REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC APPEAL NO. 9 OF 2018

(Formerly Kisii HCC Appeal No. 98 of 2015)

NSATO MAROA…….…. APPELLANT

-VERSUS-

MAGEBO SABURE…..……..…… RESPONDENT

(Being an appeal against the Ruling of Honourable C.M. Kamau, Resident Magistrate as he then was,

in Kehancha Principal Magistrate's court Land case No. 18 of 2010 dated and delivered on 15/7/2015)

JUDGMENT

A Introduction

1. On 23rd July, 2015, the Appellant namely, **Nsato Maroa** filed the instant appeal by way of a Memorandum of Appeal of even date wherein he challenged the trial court's ruling delivered and dated 15th July 2015 whereby the appellant's application dated 10th April 2015 for review of the trial court's orders dated 22nd October 2014 and for execution of decree dated 13th January 2011, were dismissed. It is the Appellant's case that as the decree holder, he had an obligation under Order 22 Rule 19 of the Civil Procedure Rules, 2010 to take out and serve upon the Respondent, the Notice to Show Cause before executing the decree. That the trial Court erred in holding, inter alia, that his application was rendered null and void by the trial court's decision dated 22nd October, 2014.

2. The appeal is anchored on the following seven (7) grounds:

> ***1. That the learned trial magistrate erred in law and in fact by holding that there was no new material or error apparent on face of the record to allow the application for Notice to Show Cause and Review.***
>
> ***2. That the learned trial magistrate erred in law and in fact by failing to appreciate the provisions of Order 22 Rule 19 of the Civil Procedure Rules, 2010.***
>
> ***3. That the learned Magistrate erred in law and in fact by holding that the decision adopted in Court on 13/01/2011 had been rendered null and void and therefore quashed.***
>
> ***4. That the learned trial magistrate erred in law and in fact by failing to address the rights of illiterate litigants as provided for under the Civil Procedure Rules, 2010.***
>
> ***5. That the learned trial magistrate erred in law and in fact by failing to address the issue of giving half-baked directions to the litigants.***
>
> ***6. That the learned magistrate erred in law and in fact by failing to take judicial notice that the provisions of Order 22 Rule 19 of the Civil Procedure Rules, 2010 are mandatory.***
>
> ***7. That the trial magistrate failed to apply his judicial mind appropriately.***

3. On 31st January, 2019, this court gave directions that the instant appeal be argued by written submissions. Consequently, Mr. Nyambati, learned counsel for the appellant and Mr. Kisera, learned counsel for the Respondent filed their respective submissions and did not wish to highlight the same. Furthermore, on 4th December 2019, Mr. Kisera also filed authorities in support of his case in lieu of highlighting the submissions.

B. The 'gist of the Appellant's case

4. In his six (6) paged submissions dated 25th July 2015 and filed in court on even date, learned counsel for the appellant took this Court to the genesis of the instant appeal. Counsel submitted that the subject matter of this appeal was borne out of the award made to the appellant by the then Kuria West District (Masaba Division) Land Dispute's Tribunal (hereinafter referred to as the defunct LDT) in respect of Land Registration No. Bugembe/Masaba/304 (hereinafter referred to as "the suit land"). That the award was subsequently adopted as Judgment by the trial court. The Respondent was dissatisfied thereby and filed an Application dated 24th January 2011 contesting the verdict. He argued that the said Application was dismissed thus prompting the Respondent to file Kisii **Environment and Land Court Judicial Review Application No. 49 of 2011** (hereinafter referred to as the JR application) whereby Samson Okongo J expressed his position in law if the Application was to succeed but eventually dismissed it for want of merit. The Appellant maintains that the court's sentiments in the JR application did not set aside the adopted judgment or quash the same. Moreover, that since the Respondent's application was dismissed, the orders of stay of execution of proceedings were accordingly vacated. That as such, nothing stopped the appellant from executing the judgment of the trial court.

