



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT KAJIADO**

**KAJIADO CIVIL APPEAL NO. 10 OF 2018**

**LOISE WARIGIA NJOROGE.....APPELLANT**

**AND**

**STANLEY MANYARA AND NANCY MANYARA.....1<sup>ST</sup> RESPONDENT**

**PIUS WARUIRI MUKURIA.....2<sup>ND</sup> RESPONDENT**

**E. GITAU NG'ANG'A T/A TREND AUCTIONS LIMITED.....3<sup>RD</sup> RESPONDENT**

**NTEMI HOLDINGS.....4<sup>TH</sup> RESPONDENT**

**GIDEON K. MEENYE.....5<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

**(Being an Appeal from the Ruling and Order of Hon. E.A. Mbicha delivered on 23<sup>rd</sup> May, 2014 in Kajiado SRMCC No. 351 of 2006)**

By a Memorandum of Appeal dated 10<sup>th</sup> March, 2015 the Appellant appealed against the whole of the Ruling delivered by Hon. E. A Mbicha, based at Chief Magistrate's Court at Kajiado on 23<sup>rd</sup> May, 2014. The genesis of this appeal is the Ruling of the Resident Magistrate Hon. E.A. Mbicha in Kajiado SRMCC No. 351 of 2006 where he ruled in favor of the 2<sup>nd</sup> Defendant/ 2<sup>nd</sup> Respondent by allowing his application dated 8<sup>th</sup> of October, 2013 in terms of Prayer 2& 3, to wit:-

1. THAT the orders issued herein on the 28<sup>th</sup> day of July, 2011 be and are hereby reviewed and set aside.
2. THAT an order of cancellation of all the entries / transactions made in the register with respect to the properties known as Kajiado/Ol Kasasi/ 1011 and 1012 (subsequent to the issuance and registration of the orders herein dated 28<sup>th</sup> July, 2011) be and is hereby issued.
3. The 2<sup>nd</sup> Defendant/ Applicant shall have the cost of the Application.

The Appellant being dissatisfied by the whole Ruling filed an appeal at the Environment and Land Court at Machakos on 11<sup>th</sup> March, 2015 which was later transferred to this Court. The Memorandum of Appeal contained the following grounds;

1. THAT the Learned Magistrate erred in law in making the order dated 23<sup>rd</sup> May, 2014 whose effect was to affect the rights of parties who were the registered owners of the suit properties known as Kajiado/ Ole Kasai/ 1011 and Kajiado / Ole Kasai 1012 who had not been enjoined in the suit.
2. THAT the Learned Magistrate erred in law in following the prosecution of the 2<sup>nd</sup> Respondent's application, Notice of Motion dated 8<sup>th</sup> October, 2014 and making the order dated 23<sup>rd</sup> May, 2014 without giving an opportunity to the affected parties their constitutional right to be heard.
3. THAT the Learned Magistrate erred in law in making the order dated 23<sup>rd</sup> May, 2014 without giving an opportunity to the affected parties their right to be heard whose effect was to affect the rights of parties who had not been enjoined in the suit but who

ought to have first been enjoined before hearing of the 2<sup>nd</sup> Respondent's application dated 8<sup>th</sup> October, 2014.

4. THAT the Learned Magistrate erred in law in allowing a review of the orders sought on the 28<sup>th</sup> July 2011, by the Appellant since there were no sufficient grounds to pray for an order of review.

5. THAT the Learned Magistrate erred in law in allowing the 2<sup>nd</sup> Respondent's application, Notice of Motion dated 8<sup>th</sup> October, 2013, which sought for review of the orders dated 28<sup>th</sup> July, 2011 on the basis that the Notice of Motion dated 20<sup>th</sup> July, 2011.

6. THAT the Learned Magistrate erred in law for allowing the appellant to review of the order made in on the 28<sup>th</sup> July 2011 since the appellant ought to have applied for a re-hearing.

7. THAT the Learned Magistrate had no jurisdiction to make the order dated 23<sup>rd</sup> May, 2014 as it involved land ownership rights of parties who had not participated in court proceedings taken in the subordinate court.

8. THAT the Learned Magistrate failed to consider the overall evidence of the law applicable in determining the 2<sup>nd</sup> Respondent's Notice of Motion dated 8<sup>th</sup> October, 2014.

9. THAT the Learned Magistrate erred in law by allowing the application dated 8<sup>th</sup> October 2013 without cross examination of the process server.

The Appellant prays that this appeal be allowed with costs and the order of 23<sup>rd</sup> May, 2014 made in Kajiado SRMCC No. 351 of 2006 by the Honourable learned Principal Magistrate E.A Mbicha be set aside forthwith.

The 1<sup>st</sup> , 3<sup>rd</sup> , 4<sup>th</sup> and 5<sup>th</sup> Respondents failed to file their submissions. The Appellant and 2<sup>nd</sup> Respondent filed their submissions to canvass the instant Appeal.

#### **Appellant's Submissions**

The Appellant submits that the Orders granted by the Magistrate were wrongly issued since there was non joinder of parties. Further, the orders sought would affect the rights of the third parties who are not enjoined herein. She relied on Article 50 of the Constitution and the case of **Benson Mwangi Wangai V Ibrahim Ndwiga & Another (2015) eKLR** to buttress her averments. She insists the Learned Magistrate erred in allowing prayers for review and referred to Order 45 Rule 1 of the Civil Procedure Rules. Further, that the Applicant never met the grounds set for review and the application for setting aside was filed too late in the day. She reiterates that the Learned Magistrate did not have jurisdiction to grant the said orders. Further, that if there was allegation or doubt on service, then the process server should have been put on the witness box for cross examination. To support her arguments, she relied on the following decisions: **Stephen Oddiaga t/a Stephen Oddiaga & Co. Advocates V Christopher Happe (2014) eKLR** and **Amayi Okumu Kasiaka & 2 others V Moses Okware Opari & Another ( 2013) eKLR**.

#### **2<sup>nd</sup> Respondent's submissions**

The 2<sup>nd</sup> Respondent submits that the main thrust of the grounds of the appeal is that the Lower court granted the Order without hearing parties that had not been enjoined in the proceedings; that it had no jurisdiction to entertain the application and that the lower court allowed the application without cross examining the process server.

The 2<sup>nd</sup> Respondent relied on the case of **Peters vs Sunday Post Limited [1985] EA 424** to buttress the argument that this being an appeal, the court is under duty to re-evaluate and assess the evidence and make its own conclusion.

The 2<sup>nd</sup> Respondent while concurring with the Lower court's decision, contends that the Appellant has no evidence to controvert the averment before the court and that everything deponed therein was true. He argues that the Appellant had every opportunity to provide evidence to confirm service of the application dated 20<sup>th</sup> July, 2011 but declined to present it either through her advocates or the process server.

**On the issue whether the lower court had jurisdiction to entertain the application dated 8<sup>th</sup> October, 2013**, the 2<sup>nd</sup> Respondent submits that it had jurisdiction to entertain the said application. He further submits that so long as the Lower court has pecuniary jurisdiction to handle the matter then it can hear the land matter. It is his argument that the issue of lack jurisdiction was never raised in the lower court during the hearing of the said application thus late in the day.

**On whether the 2<sup>nd</sup> Respondent ought to have fixed the application dated 20<sup>th</sup> July, 2011 for re-hearing**, he submits that this has no legal basis because the said application was heard and orders sought granted. The Lower court was thus rendered *functus officio* as it relates to the said application. He argues that after the grant of the orders in the said application, the Appellant registered the orders against the suit property and transferred it to third parties. Thus the only recourse was to set aside the said orders granted on 28<sup>th</sup> July, 2011.

**On whether the lower court erred by allowing the application without cross- examining the process server**, he submits that it has no basis and further the Appellant was granted an opportunity to present the process server but instead filed a Notice of Preliminary Objection and failed to call him.

**On whether the appeal will serve any useful purpose in light of certain events that took place after the delivery of the ruling on 23<sup>rd</sup> May, 2014**, he submits that by the time the appeal was filed on 31<sup>st</sup> October, 2014, the 2<sup>nd</sup> Respondent had already extracted orders issued by the Lower Court and had them registered in the Lands Office at Ngong; a fact brought to the attention of the Machakos High Court vide a replying affidavit which annexed the Certificate of Official Search for the properties known as Kajiado / Olkasasi/1011 & 1012.

He argues that by registering the order, the 2<sup>nd</sup> Respondent returned the status quo that was obtained prior to allowing Appellant's application dated 20<sup>th</sup> July, 2011. It is thus his view that the only viable option is for the lower court matter to be fixed for hearing and parties granted an opportunity to ventilate their respective claims.

### **Analysis and Determination**

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal, Supplementary Record of Appeal and parties' submissions, I have summarized the following issues for determination:

- Whether the Learned Magistrate erred in law in making the order dated the 23<sup>rd</sup> May, 2014.
- Whether the Learned Magistrate had jurisdiction to make the order dated 23<sup>rd</sup> May, 2014.
- Whether the Appeal is merited.
- Who should bear the costs of the Appeal?

I will proceed to deal with the aforementioned listed issues jointly. Before I proceed to decide whether the Learned Magistrate erred or not, I wish to provide a background of the Appeal herein. The impugned decision sought to be appealed against is dated the 23<sup>rd</sup> May, 2014 which arose from an application seeking for the review of the orders that had been granted on the 28<sup>th</sup> July 2011 by the trial Magistrate; wherein a Court Order which had initially been registered against the suit land was lifted culminating in the 2<sup>nd</sup> Interested Party subdividing including disposing of the same while the lower court matter was still pending. The 1<sup>st</sup> Defendant therein who is the 2<sup>nd</sup> Respondent sought for the review of the said order and the trial Magistrate proceeded to review and set aside the orders issued on 28<sup>th</sup> July 2011. Further, the trial Magistrate directed that entries that had been done to the register in respect to the suit land be cancelled. I note in the lower court the dispute therein revolved around land parcel numbers Kajiado/ Ole Kasasi/ 98 and 255 respectively. The Plaintiff therein sought for orders of injunction against the Defendants in respect to land parcel numbers Kajiado/ Ole Kasasi/ 98 and 255. During the pendency of the suit, the Court had granted orders against Land Parcel Number Kajiado/ Ole Kasasi/ 1011 and 1012 which were resultant subdivisions of Kajiado/ Ole Kasasi/ 255. I note the Plaintiff in the lower court disposed of the resultant subdivisions of land parcel number Kajiado/ Ole Kasasi/ 255 to the 2<sup>nd</sup> Interested Party/ Appellant herein on 10<sup>th</sup> January, 2008 during the pendency of the lower court suit. The 2<sup>nd</sup> Interested Party/ Appellant proceeded to obtain ex parte orders on 28<sup>th</sup> July, 2011 for the removal of Court Order registered against the two parcels of land after which she disposed of it to third parties. The 2<sup>nd</sup> Respondent on realizing that adverse orders had been granted against it on 28<sup>th</sup> July, 2011 proceeded to seek for review of the said orders which the lower court allowed and is the subject of this Appeal. The Appellant in the Memorandum of Appeal has contended that the Magistrate erred in granting orders for review since he did not include the third parties who now owned the suit land as they were not enjoined in the suit; there were no orders to review and the process server was not cross examined.

I note the Appellant in her initial application which was subject to review claimed to have served the 2<sup>nd</sup> Respondent but on the court directing her to furnish the process server for purposes of cross examination, she failed to do so. Further, the Appellant's lawyer failed to attend court twice. It is as a result of the said proceedings that led the court to review the Orders granted on 28<sup>th</sup> July, 2011 to the Appellant wherein the court set aside the said orders which had enabled the Appellant transfer the suit land to third parties. I wish to refer to various legal provisions governing review and or setting aside of Court Orders.

Section 80 of the Civil Procedure Act provides: -**"Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."**

Further, Order 45, rule 1 (1) of the Civil Procedure Rules stipulates thus: **' Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.'**

From a reading of the said legal provisions I have cited, it is evident that a party can only seek for review and or setting aside of an order from the Court that passed the previous order. In the circumstance, I find that the Learned Magistrate indeed had jurisdiction to handle the application for review. Further, from the proceedings in the lower court, since the Appellant never proved service upon the 2<sup>nd</sup> Respondent, and proceeded to obtain ex parte orders, there was indeed an error apparent on the face of record. Based on the facts before me, I find that the Learned Magistrate did not err in law and fact by reviewing the orders the Appellant had obtained exparte. I further find that the Learned Magistrate did not err in law and in fact by setting aside the said orders even though the third parties who purchased the resultant subdivisions had not been enjoined in the suit. I note despite the fact that the ownership of the suit lands had not been determined, the Appellant proceeded to have the court order removed and then hastily transferred the land to the third parties. I find that the Appellant's actions were contrary to the doctrine of lis pendens, which position was ably articulated in the case of *Mawji vs US International University & another [1976] KLR 185*, where Madan, J.A. stated thus:- **"The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of**

**public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”**

See further the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] Eklr** where the Court while dealing with issues touching on the doctrine of *lis pendens*, held that the same is applicable pursuant to provisions of section 107 of the Land Registration Act. It is further trite that he who comes to equity must come with clean hands, the Appellant in the lower court attempted to steal a march against the 2<sup>nd</sup> Respondent, by obtaining ex parte orders and thereafter transferring the suit land to third parties. She cannot come to court and cry foul when the said orders were set aside as they were obtained in error. I opine that the said third parties who purchased suit lands from the Appellant have a remedy against her but can also opt to be enjoined in the lower court suit.

It is against the foregoing that I proceed to uphold the Ruling delivered by Hon. E. A Mbicha on 23<sup>rd</sup> May, 2014 in Kajiado SRMCC No. 351 of 2006.

The upshot is that I find this Appeal unmerited and will proceed to dismiss it with costs to the 2<sup>nd</sup> Respondent.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 8<sup>TH</sup> DAY OF MARCH, 2021**

**CHRISTINE OCHIENG**

**JUDGE**