



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

APPEAL NO. 97 OF 2015

NGITIMBE HUDSON NYANUMBA.....APPELLANT

VERSUS

THOMAS ONGONDO.....RESPONDENT

J U D G M E N T

(Being an appeal from the Ruling of Hon. Mugendi Nyaga, RM issued in Kisii CMCC No. 239 of 1996 dated on 9th July 2015)

1. The instant appeal arises from the ruling of Hon. Mugendi Nyaga Resident Magistrate in Kisii CMCC No. 239 of 1996 delivered on 19th June 2015. By the ruling the learned trial magistrate dismissed the appellants application dated 8th July 2013. By the said application the appellant had inter alia sought the following orders:-

- 1. An order that the Notice of Change of Advocates filed by the firm of Nyamurongi Nyasimi after judgment without seeking leave of the court as provided under the law was irregular null and void.**
- 2. A declaration that the sale by public auction of the defendant's land title number West Kitutu/Bomatara/1737 (the suit property) under the instructions of a stranger to the proceedings and without service of notice to show cause was null and void.**
- 3. A declaration that the sale, transfer and registration of the suit property in the names of Wilson Omurwa Machuki was irregular, null and void.**
- 4. Cancellation or nullification of Wilson Omurwa Machuki and all consequential transfers and registrations on the suit property and restoration of the defendant's names.**

2. The said application was heard inter partes and in a reasoned ruling the learned trial magistrate dismissed the appellant's application inter alia holding that the appellant had failed to explain the inordinate delay in filing the application. On the issue regarding the alleged irregular appointment of the firm of Nyasimi Nyamori advocates to come on record, the court stated that the appellant failed to raise issue with the appointment of the said firm during the conduct of the matter holding that it was too late in the day to raise the issue at the present time. Equally, the learned trial magistrate held that the appellant could not properly challenge the execution process after the expiry of almost 8 years intimating that the appellant was caught up by laches and could not assert any rights he may have had by reason of the inordinate delay. The learned trial magistrate further found that the order issued on 30th May 2005 restraining the sale of the suit property on 31st May 2005 was not served on the plaintiff and the property was accordingly sold by public auction on 31st May 2005 and was vide a court order issued on 18th August 2005 authorizing the court's Executive Officer to sign the necessary transfer documents transferred to the purchaser at the auction. The court found no justifiable reason to nullify the sale of the suit property and held that the filing of the application of 8th July 2013 was an afterthought the defendant having slept on his rights, if any, for over 8 years.

3. The appellant being dissatisfied/aggrieved by the decision/ruling of the learned trial magistrate has appealed to this court and sets out the following grounds of appeal in his memorandum of appeal:-

- 1. THAT the learned trial magistrate erred in law and fact by dismissing the appellant's application dated 8th July 2013.**
- 2. THAT the learned trial magistrate erred in law and fact by failing to appreciate the provisions of Order 9 Rule 9 of the Civil Procedure Rules.**

3. THAT the learned trial magistrate erred in law and fact by failing to appreciate the provisions of Order 22 of the Civil Procedure Rules.

4. THAT the learned trial magistrate erred in law and fact by holding that the application dated 8th July 2013 was an afterthought.

5. THAT the learned trial magistrate erred in law and fact by holding that although the execution proceedings were irregularly done, the appellant did not complain in time.

6. THAT the learned trial magistrate erred in law and fact by relying on extraneous finding and ignoring submissions of the appellant.

7. THAT the trial magistrate failed to apply his judicial mind appropriately.

The appellant prays for the appeal to be allowed and the ruling dated 18/6/2015 set aside and substituted with an order allowing the application dated 8th July 2013.

4. The brief background to this matter from a perusal of the lower court record is that the respondent who was the plaintiff in the lower court sued the appellant who was the defendant claiming a sum of KShs. 300,000/=. The respondent obtained an interlocutory judgment in default of a defence and a decree issued. There were various attempts to execute the decree and the appellant was committed to civil jail on 6th August 1996 for a period of 30 days but was released from civil jail following an ex parte application by the appellant's counsel on 9th August 1996. Thereafter the appellant's application dated 9th August 1996 came up for hearing on diverse dates and was disposed of on 18th March 1997. The judgment entered in favour of the respondent was never set aside and efforts at execution continued.

5. The record shows that the appellant appointed the firm of Kerosi Ondieki & Company Advocates on 9th August 1996 and further appointed the firm of Makori Omwario & Co. Advocates as an additional firm to act jointly with the firm of Kerosi Ondieki & Co. Advocates vide a notice dated 30th May 2005 filed on 31st May 2005. On the other hand the respondent appointed the firm of Nyamori Nyasimi & Co. Advocates to act for him in place of E. Asati & Co. Advocates who had hitherto represented him and a Notice of Change of Advocate dated 21st October 1998 was filed in court on 22nd October 1998.

6. On 16th November 2004 the firm of Nyamori Nyasimi & Company Advocates filed an ex parte Notice of Motion seeking a prohibitory order against land parcel **West Kitutu/Bomatara/1737** registered in the name of the appellant/judgment debtor signifying his intention to attach the same. The order was granted and a prohibitory order was registered against the property. A notification of sale of the property was issued by the court on 11th March 2005. Though not apparent from the record the sale of the property by public auction was scheduled on 31st May 2005 as is evident from the appellant's chamber summons application dated 30th May 2005 filed on 31st May 2005 where the appellant inter alia sought an order:

“That, the respondent/plaintiff or his agents be restrained/ stopped from selling all that land parcel No. West Kitutu/Bomatara/1737 which is scheduled for sale on 31st May 2005.”

7. Although the application was granted it does appear the sale nonetheless proceeded as the court on 18th August 2005 allowed the court's Executive Officer to sign the necessary documents for the transfer of the property to one, Wilson O. Machuki following the sale by public auction. The court's Executive Officer executed a transfer in favour of Wilson Omurwa Machuki on 27th September 2005 and on the same day as per the abstract of title (green card) he was registered as the owner of the property by virtue of the court order on 13th October 2005 the property was transferred to one Kephias N. H. Matoke and on 13th July 2016 the same property was transferred to Coast Properties Limited and a title issued to them.

8. The foregoing is the contextual background against which this appeal has to be evaluated. As in the normal course this court being the appellate court of first instance, I have to evaluate the appeal on the basis of the evidence and material that was before the trial magistrate to determine whether the learned magistrate arrived at the correct decision having regard to the facts and the law.

9. The appeal as earlier pointed out is against the ruling of the trial court delivered by Hon. Mugendi Nyaga, RM Kisii arising from the appellant's application dated 8th July 2013 dismissed vide the said ruling. The appeal was argued by the parties by way of written submissions. The appellant's submissions were filed on 25th January 2018 while those of the respondent were filed on 5th March 2018.

10. The appellant's submissions are predicated on the argument that the firm of Nyamori Nyasimi & Co. Advocates did not properly come on record for the respondent as they never obtained the leave of the court as required under Order 9 Rule 9 where a judgment has been entered in a matter. The appellant further submits the respondent subsequently purported to file a Notice to Act in person and later appointed the firm of Sagwe & Co. Advocates to act for him all after the judgment had been entered. The appellant thus contends all the orders obtained by persons who were not properly on record were irregular and ought to be annulled as they were obtained without due process of the law.

11. The appellant further in the submissions faults the learned trial magistrate's failure to allow the appellant's application dated 8th July 2013 contending that the learned magistrate's exercise of discretion was not judicious. The appellant argues that the court had ordered a stay of the public auction scheduled on 31st May 2005 and contends therefore the sale and the consequent transfer of the suit property was a nullity. The appellant further contends there was no basis for the learned trial magistrate to hold that the appellant's application was an afterthought and/or that there was inordinate delay in bringing the same since according to the appellant a period of 12 years had not lapsed

and further Article 50 of the Kenya Constitution 2010 guarantees every person the right to a fair hearing.

12. The appellant further submitted that the respondent having been paid the decretal sum from the proceeds of the **“illegal sale”** and the property having been transferred to the alleged purchaser he had no further interest in the matter and further pointed out the consequent rapid transfers of the property to various parties was upon realization of the irregularities in the process of sale and the transfers were perpetrated to defeat the ends of justice.

13. The respondent in his brief submissions defended the execution process and averred that the learned trial magistrate properly disallowed the appellant’s application for the reasons that indeed. The respondent further submitted the third party who purchased the property at the public auction was not enjoined to the suit yet the orders that the appellant seeks in the appeal would affect him and/or the person presently registered as the owner of the suit property. He contended that the suit property is not in the respondent’s name and the court cannot give an order in vain. The respondent sought the dismissal of the appeal with costs.

14. Nyamori Nyasimi & Co. Advocates came on record for the plaintiff/ decree holder in this matter on 22nd October 1998 when he filed a Notice of Change of advocate to take over the conduct of the matter on behalf of the plaintiff from E. Asati & Co. Advocates. By this time the plaintiff had obtained judgment against the defendant and had commenced execution proceedings initially by way of Notice to Show Cause why the judgment debtor should not be committed to civil jail in default of payment of the decretal sum. The defendant who was represented by Kerosi advocate then never raised any objection to Nyamori Nyasimi & Co. Advocates coming on record for the plaintiff. Besides at the time there was no legal requirement for an advocate to obtain leave of the court to come on record for a party where judgment had been entered.

15. Before the enactment of the new Civil Procedure Rules 2010 the provisions for change of advocate were contained under Order III Rule 6 which was in the following terms:-

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 7, the former advocate shall, subject to rules 11 and 12 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

This was the position that obtained in 1998 when the firm of Nyamori Nyasimi & Co. Advocates filed their notice of change of advocate and as is evident there was no mention of change of advocate after entry of judgment. However, in May 2000 vide Legal Notice No. 36 Order III of the Civil Procedure Rules was amended by the insertion of a new rule 9A which provided thus:-

“9A. When there is a change of advocate to act when a party decides to act in person having previously engaged an advocate after judgment and decree have been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record.”

This provision was further amended by deletion and insertion of a new rule vide Legal Notice No. 128 of 31st August 2001 which provided thus:-

“9A. When there is a change of advocate, or when a party decides to act in person having engaged an advocate after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record.”

This later amendment was in the reorganized Civil Procedure Rules 2010 retained under Order 9 Rule 9 but reworded thus:-

Order 9 Rule 9:

“Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court -

(a) Upon an application with notice to all the parties; or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

The appellant as is clear in his submissions places reliance on Order 9 Rule 9 which could not have any application since the notice of change of advocate was effected in 1998 when the said provisions were not in force. The law cannot be applied retrospectively.

16. The learned trial magistrate in disposing the issue that the firm of Nyamori Nyasimi & Company advocates came on record irregularly without obtaining the leave of the court held that the appellant did not challenge the entry of Nyamori Nyasimi on record for the plaintiff but rather acquiesced to their participation in the proceedings. The magistrate further held if there was any objection to the firm acting, the same should have been taken at the time the notice of change was filed and that to wait for 8 years to raise the objection was unreasonable by reason of inordinate delay. The learned trial magistrate further was of the view that the complaint by the appellant that the plaintiff/respondent had not issued any notification to change the mode of execution from committal to civil jail to attachment of immovable property was unfounded as the appellant had no explanation why he waited for almost 8 years to raise the issue. He slept on his rights.

17. On the complaint that the auctioneer proceeded on with the auction on 31st May 2005 although there was an order staying the sale issued on the 31st May 2005, the Magistrate held that there was no evidence that the order had been served on the auctioneer and he disobeyed the same. The Magistrate further held the court's Executive Officer was on 18th August 2005 authorized vide an order issued on the same date to execute all the necessary documents to effect the transfer of the property to the purchaser at the auction.

18. I have reviewed the application dated 13th July 2013 and the affidavit in support and in opposition and the submissions by the parties and I find no basis upon which I can fault the learned magistrate. From the record, it is clear that the defendant/appellant as early as 15th July 1996 was aware that a judgment had been entered against him. On the date the appellant, appearing in court on a notice to show cause why he should not be committed to civil jail for failure to pay a decretal sum of kshs. 334,235/= sought for time to make repayment proposals and was granted. The appellant did not make any acceptable proposals and he was on 6th August 1996 committed to civil jail for 30 days. The judgment resulting in the execution has never been set aside. On 16th November 2004 the firm of Nyamori Nyasimi who hitherto had acted for the respondent since filing a notice of change of advocates from 21st October 1998 applied for issue of a prohibitory order to be registered against land parcel **West Kitutu/Bomatara/1737** owned by the appellant thereby signifying the intention to attach the property in execution of the decree. The record shows that a notification of sale was issued and that the appellant was aware of the sale as he vide an application dated 30th May 2005 applied for a stay of the sale scheduled on 31st May 2005. The sale proceeded and the property was sold and later transferred to the buyer and there have been subsequent transfers of the property to parties who were not enjoined to the suit.

19. The appellant's Notice of Motion dated 8th July 2013 was predicated on the view that the firm of Nyamori Nyasimi came on record for the respondent after judgment without leave of the court and therefore was irregular, null and void and all orders emanating and/or ensuing thereafter were a nullity and ought to be cancelled. The appellant had every opportunity to challenge the appointment but did not do so. Instead the appellant participated in the proceedings and did not raise any issue regarding the irregularity of the Notice of Change of Advocate that placed Nyamori Nyasimi advocate on record. One may ask what injustice was occasioned to the appellant by the appointment of Nyamori Nyasimi advocate after judgment allegedly without leave? I discern none, the appellant continued to participate in the proceedings without raising any objection. The idea/objective behind amending the Civil Procedure Rules to provide that where judgment had been entered any change of advocate was to be with the leave of the court was essentially for the protection of the advocates to safeguard their fees from their clients. The amendment was aimed at preventing mischief whereafter an advocate worked tirelessly for a client upto obtaining a judgment, the advocate is not debriefed by merely another advocate filing a notice of change or the client filing a notice to act in person so that execution of the decree is by another advocate who did not participate in the trial and/or by the client directly with the object of denying the advocate his fees or costs.

20. Although I agree with the learned magistrate that there was an inordinate delay in bringing this application challenging the notice of change of advocate without leave, my view is that no leave was required as at the time and that even if it was required I would nevertheless not have been persuaded to annul the subsequent and consequential orders from the date the notice of change was filed. The appellant suffered no prejudice at all by reason of such change of advocate. The appellant participated and/or was not prevented from participating in the proceedings and there was no miscarriage of justice. The court is enjoined under Sections 1A and 1B of the Civil Procedure Act, Sections 3(1) and 19(1) of the Environment and Land Court Act and Article 159 2(d) to administer justice expeditiously and justly and without undue regard to technicalities of procedure and it is my view that this is such a case where the court would have been entitled to disregard the strict rules of procedure in order to do substantive justice. In this case, judgment was entered way back in 1996 and execution commenced then and was completed on 31st May 2005 when the judgment debtor's property was sold in execution of the decree. It is unexplainable why the appellant should wait more than 8 years to challenge that sale. Litigation, as the saying goes, has to come to an end. The delay by the appellant in challenging the sale of 31st May 2005, which he had notice of, was inordinate and inexcusable. The bringing of the application after the lapse of 8 years was in my view an abuse of the court process and the application was properly and rightly refused by the learned magistrate.

21. Before concluding this judgment I would wish to comment on the competence or otherwise of the appellant's notice of motion dated 13th July 2013. Under prayers 2 and 3 thereof the appellant sought declarations that the sale of the defendant's land parcel **West Kitutu/Bomatara/1737** by public auction was a nullity and a declaration that the sale, transfer and registration of the property in the name of Wilson Omurwa Machuki was irregular, null and void. Under prayer 4 the appellant sought for the cancellation and nullification of the title registered in the name of Wilson Omurwa Machuki and the restoration of the appellant's name as the owner of the property. Evidently, the appellant was aware that the property had been sold by public auction and had been transferred to a third party. The orders sought by the appellant in the application if granted would invariably have affected the interests of a third party who was not a party to the proceedings. It is a cardinal rule of natural justice that no party should be condemned without being heard. Were the court to have granted the orders sought by the appellant in the notice of motion, the person who the appellant affirmed was the registered owner following the impugned public auction sale would have been condemned without being heard. To the extent therefore parties who stood to be affected by the orders sought by the appellant in the application were not enjoined in the proceedings, the appellant's application before the learned magistrate was misconceived and was an abuse of the court process.

22. The instant appeal is thus without any merit and the same is dismissed with costs to the respondent.

23. Orders accordingly.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 22ND DAY of JUNE, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Nyambati for the appellant

N/A for the respondents

Ruth court assistant

J. M. MUTUNGI

JUDGE