



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL 40 OF 2005

CHARLES NJONJO GATHUNJAAPPELLANT

VERSUS

SAMUEL GICHAU THUKU

SIMON GITAHE KANYUGE..... RESPONDENTS

(Appeal from original Judgement and Orders of the Chief Magistrate's Court at Nyeri in Civil Case No. 646 of 2002 dated 4th August 2005 by E. Juma Osoro (Mrs) – SRM)

J U D G M E N T

By a Chamber Summons Application dated 23rd May 2005 and filed by the respondents herein in the Chief Magistrate's Court at Nyeri, the Respondents sought that the attachment of hand parcel No. **Othaya/Kiandemi/1020** be raised. The application was premised on the grounds that the respondents had purchased the suit premises and taken full possession of their various portions and extensively developed the same. That the Respondents had filed High Court civil Case Number 59 of 2001 seeking to compel the defendant therein, **James Gichuru King'ori** (the vendor) to transfer the suit premises to the Respondents. That the respondents had already obtained interlocutory judgment in the aforesaid suit, accordingly interest in the suit premiums had already passed on to the Respondents.

The application was opposed by the appellant on the grounds that it was misconceived and incompetent. That the Respondents did not have any legal or equitable interests in the property as there was no final judgment and decree in Nyeri HCCC No. 59 of 2001 in their favour. That the purported sale of the suit premises was a nullity for want of consent from the relevant land control board. That the appellant's claim vested first by the attachment of the suit premises and he who is first in equity is stronger in law as priorities rank in the order of their creation. Finally the appellant contended that the objection proceedings were otherwise malafides.

Mrs. Osoro, Senior Resident Magistrate having considered and evaluated the arguments that were advanced in favour of and against the application returned a verdict in favour of the Respondent. She held that the application dated 23rd May 2005 had merit and proceeded to allow the same. It is this order that has triggered this appeal.

Through **Messrs Wahome Gikonyo & Co. Advocates**, the appellant filed the instant appeal setting out

6 grounds of appeal in the memorandum of appeal to wit;

- 1. The learned Senior Resident Magistrate erred in law and fact in holding that the Respondents had any legal or equitable interest in L.R. Number Othaya/ Kiangemi/1020 capable sustaining an on an objection merely because the respondents had obtained an interlocutory judgment against the registered owner vide Nyeri HCCC Number 59 of 2001. A miscarriage of justice was thereby occasioned.**
- 2. The learned trial Magistrate erred in law and fact in treating an interlocutory judgment as a final judgment of a High Court. A miscarriage of justice was thereby occasioned.**
- 3. In so far as the sale agreement between the Respondents and the registered owner to L.R. Number Othaya/Kiandemi/1020 had not been blessed with the mandatory land Control Board consent, the learned trial magistrate erred in law and fact in not finding and holding that, since the same are null and void ab initio, the same cannot form the basis of any legal or equitable interest to sustain an objection, the interlocutory judgment in Nyeri HCCC number 59 of 2001 notwithstanding. A miscarriage of justice was thereby occasioned.**
- 4. In so far as an order of attachment had been issued in favour of the Appellant against L.R. Number Othaya/Kiandemi/1020, the learned Senior Resident Magistrate erred in law and fact in not holding that his interest had a priority over the interest of the Respondents in the same. A miscarriage of justice was thereby occasioned.**
- 5. The learned Senior Resident Magistrate erred in law in not holding and finding that an interlocutory judgment is not a final judgment and is subject to formal proof and one of the things the Respondents must proof in Nyeri HCCC Number 59 of 2001 is that they obtained a land Control Board consent for their agreements within six (6) months from the date of execution and in the absence of such proof no final judgment can be entered in their favour. A miscarriage of justice was thereby occasioned.**
- 6. The learned Senior Resident Magistrate's ruling is not supported by the Law. A miscarriage of justice was thereby occasioned.**

When the appeal came up for hearing before me, the appellant was represented by **Mr. Wahome**, learned counsel whereas the respondents were represented by **Mr. Gori**, learned counsel as well. It was agreed among counsel that the appeal be argued by way of written submissions. Subsequent thereto, counsel filed their respective written submissions which I have carefully read and considered.