5. It is the Appellant's further submission that under the repealed Land Disputes Tribunals Act, 1990 (the Repealed LDTA), the court's position in the JR application did not constitute a reprieve to the Respondent. That it was not to be used as a basis to set aside the adopted judgment. He argued that the trial court erred in law by dismissing the execution proceedings sought by the Appellant in court in spite of the clear provisions of Order 22 Rule 19 (supra).

6. The Appellant also submitted that if the Respondent was aggrieved by the defunct LDT's award, he ought to have filed a declaratory suit against the same. That the trial court could not have purported to determine and dismiss the Appellant's application as if it was making a determination in a declaratory suit. That the same was outside the mandate and Jurisdiction of the trial court. That since the award had been adopted by the same court, it could not have overstepped it's mandate by sitting on appeal to vary and set aside the judgment. That any error on the judgment could only have been interrogated and rectified by a superior court in exercise of it's supervisory jurisdiction.

7. It is the Appellant's case that when the respondent prosecuted the substantive motion through the JR application, the trial court did not appraise itself fully with the import of the Application. That it propelled the court to dismiss the JR application.

8. While speaking to the powers of this Court, the Appellant submitted that it has jurisdiction to supervise or review the decisions of subordinate courts where there is enough reason to do so. To that end, he urged the Court to enter judgment in favour of the Appellant based on the evidence presented.

9. In conclusion, the Appellant's counsel urged this court to follow the settled principle that costs follow the event. However, counsel noted that it is a discretionary power and asked the Court to exercise it judiciously. That the appellant is ready and willing to appease the Respondent by way of costs if the appeal succeeds.

C.The gist of the Respondent's Case

10. By his five (5) paged submissions dated 27th August 2018 and filed in court on 28th August 2018, learned counsel for the Respondent brought to fore the history of the dispute. His version of the case is that the Respondent is the sole proprietor of the suit land. That the Appellant filed dispute No. 16 of 2010 before the defunct LDT challenging title to the land. That the defunct LDT terminated his title to the suit land and subdivided amongst Chacha Maroa, Magaigwa Maroa, the appellant and himself (the Respondent).

11. He further submitted that he was aggrieved by the award, thus he originated the JR application. Consequently, the court dismissed the JR application but made weighty findings relating to illegalities and nullities of the defunct LDT's award and the subsequent decree of the trial Court.

12. The Respondent further submitted that subsequent to his case being dismissed on 7th February 2014, the Appellant applied to the trial court on 12th May, 2014 seeking to execute the original decree derived from the defunct LDT's award. However, on 22nd October 2014, the application was dismissed by the trial court. In so doing, the trial court referred to the finding in the JR application that the proceedings before the defunct LDT were a nullity because the defunct LDT did not have jurisdiction to determine the dispute.

13. The Respondent contends that the dismissal of his JR application did not oust the substantive findings in the entire decision. That the trial court rightly interpreted the JR application decision to the effect that the defunct LDT did not have jurisdiction to determine matters of title thus denying the Appellant the right to execute the award of the defunct LDT.

D. Issues for determination

14. In view of the foregone summarised set of facts, the issues that present themselves for determination in this appeal are compressed as follows;

a. Whether the Trial Court was right in dismissing the application based on the findings in the JR application.

b. What orders should this Court make in view of the peculiar circumstances of the case?

E.Analysis and Determination

15. At the onset, this Court is cognizant of the fact that it cannot supervise the decision of a court of concurrent jurisdiction. It therefore cannot sit on appeal with respect to the JR application by virtue of Article 162 (2)(b) of the Constitution of Kenya, 2010; see also ***Republic-***

vs- Karisa Chengo and 2 others (2017) eKLR .

16. This court will only pay difference to the trial court's decision and thereafter make an assessment on whether the court correctly directed it's mind in dismissing the Applicant's case based on the decision of the JR application; see **Selle and another –vs- Associated Motor Boat company Ltd (1968) EA,123** and **PIL Kenya Ltd –vs- Oppong (2009) KLR 422.**

17. I have thoroughly studied the decision in the JR application. I have also painstakingly perused the relevant rulings including the impugned decision of the trial court.

