panel and without any regard to them, fraudulently, irregularly and unlawfully, sold and transferred the suit property to the 2nd respondent.

By way of relief the appellants prayed for a declaration that the suit property was family land and an order for the registration of the same in the names of family members in equal shares; a permanent injunction to restrain the 1st respondent from selling or transferring the suit property to the 2nd respondent or otherwise interfering with the appellants' peaceful occupation of the same and a mandatory injunction to compel the respondents to cede quiet and peaceful possession of the suit property to the appellants.

In his statement of defence filed on 26th April 2013, the 1st respondent denied all the appellant's averments. According to him, before the patriarch died, he had shown his four sons their respective parcels of land. His father, Nyambu had done likewise for his sons before his death, which preceded commencement of land adjudication in Kilifi.

After the land adjudication process, the suit property, which rightfully belonged to the 1st respondent, was fraudulently and illegally registered in the name of Kalume Deri Mumbo. The 1st respondent then filed an objection with the adjudication officer, which he lost due to his old age and lack of education. He subsequently filed an appeal with the Minister and enlisted the assistance of the 1st appellant, who was educated and knowledgeable, to present the appeal. For that purpose, on 20th March 2007 he donated a special power of attorney to the 1st appellant to represent him in the appeal and all matters pertaining to the suit property.

The 1st respondent further pleaded that the suit property was not family land as claimed by the appellants and that he did not get to know that the 1st appellant had misled the Panel until the filing of the High Court suit. It was his further contention that the appellants had their own land, which they had inherited from the patriarch through their fathers and were not otherwise entitled to inherit land from Nyambu. Lastly he confirmed that upon registration as the proprietor of the suit property, he had sold the same lawfully to the 2nd respondent who had embarked on developing it.

In its defence filed on 27th July 2012, the 2nd respondent denied the appellants' averments and pleaded that it was the lawful owner of the suit property, having lawfully purchased the same from the duly registered owner, the 1st respondent. It further pleaded that after purchase of the suit property, it had invested Kshs 90 million in it and prayed for dismissal of the suit.

Angote, J. heard the suit with both the 1st appellant and the 1st respondent testifying, among other witnesses. In a considered judgment the learned judge found that the suit property belonged to the 1st respondent and that he did not hold it in trust for the appellants. He also found that no fraud was proved in the registration of the suit property in the name of the 1st respondent or in the subsequent sale and transfer of the same to the 2nd respondent. He accordingly dismissed the suit with costs. The appellants were aggrieved by the outcome and promptly lodged this appeal.

With the consent of the parties, the appeal was heard by written submissions, with only the respondents electing to exercise their right of oral summation of the written submissions. Although in their memorandum of appeal the appellants listed eight grounds of appeal, at the hearing of the appeal they compressed the same into only three issues contending that the learned judge erred by:

i. ignoring the decision of the Minister dated 27th March 2012, which under the repealed Land Adjudication Act was final;

ii. holding that the suit property was not family land; and

iii. failing to hold that the sale and transfer of the suit property by the 1st respondent to the 2nd respondent was in breach of the Land Control Act and therefore null and void.

Mr. **Titus Mugambi**, learned counsel for the appellants submitted that the Minister's Panel decided in its decision of 27th March 2012 that the suit property should be registered in the name of the 1st respondent

on behalf of other family members as confirmed by the 1st appellant. In counsel's view, under the repealed Land Adjudication Act, the decision of the Panel was final and the learned judge had erred by ignoring it.

On whether the suit property was family land, the appellants relied on the same finding of the Panel and submitted that it was indeed family land. We were therefore urged to find that in reaching a finding contrary to the final and conclusive decision of the Panel, the learned judge had erred, and to reverse his decision and restore that of the Panel.

