



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 35 OF 2018

(Formerly MERU HCA 44 OF 2011)

GATUGI MUGIRAAPPELLANT

-VERSUS-

LAWRENCE MIRITI BAKARI.....1ST RESPONDENT

ONESMUS GITOBU M'NKANATA.....2ND RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This appeal consists of two consolidated appeals which were formerly known as **Meru HCCA NO. 130 of 2010 and Meru HCCA No. 44 of 2011**. The former appeal challenged the ruling and order of **Hon. Kiarie W. Kiarie (SPM)** dated 16th February, 2010 in **Meru CMCC No 714 of 1992** dismissing the Appellant's preliminary objection to the 1st Respondent's application dated 16th December, 2009. The latter appeal challenged the ruling and order of **Hon. Kiarie W. Kiarie (SPM)** dated 18th March, 2011 in the same case allowing the 1st Respondent's application dated 16th December, 2009.

2. The material on record indicates that the Appellant was once the registered owner of Title Nos. **Igoji/Kinoro/1324 and 1325 (the suit properties)**. It would appear, however, that the suit properties were sold by public auction in 1993 in execution of a decree of the court. The purchaser at the auction was **Lawrence Miriti Bakari**, the 1st Respondent in the appeal.

3. The material on record indicates that the Appellant challenged the sale of the suit properties by seeking to set aside the sale before the trial Court but his bid was unsuccessful. He appealed to the High Court in **Meru High Court Civil Appeal No. 21 of 2006** but his appeal was dismissed on 7th November, 2008. The Appellant then sought leave to appeal out of time to the Court of Appeal but his application was dismissed by **Hon. Justice Nyamu J.A** on 24th June, 2010 in **Civil Application No. 371 of 2007**.

4. It would appear that even after coming to the end of the road, the Appellant did not vacate the suit properties or hand over possession to the purchaser. Consequently, vide an application dated 16th December, 2009 the 1st Respondent sought the following orders from the Chief Magistrates' Court in **Meru CMCC No 714 of 1992**.

(a) That the court be pleased to issue orders of eviction against one Gatugi Mugira and all his family members from LR No. Igoji/Kinoro/1324 and 1325.

(b) That, alternatively, the court be pleased to put the Applicant into possession of LR No. Igoji/Kinoro/1324 and 1325.

(c) That the Officer Commanding Station, Nkubu and the District Officer Igoji West Division do ensure compliance with the orders so issued.

(d) That costs be in the cause.

5. The Appellant opposed the said application and filed grounds of opposition and a notice of preliminary objection dated 26th January, 2010 in which he contended that the application offended the mandatory provisions of **Section 3(9)** of the **Land Disputes Tribunals Act, 1990** and that the application was time barred by virtue of the provisions of **Section 7 of the Limitation of Actions Act (Cap. 22)**. The Appellant

was of the view that the matter ought to have been referred to the relevant Land Disputes Tribunal (*Tribunal*) and the application was statute-barred since the purchaser was registered as owner of the suit properties in 1995.

6. By a ruling dated 16th February, 2010 the trial court overruled the Appellant's preliminary objection for lack of merit. The trial court was of the opinion that the application for an eviction order was merely intended to give effect to what had already been determined earlier hence the preliminary objection on limitation was misplaced. Later on 18th March, 2011 the trial court allowed the 1st Respondent's application dated 16th December, 2009. The court found that the Appellant had challenged the sale of the suit properties before the trial court and the High Court without success. The court was, therefore, of the opinion that there was no valid justification or excuse to keep the purchaser out of the suit properties.

B. THE GROUNDS OF APPEAL

7. Being aggrieved by the said rulings dated 16th February 2010 and 18th March 2011 the Appellant filed the consolidated appeals challenging the resultant orders. The Appellant raised the following grounds against the ruling dated 16th February, 2010 overruling his preliminary objection:

*(a) That the trial court erred in law and fact in failing to give full meaning and effect to **Section 3 (9) of the Land Disputes Tribunals Act, 1990.***

(b) The trial court erred in law and fact in failing to find that it had no jurisdiction to entertain the application.

*(c) The trial court erred in law and fact in failing to find that the application was time-barred under **Section 7 of the Limitation of Actions Act.***

8. By a memorandum of appeal dated 13th April, 2011, the Appellant raised the following grounds of appeal against the ruling and order dated 18th March 2011:

(a) The learned Senior Principal Magistrate erred in law and in fact in failing to consider the grounds of opposition filed against the application dated 16th December, 2009.

(b) The learned Senior Principal Magistrate erred in law and in fact in failing to address the issues of law raised against the application dated 16th December, 2009 in the grounds of opposition and make a finding on the same one way or the other.

*(c) The learned Senior Principal Magistrate erred in law and in fact in failing to appreciate the fact that the application was time barred under the **provision of Section 4(4) of the Limitation of Actions Act as read with Order 22 Rules 79 and 80 of the Civil Procedure Rules.***

*(d) The learned Senior Principal Magistrate erred in law and in fact in failing to appreciate the fact that the court lacked jurisdiction to order eviction of the appellant in view of **Section 3 (9) as read with Section 3(1) of the Land Disputes Act No. 18 of 1990.***

*(e) The learned Senior Principal Magistrate erred in law and in fact in failing to appreciate the fact that the prayer for eviction was statute barred under the **provisions of Section 7 of the Limitation of Actions Act, Cap. 22 Laws of Kenya.***

(f) The learned Senior Principal Magistrate erred in law and in fact in arriving at a decision wholly against the weight of the facts before the court and the applicable law.

9. As a result, the Appellant sought the following reliefs:-

(a) That the ruling and order dated 16th February 2010 be set aside.

(b) That the Preliminary objection dated 26th January, 2010 be upheld and the application dated 16th December, 2009 be struck out.

(c) That the ruling and order dated 18th March, 2011 in Meru CMCC No. 714 of 1992 be set aside and replaced with an order dismissing the application dated 16th December 2009 with costs.

(d) That the Appellant be awarded costs of the appeal.

C. DIRECTIONS ON SUBMISSIONS

10. When the appeal was listed for directions on 20th March, 2019 it was directed that the appeal shall be canvassed through written submissions. The parties were granted 30 days each to file and exchange their written submissions. The record shows that the Appellant filed his submissions on 30th April, 2020 after he obtained leave of court to file his submissions out of time. However, there is no indication of the 1st and 2nd Respondents having filed any submissions by the time of preparation of the judgment.

D. THE ISSUES FOR DETERMINATION

11. Although the Appellant raised several issues in his two memoranda of appeal, the court is of the opinion that the appeal may effectively be determined on the basis of the following three (3) issues:-

(a) Whether the trial court erred in law in overruling the Appellant's preliminary objection dated 16th January, 2010.

(b) Whether the trial court erred in law in allowing the 1st Respondent's notice of motion dated 16th December, 2009.

(c) Who shall bear costs of the consolidated appeals.

E. THE APPLICABLE LEGAL PRINCIPLES

12. There is no doubt that in determining the 1st Respondent's application dated 16th December 2009 the trial court was exercising judicial discretion. It has been held that an appellate court should be slow in interfering with the exercise of judicial discretion by the trial court unless it is demonstrated that such discretion was not exercised judiciously or that the trial court acted on wrong principles. However, the Appellant's preliminary objection was to be determined purely on the basis of the existing law.

13. In the case of **Mbogo & Another v Shah [1969] EA 93**, it was held, *inter alia*, that:

" An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

14. There are other decisions from superior courts which have enunciated the same principles on the jurisdiction of an appellate court to interfere with the exercise of judicial discretion by the trial court such as **Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR; Apungu Arthur Kibira v IEBC & 3 Others [2019] eKLR and Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125.**

15. In the case of **Apungu Arthur Kibira (supra)**, the Supreme Court of Kenya stated as follows at paragraph 39:

"We reiterate that in an appeal from a decision based on an exercise of discretionary power, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v Bashir (2010)NZSC 112; (2011)2 NLRI (Kacem)* where it was held para 32]:

" In this context a general appeal is to be distinguished from an appeal against the decision made in exercise of discretion. In that kind of case, the criteria for a successful appeal are stricter: (i) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."

F. ANALYSIS AND DETERMINATION

(a) Whether the trial court erred in law in overruling the Appellant's preliminary objection dated 16th January, 2010

16. The court has considered the submissions and material on record on this issue. The Appellant's preliminary objection was hinged upon two contentions. First, that the trial court had no jurisdiction to entertain the application because the matter in issue was reserved for the Tribunal under **Section 3(9) of the Land Disputes Tribunals Act, 1990 (now repealed)**. Second, that the application was statute-barred under **Section 7 of the Limitation of Actions Act (Cap. 22)**. The Appellant relied on the case of **M'Ikiara M'Rinkanya & Another v Gilbert Kabeere M'Mbijewe [2007] eKLR** in support of his submissions on limitation.

17. The material on record shows that the original decree was executed by attachment and sale of the suit properties on 28th September, 1993. The Appellant thereafter made various efforts to set aside the sale before the trial court without success. He then proceeded on appeal against the refusal of the trial court to set aside the sale in **Meru HCCA No. 21 of 2006**. That appeal was dismissed with costs by Hon. Justice W. Ouko on 7th November, 2008.

18. The material on record further shows that one year after the dismissal of the said appeal, the 1st Respondent filed the application dated 16th December, 2009 seeking eviction of the Appellant and his family members from the suit property. The record further shows that on 23rd December, 2009 the Appellant moved the Court of Appeal seeking extension of time to lodge an appeal out of time against the judgment of the High Court dismissing his appeal. That application was considered and dismissed by the Hon. J.G. Nyamu J.A on 24th June, 2010. It would appear that the 1st Respondent thereafter pursued his application for eviction dated 16th December, 2009 and obtained orders in his favour on 18th March, 2011.

19. It is thus evident that the Appellant was busy challenging the sale of the suit properties between 1993 and 2010 when he finally lost before the Court of Appeal. So, how could the 1st Respondent's right to take possession of the suit properties be adversely affected whereas the Appellant was actively litigating to overturn the attachment and sale of the same properties? The Appellant contended that the

application for eviction was a suit or “action” for recovery of the suit properties which was statute-barred because it was filed 15 years after the 1st Respondent’s registration as proprietor thereof. The Appellant relied upon the case of **M’Ikiara M’Rinkanya & Another v Gilbert Kabeere M’Mbijewe (supra)** in support of that submission.

20. The court has carefully perused the said authority relied upon by the Appellant. In that case, the Respondent had applied for execution of a decree he had obtained after passage of about 18 years. The last **appeal** in that matter had been concluded in 1984 but the Respondent did not initiate proceedings until 15th November, 2001 nearly 18 years later by which time the decree was already time-barred under **Section 4(4) of the Limitation of Actions Act (Cap. 22)**.

21. The court is unable to agree with the Appellant that the application dated 16th December, 2009 was time barred for at least two reasons. First, the High Court judgment dismissing the Appellant’s appeal was delivered on 7th November, 2008 whereas the Court of Appeal ruling which dismissed the Appellant’s application for leave to appeal out of time was delivered on 24th June, 2010. So, whether time is computed with effect from 7th November, 2008 or 24th June, 2010 the 1st Respondent’s application was not time barred.

22. The court finds that the Appellant has employed the cited authority out of context in order to mislead the court. The Appellant must have been aware that the 18 years were computed from the date the last **appeal** was concluded and not from the date of the original decree. In the said authority, the Court of Appeal stated, *inter alia*, that:

“For the foregoing reasons the Notice of Motion dated 15th November, 2001 and filed in court on 16th November, 2001 for a warrant of eviction was, for all intents and purposes, an “action” upon a judgment to recover possession of land. The proceedings to recover land having been filed nearly 18 years after the final judgment of the Court of Appeal were statute-barred...”

23. The court is further of the opinion that if the Appellant’s computation of time from the date of the decree were to be accepted then it would lead to a situation where the successful Appellant may be barred from executing the decree if the appellate proceedings were to take more than 12 years to conclude. That would clearly be an absurd result. That could not have been the intention of the legislature in enacting the **Limitation of Actions Act**. The period of limitation can only be logically computed from the date of conclusion of any appellate proceedings challenging the original decree.

24. The court has also considered the Appellant’s contention that the application was a violation of the “mandatory” provisions of **Section 3 of the Land Disputes Tribunals Act 1990. Section 3 (1) Section** provided that:

“Subject to this Act, all cases of a civil nature involving a dispute as to –

(a) the division of, or the determination of boundaries to land, including and held in common.

(b) a claim to occupy or work land, or

(c) trespass to land. Shall be heard and determined by a Tribunal established under Section 4”.

25. On the other hand, **Section 3 (9) of the Act** provided as follows:

“Notwithstanding any other written law no Magistrate’s Court shall have or exercise jurisdiction or powers in cases involving any issues set out in paragraphs (a) to (c) of the sub-section (1).”

26. The material on record indicates that the 1st Respondent was a purchaser for value of the suit properties at an auction conducted in execution of a decree of a court of competent jurisdiction. The 1st Respondent’s application was not based upon a boundary dispute, division of land, trespass to land or a claim to work or occupy land under customary law. It was a claim for vacant possession after execution of a decree **under Section 51 of the Civil Procedure Act (Cap. 21)**.

27. **Section 51 of the Civil Procedure Act** stipulates as follows:

“Where the court is satisfied that the holder of a decree for the possession of immovable property, or that the purchaser of immovable property sold in execution of a decree, has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some other person on his behalf, and that such resistance or obstruction was without any just cause, the court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in prison for a term which may extend to thirty days, and may further direct that the decree-holder or purchaser be put in possession of the property.”

28. The court is thus far from satisfied that the Tribunal had jurisdiction to entertain the said application. The court is far from satisfied that the trial court had no jurisdiction by virtue of **Section 3 (1) of the Land Disputes Tribunals Act, 1990**. The court is of the opinion that the trial court was properly seized of the application as the court undertaking execution of the decree issued in **Meru CMCC No. 714 of 1992**. It would be illogical for the trial court to hear a suit, pass judgment, execute the decree and then surrender the matter to the Tribunal to grant vacant possession to the successful purchaser.

29. In the premises, the court finds and holds that the trial court did not err in law in dismissing the Appellant’s notice of preliminary

objection dated 16th January, 2010. The court did not err in principle and it did not take into account any irrelevant considerations nor did it fail to take into account any relevant considerations. The Appellant's preliminary objection was absolutely groundless and without merit hence the trial court was entitled to overrule the same.

(b) Whether the trial court erred in law in allowing the 1st Respondent's notice of motion dated 16th December, 2009

30. The court has considered the submissions and material on record on this issue. The court has noted from the ruling of the trial court that it was alive to the fact that the 1st Respondent was a purchaser at a public auction conducted in execution of a valid decree. The court was also alive to the fact that the Appellant had unsuccessfully challenged the sale and exhausted his options of appeal. The trial court was satisfied that it was obligated to facilitate the purchaser's possession and enjoyment of the suit properties in the circumstances.

31. It is evident from the material on record that the Appellant had effectively come to the end of the road by the time the application dated 16th December, 2009 was allowed. He had failed in his bid to set aside the sale of the suit properties. He was also not successful before the High Court and the Court of Appeal. There was no pending appeal which could have reversed the execution of the decree. In the opinion of the court, the trial court did not err in law in allowing the 1st Respondent's application. The trial court was perfectly entitled to allow the application for eviction to bring the litigation to an end.

32. The court finds no error of principle on the part of the trial court in allowing the application. As indicated before, the option of conducting the proceedings before the Tribunal was not lawfully available. The application for eviction was not statute-barrred under **the Limitation of Actions Act** either. The trial court did not take into account any irrelevant considerations nor did it fail to take into account any relevant considerations. The court finds and holds that the trial court correctly exercised its judicial discretion in allowing the application dated 16th December, 2009.

(c) Who shall bear costs of the appeal

33. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful parties should not be awarded costs of two appeals. Accordingly, the Respondents shall be awarded costs of the appeal.

G. CONCLUSION AND DISPOSAL

34. The upshot of the foregoing is that the court finds no merit whatsoever in the Appellant's appeal. Accordingly, the court makes the following orders for disposal thereof:

(a) The two consolidated appeals be and are hereby dismissed in their entirety.

(b) That the orders of the trial court dated 16th February, 2010 and

18th March, 2011 respectively are hereby affirmed.

(c) The Respondents are hereby awarded costs in the two consolidated appeals to be borne by the Appellant.

(d) For the avoidance of doubt, any stay or interim orders in place in favour of the Appellant are hereby vacated.

35. It is so decided.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 16TH DAY OF JUNE 2021.

Y. M. ANGIMA

ELC JUDGE

JUDGMENT DELIVERED THROUGH EMAIL THIS 8TH DAY OF JULY, 2021.

L. N. MBUGUA

ELC JUDGE-MERU