REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. 8 OF 2015

ERNEST MUKIRIMA SIDIDI.....APPELLANT

VERSUS

JOTHAM IMBIMA ISULI.....RESPONDENT

JUDGEMENT

The appellant Ernest Mukirima Sididi being aggrieved by the judgment and or decree of the learned resident Magistrate in the above matter do hereby appeal against the same on the grounds that:-

1. The learned Resident Magistrate erred in law and in delivering the judgment dated 16th February, 2011 outside the Statutory period of 60 days without any or any acceptable explanation for the delay.

2. The delivery of the judgment on the 16th February, 2011 was in violation of the law as there was no prior notice of the date to the appellant or his counsel.

3. The learned Resident Magistrate erred in law in granting an injunction against the appellant over land parcel S/MARAGOLI/MADZUU/1284 while the said appellant was and had all along been in occupation.

4. The learned resident magistrate erred in law in failing to appreciate by reason of the ruling of the High Court of Kenya at Kakamega in Miscellaneous Civil Application No. 98 of 1978 between the appellant and Janet Ademo the later had no proprietary interest in the suit land to transfer to the respondent and hence the title deed which the respondent holds on S. Maragoli/Madzuu/1284 was not a good one to entitle the respondent to the equitable and or discretionary remedy of injunction.

5. In all circumstances of the case the learned resident magistrate did not address herself correctly or sufficiently to the applicable principles of the law and grossly erred in dismissing the appellants counterclaim.

6. The learned resident magistrate exceeded her legal mandate in the matter.

REASONS WHEREOF the appellant prays for orders that:-

(a) The appeal be allowed.

(b) The decree and all subsequent orders of the lower court be set aside and or vacate.

(c) The orders of the lower court dismissing the appellants counter claim be also set aside and or vacated.

(d) The honourable court do find in favour of the appellant at the lower court and do enter judgment against the respondent on the counter claim.

(e) Costs of this appeal and in the lower court be awarded to the appellant.

The Appellant submitted that, the appeal is against the judgment and or decree of T.N Bosibori Resident Magistrate dated 16th February 2011 in Vihiga SRMCC No. 13 of 2004 which was against the appellant Ernest Mukirima Sididi. The Learned Magistrate dismissed the counterclaim filed by the appellant on the ground that the same had not been proved. The suit land is S. MARAGOLI/MADZUU/1284 which was initially registered in the name of the appellant but pursuant to an award of the Land Disputes Tribunal Vihiga, was granted to one Janet Ademo Adaro who got herself registered as proprietor when misc. Civil Application No. 98 of 1998 before the High Court of Kenya at Kakamega challenging the award was pending.

The award of the tribunal was subsequently quashed by the High Court on 16th February 1999. The copy of the High Court order is filed at page 50-51 of the record, Janet Ademo Adaro secured registration of the land in her name on 20th April, 1999 as a gift from the appellant and obtained title deed. She sold off the land to the respondent on 12th November, 2002.The Learned Magistrate after hearing the parties made an order on 13/10/10 that judgment would be delivered on 24/11/2010 (see page 44 of the record) for reasons not appearing on the record, judgment was delivered on 16/2/11 with counsel for the plaintiff (respondent) only in present (see page 62 of the record of appeal) The judgment gave rise to the present appeal filed in the year 2012 after leave being granted by this court.

Failure by the Learned Magistrate to deliver judgment within the prescribed time limits-

> Order 21 Rule 1 of the Civil Procedure Rules 2010 provides as follows-
> 'In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates. Provided that where Judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the chief justice and shall immediately fix a date for judgment"

The above rule Is in mandatory terms that once a trial has been concluded, the court must fix a date within 60 days and deliver judgment within that period and on a date of which the parties and their advocates have notice.

From the record, the Learned Magistrate must have been aware of the requirement by 13th October, 2010 when she fixed the judgment for 24th November, 2010 that's just30 days after conclusion of the hearing. The Initial date for judgment was fixed in the presence of the defendant (appellant) and Mr. Athung'a Advocate for the plaintiff (respondent).

Further, from the court record, judgment was never delivered on 14th November, 2010 as scheduled and was never delivered within 60 days as mandatorily demanded by the rule. It was delivered on 16th February, 2011 that's more than four months (to be exact 125 days) after conclusion of the hearing. In this case a judgment delivered outside the statutory limit is no judgment. The only way to give life to such "judgment" would be to comply with the proviso. Did the Learned Magistrate comply?

Ground 2- Failure on the part of the court to deliver Judgment within 60 days is not an incurable omission only if the court (a) records the reasons why judgment was not given within the period (b) forward a copy to the chief justice and (c) immediately fix a date for judgment.

From the lower court record, there are no records for 24th October, 2010 which means the status of the judgment was never made known to the parties and the reasons for not giving the judgment as scheduled were never given.

The next record on the court file is 16th February, 2011 when judgment was delivered and nothing on record indicates that parties or their advocates were ever notified of the said date. Even though counsel for the respondent is recorded as being present on the date of judgment, the record of the court of that date do not show that counsel was present pursuant to notification by court also sent to the appellant.

In effect the Learned Magistrate violated Rule 1 of Order 21 of Civil Procedure Rules 2010 in entirety and at will. The legal effect of that is that subject judgment remains a nullity and this Honorable Court is invited to make such a finding.

Ground 3- The appellant in his testimony in the first paragraph on page 42 of the record testified that he had been in occupation of the suit land for 17 years. The house on the land belonged to his son. That evidence was never challenged or displaced. The plaint is filed at page 3-5 of the record. The respondent made no averment that he was in possession of the land. In his defence to counter-claim filed at page 10-11 of the record, the respondent does not aver that he was in possession. In fact his prayers in paragraph (a) of the plaint he sought orders of injunction AND OR EVICTION. In effect he wanted to evict the appellant and such a prayer only confirmed his admission that the appellant was then is possession.

The honourable Learned Magistrate did not give regard to that position when she gave judgment against the appellant, which effectively was to either stop the appellant enjoying the possession or evict him (presumably even evict the appellant's son who had a house on the land). To that extent, the judgment is vague and if not so then against acceptable principles of justice as a person in possession cannot suffer orders of injunction.

Ground- 4, 5 and 6 The Learned Magistrate had on her record evidence that the tribunal's award that gave land to Janet Ademo which she later sold to the respondent was quashed on 10th February, 1999 by the High Court of Kenya in Misc.Application No. 98 of 1998 even before the land was transferred to her on 20th April, 1999. (See order at page 50 of the record). And from the green card (at page 46 of the record) the said Janet Ademo did not transfer the land to herself pursuant to the tribunal's award but by way of gift from the appellant.That clearly proves that the transfer of the land to the person who sold the land to the respondent was fraudulent.

The Learned Magistrate was wrong in her judgment at paragraph 1 on page 61 of the record when she observed that the respondent was an innocent buyer for value as the appellant had not obtained stay of execution and never notified the respondent. Innocent buyer for value has obligation to search not only at the lands registry but also physical to satisfy himself that the land is free for occupation. The respondent did not carry out physical search or if he did, he did not disclose to court as her knew the appellant was in possession and that disclosure would defeat his claim.

The Learned Magistrate's interpretation of the High Court Order is to render that judgment subordinate to the magistrate's own judgment with respect to the ownership of the suit land. Honestly ownership of property founded on the basis of an award of a lower court which is later reversed by High Court cannot be a bonafide ownership for value without notice. There must be orderliness in the administration of justice. The High Court should not allow a situation when its orders are suppressed by judgments of a lower court however reasoned.

The person who was to suffer for the fraud of Janet Ademo was not the appellant but the respondent. The respondent cannot argue that he was not party to the proceedings of the High Court. He should have applied to be enjoined to the said High Court proceedings for an opportunity to reverse the orders and not benefit from the lower court judgment as such court has no appellate powers over the High Court.

Having found as she did that the High Court had quashed the decision of the tribunal which gave the land to Janet Ademo (see page 60 of the record) the Learned Magistrate should have not entered judgment for the respondent and dismissed the appellant's counterclaim.With due respect the Learned Magistrate was in misapprehension of the correct principles of the law, and acted outside her lawful mandate. The appeal is merited and ought to be allowed as prayed.

It is the respondent's submission that the appeal herein lacks merit and ought to be dismissed.

On ground 1, it is the respondent's submission that order 21 rule 1 does not invalidate a judgment delivered outside the 60 days. In this matter notices were issued to the parties when judgment was to be delivered and copies of the said notices are on court record.Further the judgment was not delivered after 125 days, as December, 21st January 13th of any calendar year is not counted in terms of the Order 50 rule 4. The judgment was thus delivered approximately 80 days, which is about 20 days late and such period is not inordinate. The spirit of order 21 rule 1 is not meant to invalidate judgment, but to fast track the delivery of judgment, which in their considered opinion is administrative and does not go to the core of the issues in dispute in a case.

Further my lady, such an omission, which is not deliberate, as it depends with the work load of the judicial officer and which this court should take cognisance of, do not prejudice the parties as the time frame within which to deliver judgment cannot change its contents. Hence this cannot be a ground of appeal as it does not challenge the findings of the trial court. Grounds 1 and 2 of the appeal fails for reasons given above.

On ground 3, the testimony of the appellant was challenged as he stated he did not reside on the land in issue and the son, who was a witness, admitted that the house was erected on the said land when the case was pending in court. That the land disputes tribunal case and Kakamega High Court miscellaneous application No. 98 of 1998 did not involve the respondent at any stage as he was not a party.

The respondent was not aware of any dispute between the appellant and one Janet Ademo, who sold the land to the respondent. At the time the land was sold, it was in the names of Janet Ademo, and thus the respondent is an innocent purchaser for value without notice and took due diligence in carrying out the search, and it showed Janet Ademo as the owner.

The only recourse that was left to the appellant after the reversal of the tribunals verdict was to claim compensation from the said Janet Ademo as the rights of proprietorship had passed over to a respondent prior to the reversal. The appellant cannot use the judgment of the High Court to dispossess the respondent who was not a party to or aware of it.

The judgment of the trial court did not suppress the High Court one as the judgment in the High court was between the appellant and Janet Ademo. The judgment cannot affect the respondent in anyway. The appellant could have a judgment in his favour but he cannot execute the same against the respondent, who was not a party and thus the trial court did not misapply the law. Janet Ademo had no right over the said land after disposing it to the respondent, a material fact that the High Court did not have when hearing the case between the appellant and one Janet Ademo, otherwise the High Court would have arrived at a different decision.The trial magistrate in whole, did not misapply the law. They urge the court to find that the appeal lacks merit and be dismissed with costs.

This court has carefully considered both the appellant's and the respondent's submissions. On grounds 1and 2, it is the respondent's submission that order 21 rule 1 does not invalidate a judgment delivered outside the 60 days. The spirit of order 21 rule 1 is not meant to invalidate judgment, but to fast track the delivery of judgment, which in their considered opinion is administrative and does not go to the core of the issues in dispute in a case. I concur, I find from the records in this matter notices were issued to the parties when judgment was to be delivered and copies of the said notices are on court record. The judgment was thus delivered after 60 days and this would be an administrative issue and would not invalidate the judgement.

On grounds 3 to 6 the appellant submitted that, the learned Resident Magistrate erred in law in granting an injunction against the appellant over land parcel S/MARAGOLI/MADZUU/1284 while the said appellant was and had all along been in occupation.The learned resident magistrate erred in law in failing to appreciate by reason of the ruling of the High Court of Kenya at Kakamega in Miscellaneous Civil Application No. 98 of 1978 between the appellant and Janet Ademo the later had no proprietary interest in the suit land to transfer to the respondent and hence the title deed which the respondent holds on S. Maragoli/Madzuu/1284 was not a good one to entitle the respondent to the equitable and or discretionary remedy of injunction.

I have carefully perused the record of appeal and the lower court file, The Learned Magistrate had on her record evidence that the tribunal's award that gave land to Janet Ademo which she later sold to the respondent was quashed on 10th February, 1999 by the High Court of Kenya in Misc.Application No. 98 of 1998 even before the land was transferred to her on 20th April, 1999. (See order at page 50 of the record). And from the green card (at page 46 of the record) the said Janet Ademo did not transfer the land to herself pursuant to the tribunal's award but by way of gift from the appellant.

The Learned Magistrate in her judgment at paragraph 30 on page 61 of the record she stated that;

> "*that the seller one Jane AdemoAdero had capacity to sell the subject land to the plaintiff since she was the registered owner at that time that the plaintiff was an innocent buyer for value".*

I find that the seller Janet Ademo could not have capacity to sell the land as the tribunal's award that gave her the land to which she later sold to therespondent was quashed on 10th February, 1999 by the High Court of Kenya in Misc.Application No. 98 of 1998 even before the land

was transferred to her on20th April, 1999. Innocent buyer for value has obligation to search not only at the lands registrybut also should have physically verified the same on the ground to satisfy himself that the land is free for occupation. The only remedy that was left for the respondent was to claim claim compensation from the said Janet Ademo as she had no rights of proprietorship at the time of selling the land and was fraudulent.

In **Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870**, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was not judiciously arrived at and the learned Resident Magistrate erred in law in finding that the respondent had proved his case and in dismissing the counterclaim. I find this appeal has merit and I grant the following orders:

1. The appeal be allowed.

2. The decree and all subsequent orders of the lower court be set aside and or vacate.

3. The orders of the lower court dismissing the appellants counter claim be also set aside and or vacated.

4. The honourable court do find in favour of the appellant at the lower court and do enter judgment against the respondent on the counter claim.

5. Costs of this appeal and in the lower court be awarded to the appellant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 31ST DAY OF MAY 2018.

N.A. MATHEKA

JUDGE