



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CIVIL APPEAL NO. 4 OF 2020

EASTSIDE DEVELOPMENT LIMITED.....APPELLANT

VERSUS

NAIROBI CITY COUNTY.....1ST RESPONDENT

ITE FARMERS CO-OPERATIVE SOCIETY LIMITED...2ND RESPONDENT

(Being an appeal from the Ruling and order of Senior Resident Magistrate's Court at Nairobi City Law Courts (Hon. S. Muchungi) delivered on 23rd January 2020 in 1st Class Magistrates Court Civil Suit No. 20 of 2013)

JUDGMENT

1. In this appeal, the Appellant has sought for the setting aside of the Ruling and order by Hon. S. Muchungi delivered on 23rd January 2020. The Appeal is premised on the grounds that:

a. The learned magistrate erred in fact by holding that the Appellant did not file any response to the 2nd Respondent's Notice of Motion dated 12th September 2018, yet there was on record a replying affidavit sworn by Emmanuel Okello on 19th October 2018 and filed in court on the same day and two sets of submissions filed on 23rd November 2018 and 5th November 2019 in favour of the Appellant and served upon all parties.

b. The learned magistrate erred in law and in fact by setting aside the sale of LR Number 27399 I.R. Number 103116 without any substantive prayer being made seeking the order.

c. The learned magistrate erred in law and had no jurisdiction to set aside the sale of LR Number 27399 I.R. Number 103116 when the same had been confirmed and made absolute by the High Court on 26th March 2015 in ELC Misc. Application Number 62 of 2015 between the parties herein.

d. The learned magistrate erred in law and fact by failing to take into consideration the Appellant's replying affidavit aforesaid, two sets of submissions or analyses of the evidence and law contained in the appellants' replying affidavit and submissions, including the evidence of the advertisement of LR Number 27399 I.R. Number 103116 for sale and receipts issued by Ideal Auctioneers acknowledging receipt of payment of the entire purchase price and as a consequence ended with an erroneous finding that there was no evidence of advertisement of the property for sale and payment of the purchase price on the courts record.

e. The learned magistrate erred in law and fact by failing to take into consideration, analyse the two sets of submissions and authorities on court record and make a finding that the Appellant was a bona fide purchaser of L.R. No. 27399 IR Number 103116 for value without notice of any irregularities, including the alleged irregularities which she found to have been committed by the 1st Respondent through their failure to follow the procedure as required by law on execution proceedings.

f. The learned magistrates erred in law and fact by failing to take into consideration, analyse the appellants submissions and authorities on record and make a finding that the appellant was not a party or acquiesced with the 1st Respondent or the Auctioneer on the alleged omission to comply with the legal procedure on execution proceedings or the purported omission to make payment of the purchase price into court.

g. The learned magistrate erred in law by failing to find that the 2nd Respondent's remedy, if it had suffered any prejudice or damages, as a result of the failure to comply with the law and procedure on the part of the 1st respondent, lied in damages

against the 1st Respondent, who she found to have failed to observe the law on execution proceeding.

h. The learned magistrate erred in law by failing to find that the Appellant had acquired a good title over LR 27399 IR Number 103166 during the sale and that the same could not be impugned or set aside.

2. The Appeal proceeded by way of written submissions.

The parties' Submissions

3. The Appellant, through its counsel, filed written submissions dated 2nd November 2021. Counsel submitted that the learned Magistrate erred in finding that the Appellant did not file any response to the 2nd Respondent's Application, leading to other fundamental errors in her Ruling.

4. Counsel submitted that the replying affidavit filed by the Appellant had relevant evidence annexed to it, particularly the public advertisement of the intended sale of the suit property, the Memorandum of Sale and the receipts for the purchase price issued by the Auctioneer.

5. The Appellant's counsel submitted that the failure by the learned Magistrate to take into account the replying affidavit, the annexures and submissions led to a miscarriage of justice and that the Magistrate had no jurisdiction to set aside the sale of the suit property because it had been confirmed and made absolute by the High Court on 26th March 2015 in ELC Misc. Application No. 62 of 2015 and in accordance with **Order 22 Rule 77 (3)** of the **Civil Procedure Rules**.

6. It was submitted that the 2nd Respondent's application did not have a prayer to set aside the sale of the suit property; that the particulars of irregularities as enumerated by the Magistrate in her Ruling were not raised by any parties in the application and that the application did not conform to **Order 27** of the **Civil Procedure Rules**.

