



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Nyarangi, JA, Platt & Gachuhi, JJ A)

CIVIL APPEAL NO 87 OF 1983

BETWEEN

JOSEPH NJENGA NJOROGE APPELLANT

AND

KABIRI MBITI RESPONDENT

(Appeal from judgment and decree of the High Court of Kenya at Nairobi Chesoni, J)

dated October 14, 1982

In

Civil Appeal No 101 of 1981)

JUDGMENT OF PLATT, AG JA

This is an appeal against the judgment of the High Court, in which the High Court directed that the ruling of the Resident Magistrate dated March 13, 1981, and the ruling of the Senior Resident Magistrate dated March 26, 1980 be set aside. The Land Registrar was directed to cancel the entry made in the register in consequence of the order given on March 26, 1980. The appellant challenges those orders, but before I deal with the grounds of the appeal it will be necessary to set out the background of the case.

As the learned judge stated, a person called Wanjohi Kiranga sued another person called Kabiri Ngathuri alias Kibiri Ngathori in 1967 in the Resident Magistrate's Court at Nairobi (Civil Case No 4082 of 1967). The suit was for Shs 1,600, being money paid by Wanjohi Kabiri as part payment of the purchase price of 7 acres of land situated at Kiirie, Kirinyaga District. Kabiri had agreed to sell this land for Shs 2,800. The defendant Kabiri having been duly served, failed to enter an appearance, and on the application of the advocate for the plaintiff, judgment was entered for Wanjohi. A decree was issued and Wanjohi applied for execution by attachment and sale of all that piece of land known as No Kiine/Kibingoti – Ngunguini/865 comprising 7 acres or thereabouts belonging to Kabiri Gathuri. The application was granted and the land was sold by public auction to Joseph Njenga Njoroge for Shs 1,150. That was a disappointment to the decree-holder who recovered Shs 610.00 net leaving a balance of around Shs 1,000. The sale by public auction took place on April 8, 1969. On November 1, 1969 the Senior Resident Magistrate certified that Joseph Njenga had been declared the purchaser of the land in question on April 8, 1969. However, it does not appear from the record that the provisions of Order 21 Rule 31(1) of the Civil Procedure Rules were complied with. There is no order that can be seen confirming the sale which was thereupon to become absolute, in which case under Rule 83, the certificate of sale may be granted bearing, the date when the sale became absolute.

Mr. Wanjohi, the decree-holder had attempted to sell the remaining part of the land. On October 24, 1969 Mr Nowrojee, acting for him pointed out that 7 acres of land had been sold out of a plot of 11 acres. Therefore the decree-holder wished to sell the remaining part of the land to satisfy the balance of the money owing. The Resident magistrate at that time issued a notice to show cause why the remaining part of the plot should not be sold to recover the balance of the decree. It appears however, that the notice to show cause was to be served for January 15, 1970. In May 1970, Mr Nowrojee explained to the court that the purchaser had been unable to get title to the land, as he had only bought part of the land under that title. The registrar at Embu refused to subdivide the land or issue a title to the 7 acres. So Mr Nowrojee asked for liberty to amend both applications for attachment and sale and to amend the certificate of sale. The Senior Resident Magistrate allowed the application for execution to be amended, and ordered that they be served on the judgment debtor and the purchaser.

The mention of a purchaser refers to the further complication in this case. Mr Joseph Njenga, the auction purchaser on April 8, 1969, agreed to sell to Mr Mwangi Kahue the portion of land known as Kiine/Kibingoti/ Ngunguini 865 measuring seven acres situated in Ndia Division in Kirinyaga District at the price of Shs 500 per acre. There is no doubt that the auction purchaser was selling off the land he had bought at the auction at a pleasant profit, the price being Shs 3,500. His agreement for sale recognized that he had received Shs 3,000 and that he would agree to procure the transfer of the property on receipt of the balance of Shs 500. On July 6, 1970 Mr Njenga confirmed in writing that he had by that date received the whole purchase price, and he undertook to transfer the property. It is not clear whether the Land Board consented to the purchase of the land by Mr Mwangi Kahue. It should perhaps be said here that it is not clear whether the Land Board gave consent to the original sale by Kabiri to Wanjohi; but that is not of importance because Wanjohi would at least be able to recover from Kabiri, the purchase price or such part as he had paid to Kabiri.

Of more importance perhaps is the fact that the auction sale was not consented to, which would presumably be part of the procedure leading to the Resident Magistrate confirming the sale.

The action of the Land Registrar in refusing to register the land, his decision being notified to the court by his letter dated January 27, 1970, seems to have made it difficult for the parties, and no further steps seem to have been taken until Mr Mwangi Kahue (or Kahwe) brought a motion asking for the prohibitory order registered against the title to be removed. He also asked that the property registered in the name of Kabiri Ngathuri or Kabiri Gathori be vested in him absolutely. For this purpose, he asked that the Executive Officer of the court be directed to execute and sign a transfer form; the application to Land Control Board for consent; and all other forms which might be necessary to enable him to be registered as owner of Kiine/Kibingoti/Ngunguini/865. It is not quite clear who put the prohibitory order on the title. According to the Land Registrar, the prohibitory order was given under the hand of the Resident Magistrate dated November 6, 1968. The copy of the register does not show a date for the prohibitory order. But at any rate, the Land Registrar refused to register the sale to Joseph Njenga Njoroge because of the discrepancy between 7 acres and 11 acres and also because of the prohibitory order.

When Mr Mwangi Kahue brought this motion for the removal of the prohibitory order, argument was heard, and the Senior Resident Magistrate, Mr Tank, gave a ruling on March 30, 1978 to the effect that Mr Mwangi Kahue could not bring his motion because he was merely the nominee of Mr Joseph Njenga Njoroge. He had no right therefore to try and clear the title which Mr Joseph Njenga Njoroge was trying to substantiate in accordance with the certificate of sale issued on November 1, 1969. The Senior Resident Magistrate did not take the point that the certificate of sale was not sufficient by itself to pass title to him, and that in any case the consent of the Land Control Board had not been given to the transaction.

As a result of Mr Mwangi Kahue failing to raise the prohibitory order, on February 29, 1980, Mr Joseph Njenga Njoroge himself asked to raise the prohibitory order, and to obtain orders that the Senior Executive Officer be authorised to sign all necessary documents, to effect the transfer of the land to himself. On March 26, 1980 as a result of an *ex parte* hearing of this application, the prohibitory order was lifted and the Senior Executive Officer was ordered to sign the transfer papers.

By this time the original judgment-debtor, Kabiri Gathori or Kabiri Kathuri had died on August 26, 1978. Mr Kabiri Mbiti, his nephew, claimed to be his sole heir in accordance with Kikuyu custom. Mr Kabiri Mbiti then brought a motion on October 2, 1980, which sought to review and set aside the *ex parte* order made on March 26, 1980 by the Senior Resident Magistrate, Mr Bhandari. As a consequence it was asked that the registrar be required to rectify the register by canceling the entry dated May 10, 1980 in favour of the respondent, Joseph Njenga Njoroge, and by restoring the name of Kabiri Ngathuri deceased as registered owner of the land in question. He went further and asked for the purported sale of seven acres by auction dated April 8, 1969 and the certificate of sale dated November 1, 1969 to be cancelled and set aside. He asked for all the necessary orders for restitution, the appointment of a legal representative to be made as the court should think fit.

As a result of this application, the learned Magistrate, Mr Bosire, reached the conclusion that he could not set aside the *ex parte* order, because Mr Kabiri Mbiti did not come within the ambit of the provisions for a review, until he had taken out Letters of Administration. His claim to be the sole heir was uncertain until he had been so appointed under section 120 of the Registered Land Act (Cap 300). It followed that he did not have a sufficient interest so as to bring him within the ambit of a person who considers himself aggrieved, a description which comes from section 80 of the Civil Procedure Act (Cap 21) and Order XLIV of the Civil Procedure Rules.

Following upon that order, Mr Kabiri Mbiti appealed, the respondent being Mr Joseph Njenga Njoroge. This explains why the original parties to the suit and execution are not involved in this appeal process.

The learned judge held that Mr Kabiri Mbiti was an interested party because he had a present or future interest in the property; and that by virtue of that interest he could apply for review if he felt aggrieved.

On that basis, the learned judge then went on to consider whether the learned Magistrate should have set aside the *ex parte* order. It was held that it should have been set aside, because Order XX Rule 5A of the Civil Procedure Rules had not been complied with, and because the application would have the same result as a vesting order, which should not be granted *ex parte*.

The appellant now before this court is Mr Joseph Njenga Njoroge, he seeks to support the *ex parte* order of March 26, 1980 and for that purpose the order of March 13, 1981. In his view the prohibitory order should be raised, and the transfer to him should be carried out. At this stage there are two issues for decision, arising out of the memorandum of appeal:

(a) was the respondent entitled to proceed by way of Review, and

(b) if he was, should he be permitted to contest appellant's motion? A further question will then arise whether this court should intervene?

As to the respondent's *locus standi* the debate between the lower courts brings out the two sides of the argument very well. It is true that in the normal course of continuing a trial after the death of a party, the heir of a deceased party must have obtained Letters of Administration or been named an executor before he can be brought on to the record. That follows from the provisions of Order XXIII of the Civil Procedure Rules. On the other hand, as the learned judge pointed out, neither section 80 of the Act nor Order XLIV of the rules, refers to "parties in a suit". A wider provision has been made, probably because it is desired to cater for persons who have no right of appeal. An illustration is afforded by these proceedings. Orders were made with regard to the Registrar. He is not a party. But he would be expected to comply. He could bring an application for review. If that is so, how far does this interpretation go? Is the learned Magistrate right to warn of dangers against those he might think are busy bodies? He may well be right and it may not be easy to draw the line clearly.

But in this case there is no difficulty. The defendant had died. Someone should succeed him, and safeguard the property of the estate. The respondent is a relation. The action he has taken is to preserve the estate. It is not a claim to the land as yet. He has proposed that an *ex parte* order by which the land would be transferred be set aside in favour of a hearing on the merits. He has sufficient interest as a

putative heir to appear to do that. It can usually be arranged that Letters of Administration *pendente lite* (for the purpose of that particular litigation), are quickly granted by the Probate Court and in that way the inheritance left undisturbed. Rather than defeat an application such as this, it would usually be better to order an adjournment for limited representation to be granted, and then proceed. But even so, I would respectfully agree with the learned judge, that the words of Section 80 of the Act and Order XLIV of the rules are wide enough to cover the respondent, and that it is safe to do so in this case. The respondent as heir must certainly feel aggrieved if valuable property passes out the family, after a doubtful sale.

That brings me then to the second heading. Should the learned Magistrate have reviewed the order of March 26, 1980? The short answer to this is that he certainly should have done so, because the defendant had died, and on any view of the case, as the prohibitory order was to be lifted and the deceased's land transferred free of that order, the deceased had to be served with the application. The deceased was not served because he had died. The *ex parte* order was a nullity on that account.

In that case, what should this court do now? The learned judge was no doubt right to set aside both orders, but the question remains whether the auction sale should continue to cast its shadow across the affairs of these litigants. If the *ex parte* order is set aside the prohibitory order will be revived, and the Registrar will refuse to register the title. That is because the sale is a nullity in reality. The error in the size of the land is so great, and the application for attachment and sale was wrong, because there was no division of the land. Mr Nowrojee applied for and was allowed to amend the two applications for execution. It is not clear how the amendments were granted. It is impossible to amend an application for attachment and sale after the sale has taken place. The proper course to adopt was to set the sale aside and begin again. There was no application for setting aside the sale under Order XXI Rules 78 to 80 of the Rules in fact. But it must have the same effect, if the attachment has to be materially amended and that amendment is allowed. The sale cannot stand. Moreover it was never confirmed, a step which is mandatory (See *Sheikh Mohamed Bashir vs United Africa Co* [1959] EA 706 at p 709 following the Privy Council in *Seth Nanhelal vs Umrao Singh* [1931] 58 IA 50). It must be declared to be a nullity. Mr Mulwa who appeared for the appellant, left the matter to the Court. If the sale is declared to be a nullity, the Registrar will no longer be in a dilemma, and the parties will know where they stand. It is unlikely that the sale to Mr Mwangi Kahue was valid; the purchase price will probably have to be returned there. The original parties will have to start again; and for that purpose no doubt an application will be made to remove the prohibitory order. In the meantime Mr Kabiri Mbiti can obtain Letters of Administration, at least limited to this case if necessary.

I would dismiss the appeal, confirm the setting aside of the two orders, and declare the auction sale a nullity. I would grant the respondent the costs of this appeal and in the court below.

Nyarangi JA. I also agree that the appeal should be dismissed, and would only add a few words on two points.

On the evidence the sale of 7 acres was invalid and any consequential registration for the acreage equally invalid. The appellant concedes that he has not paid for 4 1/2 acres. There is no legal or factual basis upon which this court can rectify the fundamental error which was committed by the auctioneer in his decision to sell by public auction undefined and unregistered property. The appellant was obliged to ascertain first, the nature of the property he was purchasing and secondly that after the purchase, title would pass to him as sole proprietor on registration. The appeal is wholly without any merits and as Platt and Gachuhi, Ag JJ A agree, the order of the court is that the appeal is dismissed with costs of this appeal and the court below.

Gachuhi Ag JA . I agree with the judgment prepared by Platt Ag JA and the conclusion therein reached.

The sale having failed, the execution for money paid ought to have been against a parcel of land as would be represented by a certificate of registration. The sale of 7 acres as part of the land would only proceed with the consent of the owner whereby a sub-division should have been sought. There can never be a correction or amendment of the execution after a decree had been executed and realised.

The other point is that, there can never be any proceeding against a dead person. A personal representative should have been brought in the suit by the decree holder.

The proceedings after obtaining judgment were a nullity and the High Court judge was right in setting aside the proceedings and the orders hereon.

I too would dismiss the appeal with costs.

Dated and delivered at Nairobi this 15th day of October, 1986.

J.O.NYARANGI

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JUDGE OF APPEAL

H.G.PLATT

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JUDGE OF APPEAL

J.M.GACHUHI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR