REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC APPEAL NO. 47 OF 2014

JAMES NGARI MUCHIRI.....APPELLANT

VERSUS

MORRIS MUTERO KIMOTHO.....1ST RESPONDENT

WILSON NJAGI MUTHIRU.....2ND RESPONDENT

(BEING AN APPEAL FROM THE RULING DELIVERED ON 10TH JULY, 2013

BY HON. J.K. NG'ENO – C.M AT KERUGOYA CHIEF MAGISTRATE'S COURT

CIVIL CASE NO. 71 OF 2010)

JUDGMENT

The appellant herein (**JAMES NGARI MUCHIRI**) filed **KERUGOYA PRINCIPAL MAGISTRATE'S COURT CASE No.71 of 2010** against the 1st respondent **MORRIS MUTERO KIMOTHO** seeking an order that the caution placed on his land parcel No. NGARIAMA/NGIRIAMBU/4014 by the 1st respondent be removed.

The 1st respondent filed a defence in which he pleaded that on 23rd August 2006, he had entered into a sale agreement with the appellant whereby he was to purchase ¼ acre out of L.R No. NGARIAMA/NGIRIAMBU/1732 from the appellant at a consideration of Ksh. 90,000 of which Ksh. 47,000 was paid on the date of the agreement and Ksh. 43,000 was to be paid on 27th November 2009. The 1st respondent took possession and in furtherance of the sale agreement, the appellant partitioned the land parcel No. NGARIAMA/NGIRIAMBU/1732 and one of the resultant portions was land parcel No. NGARIAMA/NGIRIAMBU/4014 for which the appellant sought the consent of the Land Control Board to transfer to the 1st respondent. However, the consent was not granted because the appellant failed to attend the Board and later, the 1st respondent learnt that the appellant had already entered into an agreement for sale of the same parcel with another person. The 1st respondent therefore lawfully lodged a caution against the property No. NGARIAMA/NGIRIAMBU/4014 as a purchaser.

The 1st respondent also filed a counter-claim seeking a refund of Ksh. 90,000, damages for breach of the agreement with interest and also the dismissal of the appellant's suit.

There was no reply to the defence or defence to the counter-claim and on 5th October 2010, an ex-parte judgment was entered for the 1st respondent on his counter-claim and the case came up for formal proof

on 22nd September 2011 when the trial magistrate **H.N. NDUNGU** Senior Principal Magistrate proceeded to hear the 1st respondent's counter-claim without first confirming if the appellant had been served nor did the magistrate deal with the appellant's claim as per his suit. Judgment was entered for the 1st respondent on his counter-claim and an application dated 16th May 2012 seeking to set it aside was declined in a ruling delivered on 10th July 2013 by **J.K. NG'ENO** Chief Magistrate and which is the subject of this appeal. Having obtained judgment, the 1st respondent sold land parcel No. L.R NGARIAMA/NGIRIAMBU/4014 and ½ of L.R NGARIAMA/NGIRIAMBU/4013 by public auction to the 2nd respondent.

The appellant has raised the following twelve (12) grounds in his appeal against the ruling of the **J.K. NG'ENO** dated 10th July 2013:-

1. ***The learned magistrate erred in law and in fact by failing to find that there was irregularity in the proceedings of 22nd September 2011 as the Court never dealt with the plaintiff's claim either to dismiss it for non-attendance or not before proceeding to hear the counter-claim.***

2. ***The learned magistrate erred in law and in fact by failing to find that there were good grounds to set aside the judgment as the appellant had good defence to the counter-claim raised by the 1st respondent herein. The 1st respondent is the one who was in breach of the sale agreement dated 23rd August 2006.***

3. ***The learned magistrate erred in law and fact in failing to find that there was no proper service of the hearing notice of the hearing of 22nd September 2011 and that alone could have warranted setting aside of the judgment.***