18. Notably, by a notice of motion filed before the trial court on 12th June 2014, the appellant sought execution of the trial court's judgment and decree pursuant to the award made in his favour by the defunct LDT. The trial court relied on the decision in the JR application and dismissed the motion on 22nd October, 2014.

19. Being dissatisfied thereby, the appellant moved the trial court by way of an application dated 10th April, 2015 seeking orders including review of court's orders dated 22nd October 2014 and for application for execution of it's decree dated 13th January, 2016. The trial court dismissed the said application and held, inter alia;-

> ***"This application was rendered nugatory by the decision of the court dated 22nd October 2014. The effect of the decision was to declare the 2011 court decision, order and decree null and void and therefore unenforceable" .***

20. It is important to note that judgment in the JR application effectively rendered the award of the defunct LDT and the adopted judgment of the trial court in favour of the Applicant, of no consequence. Clearly, it was held that the defunct LDT had no jurisdiction to make the award regarding title of the suit land. As such, the award was a nullity, so was the adopted judgment.

21. To that end, the court in the JR application held thus;

> ***"it follows that the decision of the 1st Respondent (Land Dispute Tribunal) was a nullity... There was nothing in law that could be filed before the 2nd Respondent (Trial Court) for adoption as judgment of the court. Such judgment would equally be a nullity. Since the decision of the 1st Respondent was a nullity for want of jurisdiction, the 2nd Respondent could not adopt the same as judgment of the court as out of nothing comes nothing."*** *(Emphasis laid)*

22. In the case of **Desai –vs- Warsame (1967) EA 351,** it was held that a court of law can not confer jurisdiction on itself. That such assumed jurisdiction is a nullity.

23. Similarly, in the case of **Samwel Kamau Macharia and another –vs- Kenya Commercial Bank Ltd and others (2012) eKLR**, the Supreme court of Kenya held thus;-

> ***"A Court's jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It can not arrogate to itself jurisdiction exceeding that which is conferred upon it by law……"***

24. In the JR application, the court also observed that ;-

> ***"The interested party's (Appellant herein) argument was that upon adoption, the decision of the 1st Respondent (Land Dispute Tribunal) ceased to exist alone but became subsumed in the decision of 2nd respondent that adopted it as a judgment. "***

25. The court further remarked;-

> ***"…… I have concluded herein above that the 1st and 2nd respondents acted in excess of jurisdiction conferred upon them by law and their decisions null and void…"***

26. The Black's Law Dictionary, 10th Edition at page 1236 defines the term **"nullity"** as follows**.**

> ***"something that is legally void"***

27. It is trite law that a void act is nullity ab initio; see **Republic –vs- Karisa Chengo(supra).**

28. **In the case of Macfoy –vs- United Africa Company Ltd(1961) 3 All ER 1169 at 1172** regarding an act which is a nullity**, Lord Denning** held thus**;**

> ***"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado…"*** *(Emphasis added)*

29. This court is acutely aware of **Order 22 Rule 19 and Order 42 Rule 2 (supra).** Furthermore, Judicial Review remedy is one of the

reliefs provided for under **Article 23 (3) (f) of the Constitution of Kenya 2010.** In the JR application, my learned brother was guided by authorities including **Macfoy case** (Ibid) and noted that the award of the defunct LDT and subsequently adopted as Judgment by the trial court, was a nullity. Accordingly, I endorse the finding in the JR application that the decision of the 1st and 2nd respondent in the dispute were a nullity. Quite plainly, there was no need for a court order to set it aside; see **Macfoy case(Ibid).**

30. In the end, this Court finds and hereby holds that the impugned decision of the trial court was based on correct legal principles. The said decision stands faultless in the circumstances of this case.

31. Thus, the instant appeal mounted by a memorandum of appeal dated 23rd July 2015, is not meritorious. I proceed to dismiss the same with costs in this appeal and the original suit, to the respondent.

Delivered, Signed and Dated at Migori through email pursuant to,inter alia, Articles 7 (3) (b),159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the prevailing Corona Virus pandemic, this 27th day of May, 2020.

G.M.A ONG'ONDO

JUDGE