



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCA NO. 56 OF 2016

(FORMERLY HIGH COURT CIVIL APPEAL NO.323(A) OF 2011)

SALOME MUMBI KARUMBA.....APPELLANT

VERSUS

STEPHEN NDICHU NJIHIA.....RESPONDENT

JUDGMENT

Background:

1. On 10th June, 1991, the appellant filed a suit against the respondent at the Chief Magistrate's Court at Thika in Thika CMCC No. 168 of 1991 (hereinafter referred to as "the lower court"). In her plaint in the lower court, the appellant averred that she was at all material times a shareholder of Nyakinyua Investments which owned a parcel of land known as Murera Farm. The appellant averred that Nyakinyua Investments was in the process of subdividing the said farm so that it could allocate portions thereof to its shareholders.

2. The appellant averred that the shareholders of Nyakinyua Investments had already balloted for plots in the said farm and were only waiting for the processing of title deeds. The appellant averred that she had balloted for Plot No. Ruiru/Ruiru East/Bock 2/340 (hereinafter referred to as "the suit property" where the context so admits) while one, Joseph Ndungu Kahonu balloted for the adjacent Plot No. 327(hereinafter referred to as "Plot No.327" where the context so admits) which he subsequently sold to the respondent.

3. The appellant averred that the respondent had without any right to do so, trespassed on the suit property and caused loss and damage to her. The appellant sought judgment against the respondent for:

a) An order restraining the respondent from further trespassing on the suit property.

b) Mesne Profits.

c) Costs of the suit.

4. Together with the plaint, the appellant who was represented by an advocate brought an application by way of Chamber Summons dated 10th June, 1991 seeking a temporary injunction to restraining the respondent from trespassing on the suit property pending the hearing and determination of the lower court suit.

5. From the record, there is no evidence that the respondent filed a statement of defence to the appellant's

claim. The record and supplementary record of appeal do not contain a copy of the respondent's defence. I have also perused the lower court file and have not come across the same.

6. The respondent opposed the appellant's application for temporary injunction through a replying affidavit sworn by one, Magdalina Wambui Ndungu on 25th June, 1991. In the said affidavit, the said Magdalina Wambui Ndungu stated that she was a member of Nyakinyua Investments and that during the balloting process, she balloted for Plot No. 327 which she later on sold to one, Teresia Wanjiku Njihia who was the respondent's wife. Magdalina Wambui Ndungu stated that in the subdivision plan, Plot No. 327 was situated at the site of the suit property which the appellant had claimed to belong to her. Magdalina Wambui Ndungu stated that the respondent had entered Plot No. 327 pursuant to the agreement for sale that she had entered into with the respondent's said wife.

7. When the appellant's application for injunction came up for hearing on 26th June, 1991, the parties entered into a consent which was recorded by the court on the following terms:

a) That by consent matter referred to the management of Nyakinyua Women Co. Ltd. to determine the legal owners of Plot Number 2/340 and 2/347 and submit their report to court within 30 days.

b) Order to be served on management of the said company by court process server.

c) Mention on 26th July, 1991. Interim orders extended to mention date.

d) That costs be in the cause.

8. On 23rd July, 1991, the company secretary of Nyakinyua Investment Company Ltd. submitted a report to the court pursuant to the said court order. In the report, the said company secretary stated among others as follows:

a) Plot No. 2/340 was originally owned by Magdaline Wambui Ndungu I.D. No. 30612781/66 and she transferred it to Mrs. Teresia Wanjiku Njihia w/o Stephen Njihia I.D No. 3053826/66.

b) Plot No. 2/327 belongs to Margaret Kuria Karanja I.D No. 3043678/66 and Joice Wainaina I.D No. 3092743/66 jointly.

c) Plot No. 2/347 belongs to Jacinta Wambui Nganga I.D No. 3107973/66 she hails from Kiganjo Location, Gatundu Division.

9. When the matter came up for mention on 26th July, 1991, the said report by the company secretary of Nyakinyua Investment Company Limited which was treated by the court and both parties as an arbitration award was read to the parties and the court gave whoever was dissatisfied with the same 30 days within which to object to the same.