4. ***The learned magistrate erred in law and in fact in failing to find that the execution of the decretal sum and specifically sale by public auction of land parcel No. NGARIAMA/NGIRIAMBU/4014 and ½ share of land parcel No. NGARIAMA/NGIRIAMBU/4013 was irregular, un-lawful and contravened Order 22 Rules 48, 62, 74, 75 and 76 of the Civil Procedure Rules.***

5. ***The learned magistrate erred in law and in fact by failing to find that the Court had not ordered any sale of the plaintiff's property to wit the land parcel No. NGARIAMA/NGIRIAMBU/4014 and ½ share of land parcel No. NGARIAMA/NGIRIAMBU/4013 prior to the sale and as such the sale was unlawful.***

6. ***The learned magistrate erred in law and in fact in failing to find that the appellant was not given a notice to show cause why his land parcel No. NGARIAMA/NGIRIAMBU/4014 and ½ share of the parcel No. NGARIAMA/NGIRIAMBU/4013 should not be sold by public auction in default of settlement of decretal sum.***

7. ***The learned magistrate erred in law and fact in failing to find that the sale by public auction contravened Section 6(1) of the Land Control Act.***

8. ***The learned magistrate erred in law and in fact by failing to set aside the public auction sale that was un-lawful and irregular and/or appreciate if he had powers to do so under the law.***

9. ***The learned magistrate erred in law and in fact by failing to find that land parcel No. NGARIAMA/NGIRIAMBU/4013 could not be sold as the same was jointly owned by the appellant and his wife MARY WANJIKU NJUIRI. The same could not also be ordered to be sold by public auction without notice to MARY WANJIKU NJUIRI.***

10. ***The learned magistrate erred in law and in fact by failing to find that by the time the parcels of land were sold by public auction, ownership of the same had already passed to BENSON MUCHIRI KARIA and TABITHA WANJIRU KARIUKI and as such the sale should have been set aside as a matter of law.***

11. ***The learned magistrate erred in law and in fact by failing to find that a person suffering through any irregular public auction has a remedy in damages.***

12. ***The learned magistrate erred in law and in fact by not considering and/or appreciating the legal principles in all authorities/case law quoted by the appellant in support of his application.***

The appellant therefore prayed for:-

a. ***The appeal be allowed and ruling delivered on 10th July 2011 be set aside.***

b. ***The application dated 16th May 2012 be allowed in its entirely.***

c. ***Any other order that the appellate Court may deem fit and just to grant.***

d. ***Costs of the appeal be awarded to the appellant.***

I pause here to confirm the following from the record i.e. that the ruling by **J.K. NG'ENO** the subject of this appeal was delivered on 10th July 2013.

Submissions have been filed by Ms Wangechi advocate for the appellant, Mr. Magee wa Magee advocate for the 1st respondent and Mr. Njeru advocate for the 2nd respondent.

I have considered the appeal and the submissions by counsel.

The appellant's Notice of Motion dated 16th May 2012 and which gave rise to the ruling subject of this appeal sought the following orders:-

1. ***The application be certified urgent.***

2. ***That the Honourable Court be pleased to enjoin WILSON NJAGI MUTHIRU as interested party in the suit.***

3. ***Upon grant of prayer No. 2 herein above, this Honourable Court be pleased to stay registration of land parcel No. NGARIAMA/NGIRIAMBU/4014 and ½ share of land parcel No. NGARIAMA/NGIRIAMBU/4013 in the name of interested party pending the hearing and determination of the application.***

4. ***That the Honourable Court be pleased to set aside the sale by public auction of land parcel No. NGARIAMA/NGIRIAMBU/4014 and ½ share of land parcel No. NGARIAMA/NGIRIAMBU/4013 conducted on 20th April 2012 and any other subsequent order issued pursuant to the said sale.***

5. ***That this Honourable Court be pleased to set aside the judgment herein and grant leave to the plaintiff to defend himself against the counter-claim and also prosecute his claim herein.***

6. ***That the costs of the application be provided for.***

The same was based on the grounds set out therein and the appellant's supporting affidavit.