Lastly, learned counsel submitted that the learned judge erred by upholding the consent granted by the Land Control Board sanctioning the sale and transfer of the suit property by the 1st respondent to the 2nd respondent. It was counsel's view that by virtue of **section 9 (1) (c) (i)** of the Land Control Act, no consent could have been validly given in the transaction because the 2nd respondent was a private company whose members were not all Kenyan citizens. On the authority of **KIM PAVEY & 2 OTHERS V. LOISE NJOROGE & ANOTHER, CA NO. 217 OF 2005**, we were urged to find that there was no valid consent by the Land Control Board and to hold that the sale of the suit property to the 2nd respondent was therefore null and void.

The respondents opposed the appeal through their learned counsel, Mr. **Paul Ogunde**. It was submitted that the learned judge had painstakingly set out and considered the legal regime under the Land Adjudication Act, the entire history of the dispute and the real claimants of the suit property during land adjudication, before properly concluding that the appellants had no basis for claiming that the suit property was family land. It was further submitted that the appellants had deliberately glossed over the history of the dispute and mischievously focused on the self-serving appeal, which was spearheaded by the 1st appellant and in which the false claim that the suit property was family land was made for the first time.

It was the respondents' further submission that the evidence on record was consistent that the appellants' parents, who were alive during the land adjudication process, never participated in the process or laid any claim to the suit property as family land, because they had already been given their respective parcels of land. It was therefore left to the 1st respondent, it was submitted, to fight for the suit property, which was his inheritance.

Lastly on this ground of appeal, it was submitted that what was before the Minister's Panel was an appeal rather than an original action and to that extent the Panel could not purport to change the nature of the dispute in the last minute and claim that its decision was final.

On whether the suit property was indeed family land, learned counsel submitted that the terms of the special power of attorney were very clear that the 1st respondent was claiming the suit property as his own and not for the family and that the 1st respondent had deliberately misrepresented the matter before the Minister's Panel. In light of the history of the dispute, the evidence adduced that each family of the sons of the patriarch had been allocated its own land and the terms of the special power of attorney, it was submitted, the learned judge could not be faulted for finding that the suit property was not family land.

Regarding the last issue on the consent of the Land Control Board, Mr. Ogunde submitted that the issue was never pleaded by the appellants and no evidence was led on the matter, save for a question or two that was vaguely asked in cross-examination. It was therefore submitted that the trial judge was right in declining to consider the matter because it was not pleaded; was not an issue in the trial; and was not addressed in the evidence adduced by the parties. Learned counsel urged us to find the appeal bereft of merit and dismiss the same with costs.

We have duly considered the evidence on record, the judgment of the trial court, the submissions of learned counsel and the law. We have also reappraised the entire evidence with a view to coming to our own independent conclusion, subject to the indisputable proposition that on matters touching on the credibility of witnesses, we must defer to the conclusions of the trial judge, who had the advantage of

seeing and hearing the witnesses as they testified, unless there is good reason for differing with his conclusions. (See **RAMJI RATNA & CO. LTD V WOOD PRODUCTS (KENYA) LTD, CA NO. 117 OF 2001**).

We shall first dispose of the last ground of appeal touching on the validity of the consent of the Land Control Board. The learned judge found that this issue was not pleaded and that no evidence was led on the same. In his view, this was an issue that required to be specifically pleaded and in the absence of such pleading and cogent evidence, he had no choice but to disregard the same.

Under **Section 9 (c) (ii)** of the Land Control Act, the Land Control Board is required, unless the President has given exemption under **section 24** of the Act, to refuse consent in any case in which the land or share is to be disposed of by way of sale, transfer, lease, exchange or partition to, among others, a private company or co-operative society all of whose members are not citizens of Kenya. Subject to the power vested in the President to exempt transactions from the above requirement, section 9(c) (ii) constitutes a statutory prohibition of the kind of transactions named therein.

Order 2 Rule 4 of the **Civil Procedure Rules** obliged the appellant to specifically plead the above statutory prohibition if it wished to rely on it because breach thereof constitutes an illegality. Under **Order 2 Rule 4 (1) (b)** that is the kind of issue, which if it is not specifically pleaded, might take the opposite party by surprise. In the present case, if the issue was pleaded as required by the rules, the 2nd respondent would have had an opportunity to lead evidence on the citizenship of its members or if applicable, even evidence of exemption under section 24 of the Land Control Act. The effect of the failure by the appellants to plead this issue was to take the respondents by surprise and to deny them a fair opportunity to respond to the issue.

