



IN THE COURT OF APPEAL

AT MOMB ASA

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

CIVIL APPEAL NO. 191 OF 2012

BETWEEN

- 1. ATTORNEY GENERAL**
- 2. COMMISSIONER OF LANDS**
- 3. CHIEF LANDS REGISTRAR MOMBASA**
- 4. REGISTRAR OF LANDS, KILIFI**
- 5. REGISTRAR OF LANDS, LAMU**
- 6. REGISTRAR OF LANDS, KWALE**
- 7. REGISTRAR OF TITLES, COAST REGISTRY APPELLANTS**

AND

- 1. MOHAMED BALALA**
- 2. MICHAEL SANGORO**
- 3. JANET N. KATISYA**
- 4. MERCY NGUGI**
- 5. ABED O. ABED**
- 6. GEORGE ODULL**
- 7. ASMINA H. AZMARSHI**
- 8. KARIM A. CHAKERA**
- 9. JAYANT SHAH**
- 10. PAUL WAMUTI NDEGWA**
- 11. PRISCA OBURA**

12. CHARLES OPULLU (*as officials*

of the Mombasa Law Society)RESPONDENTS

(Being an appeal against the judgment and order of the High Court of Kenya at Mombasa (Kasango, J.) dated 17th May 2012

in

H.C. C. Petition No. 41 of 2011)

JUDGMENT OF THE COURT

In this appeal, we are being called upon to determine whether the High Court was right in finding that the precondition of presidential consent before a transfer of 1st and 2nd row beach plots hereafter “*the plots*” can be effected is illegal, discriminative and therefore null and void. The net result of that determination by the High Court on 17th May 2012 was that the appellants were effectively prohibited from demanding of the transferees that requirement before effecting their transfers. That determination elicited or provoked this appeal on seven grounds to wit:-

“1. THAT the learned judge wholly misapprehended the rationale and reasons for the requirement (sic) of the Presidential consent requirement for transactions concerning the 1st and 2nd row beach plots and therefore arrived at a wrong decision among other things the honourable judge failed to understand that:

(i) THAT the requirement of Presidential consent is an administrative action to enable executive and the security agencies vet the owners of those plots so as to prevent them from being used unlawfully and illegal purposes.

(ii) THAT the said provision is not discriminative but is based on reasonable differentiation for purposes of security only.

(iii) THAT the requirement for the Presidential consent as a precondition to transfer 1st and 2nd row beach plots is not discriminatory but is informed by the fact that almost all such land are leaseholds issued by the Government which are subject to special conditions thereof.

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3. THAT the said directive was not meant to prevent any person from acquiring the said land but to ensure that such transactions are monitored and documented, the purchases are vetted to ensure that they are not a security threat.

4. THAT the process is a lawful exercise of the executive functions of the Head of State and does not fit the description set out in Article 27(1)(4) of the Constitution either.

5. THAT the requirement of Presidential consent is an administrative action to enable executive and the security agency vet the owners of those plots so as to prevent them from being used unlawfully and illegal purposes and also ensure universal access to the public beaches by the citizens as provided for in Article 66(1) of the Constitution of Kenya.

6. THAT the said provision is not discriminative but is based on reasonable differentiation for purposes of security only.

7. THAT though the appellants failed to submit the learned Judge erred by failing to consider the respondents grounds of opposition on record in making her determination.”

The brief background of this dispute is that over the years the appellants are said to have introduced a requirement that an application for registration of transfer of the plots should be accompanied by a presidential consent. This consent is obtained by filling a form obtainable at the office of the Provincial Commissioner. This requirement and the said form, it was argued by the respondent, was not provided for in any law and was thus clearly unconstitutional since it had the effect of denying the respondents who are all practitioners of law and their clients free transfer of property through unnecessary delays and the right to equitable access to land. In addition, the appellants, being public officers had acted *ultra vires* the law by such demand and refused or failed to act as per their mandate under the law. It was on this basis that the respondents on 22nd July 2011, petitioned the High Court for an order prohibiting the appellants from requiring or insisting on presidential consent as a precondition before transferring the plots, and a declaration that presidential consent is an illegal and discriminative practice against owners of the plots. The petition dated 21st July 2011 was supported by the affidavit of the 1st respondent who was by then the chairman of the Mombasa Law Society. The Petition had been instituted on their own behalf and on behalf of their members. The gravamen of the complaint as captured in the pleadings is that, the requirement was discriminatory and was not anchored on any law. It denied owners their constitutional rights to equitable access to land, is shrouded in mystery, bribery and corruption, thereby leading to delay in transactions involving the plots. Simultaneously with the filing of the petition, the respondents also took out a Chamber Summons application seeking temporary conservatory orders in the nature of interim injunction to restrain the appellants and their agents from continuing to require a presidential consent as a pre-requisite to register transfers or leases of the plots pending the hearing and determination of the petition. The application was on the same day certified urgent. However no interim injunction was granted. Instead the respondents were directed to serve the application on the appellants for inter-partes hearing.

