



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL APPEAL NO. 27 OF 2016**  
**FORMERLY EMBU E.L.C. 280 OF 2015**

**ALFRED NJERU MURUANGUGI.....APPELLANT**

**VERSUS**

**DORIS MUTHONI KAGAI .....RESPONDENT**

**JUDGEMENT**

1. The appellant has appealed against the order of the court of the Senior Principal Magistrate dated 3<sup>rd</sup> October 1997 sitting at Embu. That court had ordered for cancellation of title to land parcel Nos. 4551, 4552 and 4553 which arose as a result of the sub-division of the original title No. Gaturi/Weru/426. Additionally that court also ordered for the restoration of the original title No. Gaturi/Weru/426 and to be registered in the name of the respondent, who was also the original owner.

2. The respondent had presented to the Land Registrar a certificate of confirmed grant in respect of land parcel No. Gaturi/Weru/426 to be registered as the owner of the said suit land, but the land registrar refused to recall the title deeds in respect of the above three parcels of land. He had promised to recall those titles, but after seven days he had done nothing. As a result the respondent filed an application in court to enforce the orders of the magisterial court delivered on 18<sup>th</sup> September 1997. The appellant opposed her application because thirty days within which to appeal had not expired. The appellant further submitted that the land registrar was not a party to the suit. According to the appellant the land registrar ought to have been joined as a party to the suit, because the orders were directed against him. The appellant further submitted that the respondent should have filed for an order of mandamus in the High Court to order the land registrar to carry to implement the court order. The magisterial court dismissed the appellant's application and ruled in favour of the respondent. That in short is the ruling from which an appeal has been preferred to this court.

3. In his ruling the magisterial court found that the Land Registrar had cancelled the title to land parcel No. Gaturi/Weru/426 without asking the respondent to return the original title deed in respect of land parcel No. Gaturi/Weru/426. As a result three land parcel Nos. 4551, 4552 and 4553 came into existence. The court found the conduct of the land registrar to be suspicious. According to the court the land registrar registered the three new title deeds contrary to prohibitory order issued by the court. The trial court stated that the land registrar should have been cited for contempt of court. As at that time the appellant had not applied for a copy of proceedings for appeal purposes nor had he applied for stay of execution pending appeal.

4. Furthermore, the trial court found the land registrar was not a necessary party to the application before him. According to the trial court the Land Registrar was a vehicle to carry out the orders of the court,

since the land had no interest in the application. The trial court ruled that it was not necessary for the respondent to apply for order of mandamus, because the Land Registrar had not given any indication that he was not going to comply with the court orders. Finally the trial court ordered the land registrar to dispense with production of title deeds in respect of land parcel Nos Garuri/weru/4551, 4552 and 4553 and comply with court order of 17<sup>th</sup> September 1997 and 18<sup>th</sup> September of 1997. That in effect meant restoring the land to its original title No. Gaturi/Weru/426 in the name of the respondent.

5. The appellant has raised seven grounds of appeal. In ground one he has faulted the trial court for cancelling his title to land parcel Nos. Gaturi/weru/4551, 4552 and 4553 without affording the him an opportunity to prepare and be heard. I have considered this ground of appeal and I find that counsel for the appellant effectively presented the case for the appellant notwithstanding that he was not given more time that he had requested for. It is clear from the proceedings that this was an old case which had been pending in court since 1995. I find that the rules of natural justice were complied with and there was no failure as submitted by the appellant. This ground of appeal is hereby dismissed for lacking in merit.

6. In ground two the appellant has faulted the trial court for granting orders based on an application that was defective and incompetent, because the application was brought by chamber summons and was anchored the respondent's in the affidavit of 3<sup>rd</sup> September 2015. I find that this is a technical argument that is contemplated in **Article 159 (2) (d) of the 2010 Constitution**. The provisions of that article require the court to administer justice without undue regard to procedural technicalities. If the argument of the appellant were to be upheld, substantive justice would be defeated. I find that there is no merit in this ground of appeal, because the trial court was asked to implement a court order. This ground of appeal is hereby dismissed.