We agree with the respondents that from the record, the issue was only obliquely and surreptitiously raised in cross-examination when **Philip Camerucci**, a director of the 2nd respondent testified on 18th September 2013 and was asked about the shareholders of the 2nd respondent. It was only in their written submissions that the appellants directly raised the issue of contravention of the section 9 (c) (ii) of the Land Control Act, by which time the hearing of the suit had concluded.

In **GANDY V. CASPAR AIR CHARTERS LTD [1956] 23 EACA, 139** the former Court of Appeal for Eastern Africa stated as follows regarding pleadings:

“The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given.”

This Court reiterated the same view in **KENYA COMMERCIAL BANK LTD V. SHEIKH OSMAN MOHAMMED, CA NO 179 OF 2010** thus:

“It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff’s claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”

We are satisfied that the learned judge did not commit any error in holding that the appellants could not raise the issue of the alleged violation of the Land Control Act in the circumstances of this case. They were perfectly bound by their pleadings and were not allowed to introduce, by guile, new issues at the close of the case without formal amendment. (See **IEBC & ANOTHER V. STEPHEN MUTINDA MULE & ANOTHER** and **DAVID SIRONGA OLE TUKAI V. FRANCIS ARAP MUGE & OTHERS, CA NO. 76 OF 2014**).

The next ground of appeal that we shall consider is whether the learned judge erred in holding that the

suit property was not family land. From the outset what stands out in this appeal is the shifting stand that was taken by key witnesses called on behalf of the appellants and in particular by the 1st appellant and Barua Nyambu (PW2). On this aspect of the appeal, which turns heavily on assessment of the credibility of the witnesses, we have no choice but to defer to the conclusions of the trial judge. (See SUSAN MUNYI V. KESHAR SHIANI, CA NO. 38 OF 2002).

Although the 1st appellant claimed that the suit property was family land owned by Iddi Moto, Geji Moto and the 1st respondent, and that Iddi Moto and Geji Moto, under whose name the appellants were claiming the suit property, did not have any other land, under cross-examination he belatedly conceded that indeed Iddi Moto and Geji Moto had their own separate properties, namely *Mwapula/Magogoni/372* and *Mwapula/Magogoni/645*. This was after he was confronted with certificates of search attesting to that fact.

Similarly PW2 started off by claiming that the suit property belonged to Iddi Moto and Geji Moto. However, under cross-examination, he was forced to concede that the patriarch had given each of his four sons their respective parcels of land and that the families of those sons lived on their separate parcels of land. Further the witness conceded that the 1st respondent had obtained the suit property as his share from his father Nyambu, and that the families of the other sons of the patriarch could not claim that land.

As regards these two key witnesses of the appellants, the learned judge expressly found in paragraph 122 of the judgment that they totally lacked credibility, and from the record, we do not have any reason to disagree with the assessment of the learned judge in that respect. Indeed, even the cold record bears out the learned judge.

Another important piece of evidence that the learned judge relied upon to come to the conclusion that the suit property was not family land was the history of the litigation over the suit property. The evidence on record indicates beyond peradventure that during the adjudication process, it was the 1st respondent only who was battling for the suit property against Kalume Deri and claiming the same as his own. Although at that time it was conceded that Iddi Moto and Geji Moto were both alive, they did not feature anywhere in the dispute as claimants of the suit property, either separately or jointly with the 1st respondent.