An appearance was subsequently entered for all the appellants by the 1st appellant on 8th August 2011. Thereafter, on 25th November, 2011, Grounds of Opposition by the appellants were filed in response to the petition. These were that:-

“1. The requirement for presidential consents to all transfers of lands fronting the sea i.e. 1st and 2nd row plots was placed for reasons of national security of the state.

2. These types of consents must be brought to the attention of the commissioner of lands and the provincial commissioner coast province because they lie next to territorial waters and thus are part of the nation’s borders raising issues of security concern.

3. The requirement for presidential consent is not in any way discriminatory nor is there any violation of prospective buyers of beach plots to ensure that such plots are not used as bases for illegal activities like drug trafficking, smuggling or piracy.

4. The petitioners had failed to show any real infringement of fundamental rights caused by the consents other than inconvenience to prospective buyers and sellers of these beach plots in the transfer process.

5. This petition is frivolous and vexatious and otherwise an abuse of the suit process.”

Despite adjourning the hearing of the application on 22nd July, 26th October and 21st November, 2011 respectively to enable the appellants to file their papers in opposition to the application, no such response was filed. Neither did the appellants file a defence or a replying affidavit to the petition. The

parties subsequently agreed on 28th November, 2011 to dispose of the application by way of written submissions. The respondents duly filed their submissions dated 13th January, 2012. The appellants did not and when the petition came up for mention on 23rd February, 2012, the court directed that in view of the fact that the application more or less sought similar prayers as in the petition, the application should be abandoned to give way to the hearing of the substantive petition. The proposal was accepted by all the parties. The Court further directed that the petition be heard by way of written submissions and set 27th March, 2012 as the date for highlighting the respective written submissions. Come this date and the respondents chose to rely on the submission they had already filed in support of the application. On their part the appellants informed the court that they were not intent on filing any written submissions nor would they be making oral submissions.

In brief, it was submitted for the respondents that the appellants in requiring presidential consent to transfer the plots were acting in excess of their powers as they lacked legal capacity to impose such conditions. None of the statutes dealing with land, it was submitted, had any such provisions or requirement. The demand was in their opinion unfounded, lacked legal basis, was discriminative, *ultra vires* the constitution and an infringement of the fundamental rights and freedoms of the people of coast region as per Articles 24, 27 and 40 of the Constitution. The High Court was asked to consider that the requirement only affected the coast region, yet other areas of the country with similar security threats and concerns were not affected with such requirement. In a reserved judgment delivered on 17th May, 2012, *Kasango, J.* in allowing the petition with costs opined that the petitioner's submissions had been largely in the same vein as the affidavit in support of the petition and were not controverted at all by the appellants. Therefore, it followed that there was no legal basis for requiring a consent to be produced when registration of a transaction over the plots was being processed. She was satisfied that such requirement amounted to discrimination, was in contravention of the national values set out in Constitution which values are required of the State Officers and Public Officers under Article 10 of the Constitution. She further held that the requirement was a contravention of Article 27(4) of the Constitution. As a parting shot the Judge remarked and for good measure:

“The fact that the respondents failed to respond to this petition is seen as a concession on their part that the requirement of presidential consent does not enjoy the backing of any law. It is in my view an appendage of yesteryears when presidential decrees were equated to the law. It has no place in the Kenyan society of today since it is discriminative in nature.”

We could not agree more with this surmise.

On 15th July, 2013 the appellants through **Mr. Eredi**, learned Principal Litigation Counsel and **Mr. Khatib** learned counsel for the respondents agreed before us to canvass the appeal through written submissions. In their submissions the appellants urged that despite the appellants not having filed written or made oral submissions in the High Court the petition should not have been treated as though it was undefended. The grounds of opposition contained valid points and it was incumbent upon the learned Judge to consider all materials before her before making a determination. Further, it was submitted that the order/decreed/declaration or legal notice encompassing the impugned instrument sought to be quashed should have been but was not annexed to the petition so that the court is not seen as acting in vain or in a vacuum. The locus/capacity of the petitioners was put into question as well. It was also claimed that the respondents had failed to present any proof of the alleged bribery, opacity, corruption, inflated costs that attended the requirement. That the respondents had not stated clearly which particular rights of theirs or whoever they purported to act for had been violated, and by who or how. That the mere fact that there was no similar requirement for consent in other border areas could be explained on the basis of constitutional differentiation which allows for different treatment based on reasonable differentia. In a nutshell the case for the appellant was that the requirement for presidential consent did not violate any article of the Constitution and that the purpose for that requirement was to vet potential purchasers of these plots because of their geographical position as they lay next to the territorial waters that pose a unique challenge and attract illicit activities like piracy, smuggling, terrorism, etc.

In countering those submissions, the respondents maintained that the grounds of opposition were not argued before the High Court as the appellants failed to file written submissions. Therefore the High Court was right in holding that the petition was not controverted by the appellants. The arguments that the appellants were now advancing in this appeal ought to have been canvassed before the High Court. In any event the appellant had not presented any arguments to warrant this Court to upset the decision of the High Court. They had not demonstrated that owners of plots situate in similar strategic areas were being subjected to the same requirement. Nor had they demonstrated that the requirement was lawful. Much as the appellants alluded to executive order as the basis for the requirement and the public interest need for members of the public to have unfettered access to the plots for commercial and recreational purposes there was no law backing such surmises. The Constitution did not provide for such a move and there was no statute that allows them.

When the parties appeared before us on 11th February, 2014 for highlighting of their submissions, Ms Lutta, learned Litigation Counsel now appearing for the appellants opted not to highlight. Mr. Balala, the 1st respondent, in the absence of counsel for the respondents for no apparent reason opted to take the matters into his hands and orally highlighted the written submissions on his own behalf and on behalf of the other respondents. He stated that the respondents' submissions were based on the law as it was prior to the enactment of the current Land Registration Act and the Lands Act. However, he maintained that, the consent is still not a requirement under the current Land laws. The issue of security is not within the law. Aside from the constitutional restriction as to the term, there was no other restriction for ownership of land by foreigners. Other border lands which are insecure do not have similar requirement. Finally, he observed that the requirement is not under a presidential decree signed under the seal of the President.

In her brief reply to the respondents' highlights, Ms Lutta stated that the grounds of opposition filed on 24th November, 2011 addressed the issue of national security and the fact that the petitioner had failed to demonstrate the exact breach. The requirement is a directive under Article 24 of the Constitution, under which an individual's rights may be limited on such grounds as security. The burden of proof, it was submitted had not shifted and had not been discharged by the respondents.

We have carefully considered the pleadings, the proceedings and judgment of the High Court, the record of appeal, rival oral and written submissions, as well as the law. On the outset we must first remind ourselves that we are the first appellate court in this matter. As such we are obligated to re-evaluate the evidence, assess it and come to our own independent conclusion. See *Selle v Associated Motorboat Company Limited [1968] E.A. 123* and *Williamson Diamonds Ltd vs Brown [1979] E.A.1*. However, and as already noted the only evidence that shall call for our re-evaluation is that of the respondents, for the appellants led no evidence in the High Court. The appellants neither filed a defence nor replying affidavit in the High Court to counter the averment and depositions of the respondents contained in the petition and the affidavit sworn in support of their application for conservatory orders. Nor did they file written submissions. Further they never made any oral representations before the High Court by way of oral submissions. They only filed grounds of opposition.

We do not think that the grounds of opposition were sufficient to counter the complaints by the respondents. They were neither a defence nor evidence that the High Court could have relied on to find favour with their arguments. The grounds so to speak were a mere skeleton which required beefing up by way of evidence either through a replying affidavit or other means. Being a mere skeleton, the Judge could not really tell what the appellants case was or what they were upto. The grounds required to be elucidated, elaborated and expounded upon by the appellants so that the High Court could appreciate the issues being ventilated by the appellants in answer to the respondent's allegations. In the absence of such, the High Court was quite right in holding that the petition was undefended. The appellants did not expect the High Court to embark on a fishing expedition of its own to find out exactly what the appellants defence was; put the other way, it was not the duty of the High Court to firm up the grounds of opposition on behalf of the appellants. Further the grounds of opposition could not pass for evidence as they were not deponed or deposed to by any of the appellants.

Again reading through the appellants' written submissions filed in this appeal, they have said things ideally that ought to have been said in the High Court in the first instance. In other words, the appellants

are saying to us things which they ought to have said in the High Court and which will have called for our reconsideration and evaluation in this appeal. They have also introduced issues that were neither captured in their pleadings or presentation before the High Court. Since as a first appellate court, our duty is to re-evaluate and analyze the evidence as tendered before the High Court, to enable us reach our independent conclusion as to whether or not to sustain the judgment of the High Court, we should ideally not revert to the evidence that was not tendered and or pleadings or issues raised by the appellant that were not available before the High Court. The appellants were granted opportunity in the High Court to ventilate their concerns which opportunity they never seized. They cannot now use this appeal to reinvent the lost opportunity. However, since some of the issues canvassed, are matters of law, we cannot ignore them. We shall address them somewhat in this judgment.

The issue of *locus standi* of the respondents to mount the petition was one such issue. It was never raised in the High Court. This is a new ground which was not pleaded at the trial. There would be nothing to fault or reconsider from the High Court on that account. In the case of **Galaxy Paints Co. Ltd. vs Falcon Guards Ltd.** [2000] EA 885 the Court of Appeal held that:

“The issue of determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. Unless pleadings were amended, parties were confined to their pleadings Grandy v Caspair [1956] EACA 139 and Fernandes v People Newspapers Ltd. [1972] EA 63 considered.”

That notwithstanding; it is a matter of law. The Law Society of Kenya is a body corporate with power to sue and be sued in its corporate name. Among its objects is to assist the Government and courts in all matters affecting legislation and administration of justice. The respondents in this case are members of Law Society practicing in Mombasa, a sub-branch of the Law Society of Kenya. Its officials have sued in their own names and on behalf of their members seeking the enforcement/protection of constitutional rights of their prospective clients who may now or in future seek their professional legal services for the transfer of the plots. Therein lies their *locus standi*. In any event under Article 258 of the current Constitution, every person has a right to institute court proceedings claiming a right or fundamental freedom has been infringed or is threatened with contravention including public interest suits. See **Trusted Society of Human Rights Alliance vs Attorney General & 2 Others** [2012] eKLR. The issue arising from the petition was a matter of public interest whose determination would assert the constitutional position for future reference. The respondents cannot be said therefore to be busy-bodies.

The other issue that has been raised in this appeal and which was ventilated in the High Court is whether it was proper for the court to issue orders aimed at prohibiting a directive that does not exist on paper. The appellants have not denied the existence of such requirement. If anything, they have readily conceded to its existence. It has been a practice at the Coast attributed to a road-side declaration by President Mzee Jomo Kenyatta some seven years after independence. That requirement has never been anchored in any legal regime although it was being scrupulously enforced. Neither the Registered Land Act, Registration of Titles Act nor the Land Titles Act, now all repealed or the current Land law regime has such provisions. Nor is there any statute or legal basis for requiring such consent. The foregoing notwithstanding if the consent is not obtained, the 4th to 7th appellants would reject an application to transfer the plots. When challenged, they would explain that Presidential consent was required for security reasons and was in the national interest. Being a roadside declaration and having not been anchored in any law, where would the paper that the appellants are demanding of the respondents be found?

The petition claimed that the requirement was inconsistent with the new Constitution, particularly Article 27 that deals with Equality and Freedom from Discrimination. Certainly the requirement was discriminatory to those carrying out transactions with regard to those plots. Article 40 that deals with Protection of the Right to Own Property allows the owner of land to use, transfer, enjoy and control his/her private property. Therefore, a condition of obtaining presidential consent before transferring the plot limits the owner's right to property and is an unnecessary clog or fetter to that freedom and indeed freedom to contract.

The appellants submitted that the President enjoys some degree of discretionary power by virtue of his executive authority. There is however nothing in the Article 131 of the Constitution of Kenya 2010 that would warrant the issuance of such directive. If anything by courtesy of sub-article (e), the President is obligated to ensure the protection of human rights and fundamental freedom and the rule of law. How can we say that there is rule of law when we clothe the President with power not anchored in law and which is exercised in an opaque manner. How then will the President be held to account if he was to exercise such power oppressively in a cavalier manner or even capriciously or whimsically? Executive authority should be exercised on the basis of law and not fiat. The appellants talk of the President exercising some powers through executive orders. However, no evidence of such executive order signed under the hand of the President and his seal was tendered in this case. We are a country who proclaim to all and sundry that we run our affairs within the tenets of rule of law. Whatever is done or decreed in the name of the country must have a legal basis. It should be supported by statute or the Constitution. The requirement in this instance is opaque and cannot be traced to any legal grounding for evaluation nor rationale. It is worth repeating that it was not sufficiently demonstrated that the requirement was a presidential decree issued in furtherance of his executive powers, especially since there appears to have been a break in its implementation between the first and second Presidents.

