REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC NO. 257 OF 2018

(FORMERLY NAKURU HCCA NO. 150 OF 2008)

JAMES NJOROGE WAINAINA.....APPELLANT

VERSUS

NYAKIO NJOROGE ….....RESPONDENT

(Being an appeal from the ruling and order of the Principal Magistrate's Court at Naivasha (Hon. N.N. Njagi,

Principal Magistrate) delivered on 15th July 2008 in Naivasha RMCC No. 337 of 1988

James Njoroge Wanaina vs Nyakio Njoroge)

JUDGMENT

1. The dispute between the parties herein has been pending in court since 9th November 1988 when the appellant filed his plaint at the then Resident Magistrate's Court, Naivasha. In the course of the litigation before the subordinate court, the respondent herein filed Notice of Motion dated 23rd October 2007, seeking the following orders:

> 1. *THAT this honourable court be pleased to set aside and/or vary the orders made ex-parte on the 22nd July, 2004 and 26/8/2004 in toto.*
>
> 2. *THAT this honourable court do order the rectification and/or cancellation of the register relating to title No: Nyandarua/Ndemi/4538 and 4539 and for the reinstatement of the original number thereof namely Nyandarua/Ndemi/1213 in the names of the applicant.*
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> 3. *THAT this Honourable court do order that the suit herein be heard on its merits as directed by the High court in Nairobi H.C.C.A No: 261 of 1993 vide its ruling delivered on the 24/10/2002.*
>
> 4. *THAT the costs of this application be borne by the respondent.*

2. Upon hearing the application, Hon. N.N. Njagi, Principal Magistrate, delivered a ruling on 15th July 2008 allowing the application with costs to the applicant. Being dissatisfied with the outcome, the appellant filed this appeal at the High Court in Nairobi through Memorandum of Appeal dated 14th August 2008. The appeal was transferred to Nakuru High Court that very year. Subsequently, the appellant filed an Amended Memorandum of Appeal on 24th June 2008. The matter remained in the High Court until 16th July 2018 when it was transferred to this court.

3. The following are the grounds of appeal as listed on the face of the Amended Memorandum of Appeal:

> 1. *That the learned Magistrate erred in allowing the application dated 23rd October 2007, and in not finding that the said application was bad in law and lacked merit.*
>
> 2. *That the learned Magistrate erred in holding that the service of the applications leading to the orders dated 22/7/2004 and 26/8/2004 was not proper, while the issue was not raised in the defendant's affidavits.*
>
> 3. *That learned Magistrate erred in allowing the prayer for rectification of the register to registered land, while judgment in favour of the plaintiff awarding him a portion of the land is still in force and has not been challenged.*

4. *The learned Magistrate erred as he misinterpreted and misapplied the order of the High Court in Nairobi High Court Civil Appeal No. 26 of 1993 between the parties to this appeal.*

5. *The learned Magistrate erred in ordering for the rectification and cancellation of title to registered land, while he had no jurisdiction to do so.*

6. *The learned Magistrate erred by in effect and without jurisdiction siting on appeal of and faulting the legal merits of and overturning the decision of a different magistrate, a court of con-current jurisdiction.*

7. *The learned Magistrate erred in law in setting aside orders which had already been effected and spent.*

8. *The learned Magistrate erred in varying previous orders of the court without specifying the nature of such variation.*

4. Based on those grounds, the appellant prayed that the court allows this appeal, sets aside and vacates the orders of the subordinate court made on 15th July 2008 and grants him costs of the appeal as well as of the proceedings before the subordinate court.

5. As is manifest, the matter has taken an agonisingly long period in court. It is unfortunate that a suit filed in the subordinate court in 1988 is still pending and further that this appeal which was filed in the year 2008 has taken so long in court. The record however shows that the parties, who are close relatives and therefore in a position to amicably resolve the suit pending before the subordinate court, are squarely to blame for the delay. The appellant only filed the record of appeal on 8th July 2011, after the court had ordered on 27th May 2011 that the appeal would stand dismissed if he did not file the record within 45 days. There then followed another lull of 8 years until 26th June 2019 when directions were taken that the appeal be canvassed through written submissions. Even then, the appellant did not file final submissions until 27th January 2021.

6. The appellant filed submissions dated 28th February, 2020 and further submissions dated 25th January, 2021. He argued that the learned magistrate erred in faulting the service of the application giving rise to the orders of 22nd July 2004 and 26th August 2004, yet the same was not denied by the respondents/defendant and that the subordinate court itself found that on 22nd July 2004 that service had been effected. He submitted that parties are bound by their pleadings and the court ought not to have based its decision on matters that are not pleaded or canvassed before it. That it was thus not open to the trial magistrate on his/her own motion to fault the service upon the respondent/defendant. That further, no explanation was given as to why the respondent/defendant failed to attend court or respond to the application in question leading to the *ex parte* orders of 22nd July 2004 and 26th August 2004. He placed reliance on **CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR** in which the case of **Shah vs Mbogo & Another [1967] EA 116** was cited. He added that setting aside of *ex parte* orders where a party duly served fails to attend court is a discretionary remedy, however the party desiring such exercise must lay before the court sufficient material on which the court may base its said exercise of discretion. That further, in the instant case no such basis for exercise of discretion was made and thus the subordinate court fell in error in setting the said *ex parte* orders and no lawful basis had been laid down for such setting aside.

7. It is argued by the appellant that the learned magistrate went ahead to fault the previous magistrate's evaluation or interpretation of earlier judgment of the high court in an earlier appeal arising from the same matter. He placed reliance on the case of **Stephen Mwaura Njuguna v Doughlas Kamau Ngotho & another [2012] eKLR**. It is argued further that the magistrate misapprehended the decision of the High Court in Appeal No. 261 of 1993. That the order by Hon. J. E. Ashioya, RM dated 26th April 1991 has never been challenged, appealed or set aside and the suit land was already transferred, title registered and issued to the appellant/plaintiff, thus the status quo should be left to prevail. He placed reliance on the case of **Kenneth Njeru Nyaga v Sammy Gichovi & other; Joseph Nyaga Muruabui (Interested Party) [2020] eKLR**. He stated that, the learned magistrate had no justification or jurisdiction to cancel or rectify register to the suit land based on fraud which was neither pleaded nor proven. They placed reliance on cases of **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR** where the court cited with approval the decision in **Kinyanjui Kamau vs George Kamau [2015] eKLR**. That further, the dispute herein has been in court since 1988 and the same should be brought to a close, he drew the court's attention to **Sections 1A** and **1B** of the **Civil Procedure Act** and the case of **William Koross (Legal personal representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others [2015] eKLR**. He urged the court to allow the appeal with costs in his favour.

8. The respondent on the other hand submitted that the magistrate properly applied the applicable general principles in setting aside *ex parte* orders and proceedings and also that there is no ground why this appellate court should interfere with the discretion of the trial court. She placed reliance on the case **Wachira Karani vs Bildad Wachira [2016] eKLR**. On the issue of whether the trial court sat on appeal upon a decision of concurrent jurisdiction, she submitted that by the time application was filed, the magistrate who issued the orders had presumably left the station and there was another resident magistrate presiding the same court, therefore the court was not sitting on appeal.

9. Regarding the issue of interpretation of the high court judgment, she submitted that the appellant had attempted to mislead the court in obtaining the order and the same was not brought to the attention of the trial court, therefore the court having been misled failed to consider the effect of the High Court judgment. On the issue of whether the learned magistrate had justification or jurisdiction to cancel or rectify register to the suit land, she submitted that the appellant was aware of the judgment of the High Court directing that the matter be heard on merit but chose to file an application to enforce non-existing orders. That the subdivision and subsequent registration of resultant titles was done fraudulently with the appellant being the main architect of the same. Lastly, on the issue of bringing litigation to an end, she submitted that instead of the appellant claiming his deposit as the law provides, he chose the appeal route which is long and fruitless as the same had no backing. She urged the court to dismiss this appeal and allow parties to go back to the trial court and proceed with the matter on merit as earlier ordered.