7. Counsel submitted that upon declining the prayer to set aside judgement, the Magistrate's decision on the irregularity of the sale process were not founded on any prayer before her, as she ought to have been confined to the pleadings and issues submitted by the parties for determination. Counsel relied on the cases of **North Kisii central Farmers Limited vs Jeremiah Mayaka Onbui and other (2014) eKLR** and **Elizabeth O. Odhiambo vs South Nyanza Sugar Company Limited (2019) eKLR**, where in the latter case, the court stated as follows:

"The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."

8. The 2nd Respondent's advocate submitted that the Replying Affidavit filed by the Appellant would not have changed the Ruling by the subordinate court, because the Court's Ruling was based on multiple procedural irregularities by the 1st Respondent and that because the Appellant was a beneficiary of a flawed process, its only recourse in law was to seek for damages against the 1st Respondent. Counsel relied on the Court of Appeal case of **Brar vs Wareng Quarry & Another (1978) eKLR** where the court held as follows:

"Be that as it may, it is my view that as rule 53 stands, the court must at least say whether or not the property in question was or was not liable to attachment. If the court finds that the property was not liable to attachment it would then be open to the aggrieved party to seek the appropriate remedy which may be an action to recover damages against those concerned."

Analysis and Determination

9. **Order 10 Rule 11 of the Civil Procedure Rules 2010** states that where judgement has been entered because of non-appearance, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just. **Order 22 Rule 75 of the Civil Procedure Rules 2010** provides that a party may make an application to set aside a sale on grounds of irregularity or fraud:

"Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

10. In the first Magistrates' Court Civil Suit No. 20 of 2013, the 2nd Respondent filed a Notice of Motion Application dated 12th September 2018, in which it sought for the setting aside of the interlocutory Judgement entered on 26th September 2013 by Honourable Mr. J.M. Omido (Ag. P.M.) and the consequential decree dated 2nd October 2013.

11. The Judgment that the 2nd Respondent sought to set aside in the Senior Resident Magistrate's Court was pursuant to a rates suit by the 1st Respondent, the Nairobi City County, filed on 20th August 2013 in the Nairobi City Court. In the said suit, the 1st Respondent demanded for a sum of Kshs. 3,817,768 as outstanding rates, penalties, and interest as at 31st December 2013 in respect of L.R No. 27399 IR Number 103166 owned by the 2nd Respondent.

12. The lower court's record shows that on 26th September 2013, the court entered interlocutory Judgement against the 2nd Respondent for the claimed sum, the 2nd Defendant having failed to enter appearance and file a Defence.

13. The Appellant thereafter filed in this court Misc. ELC Application No. 62 of 2015, where by way of a Notice of Motion, they sought that the sale of the suit land to themselves be made absolute and a vesting order be issued to them. The Appellant herein also sought for an order that the Deputy Registrar execute all the transfer instruments requisite for the registration of the suit land in its name. The vesting orders sought by the Appellant were granted on 26th March 2015. On 3rd July 2015, the suit property was transferred to the Appellant pursuant to the vesting order.
14. The record shows that the 1st Respondent subsequently filed an application in Miscellaneous ELC Application number 62 of 2015 to set aside the vesting order. In his Ruling of 29th August, 2018, Eboso J dismissed the said application. In the Ruling, the Judge stated as follows:
- “...the court finds that the plea for an order setting aside the vesting order issued by Gacheru on 26/3/2015 is premature in the absence of an order setting aside the underpinning judgment, decree and consequential sale in RMCC No. 20 of 2013.”***
15. It is the Ruling of this court that prompted the 2nd Respondent herein to file the application dated 12th September, 2018 in the lower court for setting aside of “the interlocutory Judgment and the consequential decree dated 2nd October, 2013.”
16. While arguing the application for setting aside the interlocutory Judgment, the 2nd Respondent informed the lower court that on 15th December 2014, P.G. Waweru T/A Ideal Auctioneer conducted a public auction in respect of the suit property irregularly and fraudulently because the 2nd Respondent was not personally served with a notification of sale; that the suit land which is valued at Kshs. 180,000,000 was sold for Kshs. 20,500,000 and that the 2nd Respondent was never served with summons to enter appearance and the Plaintiff.
17. While opposing the Appellant’s application in the lower court, the 1st Respondent’s case was that the 2nd Respondent lacked locus to bring the application because it was not the registered proprietor of the suit property; that service was effected on the registered proprietor as per Section 17 of the Rating Act and that the 2nd Respondent was aware of the court proceedings.
18. It was the 2nd Respondent’s case in the lower court that the advertisement for the sale of the suit property via public auction was properly done in a newspaper of national circulation and was in the public domain and that the suit property was sold to the highest bidder, Eastside Development Limited, the Appellant, for Kshs. 20,500,000 and a memorandum of sale to that effect was executed.
19. In the Ruling delivered on 23rd January 2020, the Senior Resident Magistrate’s Court declined to set aside the Judgment but held that the 1st Respondent had failed to follow the law during execution. According to the learned magistrate, no notice of entry of Judgment was ever served on the 2nd Respondent and that the 1st Respondent failed to present evidence to show that the intended auction was advertised, making it questionable whether there was ever a public auction of the suit property.
20. The lower court further held that the purchase money was never paid in court as required by **Order 22 Rule 70 (2)** of the **Civil Procedure Rules** and that although the decretal sum was Kshs. 3,967,768, there was no explanation as to how the balance of the purchase price was utilized after the sale of the land. The court thus ruled that the said irregularities warranted setting aside the sale and the entire execution process. However, the court was satisfied that the 1st Respondent had been served with the summons to enter appearance, and that the interlocutory Judgment was valid.
21. The Appellant’s case is that the failure by the learned Magistrate to take into account the replying affidavit, the annexures and submissions led to a miscarriage of justice and that the Magistrate had no jurisdiction to set aside the sale of the suit property because it had been confirmed and made absolute by the High Court on 26th March 2015 in ELC Misc. Application No. 62 of 2015 and in accordance with **Order 22 Rule 77 (3)** of the **Civil Procedure Rules**.
22. It was submitted by the Appellant that the 2nd Respondent’s application did not have a prayer to set aside the sale of the suit property; that the particulars of irregularities as enumerated by the Magistrate in her Ruling were not raised by any party in the application and that the application did not conform to **Order 27** of the **Civil Procedure Rules**.
23. The Appellant has argued that upon declining the prayer to set aside Judgment, the Magistrate’s decision on the irregularity of the sale process were not founded on any prayer before her, as she ought to have been confined to the pleadings and issues submitted by the parties for determination.
24. On the other hand, it is the 2nd Respondent’s case that the replying affidavit filed by the Appellant in the lower court would not have changed the Ruling by the subordinate court, because the Court’s Ruling was based on multiple procedural irregularities by the 1st Respondent and that because the Appellant was a beneficiary of a flawed process, its only recourse in law was to seek for damages against the 1st Respondent.
25. The record shows that the Appellant, who was enjoined as an Interested Party, filed its replying affidavit dated 19th October 2018 to oppose the 2nd Respondent’s application for setting aside the interlocutory Judgment. Indeed, the said replying affidavit was received by the 2nd Respondent’s advocates on the same day it was filed in court. The 2nd Respondent also filed submissions dated 17th November 2018 and further submissions dated 24th October 2019.
26. Despite the 2nd Respondent having filed the replying affidavit in response to the Appellant’s application, together with written submissions, the trial court erroneously stated that the Interested Party (Appellant) did not file any response to the application, and went on to find that there was no evidence to show that “there was no notification of sale in the court file for 15th December 2014 or prove that the public auction was advertised as per the court order.”

27. In its replying affidavit in the lower court, the Appellant attached pleadings and evidence it had presented before the Environment and Land Court in Misc. Application 62 of 2015, which documents the learned Magistrate did not consider in her Ruling.

28. That being the case, it is the finding of this court that the lower court failed to consider all the pleadings and evidence on record before arriving at its decision of 23rd January, 2020. That being the case, it would be inappropriate to hold at this state, as argued by the 2nd Respondent, that the findings of the lower court would not have been any different even if the court had considered the replying affidavit that was filed by the 2nd Respondent.

29. Indeed, it is trite that courts are obligated to consider responses that are filed in respect to the applications that are before them. It is likely, and it often happens, that the learned Magistrate did not see the replying affidavit filed by the Appellant while writing her Ruling, an omission that may have occasioned an injustice to the Appellant.

30. Although the Appellant has prayed for an order of this court to set aside the Ruling of the lower court dated 20th January, 2020 and to dismiss with costs the 2nd Respondent's Notice of Motion dated 12th September, 2018, the most appropriate order to issue is to remit the application dated 12th September, 2018 to the lower court for re-hearing so as to enable the court to consider all the pleadings on record.

31. For those reasons, this court makes the following orders:

a) The Appellant's Appeal is dismissed.

b) The Application dated 12th September, 2018 in the First Magistrates Court at Nairobi Civil Suit No. 20 of 2013 is remitted back for re-hearing by any other magistrate other than Hon. S. Muchungi.

c) Each party to bear his/its own costs.

Dated, signed and delivered virtually in Nairobi this 24th day of February, 2022.

O. A. Angote

Judge

In the presence of;

Mr. Koyoko for the Appellant

Mr. Kaka for the 2nd Respondent

Ms Sheunda h/b for Osundwa for 1st Respondent

Court Assistant - Okumu