National Security is defined in Article 238 of the Constitution as the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity and other national interests. The Constitution provides for the promotion and guarantee of national security in accordance with certain principles, among which are that national security is subject to the authority of the Constitution and Parliament and secondly that national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.

Rule of Law refers to the restriction of the arbitrary exercise of power by subordinating it to well defined and established laws. The Rule of Law implies that every citizen is subject to the law, including the law makers. Even Plato, although advocating for a monarch who was above the law, did observe that,

“Where the law is subject to some other authority and has none of its own, the collapse of the State, in my view, is not far off; but if law is the master of government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a State.” Plato's: “Laws” Book IV 1 ebook www.gutenberg.org [2008] translated by Benjamin Jowett page 267.

Various sources of law in Kenya, are identified in the Constitution and Judicature Act. In this appeal as in the High Court, the appellants were unable to identify the source in law for the requirement for the presidential consent. We do not think that the appellants' submissions with regard to Presidential decrees or rather other executive orders will do. More so when they impact negatively and are discriminative of the rights of the citizenry. Parliament is the law making authority in Kenya. It is mandated to make such laws as are necessary for the maintenance of order, including the protection of national security. It would therefore be quite uncharacteristic of it to leave such an important issue as national security to chance.

On the issue of whether the learned Judge failed to consider the grounds of opposition filed by the appellants, this may appear to be a valid complaint, for in the judgment, the learned Judge merely observed:

“the respondents (the appellants herein) did not file any submissions and the learned State Counsel confirmed that the respondents were making no submissions in opposition to the petition. The petitioner's written submissions were in the same vein as the affidavit in support of the petition. It was not controverted by the respondents. It therefore follows that there is no legal basis for requiring a consent to be produced when registration of transaction over beach plots is carried out.”

However, and as already stated the grounds of opposition were just that, grounds of opposition. They lacked content for cross-analysis with the petitioner's arguments so that the learned Judge's failure to

highlight them in the judgment was of no consequence. They did not amount to evidence nor defence to the respondents' claims. Under **rule 15(1)** of the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules, 2013, which corresponds with the Constitution of Kenya (Supervisory jurisdiction and protection of fundamental rights and freedoms of the individual) High Court Practice and Procedure Rules 2006 (*Gicheru Rules*) at Rule 16 then in force, the appellants were required to have responded to the petition by way of a Replying Affidavit. The rules do not envisage the filing of grounds of opposition in lieu of or in addition thereto. In any event, the said grounds comprised of general statements of fact which could not be referenced with any law or attributed to any deponent or appellants.

Order 17 Rule 4 of the Civil Procedure Rules provides that

“Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith.”

Accordingly, any relevant evidence to demonstrate the need for the requirement ought to have been produced at the High Court. No such attempt was made. It is trite law that he who alleges must prove. This Court in ***Salem Ahmed Hasson Zaidi vs Faud Hussein Humeidan [1960] EA 92***, stated that:

“... If a party neglects to produce evidence and to prove his claim as he is bound to do, the court can proceed to decide the suit on such materials as is actually before it, and that decision so pronounced shall have the force of a decree on the merits notwithstanding the defaults of the party.”

The Judge properly addressed the submissions of the respondents before rendering her decision much as there was no evidence or submissions tendered by the appellants. The obligation of the court did not go beyond that. It had to deal with what was presented before it.

National security would ordinarily triumph over the rights of an individual. It is however in such instances that the court must be convinced that it is absolutely necessary before sanctioning it. Furthermore, such a decision must be based on the law so as to prevent abuse. There is currently no law to govern this presidential fiat, leaving it open to misuse and abuse. This was considered by the learned Judge and she found correctly that it amounted to a breach of the Constitution for contravening the national values under Article 10 of the Constitution, among them being the rule of law. We cannot fault the Judge. On the whole therefore this appeal lacks merit and is accordingly dismissed with costs to the respondents.

Dated and delivered at Mombasa this 13th day of March 2014

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL