



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 52 OF 2017

MARGARET WITHIRA NJARI.....APPELLANT

VERSUS

JOHN NJARI KAGUNYI.....RESPONDENT

AND

LUCY WANJIRU KINIARU.....1ST INTERESTED PARTY

STEPHEN GITAU KINIARU.....2ND INTERESTED PARTY

JUDGEMENT

1. Being dissatisfied with the ruling delivered by the Githunguri Resident Magistrate, Mr. Wambo on 29/10/2014, the Appellant brought this appeal. In the Memorandum of Appeal dated 5/11/2014, the Appellant faulted the Learned Magistrate for treating an application for rectification of a decree as a substantive matter which needed to be referred back to the Tribunal or the High Court. She also faulted the Learned Magistrate for finding that she had no jurisdiction to deal with the issue yet it was the court that issued the decree. Further, that the Learned Magistrate erred by finding that the decree had been overtaken by events and yet the subject matter of the proceedings was still available.

2. The background to this case is that an award was made on 7/12/2009 in Land Dispute Number 18 of 1990 to the effect that the District Land Registrar was to issue a new title deed in the joint names of John Njari Kagunyi and Margaret Waithira Njari over Githunguri/1634 as trustees for their children. The award was forwarded to the court vide the letter dated 7/12/2009 and an application was filed in June 2010 for the court to adopt that award. The court adopted the award on 18/3/2010 and issued a decree on 23/3/2010 vide which the Executive Officer of the court was to execute all documents, subdivision and transfer in respect of Githunguri/Githunguri/1634. The decree basically gave effect to the tribunal's award.

3. The Appellant filed the application dated 6/11/2013 before the Magistrates' Court seeking rectification of the decree by amending the description of the land to read Githunguri/Githunguri/3576, 3577, 3578 and 3579. The Application also sought to have the District Land Registrar issue a new title over these parcels of land in the joint names of Margaret Waithira Njari and John Njari Kagunyi. Another application dated 13/6/2014 was filed seeking joinder of two interested parties to that suit.

4. In his ruling dated 29/10/2014, the Learned Magistrate dismissed the application dated 6/11/2013 and found that its role was limited to adopting the award and any aggrieved party had remedies elsewhere before the Provincial Land Disputes Tribunal or the High Court for judicial review. The court went further to state that since the suit land had been subdivided and new titles issued, it could not go into how the subdivisions were undertaken or who owned the said pieces of land. The court further noted that there was the issue of sanctity of title which was the preserve of the High Court.

5. The court allowed the Interested Parties to join the appeal. The 1st Interested Party swore the replying affidavit on 3/6/2020 opposing the appeal. She stated that she was the widow of Simon Kiniaru Gitau and that the 2nd Interested Party was her son. She swore the affidavit as the administrator of the estate of the late Simon Kiniaru Gitau. She deposed that Githunguri/Githunguri/3576 and 3577 were registered in the name of her late husband and her name and that she only got to learn of this appeal after her husband died. She averred that they purchased the two plots with her husband on 1/3/2013 and that they had been in possession since then. She claimed that they acquired the two parcels of land for value without any notice of any third party interest and urged that their title was indefeasible. She added that her late husband, Simon Kiniaru Gitau was buried in one of the two parcels of land which they had reserved as a family burial site and which makes the land valuable to the family. She sought to have the restrictions registered against the two parcels of land removed while indicating that they wished to commence the succession process for the estate of her late husband and that it would be important for the restrictions registered against the land to be removed. She maintained that the appeal did not relate to the parcels of land they held.