In his written submissions, the appellant confined himself to one issue only and which was whether the agreement for sale of land which is not blessed with the mandatory land control board consent as required by the land control Act, can form the basis of objection proceedings under Order XXI rule 53 of the Civil Procedure rules merely because an interlocutory judgment has been obtained on the basis of such an agreement. It was his contention that section 6(1) of the land control Act as read together with section 8 thereof provides that an agreement for the sale of land is void for all purposes if the requisite land control board consent is not obtained within six (6) months of the making of the agreement. That there was no evidence that such consent was obtained with regard to the transaction. Accordingly the transaction became void for all purposes. The respondents could not therefore be said to have any legal or equitable interest in the attached suit premises as envisaged by order XXI rule 53 of the Civil Procedure Rules. For this submission counsel relied on the case of **Kahia v/s Nganga (2004) 1 E.A. 75**.

The Respondents on the other hand countered all the grounds of appeal raised by the appellant. However since the appellant chose to argue only one issue in this appeal, it is not necessary to consider the respondents written submissions on the other grounds of appeal. On the issue of the consent of the land control board, it is the contention of the Respondents that the same was not necessary as the suit premises were not agricultural land as they were situated within Othaya township and thus exempted from the requirement for the land control board consent in terms of section 2 of the land control Act. As for the

appellant's contention that the learned magistrate had erred in holding that the Respondents had legal or equitable interest in the suit premises capable of sustaining an objection merely because the Respondents had obtained an interlocutory judgment against the registered owner vide Nyeri HCCC No. 59 of 2001, the respondents' answer was that, the High Court had since heard the case by way of formal proof and final judgment given. The respondents in support of this submission tendered in the written submissions a copy of the decree in respect of HCCC No. 59 of 2001. With that decree it is clear that the respondents have a legal and or equitable interest in the suit premises.

It is trite law that whoever alleges a fact must prove it. The appellant claims that the suit premises being agricultural land was subject to the land control Act. That is to say that any transaction involving the suit premises such as sale and transfer, consent from the relevant land control board was absolutely necessary to such transaction. The appellant offered no prove of that allegation. In his muted attempt to prove the allegation, the appellant reverted to a clause in the sale agreement dated 24th October 2006 which talked of the parties thereto seeking and obtaining the consent of the land control board. I do not think that this clause in the sale agreement was sufficient proof that the transaction was subject to the Land Control Act. The appellant should have done a little bit more to prove his allegation considering further that the respondents maintained that the suit premises being situate within Othaya Municipality, they were not agricultural land and therefore not subject to the provisions of the land control Act.

Yes under Order XXI Rule 53 of the Civil Procedure Rules a person claiming to be entitled to have a legal equitable or interest in the whole or part of any property attached in execution of a decree may give Notice of objection to this attachment of such property. It is the argument of the appellant that merely because the respondents had obtained, an interlocutory judgment against the registered owner of the suit premises vide HCCC 59 of 2001 as at the time of the objection proceedings, that alone did not confer on the respondents' legal interest in the suit premises. The respondents on the other hand maintain that the learned magistrate was right to hold that the Respondents herein had legal interest in the suit premises on that basis.

I think that these submissions have since been overtaken by events. When this appeal was pending hearing the Respondents proceeded to prosecute HCCC No. 59 of 2001 to its conclusion. A decree has since been issued. The terms of the decree are:

“1. That the Defendant do cause the subdivision and transfer of land parcel number Othaya/Kiandemi/1020 to the Plaintiffs and in default the executive officer of the court do sign the necessary documents to enable the transfer.

2. That costs of transferring land be borne by the Plaintiff.

3. That each party to bear its own costs.”

It is clear from the contents of the decree aforesaid that the court has vested into the respondents the legal interest in the suit premises. It would therefore be superfluous for the court to revisit the issue by allowing this appeal. Indeed this court in so doing will be acting in vain. Be that as it may, I still think that the learned magistrate was right in holding that the Respondents had legal interest in the suit premises on the basis of the interlocutory judgment obtained by the Respondents against the registered owner of the suit premises. Interlocutory judgment is a judgment of the court on an issue. It does have the effect of conferring rights and interest. Accordingly in the circumstances of this case it had the effect of conferring legal interest in the suit premises to the Respondents partially pending formal proof.

The ruling of the learned magistrate in my view cannot be faulted. It was premised on sound appreciation of principles of law applicable. It is on this basis that I now proceed to dismiss this appeal with costs to the Respondents.

Dated and delivered at Nyeri this 31st day of January 2008

M. S. A. MAKHANDIA

JUDGE