In dismissing the said application, **J.K. NG'ENO** delivered a short two paragraph ruling and due to its brevity, I shall reproduce it:-

"The application dated 15.5.12 arose out of a sale of land described No. Ngariama/Ngiriambu/4013 and 4014 which was done by the defendant. The case proceeded exported (sic) on the counter-claim of the defendant. The matter had arisen out of a frustrated contract between the defendant and plaintiff over sale of ¼ of an acre. The deal did not go

through and defendant deposited a sum of money being Ksh. 43,000.

We are now being asked to set aside the judgment of the Court which has already been executed. I have seen the submissions filed by the parties. The solution here is for the plaintiff to take back the purchase price. I decline for the reason given above to grant the prayers of reversing the judgment of the Court and all consequential orders. Parties may proceed on appeal.

Each party shall bear own costs of this application.

J.K. NG'ENO – C.M

10.7.13"

In his ruling the subject of this appeal, the trial magistrate appears to have dealt only with the prayer for setting aside the Ex-parte judgment and the reason he gave was that the said judgment had "***already been executed"***

While considering this appeal, I bear in mind that what I have before me is an appeal against the exercise of discretion by the trial Court in refusing to set aside a judgment obtained in the absence of the appellant. Before I can interfere with the trial magistrate's exercise of discretion, I must be satisfied that he misdirected himself in some matters and as a result, arrived at a wrong decision or that he misapprehended the law or failed to take into account some relevant matter or unless it is manifest from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there has been injustice – see ***MBOGO & ANOTHER VS SHAH 1968 E.A 93*** and also ***HARRISON WANJOHI WAMBUGU VS FELISTA WAIRIMU CHEGE & ANOTHER C.A. CIVIL APPEAL NO. 295 of 2009.***

It is settled law that the power to set aside an ex-parte judgment is discretionary but must be exercised on the basis of evidence and sound legal principles. The main concern of the Court being to do justice to the parties.

The judgment that was sought to be set aside had been delivered by **H.N. NDUNG'U S.P.M** on 27th October 2011 following a brief hearing on 22nd September 2011 when the 1st respondent testified in support of his counter-claim. The coram for that day reads as follows:-

"***22.9.2011***

H.N. NDUNGU – SPM

CC MURIITHI

PLAINTIFF

DEFENDANT

M/S Mureithi for defendant –

It is for formal proof. Hearing for defendant's counter-claim".

The 1st respondent then proceeded to testify in support of his counter-claim after which judgment date was set for 27th October 2011. There is nothing on the record to show whether the appellant had been served with a hearing notice for 22nd September 2011. The trial magistrate certainly did not address that issue before the hearing. Yet, in his supporting affidavit filed together with the application dated 16th May 2012 that gave rise to the ruling subject of this appeal, the appellant had deponed in paragraphs 9, 10 and 11 as follows:-

9: "That I am informed by my current advocate, information I verily believe to be true that the hearing of the matter proceeded on 22.9.2011 in my absence"

10: "That I was not informed on (sic) aware of the said hearing of the counter-claim. My suit has also never been heard"

11: "That my advocate informs me information I very believe to be true that there is some irregularity as the Court never dealt with my claims either to dismiss if for non-attendance of otherwise before proceeding to hear the counter-claim".