6. Parties filed submissions which the court considered. The appeal was transferred to the Environment and Land Court in November 2017. The Appellant crafted several issues for determination being whether the trial court had the jurisdiction to grant the orders sought in the application dated 6/11/2013 and whether rectification of the decree was to be treated as a substantive matter to be referred to the initial tribunal or the High Court. The third issue was whether the decree had been overtaken by events and, whether the ruling of the magistrate's court should be set aside.
7. The Appellant relied on the case of **Teresiah Chelagat Tuwei and another v Albert Saina [2002] eKLR** in which the court found that the proper procedure to follow should have been an application for review. In that case an application for review of the decree was made in a matter in which it was discovered that the disputed land had been subdivided into two parcels and the registration numbers changed.
8. The Appellant submitted that an award of a tribunal becomes a judgement once it is adopted by a magistrate's court and any party can apply for a review or amendment for decree. She clarified that the application before the Learned Magistrate did not seek to amend the decision of the tribunal but sought to amend the decree. The Appellant pointed out that she could not execute the decree because the Respondent removed the caution which had been registered against Githunguri/Githunguri/1634 and caused the land to be subdivided into four parcels of land. The Appellant pointed out that the Respondent never lodged an appeal against the judgement of the trial court and that he withdrew the judicial review case which he had filed in the High Court. The Appellant added that the law as it stands provides that only the court that granted the orders can review or vary those orders. She maintained that the trial court had the discretion and jurisdiction to amend the decree to reflect the correct description of the parcel of land. The Appellant maintained that the decree had not been overtaken by events and that it still stood.
9. The Respondent submitted that at the time the Appellant made her application for review, Githunguri/Githunguri/1634 had ceased to exist and on that basis the Learned Magistrate rightly dismissed the application. He maintained that since the land had been subdivided a substantive suit was required for issues to be properly addressed since some of the title deeds were registered in the names of third parties who were not parties to the suit. He urged that granting the orders sought would have been a violation of third party rights to property and deprivation of the right to a fair hearing both of which are protected under Articles 40 and 50 of the Constitution respectively. The Respondent supported the findings made by the Learned Magistrate.
10. The Respondent submitted that the Magistrate's court had powers to review the decree that it had adopted pursuant to the award given by the tribunal. However, he maintained that the court did not have powers to review the orders in a manner that was substantially different from the earlier orders. He pointed out that the decision in **Teresiah Chelagat Tuwei and another** was distinguishable from this case because there were no rights of third parties involved in that case. He maintained that it would be unfair to give an order adverse to third parties who had bought part of the suit land as that would go against the rules of natural justice. He faulted the Appellant for the delay of three years in seeking to review the decree and stated that that was when the land was transferred to the third parties.
11. The Interested Parties submitted that Article 40 of the Constitution protected their right to own the two parcels of land as bona fide purchasers for value without notice of fraud. They relied on the sale agreement which indicated the purchase price and submitted that at the time they purchased the two parcels of land there were no encumbrances registered against the land. They submitted that the Appellant had not accused them of any fraud in acquiring the two parcels of land. They accused the Appellant of indolence and not being keen to pursue her interests in the land. They submitted that the court of equity has always refused to aid stale demands where a party has slept on his rights and acquiesced for a great length of time. They contended that what calls the court into action was conscience, good faith and reasonable diligence. They urged that guided by the Torrens Doctrine of Sanctity of Title, their title over Githunguri/Githunguri/3576 and 3577 were indefeasible. They urged to court to dismiss the appeal and to order the removal of the restrictions registered against the land to allow them to enjoy their land.
12. The Appellant filed supplementary submissions and relied on Sections 7 (2) of the repealed Land Disputes Tribunal Act, 1990 which provided that the court was to enter judgement in accordance with the decision of the tribunal pursuant to which a decree would issue which would be enforceable under the Civil Procedure Act. The Appellant relied on Section 34 (1) of the Civil Procedure Act on execution of decrees, which states that all questions arising between the parties relating to the execution or satisfaction of the decree will be determined by the court executing the decree and not by a separate suit. She submitted that the magistrates' court had a duty to adopt the award as its judgement, issue a decree and see to its enforcement. She maintained that she was right in invoking the court's power to enforce the decree. She emphasized that the decree dated 23/3/2010 had never been impeached or set aside and that it therefore remains in force and should be enforced as an order of the court.
13. The Appellant submitted that contrary to the terms of the decree, the Respondents illegally subdivided Githunguri/Githunguri/1634 into four portions and transferred parcel numbers Githunguri/Githunguri/3576 and 3577 to the Interested Parties in contempt of the court process and to frustrate the Appellants rightful claim to the suit land.
14. The Appellant submitted that the magistrates' court had the power to declare the subdivision of the suit land and the transfer of the two portions to be illegal and inconsistent with the decree which provided that the suit land was to be registered in the names of the Appellants and the Respondents. The Appellant relied on the decision in **Joseph Cheruyoit and 2 Others v Wilson Busienei and 19 Others [2018] eKLR** in which Ombwayo J. upheld the learned magistrate's decision where she had declared that the subdivision of the suit land was irregular and illegal for being inconsistent with the decree.
15. The Appellant explained that she had not been indolent rather that she had expended great effort in enforcing the decree. She stated that she filed an application requesting the Executive Officer to execute the documents for the transfer of Githunguri/Githunguri/1634 on 7/4/2010 when the Respondent refused to give effect to the orders given by the court under the decree. She added that she had registered a restriction against the suit land which the Respondent fraudulently caused the District Commissioner to lift under the guise of complying with court orders only for him to subdivide the Suit Property and transfer the subdivided portions to the interested parties. She argued that the Interested Parties' interest in the suit land was excluded from protection under Article 40 (6) of the Constitution.
16. She added that at the time the Interested Parties claim to have acquired the two portions of land in 2013, litigation between the Appellant and the Respondent was still pending in Githunguri Tribunal Case No. 17 of 2009 and the suit filed to enforce the award had not been

