IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 3 OF 2011

SAMUEL NJIRAINI NGABIA……...APPELLANT

VERSUS

NEXUS STRATEGY LIMITED…….RESPONDENT

JUDGMENT

Samuel Njiraini Ngabia, the appellant, filed this appeal against Nexus Strategy Limited, the respondent herein against the orders of Hon. Kagendo Principal Magistrate, issued on 31/12/2010. He prays that the orders be set aside and the court to order Nakuru CMCC 1463/2010, be struck out for want of jurisdiction.

To understand this appeal, I need to set out the history of this matter which is captured in the affidavit of Judith Wamiru Njeru dated 31/12/2010 accompanying the notice of motion of the same date in CMCC 1463/2010. In that affidavit, the deponent explained that the respondent is the lawful proprietor of two parcels of land Title No. Dundori/Lanet Block 5/33 (NEW GAKOE) and Block 5/35 having purchased them at an auction after the appellant failed to service a loan advanced to him by AFC (K) Ltd, as a result of which the said AFC (K) exercised its statutory right of sale and sold the properties to the respondent who was the highest bidder. The necessary ownership documents have since been transferred to the respondent. While pending registration of the land into the respondent's names, the appellant started to interfere with the premises by painting the gate and renaming the premises as Lanet Girls School, yet the appellant had been asked to vacate the suit land vide letter dated 15/12/2010 which gave the appellant 7 days to vacate the suit property.

As a result of the appellant's actions, and failure to vacate the land, the respondent filed the suit CMCC 1463/2010, **Nexus strategy Ltd v Samuel Njiraini Ngabia**, seeking the following orders:-

a. **A perpetual injunction restraining the defendant by himself and/or his servants from entering, occupying or in any way interfering with the plaintiff's (respondent) peaceful uninterrupted and exclusive use, enjoyment of the properties known as Dundori/Lanet Block 5/33 and 5/35;**
b. **An order of eviction to have the defendant(appellant) his servants and tenants forcefully removed from the properties known as Dundori/Lanet 5/33 (New Gakoe);**
c. **General damages for trespass**
d. **Costs of the suit.**

Filed simultaneously with the suit was the application dated 31/12/2010 seeking:-

1. **That pending the inter partes hearing of the application, the defendant be restrained by way of temporary injunction from entering, occupying, or in any way interfering with the applicant's**
   (respondent's) enjoyment and possession of the properties Dundori/Lanet 5/33 and 5/35;
2. **That pending hearing and determination of the application the defendant (applicant) be ejected from the suit properties with the assistance of the court bailiffs;**
3. **Pending hearing of the suit, the defendant(appellant) be restrained from interfering with the applicants possession, enjoyment and use of the suit land;**
4. **That pending hearing of the suit, the defendant (application) be removed from the suit land.**

The respondent through its advocate Mr. Kibet appeared before Kagendo, Principal Magistrate, on 31/12/2010 and she granted prayers 2, 3 and 4 of the notice of motion pending hearing of the matters inter parties. On 20/1/2011, the defendant's (appellant) counsel sought more time to enable him file a replying affidavit which he was granted till 27/1/2011. On 27/1/2011, the (appellant's) counsel again sought more time, he was given till 12.45 p.m. to file a reply and when he did not file or appear, the court proceeded to grant all the orders sought in the application ex-parte.

Those are the orders against which the appellant appeals. The grounds upon which the appeal is preferred are as set out in the memorandum of appeal as follows:-

1. **That the learned magistrate erred in law and fact in granting such orders of eviction at an experte stage;**
2. **That the learned magistrate erred in law and fact by entertaining a suit she had no jurisdiction to entertain and proceeded to issue drastic orders therein;**
3. **That the learned magistrate erred in law and fact in case by failing to find that the respondent was not a registered proprietor nor had any registered interest in the parcels of land known as Ndundori/Lanet Block 5/33 and 5/35 hence cannot be granted with eviction order against occupants of the said parcels of land;**
4. **That the learned magistrate erred in law and fact by failing to find that transfer of the suit parcels of land had not taken place in favour of the respondent to warrant the grant of orders of eviction as against the appellant;**
5. **That the learned magistrate erred in law and fact in failing to grant the appellant a chance to be heard on the application and proceeding to issue the orders of 31st December 2010 ex-parte;**
6. **That the learned magistrate erred in law and fact by failing to observe that the orders sought by the respondent were such drastic orders the grant of which had the effect of dispensing away with rather than preserving the suit property;**
7. **That the learned magistrate in granting the orders of the 31st December 2010, acted against the principle of natural justice equity and fairness**
8. **All in all, the learned magistrate misdirected himself on matters of both law and facts to occasion a miscarriage of justice against the appellant;**
9. **The subordinates' court decision was manifestly unfair and prejudice to the appellants.**

The above issues can be condensed into the following:-

Whether the court had:-

1. **Jurisdiction to grant the orders appealed against;**
2. **Whether the orders sought in the application dated 31/12/2010 could be granted at ex parte;**
3. **Whether the decision was unfair and prejudicial;**
4. **Whether the appeal has been overtaken by events;**

Whether the magistrate had the jurisdiction to deal with this matter: The appellant argued that the suit land which was 10 acres in total had a school on it and a residential house and was worth over Kshs.100

million; that Plot 5/33 was sold for Kshs.2,850,000/- while Plot 5/35 was sold for Kshs.10,350,000/-. In reply, Mr. Kibet argued that the question of jurisdiction should be challenged at first instance and cannot be heard to be challenged when the matter is concluded. He relied on the decision of the Court of Appeal in **Owners of Motor Vessel 'Lillian' v Caltex Oil Kenya Ltd (1989) KLR,** where J Nyarangi delivered himself as follows:-

> **"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity…. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined."**

When counsel for the respondent approached the trial court under certificate of urgency, the appellant was not present. The orders were granted ex parte and there was no way that the appellant could raise the issue of jurisdiction. The matter then came up on 20/1/2011 but it was adjourned because the appellant's counsel was not ready to proceed. It was listed for hearing inter parties on 27/1/2011 when again, the appellant's counsel was not ready to proceed for reasons that the appellant had not been found to swear an affidavit. It is on that date that the appellant's counsel filed a notice of preliminary objection on the question of jurisdiction. The notice of preliminary objection is on the file. There is no evidence that when the court considered the application 27/1/2011 at 12:45 p.m. that that notice of preliminary objection was brought to the court's attention or that the objection had been filed by then.

The preliminary objection was to the effect that the court lacked pecuniary jurisdiction in the matter as the land in question was worth over Kshs.100,000,000/-. Indeed the properties were sold for a total of over Kshs.12.5 million. Hon. Kagendo was a Principal Magistrate when she gave the ex-parte orders and therefore did not have jurisdiction to hear the matter whose worth was over 10 million. The pecuniary jurisdiction of a Principal Magistrate then was Kshs.5 million. Before a court embarks on determining any matter, it should be satisfied that it is clothed with the necessary jurisdiction. If for some reason, whether by error or otherwise, the court does not consider the issue of jurisdiction and proceeds with the matter as happened in this case, it was upto the appellant to raise it at the earliest opportunity. The earliest opportunity arose when the matter came up for inter partes hearing but it was never raised. There is, however, no evidence that though a preliminary objection was filed, it was brought to the attention of the court because the appellant's counsel was not present in court on 27/1/2011 at 12.45 p.m. when the orders of 31/11/2010 were confirmed.

On 31/12/2010, when the respondent's counsel appeared before the trial magistrate under certificate of urgency, the court in essence granted an evidction order before hearing the other side. In effect it was a mandatory and final order which should only be issued in the clearest of cases. An eviction is so drastic an order that the trial court should have treaded with utmost care in granting it. In my view, the order was very unfair and prejudicial to the appellant. The appellant who had counsel then did not, however, act diligently because an ex-parte judgment was entered against the appellant on 8/2/2011 for failure to file a statement of defence. The case then proceeded to formal proof on 3/3/2011 and judgment rendered in favour of the respondent on 4/4/2011. The court found that the appellant's occupation of the suit premises from 23/11/2010 after the auction amounted to trespass and awarded damages of Kshs.300,000/- to the respondent. That final judgment has so far not been challenged. Having failed to challenge or raise the issue of jurisdiction then, the appellant is estopped from raising it so late in the day when the horse has already bolted.

This brings me to the question of whether the appeal is overtaken by events. I do agree with the respondent that these proceedings are an exercise in futility because, firstly, the appellant did not challenge the exercise of statutory power of sale by HFCK when it sold the appellant's property by public auction on 23/11/2010. The appellant did not even allege that the process by which the land was sold was irregular. The property has procedurally and lawfully passed to a 3rd party as evidenced by the title deeds exhibited by the appellant at 153-156 of the record of appeal. The titles were issued to the respondents, Nexus Strategy Ltd on 17/2/2011. If the auction was irregular **Section 77(3)** of the **Registered Land Act** provided a remedy to the appellant, that is in terms of damages. In this case, this appeal was filed on

13/1/2011. There were no orders staying the transfer of the properties into the names of the respondent and the respondents were duly registered as the purchasers. As held in the case of **Marco Munuve v Official Receiver & Interim Liquidator Rural Urban CA 164/2002**, since the land was registered in the names of the respondents, the appellant's equity of redemption had been extinguished and all that he could possibly pursue is damages in terms of **Section 77(3) & (4)** of the **Registered Land Act** which provide as follows:-

> **"77(3) A transfer by a charge in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power;**
>
> **(4) Upon registration of the transfer, the interest of the chargor as described therein shall pass to and vest in the transferee freed and discharged from all liability on account of the charge, or on account of any other encumbrance to which the charge has priority (other than a lease, easement or profit to which the charge has consented in writing.)"**

It follows that even if the appeal were to succeed and the court set aside the court's order of 31/12/2010, other processes and subsequent orders that were made overtook the order of 31/12/2010. The subsequent orders are not subject to challenge in this appeal and hence the appeal is overtaken by events.

For all the reasons given in this judgment, I find that the appeal is not merited, it is dismissed with each party bearing its own costs.

DARTED and DELIVERED this 28th day of February, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Samuel Njiraini Ngabia in person - the appellant

Ms Linda holding brief for Mr. Njuguna for the respondent

Kennedy – Court Assistant