



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MURANG'A**

**ELCA NO. 4 OF 2019**

**CATHERINE NYAMBURA NJUGUNA.....1<sup>ST</sup> APPELLANT**

**JECINTA MWIHAKI NJAGI.....2<sup>ND</sup> APPELLANT**

**ANTONY KIGURU NGANGA.....3<sup>RD</sup> APPELLANT**

**VS**

**WILSON KIHUMBA GITHINJI.....RESPONDENT**

**(Being an Appeal against the entire ruling and order delivered by the**

**Hon A K Mwicigi PM on the 8/2/19 in CMCC No 368 of 2017).**

**RULING**

1. Vide a Notice of Motion dated the 28/12/17, the Appellants moved the Court for the following orders interalia;
  - a. Spent
  - b. Joinder of the Appellants.
  - c. Stay of execution of prohibitory orders against the Land Registrar against the suit land MAKUYU/KIMORORI/BLOCK11/2591 issued on the 20/12/2017.
  - d. The Court to review vary and or set aside the temporary injunction orders on the 20/12/2017 prohibiting the Defendants/Respondents or their agents from transferring or dealing with the Plaintiff/Applicants parcel of land (suit land).
  - e. The Court to review vary and or set aside the temporary prohibition order issued on the 20/12/17 prohibiting the Land Registrar from registering any transfer lodged by the Respondents in relation to the suit.
  - f. That the Court be pleased to strike out the Plaintiffs plaint and or suit for being scandalous frivolous and vexatious and an abuse of the process of the Court.
2. The application was anchored on the a number of grounds to wit; the intended necessary parties are Trustees of Diplomat welfare Group; the suit land was sold by public auction pursuant to the Court orders issued in CMCC NO 451 of 2012 after the Respondent offered the same as collateral for the loan; the suit land was purchased by Diplomat Group through its chair , the Bernard Muriuki Gaturuku, the 3<sup>rd</sup> Defendant in the lower Court case; that a vesting order in the names of the intended necessary parties was issued by the Thika Court vesting the suit land in their names.
3. Vide a consent of the parties record on the 30/1/18 prayer No 2 was granted with the consequence that the interested parties were enjoined into the suit.
4. Parties filed written submissions and the Learned Principal Magistrate heard the application and delivered his ruling on the 8/2/19. In it he dismissed the application as follows;

“the gist of the case is ownership of the suit land. The applicant seeks review of the preservation orders to allow them deal with the suit land orders which include and not limited to the transfer of the parcel.

At first glance the orders sought will compromise the case without the benefit of each party presenting their evidence. This is against the presence (?) of ascertain property interest. It is the view of the Court that both parties be accorded an opportunity to establish their interests in the property. The applicant in my view has not shown what loss if any may result unless the review and or stay is not granted.

Consequently, the Motion fails. Parties to prepare to have the dispute determined in trial by complying with the procedural aspects of the law. Interim orders to remain in force pending the hearing and determination of the suit.”

5. Aggrieved with the ruling of the learned Principal Magistrate the Appellants have proffered an Appeal in which they have raised 13 grounds of Appeal. The Appellants have faulted the ruling on the following grounds inter alia;

a. The learned Magistrate failed to appreciate that CMCC No 368 of 2017- Murang’a ought not to be entertained in view of CMCC No 451 of 2012, Thika that decreed the auction of the suit land; That CMCC No 368 of 2017-Murang’a amounts to an Appeal against the orders of CMCC No 451 of 2012, Thika.

b. That proprietary interest in the suit land had been settled in CMCC No 451 of 2012 and a vesting order issued in favour of the Appellants in MISC No 152 of 2016.

c. That the Appellants are innocent purchasers for value at an auction sanctioned by the Court and therefore are entitled to the protection of the law

d. That the issues raised in the CMCC 368 of 2017, Murang’a should have been raised in the previous suit CMCC No 451, Thika as per the provisions of section 34 of the Civil Procedure Act.

e. The Magistrate failed to find that the Respondent was in abuse of the process of the Court for filing a suit 4 years after the auctioning of the suit land in favour of the Appellants after failing to secure interim orders to impugn the sale in CMCC 451 of 2012.

f. The application to strike out the suit had not been opposed and the magistrate erred in law and fact in failing to so strike it out.

g. The learned magistrate erred in law and fact in failing to hold that Appellants had not proven the prejudice it stood to suffer unless the orders for review were granted.

h. The learned magistrate erred in law and fact in ordering interim orders issued to remain in force till the hearing and the determination of the suit effectively compromising the Respondents application for interlocutory relief dated the 13/12/2017 still pending on record without inter partes hearing.

6. The parties elected to canvass the Appeal by way of written submissions. The Appellants filed their written submissions on the 13/12/19 while the Respondent filed on the 28/1/2020.

7. The Appellants submitted and gave a long history of the suit land and the cases in Thika to wit CMCC No 451 of 2017 and Misc No 152 of 2016. In the former suit the Plaintiff filed suit against the Defendant (now the Respondent) for the recovery of a liquidated amount in the sum of Kshs 208,000/- on account of outstanding loan advanced to the Defendant and secured with the suit land. In his defense the Respondent admitted the claim and the Plaintiff in the lower Court sought and obtained a judgement on admission leading to the sale of the suit land by way of a public auction in which the Appellants were successful bidders of the suit land through its then Chairman Bernard Gaturuku. Thereafter the Appellants obtained a vesting order ordering that the suit land be registered in their names. It is the Appellants case that the Respondent in an attempt to thwart their efforts to effect the said vesting orders has filed one caution after the other sometimes on his own name and or through surrogates or proxies thus frustrating their efforts to enjoy their fruits of the orders in their favour. They submit that one of the ways was the filing of the suit CMCC No 368/17, Muranga after failing to obtain orders in CMCC No 451 in Thika in 2017 which application was dismissed on the 17/8/18. The Appellants submitted that this amounts to an abuse of the process of the Court.

8. Further they submitted that the Respondents claim as captured in CMCC No 368 of 2017 is to impugn the sale by auction of the suit property in CMCC No 451 of 2012 on grounds of fraud inter alia, which grounds are similar to those in the dismissed application dated the 4/12/17 in CMCC No 451 of 2012. Further he urged the Court that though there was judgment on admission he actually paid the outstanding loan and obtained a clearance from the Plaintiff in the lower Court and therefore the sale by public auction was fraudulent in that regard.

9. Simultaneously with the filing of the suit the Respondent sought via an application dated the 16/12/2017 where the Court granted the orders as follows on the 20/12/2017;

“That a temporary injunction be and is hereby issued prohibiting the defendants/Respondents their agents from transferring or dealing with the Plaintiffs applicants parcel of land known as MAKUYU/KIMORORI/BLOCK/111/2591.

That pending the hearing and determination of this application a prohibition do and is hereby issued prohibiting the Land Registrar Muranga from registering the transfer lodged by the Respondents herein in relation to the suit land.”

10. The Appellants submitted that these orders triggered the filing of the Notice of motion dated the 28/12/17 seeking review and setting

aside the said exparte interlocutory orders.

11. It is the submission of the Appellants that the Respondent failed to respond to the weighty and numerous issues of facts raised and in particular the Respondent did not oppose the prayer to strike out the suit.

12. In respect to grounds Nos 1, 2, 4 and 5 of the Memorandum of Appeal, the Appellants submitted that the Court orders in CMCC No 451 Thika are final valid and binding and unless and until they are set aside as per law provided. After the successful auction in 2013 the Respondent took no steps to set aside or impugn the said sale on any grounds of illegality. That the suit land is now vested in the Appellants and therefore the ownership has passed to the Appellants. That the suit in the lower Court amounts to an Appeal which is an abuse of the process of the Court in view of binding orders issued in CMCC No 451 of 2012, Thika.

13. The Appellants submitted that section 34 of the Civil Procedure Act bars the Respondent from mounting a fresh suit in view of CMCC 451 of 2012. This section provides that questions pertaining to the execution discharge and satisfaction of a Court decree shall be determined by the executing Court and not by way of a fresh suit. That CMCC No 368 of 2017 is contra statute, incompetent and is a candidate for striking out for being an abuse of the process of the Court.

14. The Appellants relied on the following cases to buttress their point that the suit should fail in view of section 34 of the Civil Procedure Act; **Joseph Mwangi Theuri & 37 others Vs David Gitonga Githinji (2014)** where the judge found that the matters in the case before him ought to have been ventilated before the Court that was executing the subject decree. In the case of **Nazir Jimnah Vs Asmahan Peterson & 2 Others (2012)** the judge found that a fresh suit mounted to challenge the attachment and sale of the goods pursuant to the decree of another Court was vexatious and an abuse of the process of the Court process. That it would be contra section 34 of the Civil Procedure Act and would amount an Appeal through the back door. That the fresh suit would be an invitation to the subordinate Court to sit on Appeal of another subordinate Court's decision which would lead to an absurdity. The Court found the suit scandalous frivolous and an abuse of the process of the Court and dismissed it.

15. In respect to grounds Nos 3 and 13 the Appellants submitted that the Hon Magistrate failed to consider that the Appellants were innocent purchasers without notice of the suit land and that the Court had issued a vesting order in their favour and that there is nothing remaining to be determined in view of the said subsisting orders of the honourable Court. That the magistrate should have found that he was not seized of the requisite jurisdiction to entertain the matter and proceed to strike it out.

16. In respect to grounds 6,7,8,9 and 11, the Appellants submitted that magistrate erred in not finding that CMCC No 368 is an abuse of the process of the Court. That the magistrate made no attempt to analyze the Appellants evidence brought before the Court hence misdirecting himself to the wrong conclusion.

17. In respect to ground No 10, the Appellants submitted that the magistrate erred in making a finding that the Appellants had not proven what loss they would suffer to warrant grant of orders of review. That by ordering the adjudication of the CMCC 368 of 2017 will prejudice the Appellants because as it stands they have a decree in their favour, vesting orders as well as consent of the Land Control Board to transfer the suit land in their names. This in itself would occasion prejudice and an injustice to the Appellants, they argued.

18. In respect to ground No 12, that the Magistrate in ordering that the interim orders issued on the 20/12/17 do remain in force pending the hearing and determination of the suit, he effectively determined the Notice of Motion dated the 13/12/17 without affording the parties a hearing on its merits. The Appellants have been denied the right of reply and a fair hearing in opposition of the said application which is against the very tenets of natural justice.

19. In his brief submissions the Respondent stated that the Learned Magistrate applied his mind correctly to the issues raised in the application and arrived at the correct decision. He added that the issues raised by the Appellants in their application if granted had the effect of determining the suit at an interlocutory stage hence denying the parties a hearing. He added that the parties need to be given the opportunity to establish proprietary interests in the suit land. That in any event there was no loss that would be occasioned to the Appellants if the application was declined. He stated that the honourable Court would be incapable of appreciating the issues as between the parties in view that the pleadings in the CMCC No 451 of 2012 which were not placed before the Court. He faulted the Appellants for adducing evidence at this stage which should correctly be reserved for the hearing. That in respect to the prayers for review the Appellants did not meet the criteria for granting review either on new evidence or mistake.

20. I will set the background of this suit as follows; Vide a plaint filed in 2012 – CMCC No 451 of 2012, Thika , Mwangaza Finance Trust Limited sued the Respondent and another seeking to recover Kshs 208,000/- together with interest of 10% p.a . It was the Plaintiffs case that the Respondent obtained a loan from the lender in the sum of Kshs 220,000/- with the suit land being collateral security thereof. As fate would have it the Respondent defaulted and hence the suit by the lender. In his defence filed and dated the 15/7/2012, the defendant (now Respondent) did not deny the Plaintiffs claim and in fact admitted the said claim.