challenged or varied. She contended that the subdivision of the suit land and subsequent transfer by the Respondent was unlawful and contrary to the doctrine of *lis pendens*. She added that the Interested Parties' only recourse was to sue the Respondent for damages since the issue of ownership of the suit land was already settled by the tribunal's award which was adopted as the decree of the court. The Appellant relied on the case of **Nancy Nyawera & Another v Archer Dramond Morgan Limited; Chief Land Registrar and Another (Interested Parties) [2020] eKLR**.

17. The issue for determination is whether the court should allow the appeal. Looking at the record of appeal, the decree was issued at the Githunguri Magistrates Court on 23/3/2010 revoking the title over Githunguri/Githunguri/1634 and directing the District Land Registrar to issue a new title deed in the joint names of the Appellant and the Respondent. The Appellant filed the application dated 7/4/2010 seeking to have the Executive Officer of the court execute the documents to facilitate the transfer of Githunguri/Githunguri/1634 in line with the decree. The Respondent filed a Replying Affidavit before the Magistrates court in which he indicated that he had filed **ELC Judicial Review Application No. 25 of 2010** to challenge the decision of the Tribunal. It would seem that he later withdrew that suit and may not have served the court papers on the Appellant.

18. The Appellant does not seem to have followed through with the execution of the documents by the Executive Officer to enforce the tribunal's decree in 2010. According to the record of appeal, what followed next was the Appellant's application dated 6/11/2013 seeking rectification of the decree to change the land reference number from Githunguri/Githunguri/1634 to Githunguri/Githunguri/3576, 3577, 3578 and 3579.

19. The Respondent deponed in the Replying Affidavit in response to that application that he had reached an agreement with the Appellant to the effect that one acre would be registered in the names of their children as he remained with the other acre because he had a second wife with whom he had children. He claimed that he visited the District Commissioner's office with the Appellant to request the lifting of the restriction. He averred that the land was subdivided with the knowledge of the Appellant and that he had already sold part of the land to a third party.

20. In her Supplementary Affidavit filed in court on 19/3/2014, the Appellant denied that she approached the Respondent for an out of court settlement. She averred that she only received summons to appear before the DO in connection with a complaint lodged by her husband, the Respondent. She further denied agreeing to have the land subdivided and have one care registered in the name of the children while arguing that if indeed it were so, then after subdivision the land ought to have been registered in their joint names as trustees for their children and not transferred to strangers.

21. The averment by the 1st Interested Party that she purchased the two plots with her husband on 1/3/2013 and that they had been in possession since then was not controverted by the Appellant. Even the 1st Interested Party's assertion that her late husband was buried on the two suit land was not challenged by the Appellant. The Appellant does not seem to have honoured the summons from the District Commissioner which would have alerted her to the removal of the restriction that had been placed against the suit land. Delay defeats equity. The only recourse that the Appellant can get is with regard to the two portions of land since her husband transferred the other two parcels of land to the Interested Parties. Delay defeats equity. The Appellant should have moved with alacrity to secure the suit land before her husband disposed of portions of it.

22. The court allows the appeal to the extent that the ruling of the Learned Magistrate dated 29/10/2014 is set aside and in its place an order is made for the rectification of the decree issued 23/3/2010 by amending the description of the land from Githunguri/Githunguri/1634 to read Githunguri/Githunguri/ 3578 and Githunguri/Githunguri/ 3579. The District Land Registrar is directed to issue new title deeds over these two parcels of land in the joint names of Margaret Waithira Njari and John Njari Kagunyi in trust for their children.

23. The Appellant is awarded the costs of the appeal to be borne by the Respondent.

Delivered virtually at Nairobi this 3rd day of May 2021.

K. BOR

JUDGE

In the presence of: -

Ms. Christine Kamau for the Appellant

Mr. P. Obado holding brief for Mr. Mangera for the Respondent

Mr. Dennis Gwaro for the Interested Parties

Mr. V. Owuor- Court Assistant