10. I have considered the appeal and the submissions. This is an appeal against an order made in exercise of discretion. The circumstances in which this court can interfere with the learned magistrate's exercise of discretion are well circumscribed. In **Mbogo and Another v Shah [1968] EA 93**, the Court of Appeal stated thus:

> ***We come now to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice***.

11. With those principles in mind, I consider grounds 1, 2, 4, 6, 7 and 8 together and lastly grounds 3 and 5 together.

12. Under grounds 1 and 2, the learned magistrate is faulted for allowing the application dated 23rd October 2007 and holding that service was not proper when service was not raised. A perusal of the record reveals that the issue of validity of service was raised at ground (f) of the application. Thus, the learned magistrate cannot be faulted for dealing with that issue. The learned magistrate came to the conclusion that there was no valid service prior to issuance of the orders of 22nd July 2004 and 26th August 2004. In such a situation, an order of setting aside issues *ex debito justitiae*.

13. The learned magistrate is also faulted for allowing the prayer for rectification of the register and that he had no jurisdiction to do so. The record herein reveals that the appellant filed an application dated 17th June, 2004 which resulted in an order dated 22nd July, 2004 which caused registration of the suit land in the appellant's name. It is noteworthy that prior to that there was a judgment delivered on 24th October, 2002 by D.K.S. Aganyanya J (as he then was) arising from another appeal by the appellant herein. The Judge ordered that the case be remitted back to Naivasha Law Court for hearing on merit.

14. It must be noted that in the application dated 17th June 2004, the appellant cited an award made by a panel of elders on 11th May 1990. Needless to state, the learned Judge had taken into account the said award as he remitted the case back to Naivasha Law Court for hearing on merit. Instead of setting the matter down for hearing on the merits, the appellant chose to obtain title through the order of 22nd July 2004, on the basis of the 11th May 1990 award which the Judge had considered as he ordered a trial. To the extent that title was obtained through an order of the subordinate court made upon an application, it follows that the subordinate court could set aside the said order on account of want of service with the result that it could also set aside the registration resulting from the order. In the circumstances, the learned magistrate cannot be faulted for ordering the rectification and cancellation of the title since in doing so, he returned the parties to the course the Judge had ordered: hearing of the suit on merit.

15. It has been argued that the judgment delivered by D.K.S. Aganyanya J remitted the matter for a hearing on the merits if the parties so wished. As has since been demonstrated by subsequent developments in terms of the orders of 22nd July 2004 and 26th August 2004 and even this appeal, it is necessary that the suit be heard and determined by the subordinate court on its merits.

16. The learned magistrate is also faulted for allegedly sitting on appeal against a decision of another magistrate of concurrent jurisdiction. It must be remembered that the magistrate was dealing with an application for setting aside of orders made in the same matter, albeit by another magistrate. The appellant has not shown that Hon. S.R Wewa who made orders that were sought be set aside was still available at the station to deal with the application for setting aside. Indeed, even if Hon. S.R Wewa was available, it does not change the fact that what was before the court was an application for setting aside.

17. In view of the foregoing, I have come to the conclusion that the appellant has not made a case for this court to interfere with the exercise of discretion by the learned magistrate.

18. In the result, I dismiss the appeal herein. From the material on record, it is apparent that the parties share close family ties. The respondent is the appellant's aunt. In the circumstances, I order that each party shall bear own costs.

19. Considering the age of the dispute, the parties to urgently set down the suit before the subordinate court for hearing and final disposal. In that regard, I order that the matter be mentioned before the subordinate court on 21st July 2021 for directions towards hearing of the suit.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 24TH DAY OF JUNE 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Waiganjo Mwangi holding brief for Ms Magana for the appellant

No appearance for the respondent

Court Assistants: B. Jelimo & J. Lotkomoi