10. On 27th September, 1991, the appellant filed an application in the lower court in which she sought the following orders:

a) That the arbitrators award read in court on the 26th day of July 1991 be set aside.

b) That this honourable court be pleased to reinstate the injunction granted on 11th day of June, 1991 until the same is heard interpartes and/or this suit is determined.

c) That the costs of the application be provided for.

11. The appellant's application to set aside the said arbitration award was dismissed by the lower court on 7th January, 1992. The appellant appealed to the High Court against the said dismissal and her appeal was

struck out by Mitei J. on 16th March, 1999. After the dismissal of the appellant's application to set aside the said arbitration award on 7th January, 1992 as aforesaid, no further proceedings of significance took place in the lower court for a period of over 16 years.

12. The next activity took place on 19th January, 2009 when the respondent filed a notice to act in person and an application by way of Chamber Summons for the following orders:

1) That the Honourable Court be pleased to order the District Registrar Thika to issue a title deed in respect of Plot No. 340(the suit property) within Nyakinyua Investment Ltd. to Stephen Ndicho Njihia.

2) That the costs be in the cause.

13. The respondent's application was allowed by the lower court on 10th March, 2009 in the absence of the respondent. The lower court ordered the Land Registrar Thika to issue a title deed in respect of the suit property to the respondent. According to the affidavit of service on record, the application was served upon the appellant by way of registered post.

14. On 20th April, 2009 the respondent brought yet another application ex parte seeking the following orders:

1. That the Land Registrar Thika to issue title deed to Stephen Ndicho Njihia in respect of Plot No. 340 within Nyakinyua Investment Limited in respect with land title No. Ruiru/Ruiru East Block 2/150(the suit property) and dispense with the production of the old title deed.

2. Costs of the application be provided for.

15. This application was also heard in the absence of the appellant on 18th May, 2009 and allowed as prayed by the lower court. According to the affidavit of service on record, the appellant was served with the application on 11th May, 2009 through the area chief. It is not clear from the record why the appellant was not served though her advocates who were then on record.

16. The lower court order of 18th May, 2009 was served upon the District Land Registrar, Thika for implementation. On 3rd July, 2009, the Land Registrar wrote to the lower court notifying it that the suit property Plot No. Ruiru/Ruiru East Block 2/ 150(also known as Plot No.340)(the suit property) whose title deed he had been directed to issue to the respondent had two titles; one in the name of the appellant and the other in the name of one, Teresia Wanjiku Mwanja and that both the appellant and the said Teresia Wanjiku Mwanja had been issued with title deeds.

17. The Land Registrar also drew the attention of the lower court to the fact that Teresia Wanjiku Mwanja was not a party to the lower court suit. The Land Registrar furnished the court with the extracts of the two registers for the suit property which were opened at different times in the names of the appellant and Teresia Wanjiku Mwanja.

18. In a letter to the Land Registrar, Thika dated 4th January, 2010, the lower court (Hon. B.A. Owino (MRS) SRM) informed the Land Registrar that in view of the contents of the Land Registrar's letter aforesaid, she was informing the parties to seek further redress in the High Court in respect of the said parcel of land. The lower court clarified that it had issued the order of 18th May, 2008 because the appellant's title had been cancelled.

19. It is not clear from the record as to what transpired between the date of the letter by the lower court to the Land Registrar dated 4th January, 2010 aforesaid and 5th August, 2010 when the respondent came to the lower court with another application dated 3rd August, 2010. In this application, the respondent sought an order for the eviction of the appellant from the suit property under the supervision of the OCS Thika Police Station.

20. The respondent's application was brought on the grounds that, the respondent was put into possession of the suit property by the court on 7th January, 1992, he had obtained a title for the said property in his name on 22nd July, 2010 and that the appellant had obstructed the him from occupying the property.
21. The respondent annexed to his affidavit in support of the application a copy of a title deed in his name issued on 22nd July, 2010. It is a mystery how the respondent acquired this title deed the lower court having advised the parties on 4th January, 2010 to seek further redress in the High in respect of the suit property.
22. The respondent's application dated 3rd August, 2010 for the eviction of the appellant from the suit property was heard by the lower court (Hon. B.A. Owino (MRS)SRM) and was allowed on 20th September, 2010.
23. Following the said order, the lower court issued warrants of eviction to an auctioneer, Joseph Nderitu of Jogan Dries Services, the OCS Ruiru Police Station and the OCS Thika Police Station on 6th October, 2010 to evict the appellant from the suit property.
24. On 2nd November, 2010, the appellant filed an application by way of Chamber Summons dated 1st November, 2010 seeking the following orders:
- a) *That the eviction order issued on 6th October, 2010 be set aside pending the hearing and determination of the application.*
 - b) *A declaration that the proceedings leading to the issuance of the title deed for Plot No. Ruiru/Ruiru East Block 2/ 150(the suit property) to the respondent and consequential order of eviction were illegal and irregular.*
 - c) *That the Land Registrar, Thika District be ordered to cancel and revoke the title deed for Plot No. 150 issued to the respondent on 22nd July, 2010.*
 - d) *That the process server one, Ann Micere be called for cross-examination.*
 - e) *That the respondent to bear the costs of the application.*
25. The application was brought on the grounds that; the orders of eviction of the appellant from the suit property were obtained un-procedurally on falsehood contained in the affidavit of service of Ann Micere as the applicant was never served; there was a pending application that was instituted by the respondent in the High Court over the said parcel of land which was pending when the said order of eviction was issued and that the respondent who had no counter-claim against the appellant had nothing to execute against the appellant save for the recovery of costs.
26. In her affidavit in support of the application, the appellant stated that she was a resident of Nakuru and that she was not served with the respondent's applications dated 8th January, 2009, 17th April, 2009 and 3rd August, 2010. With respect to the first application, the appellant stated that the process server alleged in her affidavit of service dated 19th January, 2009 to have served her through a postal address in Ruiru which was not her address. With regard to the second application, the same process server alleged in her affidavit of service dated 15th May, 2009 to have served her through the area chief. With respect to the application dated 3rd August, 2010, the same process server in her affidavit of service dated 26th August, 2010 claimed once again to have served her through the area chief.
27. The appellant stated that she had an advocate who was representing her in Nairobi High Court Miscellaneous Application No. 44 of 2004 which had been instituted against her by the respondent while the lower court suit was pending who could have been served with the respondent's applications aforesaid.

28. The appellant stated that the respondent had concealed to the lower court the existence of the said High Court case in which he had sought among others; a declaration that Teresia Wanjiku Mwanja was the lawful owner of the suit property, an order for the Land Registrar Thika to cancel the title which was held by the appellant in respect of the said property and to register Teresia Wanjiku Mwanja as the sole and absolute proprietor thereof and an order for possession of the property from the appellant.

29. The appellant stated that she was not served with a Notice to Show Cause before the order for her eviction was issued and that the order issued by the lower court to the Land Registrar to register the respondent as the owner of the suit property was irregular and illegal. The application was opposed by the respondent through a replying affidavit sworn on 14th December, 2010.

30. In the affidavit, the respondent admitted that he had instituted proceedings in the High Court to have the suit property registered in his name but contended that the application for that purpose was filed in a wrong file by a firm of advocates who did not follow his instructions.

31. The respondent stated that the filing of the said application in the High Court did not bar him from filing the applications which he subsequently filed in the lower court as the lower court had already entered judgment and issued a decree in his favour.

32. The respondent contended that the proceedings that led to the issuance of the title deed in respect of the suit property in his favour were procedural and lawful. The respondent contended that the appellant was duly served with the applications she claimed not to have been served upon her. The respondent termed the appellant's application incompetent, fatally defective and an abuse of the court process.

33. The application was heard by Hon. B.A. Owino (MRS)SRM who dismissed the same on 27th June, 2011. In her ruling the learned magistrate found that most of the issues that had been raised by the appellant were technicalities. The court held that it was *functus officio* and that the application was yet another ploy by the appellant to deny the respondent the fruits of the judgment that had allegedly been made in his favour.

34. The court held that litigation must come to an end and that the issues that had been raised by the appellant should have been raised on appeal to the High Court.

The Appeal to this Court:

35. The appellant was aggrieved by the said decision of the lower court and preferred the present appeal against the same. The appellant challenged the ruling of the lower court on the following grounds which are set out in the Memorandum of Appeal dated 15th July, 2012:

1) *THAT the Learned Senior Resident Magistrate erred in law and in fact in that all the proceedings in Civil Suit No. 168 of 1991 were irregular and could not give rise to a valid decree of the court.*

2) *THAT the Learned Magistrate erred in drawing a decree and an eviction order without considering that the defendant had not filed a counter-claim in the suit and was not entitled to a decree other than for costs if at all.*

3) *THAT the Learned Magistrate erred in law and fact in giving the defendant/respondent a decree when there was no judgment on the court record and no hearing took place.*

4) *THAT the Learned Magistrate went against the express provisions of Section 4(4) of the Limitation of Actions Act, Chapter 22 Laws of Kenya by entertaining an application to enforce a non-existent judgment and decree.*

5) *THAT the Learned Magistrate caused a transfer of the appellant's property to the respondent without giving the appellant a hearing.*

6) *THAT the Learned Magistrate cancelled the appellant's title using civil proceedings which were a nullity and an abuse of the due process of the court.*

7) *THAT the Learned Magistrate applied wrong principles of law in making the determination of the matter.*

8) *THAT the Learned Magistrate erred in law by ignoring the provisions of sections 27 and 28 of the Registered Land Act Chapter 300 Laws of Kenya over matters respecting the suit property L.R No. Ruiru/Ruiru East Block2/ 150.*

9) *THAT the Learned Magistrate failed to be guided by the principles of the Constitution of Kenya regarding the protection of sanctity of title.*

The Appellant's Submissions:

36. The appeal was argued by way of written submissions. Both parties filed submissions and the same are on record. In her submissions, the appellant argued all the grounds of appeal together without following any particular order. The appellant submitted that the lower court proceedings were irregular and could not have given rise to a decree which the respondent purported to execute by evicting her from the suit property. The appellant submitted that the respondent did not file a counter-claim in the lower court which could have formed a basis for a decree in his favour.

37. The appellant submitted further that no hearing took place before the lower court on the basis of which a judgment and decree could have been issued. The appellant submitted that the respondent's contention in the lower court all along was that the suit property belonged to his wife, Teresiah Wanjiru Njihia. The appellant has submitted that the respondent having admitted that the suit property did not belong to him, the right party in whose favour a decree could have been issued was Teresiah Wanjiru Njihia and not the respondent.

38. The appellant submitted further that the purported arbitration proceedings which gave rise to a purported decree in favour of the respondent were un-procedural in that no order of reference was made by the court pursuant to which an award could be made by an arbitrator.

39. The appellant submitted that the purported decree was invalid in that the purported award filed in court by the company secretary of Nyakinyua Investments Company Ltd. did not mention the respondent as the owner of the property. The appellant submitted that the lower court issued an eviction order to a stranger as the respondent had no proprietary interest in the suit property.

40. The appellant submitted that at no time did the lower court make an order that the respondent be issued with a title deed for the suit property on behalf of his wife, Teresiah Wanjiru Njihia. The appellant submitted that even if it is admitted for argument's sake that the letter from the company secretary of Nyakinyua Investments Company Limited that was filed in court on 23rd July, 1991 and read to the parties on 26th July, 1991 constituted a judgment of the lower court in favour of the respondent, the purported judgment could not be executed after a lapse of 12 years from the date when it was made.

41. The appellant submitted that the execution of the purported judgement that was carried out by the respondent after a lapse of over 20 years after the said judgment was made was contrary to the provisions of section 4(4) of the Limitation of Actions Act. The appellant submitted that the said execution was illegal.

42. The appellant submitted further that the proceedings which the respondent filed in the High Court at Nairobi in Miscellaneous Application No. 44 of 2004 showed that there was another title for the suit property which was issued to the respondent's wife Teresia Wanjiku Mwanja on 22nd February, 1992. The appellant submitted that the suit property could not belong to the respondent and his wife at the same time.

43. The appellant submitted that her title to the suit property which was issued on 6th October, 1988 could not be cancelled at the instance of the respondent who had no interest at all on the said property. The appellant urged the court to allow the appeal and grant the reliefs sought.

The Respondent's Submissions:

44. In his submission in reply, the respondent submitted that he obtained the title deed for the suit property through a lawful process. The respondent submitted that the dispute between him and the appellant at the lower court was by consent of the parties referred to arbitration and the arbitrator filed his award in court which was read to the parties on 26th July, 1991.

45. The respondent submitted that the appellant objected to the award and sought the setting aside of the same and that the appellant's application was dismissed on 17th December, 1991. The respondent submitted that the appellant challenged the dismissal of her application through an appeal to the High Court which appeal was struck out on 16th March, 1999.

46. The respondent submitted that through an application dated 17th April, 2009, he applied to the lower court for an order that he be registered as the owner of the suit property. The application which was not opposed by the appellant was allowed on 18th May, 2009. The respondent submitted that he was thereafter issued with a title deed for the suit property.

47. The respondent submitted that he subsequently applied for the eviction of the appellant from the suit property through an application dated 3rd August, 2010 which was allowed by the court on 20th September, 2010. The respondent submitted that the appellant did not appeal against the order of the lower court made on 18th May, 2009 through which he was issued with the title for the suit property.

48. The respondent submitted that the appellant did not also appeal against the order for her eviction from the suit property. The respondent submitted that appellant instead sought a stay of the eviction order which application was dismissed by the lower court leading to this appeal.

49. The respondent submitted that all the grounds of appeal put forward by the appellant have no merit. The respondent contended that the award of the arbitrator which was not set aside was taken by the lower court as the judgment of that court and as such there was nothing irregular in the proceedings of the lower court.

50. The respondent submitted that in the award by the arbitrator, the suit property was declared to be owned by the respondent and as such the title for the said parcel of land was issued to the respondent properly. The respondent submitted that the arbitrator found the appellant not to be the owner of the said property.

51. The respondent contended that the suit property was purchased by the respondent's wife who thereafter transferred the same to the respondent. The respondent contended that he has a genuine title for the suit property and that the title held by the appellant is a forgery. In conclusion, the respondent submitted that due process was followed in issuing the title deed for the suit property in his favour and that the appeal herein has no merit and should be dismissed.

Determination:

52. I have perused the proceedings of the lower court and the ruling of that court which is the subject of this appeal. I have also considered the appellant's grounds of appeal and the submissions by the parties' respective advocates. The application that was brought before the lower court to a large extent called for an exercise of discretion. In the case of Mbogo Vs. Shah (1968) E. A. 93, it was held that:

“ a Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision,

or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been a misjustice". See also the case of Maina –vs- Mugiria [1983] KLR 78 .

53. The appellant has challenged the decision of the lower court on several grounds. I am in agreement with the submission by the appellant that the proceedings of the lower court were fraught with irregularities and illegalities that rendered the purported decree of that court invalid, null and void. There was therefore no decree which could be executed against the appellant.

54. I am in agreement with the contention by the respondent that indeed, the issue of the ownership of the suit property was referred by the lower court to arbitration by Nyakinyua Investments Company Limited and that the report that was filed in court by the company secretary of Nyakinyua Investments Company Limited on 23rd July, 1991 constituted an arbitration award.

55. I am also in agreement with the submission by the respondent that the appellant is estopped from denying that the issue of the ownership of the said parcel of land was referred to arbitration. As I have stated earlier in this judgment, after the said award was read to the parties on 26th July, 1991, the appellant made an application to set aside the same.

56. The appellant's application which was dated 16th September, 1991 was brought under Order XLV rule 15 of the old Civil Procedure Rules which dealt with the setting aside of arbitral awards. In the application, the appellant sought an order, "*That the arbitrator's award read in court on the 26th day of July, 1991 be set aside*". I am satisfied that the parties had agreed to refer the issue of ownership of the suit property to arbitration and that the arbitrator rendered an award which was binding upon the parties unless it was set aside.

57. The award was however concerned only with the issue of the ownership of the said parcel of land. It did not dispose of the appellant's claim in the lower court. The award was not a judgment as claimed by the respondent. The lower court had to render a judgment on the dispute that was before it which concerned the alleged trespass by the respondent on the appellant's parcel of land.

58. Following the dismissal of the appellant's application to set aside the said award on 7th January, 1992, the respondent had to move the court under Order XLV rule 17(1) of the old Civil Procedure Rules which was in force for the court to enter judgment in accordance with the award if he was of the opinion that the award was in his favour.

59. No such application was made by the respondent. The said award did not therefore become a judgment of the court. Order XLV rule 17(2) of the old Civil Procedure Rules provides that it is only upon entry of judgment in accordance with the award that a decree shall issue. Since there was no judgment, no decree was issued by the court in favour of the respondent which could be executed.

60. After the appellant's application to set aside the said award was dismissed, the respondent seems to have been advised that he could not succeed in acquiring a title for the suit property in the lower court since the arbitrator had found that the property belonged to Teresia Wanjiku Njihia.

61. After a lull which took several years, the respondent moved to the High Court on 15th January, 2004 and filed Originating Summons in Nairobi High Court Miscellaneous Application No. 44 of 2004. The Originating Summons was amended on 22nd November, 2004. In the amended Originating Summons, the respondent sought, a declaration that Teresia Wanjiku Mwanja was the lawful owner of the suit property, an order for the Land Registrar to cancel the appellant's title and to register the said Teresia Wanjiku Mwanja as the sole and absolute proprietor of the said property and vacant possession of the property.

62. The Originating Summons was opposed by the appellant through the law firm of Wakahu Mbugua & Co. Advocates. The respondent did not pursue the Originating Summons to its logical conclusion. The respondent abandoned the Originating Summons and came back to the lower court 17 years after the last

order was made in the matter.

63. As I have mentioned earlier, the arbitration award that was filed in the lower court on 23rd July, 1991 and read to the parties on 26th July, 1991 was not adopted as a judgment of the court. Instead of applying to the court for the said award to be adopted as a judgment of the court assuming that such application could still be made, the respondent filed an application on 19th January, 2009 for a title in respect of the suit property to be issued to him.

64. According to the affidavit on record, this application was served upon the appellant by one, Anne Micere through registered post to the appellant's purported postal address, P.O. Box 584 Ruiru on 17th January, 2009. When the appellant was purportedly being served by registered post, the appellant had an advocate on record, Macharia & Njore Advocates.

65. There is no evidence that the appellant had filed a notice to act in person or that her then advocates on record had ceased to act for her and the court had authorized service of court process upon her by substituted service. In this application, the respondent did not disclose to the court the fact that there was a parallel suit in the High Court in which he had also sought various orders in respect of the suit property.

66. The respondent's application was heard and allowed on 10th March, 2009. The proceedings of the lower court of 10th March, 2009 show that the respondent who was acting in person appeared before the court and told the court that his application had been served upon the appellant and that the appellant was absent.

67. The court thereafter stated that; "*Your application has merit respondent duly served and is absent. Application dated 8.1.09 allowed*". The order by the lower court directing the Land Registrar to issue a title deed for the suit property in the name of the respondent had no basis. The same was not supported by the arbitral award which was not adopted as a judgment of the court or by the pleadings filed in the lower court.

68. As I have mentioned above, the arbitrator found that the suit property belonged neither to the appellant nor the respondent. The arbitrator found that the property belonged to the wife of the respondent, Teresia Wanjiku Njihia. The respondent's said wife was not a party to the lower court suit. The arbitrator did not at all say that the said property should be registered in the name of the respondent.

69. The lower court's order was not therefore founded on the said award. With regard to the pleadings, the respondent filed neither a defence nor counter-claim. The respondent did not therefore have a claim against the appellant which could form a basis for the order which was made in his favour by the lower court.

70. I wish to add that when the said order was made, the suit property was not registered in the name of the respondent. As the Land Registrar pointed out to the court subsequently, the suit property had double registration. It had two registers one of which was showing that the property was registered in the name of the appellant on 6th October, 1988 while the other was showing that the property was registered in the name of Teresia Wanjiku Mwanja on 27th February, 1992.

71. It is not clear therefore how the court could have made an order for the respondent to be issued with a title deed in respect of a property which was not registered in his name. The effect of the lower court's order was to cancel the appellant's title over the suit property and to cause the respondent to be registered as the owner thereof. The respondent succeeded in doing this without a hearing having been conducted and a judgment delivered by the court in his favour.

72. After the said order of 10th March, 2009, the respondent moved the court with yet another application dated 17th April, 2009 seeking an order that the title deed for the suit property be issued to him and that the requirement for the production of the old title deed be dispensed with. This application was also heard

in the absence of the appellant and was allowed on 18th May, 2009.

73. According to the affidavit of service on record, the appellant was served with a hearing notice for the application through the area chief on 11th May, 2009 at 9.30 a.m by one, Ann Micere. The hearing notice which was purportedly served upon the appellant is dated 12th May, 2009. Two questions arise here. First, why was the appellant being served through the chief? There is no evidence on record that the appellant had appointed the said unnamed chief as her agent to receive court documents on her behalf. Secondly, how was the hearing notice dated 12th May, 2009 served on 11th May, 2009?

74. After the order of 18th May, 2009 was taken to the Land Office, Thika, the Land Registrar declined to register the respondent as the owner of the suit property and wrote a letter to the court pointing out that the property was registered in the names of two people all of whom had been issued with title deeds.

75. The Land Registrar did not know which of the two titles to cancel. The court acknowledged the difficulty in which the Land Registrar had found himself and in a letter dated 4th January, 2010 informed him that he would advise the parties to refer the dispute to the High Court. The letter was copied to the parties herein. When writing this letter, the court was not aware that there were proceedings pending in the High Court over the same subject matter.

76. With that direction from the lower court, one would have thought that the respondent would go back to the High Court to prosecute his Originating Summons. Determined to have the suit property registered in his name by all means, the respondent caused himself to be registered as the owner of the suit property on 6th July, 2010 without a decree of the court in his favour. He was thereafter issued with a title deed for the suit property on 22nd July, 2010.

77. The respondent thereafter proceeded to obtain an order for the eviction of the appellant from the suit property without a decree for possession. It is no wonder that no formal application for execution was filed. There was no decree to execute.

78. By the time the respondent came back to the lower court on 19th January, 2009, over 17 years had lapsed from the date the award which he claimed was the judgment of the court was made. Section 4(4) of the Limitation of Actions Act, Chapter 22 Laws of Kenya bars execution of judgments after a lapse of 12 years from the date when the judgment is made.

79. It follows therefore that even if it is assumed that judgment was entered for the respondent against the appellant on 26th July, 1991 when the award was read to the parties in the lower court, the period within which the said judgment was to be executed lapsed in the year 2003.

80. The execution process that was commenced in the year 2009 was therefore time barred. Again, since the execution was commenced after the expiry of 1 year after the purported judgment, the respondent was under a duty pursuant to the provisions of Order XXI rule 18 of the old Civil Procedure Rules to serve the appellant with a notice to appear before the court and show cause why execution could not be commenced against her. It is not disputed that no such notice was served.

81. All the facts which I have set out above, were before the lower court when it was considering the appellant's application dated 1st November, 2010 in which the appellant had sought the setting aside of the eviction orders that had been issued against her.

82. The question that I have to answer is whether the lower court exercised its discretion properly in declining to grant the reliefs which the appellant had sought. My answer is no. It is clear from what I have set out above that the proceedings of the lower court were muddled with legal missteps, blunders and outright illegalities.

83. Having considered carefully the proceedings of the lower court and analyzed the material that was

before the court, it is my finding that the lower court misdirected itself as to the issues that were before it and arrived at a wrong decision on the appellant's application that was before the court. The appellant had put before the court very compelling reasons on the basis of which a court properly directing itself should have set aside the eviction orders that had been issued against the appellant.

84. The court having made a finding in its ruling that the suit property did not belong to the respondent, it should have equally found that there was no basis upon which the respondent could have obtained an eviction order. It is also clear from the ruling of the lower court that the court misdirected itself as to what took place on 26th July, 1991.

85. From the lower court proceedings of 26th July, 1991, it is clear that the court only read the award to the parties and gave an opportunity to whoever wished to object to the same to make an application to have it set aside. It is not true as the lower court held that the award was adopted as a judgment of the court on 26th July, 1991.

86. I am of the view that if the lower court had not misdirected itself, the court would have found that there was neither a judgment nor a decree which could have been executed by the respondent through the eviction of the appellant from the suit property. The lower court misdirected itself further that the appellant had made attempts to set aside the purported judgment and failed.

87. As I have stated earlier, the appellant's application was for the setting aside of the arbitral award and not the judgment of the court. There was no judgment to set aside. The lower court also misdirected itself in its finding that most of the issues which were raised by the appellant were based on technicalities. The issues which the appellant had raised before the lower court and which I have considered in this appeal are not technical in nature. They are substantive issues of law which touches on the rule of law and administration of justice.

88. The court did not consider the appellant's contention that she was not heard on all the applications leading to her eviction from the suit property. As I have illustrated above, none of the applications were served upon the appellant. The respondent for reasons only known to him purported to serve the said applications by post and through a chief. The appellant had an advocate on record and had not given P.O. Box 584 Ruiru or the local chief's office as her address for service.

89. In the Court of Appeal Case of, Richard Nchapi Leiyangu vs. IEBC & 2 others, Civil Appeal No. 18 of 2013, the court stated that;

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality”.

90. The lower court did not appreciate the fact that the appellant had a constitutional and statutory right to be heard before the orders cancelling her title to the suit property and directing the Land Registrar, Thika to register the suit property in the name of the respondent were made. The appellant was also entitled to be heard before the order for her eviction from the suit property was made.

91. The court did not make any attempt to interrogate these issues. If the court had done so, the court would have found as this court that the appellant was not served. Where a person who has a right to be served with an application has not been served and orders are made which affect him adversely, he has a right to have the orders set aside *ex debito justitiae*.

92. The appellant had a right to have all the orders which were issued by the lower court in her absence reviewed and set aside. The orders had been made erroneously by the court and the court had the discretion and inherent power to review and set them aside.

93. In the case of National Bank of Kenya Ltd –vs- Ndungu Njau, Court of Appeal at Nairobi, Civil

Appeal No. 211 of 1996 the Court of Appeal stated that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court.”

94. The court misdirected itself further by holding that it was *functus officio*. In addition to the inherent power of the court, Order L rule 17 of the old Civil Procedure Rules gave the court power to set aside ex parte orders. On the other hand, Section 34 of the Civil Procedure Act provides that all questions arising between the parties to the suit in which the decree was passed relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not in a separate suit.

95. From the foregoing provisions of the law, it is clear that the appellant’s application was properly before the court and the court had power to grant the orders sought. In the final analysis and for the foregoing reasons, I find merit in the appeal before me.

96. The appeal is hereby allowed on the following terms:

1. The ruling and orders made by Hon. B.A Owino SRM on 27th June, 2011 in the lower court are set a side.
2. The appellant’s Chamber Summons application dated 1st November, 2010 in the lower court is allowed in terms of prayers (c), (d) and (f) thereof.
3. The appellant shall have the costs of the appeal.

Delivered and Signed at Nairobi this 3rd day of November 2017

S. OKONG’O

JUDGE

Judgement read in open court in presence of:

No appearance for the Appellant

Ms. Waweru for the Respondent

Kajuju Court Assistant