21. On the 2/8/2012 Mwangaza filed a request for judgment on admission which was granted. On the 23/8/12 the Court ordered that the sale of the suit land by public auction in execution of the judgment in August 2012 unless the defendant paid the decretal amounts plus costs of the attachment to Court. A memorandum of sale by public auction dated the 27/7/13 shows that the land was sold to one Bernard Muriuki Gaturuku, at the price of Kshs 400,000/-. This buyer held the suit land for and on behalf of the Appellants. On the 11/12/2015 vide a vesting order the Appellants ordered that the suit land be registered in the names of the Appellants as trustees of Diplomat Welfare Group. The said orders mandated the Executive officer of the Court to execute the documents to effect the orders.

22. I have perused the pleadings and all the materials placed before me and it is clear that the said orders are still in force. That is to say they have not been appealed, set aside or vacated.

23. The Appellants have gone into great lengths to explain the steps they have taken to effect the vesting orders in view of the myriads of machinations (they aver) of the Respondent by himself and through proxy to frustrate them from enjoying the fruits of the decree in their

favour.

24. It is on record that whilst the orders alluded to in para 22 are still in force, the Respondent filed a fresh suit in Kerugoya ELC Court against the Mwangaza Finance Trust Limited, Paul Thumbi Kabai t/s Superview Auctioneers and Bernard Muriuki Gaturuku. This suit was transferred to CMCC Court in Muranga and registered as CMCC No 368 of 2017. In this suit the Respondent sought orders to declare the sale by public auction as fraudulent, that the sale of the property to the Appellants representative Bernard Muriuki Gaturuku was void for breach of section 8 of the Land Control Act and an order compelling the defendants to release the original title to him.

25. It is to be noted that CMCC No 451 of 2012 at Thika was filed by Mwangaza Finance Trust Limited, the lender against Wilson Khumba Githinji & Anor seeking to recover the sum of Kshs 208,000/- advanced to the Defendants and for which they had defaulted.

26. Going by para 24 it is clear that the current suit is challenging the execution of the decree in CMCC No 451 of 2012, which decree is still in force in a fresh suit before the Courts. Section 34 of the Civil Procedure Act provides as follows;

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional Court fees.

Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation.—For the purposes of this section, a Plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

27. The issue is whether the Respondent can file another suit in a Court enjoying similar or concurrent jurisdiction and challenge the execution of a decree that is to say to impugn the sale by public auction. It is to be noted that the same was pursuant to an admission in the defence. It is not for me to look into the merits of the current suit visa vis the suit that was determined and a decree issued in favour of the Appellants. The issue that I must highlight is that this suit if allowed to stand will create an absurdity that must not be allowed at all costs. I say so because this suit amounts to an Appeal cleverly crafted through the back door. A party cannot Appeal against the judgement of another Court enjoying the same jurisdiction. The Respondent had the liberty to seek other interventions like review in the same Court or Appeal the decision of the Court in the Environment and Land Court.

28. Filing a fresh suit runs afoul against the provisions of section 34 of the Civil Procedure Act which provisions are expressed in mandatory terms. It is clear that since the Respondents suit arose from execution any challenge and or claim touching on or concerning the propriety validity and legality of the same can only be mounted in the same suit but never a fresh suit. It is on record that the Respondent failed to successfully set aside the judgement and by filing this suit afresh he is seeking a second bite on the same cherry. The scenario is a replica of calling upon the lower Court to sit on Appeal over its own very decisions.

29. It is the finding of the Court that CMCC No 368 of 2017 is incompetent and amounts to an abuse of the process of the Court. The Respondent did not oppose this ground. I shall therefore determine this Appeal on this ground without the necessity of having to look at the issues of review and setting aside which I believe should be argued in the CMCC No 451 of 2012.

30. In the upshot, I find that the Learned Magistrate fell in error in dismissing the application. In addition, I find that the Plaintiffs suit filed on the 18/12/2017 as well as the application dated the 13/12/2017 offends section 34 of the Civil Procedure Act.

31. In the circumstances I dismiss the Plaintiff's suit and the application with costs in CMCC No 368 of 2017 to the Defendants. The interlocutory orders issued on the 20/12/2017 be and hereby set aside.

32. In the upshot the Appeal is allowed with costs to the Appellants.

33. **It so ordered.**

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 12<sup>TH</sup> DAY OF MAY 2020**

**J G KEMEI**

**JUDGE**