IN THE COURT OF APPEAL

AT ELDORET

(CORAM: AZANGALALA, GATEMBU, MURGOR JJ, A)

CIVIL APPEAL NO. 67 OF 2015

BETWEEN

DAUDI KIPTUGEN……APPELLANT

AND

COMMISSIONER OF LANDS, NAIROBI……..…1ST RESPONDENT

THE CHIEF LAND REGISTRAR, NAIROBI……2ND RESPONDENT

THE HON. ATTORNEY GENERAL……3RD RESPONDENT

HELDO FOOD STUFF LIMITED……...4TH RESPONDENT

DISTRICT LAND REGISTRAR, ELDORET…….5TH RESPONDENT

HELDO FOODSTUFF LIMITED……..……INTERESTED PARTY

(Appeal from the judgment and decree and order of the Environment &

Land Court at Eldoret Munyao, J,) dated 30th January 2015

in

Env. & Land C.C. NO. 787 of 2012

Formally Eldoret HCCC. No. 213 of 2011)

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JUDGMENT OF THE COURT

The dispute in this appeal concerns the triple allocation of a property known as Eldoret Municipality Block 7/154, ***(the disputed property)*** to different parties, namely the appellant, Daudi Kiptugen ***(Daudi)***, the 4th respondent, Heldo Foodstuff Limited ***(HFL)*** and an Interested Party, Haron Chepkilot Kipsang trading as Heldo Foodstuffs ***(HF).***

In his claim, Daudi sought various orders, including an order of mandatory injunction to restrain the 1st and 5th respondents from issuing another lease and certificate of lease over the disputed property to HFL; and order for the 1st and 2nd respondents to reinstate the expunged original records relating to the appellant's ownership of the disputed property; a declaration that the allotment of lease dated 26th June 1999 to HFL was fraudulent, illegal, null and void and an order for the cancellation of that lease, and finally a declaration that Daudi was the bona fide owner of the disputed property.

Daudi claimed that he was registered as the owner and leaseholder of the disputed property since 1999, and that he had been in occupation for ten years. Sometime in November, 2011 it had come to his knowledge that the 1st and 4th respondents had fraudulently removed the original documents appertaining to his ownership of the disputed property, and were intent on issuing a new lease to HFL for registration at the District Land registry. Daudi particularized the fraud by the 1st and 2nd respondents and HFL as expunging his original documents from the records at Ardhi House; replacing them with HFL's forged documents, and misrepresenting that HFL was the legal owner, by purporting to issue a new backdated lease to a company, which had not come into existence by that time.

The respondents denied the allegations and in a counterclaim HFL alleged that Daudi had secured registration of the disputed property through fraud, particularized as, the secret and fraudulent expunging from the records of HFL's documents and replacement by Daudi's forged documents; fraudulently acquiring a conveyance and transfer of lease of the disputed property without the knowledge and consent of the 1st and 2nd respondents, and HFL; fraudulently registering himself as the owner whilst knowing that the disputed property was on 24th June, 1999 allocated to HFL.

Having considered the evidence, the learned judge was not satisfied that the appellant was at any time allocated the disputed property, and concluded that it was obtained unprocedurally through fraud or misrepresentation. The learned judge went on to find that the appellant's leasehold title was impeachable under ***section 26 (1) (a)*** and ***(b)*** of the now ***repealed Land Registration Act,*** and in so finding, cancelled Daudi's registration as the proprietor and owner of the disputed property.

Dissatisfied by the decision of the High Court, Daudi has appealed to this Court on the grounds that the learned judge failed to appreciate that his records had been tampered with; that the conclusion that he had fraudulently acquired his title was not supported by evidence; that the learned judge wrongly concluded that he was allocated "Unsurveyed Residential Plot B26- Eldoret Municipality, and not Eldoret Municipality block 7/154; that the learned judge failed to appreciate that the law only contemplated the production of a registered lease and the certificate of lease and not the letter of allotment; that the learned judge erroneously shifted the burden of proof to Daudi to prove that his lease was properly acquired, and that it was improper or unprocedural for the Commissioner of Lands to issue the impugned lease which finding was in excess of the court's jurisdiction.

Before the appeal was heard, HF filed a Notice of Motion dated 22nd October, 2015 seeking to be joined as an interested party affected by the appeal on the grounds that, it had been fraudulently excluded from the proceedings in the High Court that gave rise to the appeal. It also claimed to be the rightful owner of the disputed property and being a party affected by the appeal it ought to have been served with the notice and record of appeal.

On 10th March 2016, this Court ordered that HF be allowed to join the appeal as an interested party.

When the appeal came up for hearing, learned counsel, ***Mr. Korir,*** appeared for HFL, while learned counsel, ***Mr. Komen***, appeared for HFL. ***Mr. Arusei*** was the learned counsel representing HF.

During the submissions, it became apparent that there was one issue that superseded counsels' other representations. This was whether, the appeal should be determined on its merits, or whether the suit should be remitted back to the High Court for retrial, to enable HF join as a party to the suit.

In this respect, ***Mr. Arusei*** submitted that this Court having joined the interested party to the appeal, it was imperative that HF's evidence be taken into account. It was for this reason, counsel submitted, that the matter should be remitted back to the trial court and reheard, this time taking HF's claim into consideration. Counsel argued that HF ought to be provided an opportunity to be heard by an impartial tribunal, and that the matters in the appeal as currently presented barred it from fully participating in the appeal. Relying on ***Article 159*** of the ***Constitution, section 3A*** and ***3B*** of the ***Appellate Jurisdiction Act,*** counsel urged us to accommodate the interested party's claim and dismiss the appeal, and remit the suit back to the trial court with orders that HF be allowed to join as a party so as to provide it with an opportunity to ventilate its case.

In his reply, ***Mr. Korir*** opposed the application to have the suit remitted back to the trial court. Counsel was of the view that, the dispute was restricted to Daudi and the respondents, and that HF's claims were misplaced; that no material had been placed before this Court to support the interested Party's case. Counsel urged us to apply ***Rule 29*** of this Court's rules to reappraise the evidence instead.

We have considered the record of appeal and the competing submissions of the parties. The issue as presented to us is whether to determine the appeal on its merits, or whether to remit the suit back to the High Court for retrial, to enable HF be joined as a party to the suit.

By an order dated 10th March 2016, this Court allowed HF to join the appeal as an affected party. Having joined, HF's contention is that there are undisclosed material facts in support of its case that require to be placed before the court and subjected to examination and testing, which this Court is not designed to entertain. In addition, the appeal as currently presented locked HF out, as its case has not been heard, and there was no record upon which it could rely to defend its claim.

Article 50 (i) of the ***Constitution*** stipulates that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court.

On the right to be heard, this Court in the case of ***Mbaki & Others vs Macharia & Another (2005) 2 EA 206***, stated thus:

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard. (emphasis ours)"

In ***Ismail and Another vs Njati, EALR 2008 EA 2EA 155,*** the Court of Appeal of Tanzania: Munuo, Kileo, Iuonda, JJ.A. similarly observed:

"In line with the audi alteram partem rule of natural justice, the court is required to adjudicate over a matter by according the parties a full hearing before deciding the matter in dispute or issue on merit. The omission to give the parties a hearing on the issue of jurisdiction occasioned miscarriage of justice…".

As such, the circumstances require that the fundamental principle of natural justice, or the *audi alteram partem* principle meaning, "hear the other side" should be applied to HF's case.

Article 164 (3) (a) of the ***Constitution*** and the Appellate Jurisdiction Act *(repealed)* limits the mandate of this Court to hearing appeals from decisions of the High Court or other courts or tribunals prescribed by Parliament.

The appeal as currently presented elaborates a dispute between Daudi and HFL, whose respective cases have been articulated and determined by the court below. This Court has already determined and admitted HF to participate in the appeal as an affected party within the meaning of ***rule 77*** of this Court's rules. Yet, its claim is yet to be ventilated and determined by the court below. To proceed and determine the appeal without HF's case having been heard and determined by the lower Court would be prejudicial.

Rule 31 of this Court's rules empowers us to remit a suit back to the court below for retrial so that HF can be heard. As such, providence and the interest of justice demand that this case be remitted back to the Environment and Land Court for retrial, this time, with HF joined as a party to the suit. This would forestall a multiplicity of suits on the same subject matter, and bring to finality the issue of ownership of the disputed property once and for all.

In the result, and having regard to the circumstances of the case, we order that the suit be remitted back to the Environment and Land Court for retrial, so that the suit can be heard *de novo* on a priority basis. We further order that the matter be fixed for mention before the lower court for purposes of giving direction on;

1. Joinder of HF in the suit.

2. Filing of necessary pleadings.

3. Discovery.

4. Fixing of the hearing date.

5. Any other direction for the expeditious disposal of the suit.

We order that each party bears its own costs.

Orders accordingly.

Dated and delivered at Kisumu this 23rd day of September, 2016.

F. AZANGALALA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR