



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L APPEAL NO. 35 OF 2013

MANASSEH LUMUMBA SHIVALU:::APPELLANT

VERSUS

GARI TOO BARNO:::RESPONDENT

JUDGMENT

The background to this case is reflected in the record of appeal which I have perused. It shows that the appellant, Manasseh Lumumba Shivalu was dissatisfied by the ruling in Eldoret CMCC No. 1931 of 1995 and delivered on 25th October 2002 in which the Chief Magistrate lifted the continued attachment on LR No Kakamega/Kongoni/1171.

The Appellant herein lodged the appeal on 17th December 2013 and thereafter served the respondents. Pre-trial directions were taken on 6th December 2016.

The appeal was later fixed for hearing on 12th June 2017 when the Appellant argued his appeal. The appellant proffered the following 7 grounds:

1. The learned trial Magistrate erred in law and fact by applying wrong principles of law to find that there were no proper grounds for the continued attachment on LR. No. KAKAMEGA/KONGONI/1171.
2. The learned trial Magistrate erred in law and fact in ordering that the attachment on LR No. KAKAMEGA/KONGONI/1171 be lifted
3. The learned trial Magistrate erred in law and fact in failing to consider the overwhelming evidence tendered by the appellant in support of his case.
4. The learned trial Magistrate erred in law and fact in relying on sale agreements that were not properly executed and as such not recognized in law.
5. The learned trial Magistrate erred in law and fact in by failing to consider the fact that it is only the registered proprietor who can be deemed to be the owner of the property as stipulated under section 23 of the RTA
6. The learned trial Magistrate erred in law in failing to find that GARI TOO BARNO is the legal registered owner of LR NO. KAKAMEGA/KONGONI/1171 and as such the purported objector did not have any interest in the same.

7. The learned trial Magistrate erred in law and fact in arriving at a finding that did not take into account all the issues as brought out in the appellant's pleadings.

The appellant argued his appeal and relied on the 7 grounds of appeal as filed. He prayed that the Appeal be allowed with costs.

Miss Odwa appeared on behalf of the respondent and opposed the appeal. She submitted that this case is functus officio on the grounds that upon delivery of the ruling appealed against, the appellant filed an application for review which was subsequently dismissed by the court on 28th August 2007.

Counsel for the respondent Miss Odwa further submitted that that this appeal is an abuse of the court process as the issued had been determined by the court. She prayed that the appeal be dismissed with costs to the respondents. It was her submission that the suit land had been transferred to 3rd parties who are not parties to this suit and that it would be against the interest of justice for the appellant to seek remedies that will adversely affect 3rd parties.

I have perused the record of appeal and considered the rival submissions made by the appellant and counsel for the respondent in this appeal. The issue for determination is whether Hon. Solomon Wamwayi Chief Magistrate was right in lifting the continued attachment on LR No. KAKAMEGA/KONGONI/1171 thereby allowing the Objector's application. Did the appellant's application for review of the order above have merits? The objector had a right to file the application to protect his interest as a purchaser who was in actual possession of the land that had been attached. The appellant did not produce any evidence to controvert the objector's assertion that he had bought the land. The appellant was not claiming the land as an owner but for attachment of the suit land to recover costs of the suit.

The ruling was made on 25/10/02 and subsequently the appellant made an application for review of the order. The application for review was dismissed as it did not disclose any grounds for review. The appellant only stated that he was aggrieved by the order.

The appellant did not state whether there was any error apparent on the face of the record. He did not also disclose whether he had discovered new matters which would merit a review. In short, the court found that the application lacked merit and dismissed the same. The appellant thereafter filed this appeal to question the ruling that had been made earlier lifting the attachment order on the suit land. I agree with counsel for the respondent that this appeal is an abuse of the court process. The appellant should have filed the appeal against the ruling if he felt aggrieved. He chose to file a review which was dismissed by the court. He should have filed an appeal against the dismissal of the review. It should be clear that we are not dealing with an appeal against the dismissal of an application for review. It was important to mention what had transpired in this case.

The appellant has not advanced any tangible reasons to warrant the interference with the decision of the Chief Magistrate's court. In the circumstances, it is my finding that the decision of Hon. Wamwayi for lifting the attachment on LR. No. Kakamega/Kongoni/1171 was sound and proper. For this reason, I find no merit in the appeal and accordingly dismiss it with costs.

Dated and delivered at Eldoret on this 28th day of June, 2017.

M. A ODENY

JUDGE