REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 31 OF 2019

FELIX FUNDI NJUE.....1ST APPELLANT

FELISTA NJOKI NJUKI.....2ND APPELLANT

GIANT AUCTIONEERS.....3RD APPELLANT

VERSUS

JOSEPH WACHIRA LUKA.....RESPONDENT

JUDGMENT

1. The appeal herein was instituted vide a memorandum of appeal dated 12.06.2019. The appeal is challenging the decision of the trial court (Hon. M.N. Gicheru) in Embu CMCC No. 51 of 2014 and which ruling was delivered on 20.05. 2019. The appellant raised the following grounds of appeal;-

> 1. That the learned trial magistrate erred in law and fact in finding that the respondent herein was condemned unheard whereas he participated in the proceedings
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> 2. The learned trial magistrate erred in law and in fact by making a finding against the appellants more so the 1st appellant without taking into consideration that he had paid the whole of the purchase price
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> 3. The learned trial magistrate erred in law and in fact in failing to find that the appellants had really filed submissions.
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> 4. The learned trial magistrate erred in law and in fact by giving a ruling against the evidence before him.
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> 5. The learned magistrate erred in law and in fact by failing to set out the issues for determination, the finding thereof and the reasons for the decision.

2. The appellants, as such, prayed that the appeal be allowed and the ruling delivered on 20.05.2019 be set aside and the application dated 10.09.2018 be dismissed with costs. They further prayed for the costs of the appeal.

3. The appeal was canvassed by way of written submissions.

4. The appellants in support of ground one of the appeal submitted that the court erred by finding the respondents were not heard and which was contrary to the evidence in record. That the interlocutory judgment which had been entered against the respondent was set aside vide an application dated 27.01.2015 in a ruling delivered on 25,02,2015 by Hon. AG Kibiru and the respondent herein was heard on his defense on 21.10.2015. As such, the trial court misdirected itself in finding that the respondent herein was never heard and proceeded to set aside interlocutory judgment which had already been set aside on 25.02.2015. In support of ground 2, it was submitted that the impugned ruling did not make provision as to the fate of the money already paid by the 1st respondent and who has the title to the land. That the trial court erred in finding that the appellant did not file submissions while the same were filed and that the trial court delivered a ruling which was not supported by evidence on record as the respondent herein was heard. Further that the sale became absolute and the remedy by the respondent herein was to sue for damages but not to set aside the same. Finally, the appellants submitted that the ruling was a narrative and did not meet the requirements under Order 21 of the Civil Procedure Rules.

5. The respondent herein did not file submissions and there were none on record as at the time of writing this judgment.

6. As it is now settled by the numerous authorities both by this court and the superior courts, the duty of this court as the first appellate court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. Further, this court ought not to ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. (See **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348).**

7. I will therefore proceed to restate the evidence which was before the trial court. In a nutshell, what was before the trial court was an application dated 10.09.2018 filed under certificate of urgency and wherein the respondent sought for various orders and most important in relation to this appeal being orders that the trial court be pleased to grant leave to the firm of Magee wa Magee & Co. Advocates to henceforth represent the respondent herein; that the trial court be pleased to set aside the judgment entered against the applicant on 16.06.2014 in default of appearance and grant the respondent herein leave to file his appearance and statement of defense; that the court do declare that the purported sale of LR Nthawa/Riandu/3581 by public auction by the 2nd respondent (3rd appellant herein) was unlawful, null and void and consequently order the cancellation of entry number 6 in the register of LR Nthawa/ Riandu/3581. Prayer 2 of the application (that the court be pleased to order that the status quo on LR Nthawa/ Riandu/3581, being that the applicant (respondent herein and his family are in possession of the same, be maintained pending the hearing and determination of subsequent prayers (prayers 3, 4, 5, 6, 7 and 8) was on interim basis and thus cannot be said to be one of the prayers allowed by the trial court in the impugned ruling.