But the real clincher in this appeal is, in our opinion, the special power of attorney donated by the 1st respondent to the 1st appellant. It will be recalled that in both their pleadings and the evidence of the 1st appellant, the 1st respondent had purportedly given the 1st appellant that power of attorney to enable him pursue the appeal with the Minister because the land was family land. Indeed before the Minister's Panel, this is what the 1st appellant stated:

“Christopher Iddi Moto, an adult of sound mind, states that I am speaking on behalf of our family since this is a family land. My uncle Chiriba Nyambu has been the spokesman for the past two land tribunals. He could not explain properly due to old age, illiteracy and lack of exposure and that is why he lost to the respondent. I am very optimistic that if this panel will follow my statements leading to how we owned this land, the respondent will not have any ownership to the same. I have with me a special power of attorney which Mr. Chiriba gave me on behalf of the family to represent them. This is family land. It was originally owned by three brothers, my late father Geji Moto, Chiriba Nyambu and Iddi Moto.” (Emphasis added).

Now, what were the real terms of that special power of attorney? We reproduce the pertinent part of the same *verbatim* as it puts paid to the appellants' claim and exposes the 1st appellant's duplicitousness.

“I CHIRIBA NYAMBU BARUA of National Identity Card Number 1381151 of Post Office Number 394 Kilifi do hereby ordain, nominate and appoint CHRISTOPHER IDDI MOTO holder of National Identity Card Number 2154002, Post Office Box Number 394, Kilifi to be my attorney and or representative in my plot known as MWAPULA/MAGOGONI/489 which power shall mean dealing in, preferring an appeal to the minister arising from the decision of the land

adjudication officer objection number 8 in which I was aggrieved, registering and or transferring the said plot into my names for avoidance of doubts and representing me in all manner and even in pursuance of court process and litigation. This power of attorney is made and executed by me of my free will and accord and the same is irrevocable on my part.” (Emphasis added).

Nowhere was it stated in that power of attorney that the suit property was family land or that the 1st respondent was donating the same to the 1st appellant to claim the suit property as family land. On the contrary the power of attorney was express that the suit property was the 1st respondent’s property, that it was the 1st respondent and not his family who was aggrieved, and that the intended result was registration of the suit property in his name.

When confronted in cross-examination with the terms of the power of attorney, the 1st appellant, who claims to be educated and unlike the 1st respondent not to suffer from **“old age, illiteracy and lack of exposure”** could not explain the disparity between the contents of the power of attorney and what he had told the Panel and pleaded in the plaint.

From what we have stated above, we are satisfied that the learned trial judge had before him overwhelming and convincing evidence that the suit property was not family property but rather the property of the 1st respondent. There is absolutely no basis upon which the learned judge can be faulted in that regard.

The last issue is whether the learned judge erred by ignoring the decision of the Minister’s Panel, which was final under the repealed Land Adjudication Act. We have absolutely no hesitation in holding that the decision, which was protected by the Act, as a final decision, was one made within the terms of the Act and no other. The finality provision in the Act was intended to bring closure to disputes that had gone through the stages of dispute resolution prescribed by the Act and not to protect new and fraudulent claims introduced at the tail end of the process. The matter before the Panel was an appeal challenging decisions made earlier by adjudication officers regarding the competing claims of the 1st respondent and Kalume Deri to the suit property. Those two were the only parties before the Panel on appeal. Therefore the decision of the Panel that was protected by the statute as final was on the disputed ownership of the suit property between the 1st respondent and Kalume Deri. Any new and original claims for the benefit of persons who were not party to the dispute in the earlier stages could not be entertained or determined by the Panel as it purported to do in this instance.

A decision taken outside the remit of the Act such as the current one where the Panel changed completely the nature of the dispute and purported to award the suit property to strangers and persons who had never been party to the litigation leading to the appeal cannot claim protection of the finality clause. It was a decision made without jurisdiction and to that extent, null and void and incapable of claiming any legal protection. (***MACFOY V. UNITED AFRICA CO. LTD [1961] 3 ALL ER.***)

In addition, we think that it is unfathomable for a court of law to allow a party like the 1st appellant, whose devious misrepresentations stand out from the record, to benefit from his illegalities. We are satisfied that in all respects the trial court’s judgment cannot be impeached and accordingly dismiss this appeal in its entirety with costs to the respondents. It is so ordered.

Dated and delivered at Mombasa this 4th day of December, 2015

ASIKE-MAKHANDI

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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**ou**