



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

APPEAL NO. 37 OF 2009

JOSEPHAT MWANGI MORACHA

(suing as the legal administrator of the estate of

ISAAC MORACHA ONGWACHO - (Deceased)....APPELLANT

VERSUS

BEATRICE NYAMBEKI MINDA.....1ST RESPONDENT

PATRICK RODGERS MOGAKA.....2ND RESPONDENT

OMWOYO AUCTIONEERS.....3RD RESPONDENT

J U D G M E N T

(Being an appeal from the Ruling of Hon. G. Oduor, SRM issued in Kisii CMCC No. 485 of 2005 dated on 13th November 2006)

1. The present appeal is against the ruling of Hon. G. Oduor, Senior Resident Magistrate, Kisii delivered on 20th February 2009 being a determination of the 2nd respondent's application dated 13th November 2006 in the original Kisii CMCC No. 485 of 2005 where he was the defendant. In the application the 2nd respondent had sought inter alia the setting aside of the sale and transfer of land parcel number **Nyaribari Chache/B/B/Boburia/7500** that had been sold by public auction on 28th November 2005 and the setting aside of ex parte orders made by the court on 20th January 2006. The 2nd respondent had also sought an order to enjoin the purchaser at the public auction sale and the auctioneers as interested parties in the application. The application was supported on the grounds set out on the body of the application and on the affidavit sworn in support thereof by the 2nd respondent.

2. The 1st respondent who was the plaintiff in the original suit filed a replying affidavit in opposition to the application while the appellant who was the 1st interested party in the application filed grounds of opposition and a replying affidavit in opposition to the 2nd respondent's said application. The learned trial magistrate after hearing the application inter partes allowed the application as prayed. The trial magistrate held that an earlier application dated 3rd August 2006 had been determined and the effect of the ruling on the application was not only to set aside the ex parte judgment that had been entered in this matter but also all the consequential orders emanating therefrom including the order confirming the sale by public auction. The trial magistrate in the ruling observed thus:-

“It could not have been the intention under Order XXI rule 81(1) to lock out a party who had no notice of sale of land simply because the purchaser has beaten him in the race by rushing to court to confirm the sale.”

3. It is against this ruling/decision that the appellant, who was the 1st interested party in the original suit (application) having been the purchaser at the public auction, appeals to this court and has proffered the following grounds of appeal:-

- 1. The learned trial magistrate erred in law, in entertaining and allowing the Notice of Motion dated 13th November 2006, when it was apparent that the honourable court was devoid of jurisdiction so to do, after the sale had been made absolute.**
- 2. The learned trial magistrate erred in law in setting aside the sale, when there was no proof of material irregularity or fraud, whatsoever in the sale and transfer of LR No. Nyaribari Chache/B/B/Boburia/7500, (hereinafter referred to as the suit land), either as required by law or at all.**

3. The learned trial magistrate erred in law in failing to appreciate and/or comprehend the standard of proof required in respect of a claim premised on fraud. Consequently, the ruling of the learned trial magistrate, setting aside the sale on the basis of fraud, is wrought with error and irregularities.

4. The learned trial magistrate misconceived and/or misapprehended the provisions of Order XX Rules 81, 82 and 84 of the Civil Procedure rules, in setting aside the sale that had been confirmed and made absolute.

5. That in setting aside the sale that had already been confirmed as absolute without addressing the issue of the purchase price, the learned trial magistrate meted out double punishment to the appellant. Consequently, the ruling has occasioned a miscarriage of justice.

6. The learned trial magistrate took into account erroneous and/or extraneous issues, whilst on the other hand failing to take into account relevant issues. Consequently, the learned trial magistrate discretion was coloured with errors.

7. The learned trial magistrate failed to properly evaluate and/or analyze the submissions tendered by the appellant and the authorities cited thereto. Consequently, the learned trial magistrate misapprehended the crux of the matter before the court.

8. The ruling and/or decision of the court does not capture the issues for determination, the determination thereon and the reasons of such determination. Consequently, the ruling of the court is contrary to the provisions of Order XX Rule 4 of the Civil Procedure Rules.

9. That the ruling and/or decision of the learned trial magistrate is contrary to the weight of the evidence and submissions on record.

The appellant prays that the appeal be allowed and the ruling by the learned trial magistrate be set aside and substituted with an order dismissing the 2nd respondent's Notice of Motion dated 13th November 2006.

4. This being a first appeal this court has a duty to reevaluate the evidence and material laid before the trial magistrate to determine whether that court on the basis of the law and the evidence before it came to a correct decision. This court would be entitled to come up with its own independent decision on the basis of the facts adduced and the applicable law. The principles upon which an appellate court acts were aptly stated in the Court of Appeal case of **Selle -vs- Associated Motor Boat Company Ltd -vs- Others [1968] EA 123** thus:-

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

The instant appeal arises out of a ruling on an application and hence there was no oral evidence where the demeanour of witnesses could be a factor. The court therefore is limited to the re-evaluation of the merits of the application on the basis of the affidavits in support and in opposition and the applicable law.

5. The application before the lower court dated 13th November 2016 was expressed to be brought under Order XXI Rule 79, Order L Rules 2 and 17 of the old Civil Procedure Rules and Section 3A and 63(e) of the Civil Procedure Act. The applicant sought the following orders:-

1. That the interested party/respondent herein be enjoined for purposes of this application.

2. That the orders of this honourable court made ex parte on 20th January, 2006 and all other subsequent and consequential orders be set aside.

3. That the sale of land parcel No. Nyaribari Chache/B/B/Boburia/ 7500 made on 28th November 2005 at a public auction be set aside and the transfer of the said parcel of land to the 1st interested party/respondent be cancelled.

4. That the sale of land parcel No. Nyaribari Chache/B/B/Boburia/ 7500 and the subsequent eviction of the defendant/applicant and other beneficiaries and tenant's be declared null and void.

5. That the costs of this application be provided for.

The application was inter alia supported on the following grounds:-

a. That an ex parte judgment does not vest a right of ownership in immovable property.

b. That the ex parte judgment entered herein against 1st defendant has been set aside.

c. That the plaintiff/respondent herein failed to serve a notification of sale upon the 1st defendant/applicant herein.

d. That the notification of sale did not disclose the nature and value of land parcel No. Nyaribari Chache/B/B/Boburia/7500 which was sold.

e. That the rules of procedure regarding publishing, conducting an auction sale of land parcel Nyaribari Chache/B/B/Boburia/7500 were seriously flouted by the respondents herein.

f. That no copy of the prohibitory order was affixed at the conspicuous part of the property to be sold.

g. That the 2nd interested party/respondent failed to issue a notice of not less than forty five days or at all before the said sale took place.

6. In response to the application the 1st respondent (plaintiff in the original suit) filed a replying affidavit dated 16th January 2007 and her position was that all the requisite procedures were complied with in effecting the public auction sale of a portion of land parcel **Nyaribari Chache/B/B/Boburia/7500** to Isaac Moracha Ongwacho, the appellant herein. That the portion sold to the appellant measuring 0.12Ha has already been transferred and registered in the appellant's name. The 1st respondent further deponed that the land parcel **Nyaribari Chache/B/B/Boburia/7500** belonged to the 2nd respondent and not the 2nd respondent's father as claimed by the 2nd respondent.

7. The appellant in his replying affidavit averred that he became aware of the sale by public auction of the subject property when he stumbled upon a hand bill issued by the 3rd respondent advertising the sale of the property by public auction. The appellant further averred he got interested in the property and that he participated at the auction and he emerged as the highest bidder. He paid for the property and was subsequently issued a certificate of sale and the court granted a vesting order and issued an order for the court's executive officer to execute any appropriate documents to effect the transfer to him. It was the appellant's contention that all the requisite procedures respecting the sale of the subject property had been complied with and there was therefore no basis upon which the court could interfere and/or intervene. He contended in the circumstances the court lacked the jurisdiction to revoke the sale.

8. The learned trial magistrate as observed earlier in this judgment after hearing the application inter partes and considering the applicable law allowed the application. He held that there was material irregularity in the publishing and conducting of the auction sale explaining why he allowed the application as prayed thereby effectively setting aside the sale.

9. The parties argued the appeal by way of written submissions. The appellant filed his submissions on 8th December 2017 while the 2nd respondent filed his submissions on 30th April 2018.

10. The appellant submitted that the learned trial magistrate lacked the jurisdiction to entertain and/or determine the Notice of Motion dated 13th November 2006 as the subject property had already been sold at the public auction where the appellant was declared as the highest bidder and a portion thereof being land parcel **Nyaribari Chache/B/B/ Boburia/7878** transferred to him. The appellant was registered as owner on 9th June 2009 and the appellant argues title had vested and the Magistrate had no jurisdiction to order the rectification of the title. The appellant placed reliance on Sections 27(a) and 28 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed).

11. Section 27(a) provides as follows:

27. Subject to this Act –

(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

Section 28 of the Act provides:-

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act. ...”.

Section 143 of the Act provides:-

143(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission or mistake or substantially contributed to it by his act, neglect or default.

12. The above provisions of the repealed Act mirrors the provisions in the new Land Registration Act No. 3 of 2012 in Sections 24, 25 and 80. Under the provisions, it is evident where a registration is obtained irregularly and/or fraudulently or by mistake, a court can order rectification. The appellant in support of his submission that the honourable trial magistrate lacked jurisdiction relied on the case of **YFO Masakhalia & Another -vs- Nairobi City Council & 3 Others [2010] eKLR** where the appellate court stated as follows:-

“...We respectfully agree with the superior court that the orders granted were ineffectual because by the time the orders

were granted on 20th November 1997, the two purchasers at the public auction were not only already registered as proprietors but they had also transferred the land to the 4th respondent who had in turn charged the property to the bank to secure a loan...”.

The court continued to observe that:-

“Moreover, it is only the High Court which has jurisdiction to rectify the register in respect of land registered under Registration of Titles Act. If the order was intended to nullify both the vesting order and the registration of the purchasers as proprietors, then the order was made without jurisdiction and is itself a nullity. It follows that the order of the city court setting aside the ex parte judgment and nullifying the sale had no effect either on the vesting order or the subsequent registration...”.

13. **“Court”** under the Registration of Titles Act, Cap 281 (now repealed) Section 2 means the High Court and hence if there was a need to rectify a title registered under that Act, only the High Court had the jurisdiction to do so. That was the position in the above case where the title had already been registered and hence the City Magistrates Court indeed lacked the jurisdiction to annul that registration.

14. In the present appeal the land registered in the appellant’s name following the purchase was effected under the Registered Land Act (repealed) and under the Act, **‘Court’** under Section 3 is **“except as otherwise expressly provided”**, means the court having jurisdiction in the matter in question by virtue of Section 159. The trial court had the pecuniary jurisdiction to handle the matter which resulted in the decree that the 1st respondent sought to execute.

15. Even if there was a doubt as to whether the trial court had jurisdiction, Section 34 of the Civil Procedure Act, Cap 21 Laws of Kenya puts the matter to rest as it provides that the court that executed the decree is empowered to determine any questions arising from the execution of the decree. Section 34(1) provides as follows:-

34(1) All questions arising between 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.

16. The appellant was registered as owner of a portion of land parcel **Nyaribari Chache/B/B/Boburia/7500** pursuant to an execution process that the 2nd respondent was not happy with and mounted the challenge giving rise to the present appeal. The appellant was enjoined in the application dated 13th November 2006 as a necessary party having been a beneficiary of the impugned execution process. The trial court had jurisdiction to deal with the matter and properly entertained the application on the basis of the above referred to Section 159 of the Registered Land Act and Section 34 of the Civil Procedure Act also referred to above.

17. Considering that the ex parte judgment that had been entered against the 2nd respondent had been set aside at the time the application giving rise to this appeal was filed the primary issue before the trial magistrate was to determine whether there were grounds to vitiate the public auction sale that was conducted on 28th November 2005. The Magistrate found there was material irregularity as the sale was not conducted in conformity with Rule 15(c) and (d) of the Auctioneers Rules of 1997.

18. Rule 79 of Order XXI of the old Civil Procedure Rules under which the application was brought provides:-

Order XXI Rule 79:

“Where any immovable property has been sold in execution of a decree, the decree holder, or any person whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it.

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

19. The Auctioneers Rules are elaborate on the process to be undertaken before a public auction sale is concluded and in regard to immovable property Rule 15 provides:-

a. Record the court warrant or letter of instruction in the register.

b. Prepare a notification of sale in the form prescribed in sale Form 4 set out in the second schedule indicating the value of each property to be sold.

c. Locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect.

d. Give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrants or letter of instruction.

e. On expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the

first newspaper advertisement.

20. The 2nd respondent in the application to set aside the sale was categorical that he was never served with the notification of sale and/or any notice of sale and contended that the sale was a result of collusion and connivance between the Auctioneer and the appellant. A perusal of the record and the affidavits sworn by the parties reveals that the 1st respondent obtained a prohibitory order inhibiting the transfer charging of land parcel **Nyaribari Chache/B/B/Boburia/7500** dated 1st August 2005. Although no formal application for execution is evident in the original record and the record of appeal, a notification of sale for land parcel **Nyaribari Chache/B/B/Boburia/ 7500** registered in the name of Patrick Rodgers Mogaka (2nd respondent) dated 5th October 2005 was filed on 6th October 2005. The record does not show how or if the notification of sale was served on the 2nd respondent. There is on record an undated notification of sale issued by the Auctioneer (3rd respondent), court stamped on 15th December 2005 with an endorsement that it was served on the 2nd respondent at his home on 28th September 2005 but he refused to sign. It is not clear how or when the 3rd respondent was issued instructions to sell the property. There is no record of a warrant of attachment being issued to the Auctioneers.

21. Notably, the court issued a certificate of sale of land on 9th December 2005 stating thus:-

“This is to certify that Mr. Isaac Moracha Ongwacho ID No. 157783 of P.O Box 3041 Kisii has been declared the purchaser of a portion of property known as Nyaribari/Chache/B/B/Boburia/ 7500 measuring 0.77ha. at a sale by public auction on the 28th November 2005 in execution of the decree in this suit, and that the said sale has been duly confirmed by this court.”

22. The notification of sale specified that the property the subject of the sale was land parcel **Nyaribari Chache/B/B/Boburia/7500** and not a portion of it. The order by the court of 20th January 2006 obtained also ex parte authorized the executive officer to sign the necessary documents to enable the purchaser to be registered as proprietor of a portion measuring 0.12ha. of land title **Nyaribari Chache/B/B/Boburia/ 7500**. The order also ordered the eviction of the defendant and all other persons on the portion of 0.12ha. It is intriguing how the land parcel changed from parcel **7500** to a portion thereof measuring 0.12ha. The transfer of land form signed by the executive officer on 8th February 2006 indicates the land the subject of the transfer to be **Nyaribari Chache/b/B/Boburia/7500** and not any portion thereof. Where and when was land parcel 7500 subdivided to create the parcel number **Nyaribari Chache/ B/B/Boburia/7828** transferred to the appellant on 9th June 2006 in respect of which he now holds title? A scrutiny of the copy of the exhibited title shows the register for this parcel **7828** was opened on 1st July 2004 and it was a subdivision of parcel **4707** which undoubtedly does not help to shed light in regard to the matter. Who was the owner of land parcel **4707**? Those are lingering questions with no answers.

23. On the material before the trial magistrate, I am satisfied the magistrate was right in holding that there was material irregularity to warrant the sale to be vitiated. I have herein above set out the glaring gaps in regard to the conduct of the public auction sale. It appears to me that the sale was choreographed and there were willing participants perhaps even within the court who facilitated the transactions. The court will refuse to give a seal of approval to what clearly was an irregular sale. The trial magistrate properly exercised his discretion to set aside the sale and I see no basis to interfere with his exercise of discretion.

24. The certificate of sale made on 9th December 2005 was clearly prematurely issued. The 2nd respondent was under the law entitled to challenge the sale under Order XXI Rule 79 and it cannot be said he delayed in making the application as there is no demonstration that he had any notice of the sale of his property. There is no demonstration that the sale was advertised in any Newspaper as the law requires so that the 2nd respondent could be deemed to have had notice. The court record does not also show there was any settlement of the terms of sale so that the court could have settled the terms of sale. Indeed when the 2nd respondent filed the application to set aside the ex parte default judgment he merely sought for a stay of execution and it was after he became aware of the sale that he brought the application that has precipitated this appeal. I agree with the learned magistrate that the effect of the order on the ruling setting aside the ex parte judgment was that all consequential orders that flowed from that judgment were set aside and that included the order confirming the sale.

25. The appellant has argued that the learned trial magistrate erred in not addressing himself on the issue of the purchase money paid pursuant to the sale set aside. Order XXI Rule 82 makes provision for refund of purchase money where a sale is set aside. It provides as follows:-

82. Where a sale of immovable property is set aside under Rule 81, the purchaser shall be entitled to an order for payment of his purchase money, with or without interest as the court may direct against any person to whom it has been paid.

The purchase money in this instant matter was paid to the firm of the advocates who were acting for the 1st respondent. The appellant is entitled to a refund of the purchase money from the 1st respondent but as I have found there was collusion from which I cannot extricate the appellant, I will make no order for payment of any interest on the purchase money.

26. The net result is that save for the order for refund of the purchase money that I have ordered to be made to the appellant by the 1st respondent, the appeal against the 2nd respondent is without merit and the same is ordered dismissed with costs. The 1st and 3rd respondents did not participate in the appeal and I make no order as relates to costs in regard to them.

27. Orders accordingly.

JUDGMENT, DATED, SIGNED and DELIVERED at KISII this 27TH DAY of JULY 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Ochwangi for the appellant

Ms. Momanyi for the 2nd respondent

Ruth Court assistant

J. M. MUTUNGI

JUDGE