8. The application was premised on the grounds that the respondent herein was the registered owner of the suit land and that the 1st respondent herein filed a suit against him seeking refund of Kshs. 10,000/= but he was not served with summons to enter appearance so that he could defend himself. That he came to learn of the said case when he was served with a notification of sale of the suit land and after which he filed an application for stay of the said sale vide an application dated 27.01.2015 but by ignorance since he was not represented, he did not seek setting aside of the judgment.

9. That the 2nd respondent (3rd appellant herein) proceeded to allegedly conduct sale by public auction on a subsequent date without following due process of the law. The acts which amounted to not following due process of the law were itemized in paragraph 7 of the supporting affidavit. That he became aware of the transfer of the land to the 3rd respondent in December 2017 when the 2nd respondent hired goons and maliciously and without notice demolished his house and his son's houses on the suit land and which damage disoriented his mind and he was not able to immediately engage an advocate to institute the suit.

10. The said application was opposed by the 1st appellant herein (3rd respondent in the application) and wherein he deposed that he saw an advert for auction sale of the suit land by the 2nd appellant herein and on 20.05.2016, he attended the said auction sale and wherein he was declared the highest bidder by offering a bid of Kshs.400,000/- after which he was issued with a certificate of sale after the payment and which sale was confirmed by the court. That the respondent herein (applicant in the application) was subsequently evicted from the said land and as such the 1st appellant was an innocent purchaser for value having followed due process.

11. Mr. Mugambi Rutere swore an affidavit on behalf of the 2nd appellant herein (Giant auctioneers) and wherein he deposed that his firm received a notification of sale on 2.12.2014 but which sale was stayed by the court at the instant of the respondent herein. That the respondent herein failed to comply with the conditions of stay as given by the court and he was sent a fresh notification of sale on 15.03.2016 and which notification was served upon the respondent herein and service thereof acknowledged. That the auction sale was subsequently conducted and wherein the 1st respondent was the highest bidder and the court confirmed the same. As such the application before the trial court was an afterthought and an abuse of the court process.

12. The 2nd appellant herein (1st respondent in the application before the trial court) filed a "further replying affidavit" wherein she deposed that the respondent herein participated in all court proceedings which ultimately caused the suit land to be procedurally auctioned. Further that the auction was procedurally carried out and the allegations to the contrary were untrue.

13. The trial court considered the application and in a ruling delivered on 20.05.2019, the learned magistrate found the said application meritorious and allowed the same for the reason that the respondent herein was never heard and that the right to be heard was paramount.

14. It is this ruling which necessitated the instant appeal.

15. From the above meticulous analysis of the evidence which was before the trial court (in so far as the application subject of this appeal is concerned), it is my view that the main issue which this court is invited to determine is whether the trial court committed errors of law and fact as enumerated in the memorandum of appeal.

16. However, I note that the respondent sought for setting aside of the judgment entered against the applicant on 16.06.201 in default of appearance and leave to file his appearance and statement of defense. The respondent herein as such sought for exercise of the trial court's discretionary powers and as it is trite that the appellate court cannot upset the trial court's exercise of its discretionary power save for the well laid circumstances. The said circumstances were laid down by the Court of Appeal in **Mbogo and Another v Shah [1968] EA** where the Learned Judges of Appeal held that;-

> **"…that this court will not interfere with the exercise of…discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."**

17. In **Francis Wambugu -vs- Babu Owino & others, SC Petition No. 15 of 2018,** on the issue of an appellate court entertaining an appeal founded on exercise of discretion of the trial court, it **was stated:**

> **"[76] In determining therefore an issue based on the exercise of a discretion, as has been observed, a Court can only be faulted if the use of the discretionary power was based on a whim, and that it can be established that the Court did not consider the prevailing circumstances and take into account what needed to be considered, or considered what ought not to have been considered. To infringe upon this discretionary power, would be tantamount to a judicial review of the decision of another Court's decision. This is an exercise which this Court, and indeed every other Court, should refrain from engaging in as it would be considered, or indeed viewed as, an interference in another Court's judicial independence and exercise of discretion."**

(See also **Musa Cherutich Sirma -vs- IEBC & 2 others, SC Petition No. 13 of 2018).**

18. So the question therefore is whether the trial court's discretion in allowing the prayer seeking setting aside of the interlocutory judgment and granting leave to the respondent herein to file his defense (prayers 3 and 4) (as the ruling indicates in omnibus terms that the application was merited) ought to be interfered with. The trial court held that the respondent herein was never heard and which was a paramount right.

19. I agree with the trial court that right to be heard is indeed paramount and ought to be protected. One of the conditions for setting aside judgment in default of appearance (as was the case before the trial court) is indeed where the applicant was never served with summons to enter appearance.

20. However, in the instant case, I have perused the court record and I note that indeed the trial court entered interlocutory judgment in default of appearance on 6.06.2014. The respondent herein proceeded to file an application dated 27.01.2015 seeking stay of the auction sale which was scheduled for 6.02.2015 and the main ground in support of the application was that the respondent herein was never served with summons to enter appearance but he was shocked when he saw the auctioneers serving him with a notification of sale of the suit land. The said application was subsequently opposed by the appellants herein and the trial court, in a ruling delivered on 25.02.2015 by Hon. A.G Kibiru (Ag. CM), the respondent herein was granted leave to file and serve his defense within 14 days. What this means is that the interlocutory judgment was set aside so as the respondent herein could defend the suit. The respondent indeed appeared in court on the day of the hearing of the suit and on 21.10.2015, the respondent indicated that he was ready for defense and proceeded to give his evidence after the close of the plaintiff's case.

21. It therefore means that by the trial court allowing the application in the ruling subject of this appeal (more so prayer 3 and 4), it indeed used its discretionary powers **based on a whim. Further, the trial court did not consider that similar orders had been made earlier and which orders were indeed complied with by the respondent herein by filing his statement of defence which was filed in court on 11.03.2015. In my view, if the trial court exercised its mind well, it ought to have found that it lacked jurisdiction over the said issue (setting aside of the interlocutory judgment) as the same was *res judicata*. It is, therefore clear that the exercise of the discretionary power by the trial court is a candidate for interference by this court on the basis of the above reasons. I agree with the appellant that the respondent was granted an opportunity to be heard.**

22. As I have already pointed out elsewhere, the respondent herein further sought (before the trial court) for orders that the court do declare that the purported sale of LR Nthawa/Riandu/3581 by public auction by the 2nd respondent (3rd appellant herein) was unlawful null and void (prayer 5) and consequently order the cancellation of entry number 6 in the register of LR Nthawa/ Riandu/3581 (prayer 6). The trial court as I have already noted made an omnibus statement to the effect that the application was merited on the basis that the applicant therein (respondent was never heard). As such he allowed even prayers 5 and 6.

23. The respondent in support of the above prayers deposed that the 2nd respondent in the trial court proceeded to conduct the said sale by public auction on a subsequent date without following due process of the law and amongst the issues raised on this was the allegation that the said 2nd respondent did not serve fresh notification of sale, did not advertise, did not notify the respondent herein of the sale, did not conduct a public auction but rather made private arrangements for the transfer of the suit land to the 3rd respondent therein amongst other allegations.

24. These averments were rigorously opposed by the 1st appellant herein (3rd respondent in the application) and wherein he deposed that he purchased the suit land following the right procedure and having been declared the highest bidder. He annexed to his replying affidavit an advert for the said auction sale, a certificate of sale and a certificate of vacant possession.

25. Mr. Mugambi Rutere on the other hand swore an affidavit on behalf of the 2nd appellant herein (Giant auctioneers) and wherein he deposed that the auction sale was above bond. He annexed to his replying affidavit a copy of a notification of sale dated 2.12.2014 and another one dated 15.03.2015, an affidavit of service of a redemption notice sworn on 19.03.2019, a 45 days redemption notice dated 19.03.2016 and a notification of sale dated 19.03.2016 amongst other annexures.

26. It is trite law that he who alleges must prove. The respondent herein did not seek leave before the trial court to file a further affidavit to counter the contents of these affidavits. In his written submissions, he framed two issues for determination and which solely dealt with the setting aside of the interlocutory judgment. The appellants herein filed their submissions and wherein they submitted that they relied on their respective replying affidavits.

27. It is my view that the trial court failed to consider the evidence on record in coming up with its ruling. The trial court did not consider the issue on setting aside auction sale and apply the evidence on record in that respect. It is my view that there was no evidence which was tendered by the respondent herein to prove that the auction sale was irregular or unprocedural. As such, the ruling by the trial court ought to be set aside in this respect as it proceeded to allow an order in the application without evidence in support thereof. The trial court failed to consider the evidence placed before it in regard to the auction being proper and regular and proceeded to allow the said prayer in absence of evidence to the contrary.

28. Further, by the court allowing prayer 6 which was on cancellation of entry 6 on the register of the suit land (in its ruling allowing the application as merited) it failed to consider the principle and doctrine of indefeasibility of title as established under the Torrens System of

Registration and embodied in section 26 of the Land Registration Act, No. 3 of 2012 to the effect that the title of a registered proprietor remains indefeasible unless it is shown the title was obtained through fraud or misrepresentation to which the title holder is proved to have been a party to; or w**here the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The respondent herein did not prove any of these grounds so as to warrant the trial court in granting prayer 6 when it allowed the application.**

29. There having been tendered no evidence as to any fraud or misrepresentation to which the title holder (1st appellant herein) was proved to have been a party to; or evidence as to the title having been **acquired illegally, unprocedurally or through a corrupt scheme, the court indeed erred in allowing prayer 6 of the application before it.**

30. The appellants raised a ground (ground 3) to the effect that the learned trial magistrate erred in law and in fact in failing to find that the appellants had filed submissions. I have indeed perused the trial court's record and I note that indeed 1st and 2nd appellants herein filed their joint written submissions on 9.04.2019 and dated on the even date. The 3rd appellant herein also filed its submissions on 9.04.2019 and dated 22.03.2019. The trial court in its ruling (see folio 15 and 16 page 116 of the record of appeal) noted that "Counsel for the defendant filed written submissions on 18.03.19. I have not seen any submissions filed by the other counsel." With all due respect to the learned trial magistrate, it is my view that he indeed erred in finding as such.

31. The appellants further raised a ground (ground 5) to the effect that the learned magistrate erred in law and in fact by failing to set out the issues for determination, the finding thereof and the reasons for the decision. In their written submissions, it was submitted that the ruling was a narrative and did not meet the requirements under Order 21 of the Civil Procedure Rules. However, having found that the appeal succeeds on the other grounds of appeal, it is my view that it would be an academic exercise to consider this ground. The appellants did not in fact submit as to the prejudice they might have suffered as a result of the said failure to meet the legal conditions. I say so while being aware that judicial officers have different writing styles.

32. Considering all the above, it is my finding that the trial court indeed erred in law and fact in finding that the respondent herein was condemned unheard whereas he participated in the proceedings and further by giving a ruling against the evidence before him and thus proceeded to allow the application without any evidence in support of the same. The said ruling cannot survive and the same and the orders therefrom ought to be set aside.

33. As such I make the following orders;-

1. The appeal is merited and the same is hereby allowed.

2. That the ruling dated 20.05.2019 is hereby set aside and substituted with the orders that the application dated 10.09.2018 is hereby dismissed with costs to the respondents herein.

3. That the costs of this appeal are awarded to the appellants.

34. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF NOVEMBER, 2021

L. NJUGUNA

JUDGE

…….for the Appellants

…….for the Respondent