7. In ground three the appellant has faulted the trial court in issuing orders for the cancellation of the appellant's title to the said suit three parcels of land, because the application had been made by way of chamber summons. He has further asserted that the respondent should have filed a substantive suit by way of a plaint and evidence had to be adduced because the substantive rights of the appellant had been affected. In this regard I find that the trial court was not being asked to ascertain the rights of the parties to the application. If this were the position a suit had to be filed and oral evidence led to determine the rights of the parties. In this regard I find that it was not necessary to do, so because the trial court was merely implementing a court order, following the ascertainment of those rights by the Embu Court in Succession Cause No. 252 of 1995. If this argument were to be upheld, it would defeat the overriding objective that is embodied in section 1A and 1B of the Civil Procedure Act, which is that justice should be administered in a just and expeditious manner, while at the same time making it affordable and proportionate.

8. The overriding principle also requires the efficient usage of available judicial and administrative resources. It is to be remembered that the appellant had obtained registration of the suit parcels of the land in contravention of a prohibitory order issued by the court and that explains why the trial court had indicated that the appellant was liable to be cited for contempt of court. As at that time the appellant risked being punished for contempt of court in terms of section 5 (1) Judicature Act (Cap 8) Laws of Kenya either on the application of the respondent or by the magisterial court doing it by bringing the contempt to the attention of the High Court, for ignoring a prohibitory order issued by the trial court. I further find that the appellant should not have been heard by the trial court, for he was in contempt of a court order and had not purged his contempt. This ground of appeal fails and is hereby dismissed.

9. In ground four the appellant has faulted the trial court for granting orders of cancellation because magisterial court lacked jurisdiction to do so. I find that section 143 of the Registered Land Act (Cap 300) Laws of Kenya, which permitted rectification of the register on grounds of fraud or mistake is inapplicable. I find that the trial court had jurisdiction to entertain the matter because the issue before it arose from the the order of a magisterial court that was sitting as as succession court. Furthermore, the trial court was merely implementing a court order which had not been challenged by the appellant. This ground of appeal is hereby dismissed for lacking in merit.

10. In ground five the appellant has faulted the trial court for issuing orders directly to the land registrar

who was not a party to the proceedings. According to him this application ought to be brought by way of Order 53 of the Civil Procedure Rules and that jurisdiction lay with High Court. Again I repeat that the land registrar had no interest in the outcome of the proceedings before the trial court, whose function was merely to implement a court order. This ground of appeal is also hereby dismissed for lacking in merit.

11. In ground six the appellant has faulted the trial court for directing Land Registrar to dispense with the title deeds when that court knew the said application was premature, because thirty days had not expired within which the appellant could have exercised his right of appeal. In this regard the proceedings clearly indicate that the appellant had not even applied for a record of the proceedings for appeal purposes. There was no indication that he intended to appeal. He also did not apply for stay of execution pending appeal. In the circumstances he should have sought stay of the order that he intended to appeal against. In the absence of his application for stay of the order pending the appeal and in the absence of any indication that he intended to appeal, this ground of appeal is without merit and is hereby dismissed.

12.. In ground seven the appellant has faulted the trial court for granting orders based on mere suspicion. I find that the trial court found that the Land Registrar was unwilling to implement the court order. This ground lacks merit and is hereby dismissed.

13. In the light of the foregoing the appellant's appeal is hereby dismissed with costs to the respondent.

**JUDGEMENT DELIVERED, DATED and SIGNED at EMBU this 19<sup>th</sup> day of JULY 2016.**

In the presence of Mr Nduku holding brief for Mr Muriithi for appellant and in the absence of the respondent.

Court clerk Njue

**J.M. BWONWONGA**

**JUDGE**

**19.07.16**