Order 12 Rule 3(1) of the Civil Procedure Rules provides as follows:-

"***If on the day fixed for hearing, after the suit has been called on for hearing outside the Court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the Court"*** emphasis added

It is clear from the record that when the trial came up before **H.N. NDUNG'U SPM** on 22nd September 2011, she did not confirm if the appellant had been served. Mr. Njeru advocate for the 2nd respondent has submitted that the application which was before **J.K. NGENO** had been brought under the wrong provision of the law while counsel for the 1st respondent Mr. Magee wa Magee has submitted that since the appellant had not filed a defence to the 1st defendant's counter-claim, the issue of whether or not he had a good defence cannot arise as an interlocutory judgment had already been entered against him on the counter-claim. The answer to Mr. Njeru's submission is found in ***Order 51 Rule 10(2)*** which states:-

"No application shall be defeated on a technicality or for want of form that does not affect the substance of the application"

And most importantly, ***Article 159(2) (d) of the Constitution*** which provides that:-

"Justice shall be administered without undue regard to procedural technicalities"

With regard to the submissions by Mr. Magee wa Magee, the appellant had his own claim against the 1st respondent and ***Order 12 Rule 3 (1) of the Civil Procedure Rules*** which I have cited above required that such claim be dismissed unless for good cause. The words used in that provision are "***shall be dismissed***". That was not done before the 1st respondent proceeded to prove his counter-claim with the result that whereas the 1st respondent has a judgment in his favour on the counter-claim, the appellant's claim was neither dismissed nor heard. It is still part of the record undetermined. Those were weighty issues which **J.K. NG'ENO**, as is clear from the ruling reproduced above, did not even attempt to address and in so doing, he clearly mis-directed himself both on the law and in fact and ended up exercising his discretion in a manner that is manifestly wrong and which calls for this Court's intervention. While the 1st respondent was entitled to prove his counter-claim under ***Order 12 Rule 3(4) of the Civil Procedure Rules,*** that could only properly be done after the appellant's claim had been dismissed under ***Order 12 Rule 3(1) of the Civil Procedure Rules*** and that dismissal could only have been made if the trial Court was satisfied that the appellant had knowledge of the hearing date having been served and had not appeared for the trial.

It is clear from all the above that a proper basis had been laid by the appellant as to why the judgment delivered on 27th October 2011 ought to have been set aside and **J.K. NG'ENO** erred both in law and in fact in failing to allow the application dated 16th May 2011.

The appellant also sought the setting aside of the sale by public auction of land parcel No. NGARIAMA/NGIRIAMBU/4014 and ½ share of land parcel No. NGARIAMA/NGIRIAMBU/4013 conducted on 20th April 2012 and any other subsequent orders issued pursuant to the sale including the stay of registration of the above named land parcels in the names of the 2nd respondent who was the interested party sought to be enjoined therein. Mr. Njeru advocate for the 2nd respondent has submitted, on the authority of ***GRANT VS KENYA COMMERCIAL CO. LTD C.A NO. 227 of 1995*** that a

purchaser's right is protected by ***Section 69B of the repealed Transfer of Property Act*** which protection could only be lost where it is proved that there was improper or irregular exercise of the statutory power of sale of which the purchaser had notice. On his part, Mr. Magee wa Magee submitted on the authority of ***MASINDE MULIRO VS DICKSON OCHIENG (1983) e K.L.R*** that the sale of the land to the 2nd respondent became final when he was issued with a title deed and therefore no suit or other civil proceedings could be brought to set it aside. However, all that presupposes that there was a valid judgment on record that could be executed because such judgment is the substratum on which a sale by public auction as envisaged under the provisions of ***Order 22 of the Civil Procedure Rules*** is premised. And as I have already found above, the proceedings of 22nd September 2011 having been found to be irregular, there was no valid judgment upon which execution could proceed. And even if there was a valid judgment, (which there was not) ***Order 22 Rule 48 of the Civil Procedure Rules*** lays down the procedure to be followed in attaching immovable property. That was not done in this case. Indeed in the case of ***MASINDE MULIRO*** (supra) cited by Mr. Magee wa Magee, it was held that the sale only becomes absolute after the Senior Deputy Registrar makes the order confirming the sale on the application by the purchaser or the auctioneer. There was a clear flouting of the rules in the circumstances of this case and this Court must therefore interfere.

I think I have said enough to demonstrate that there is merit in this appeal.

Ultimately therefore, this appeal is allowed in the following terms:-

a. ***The ruling delivered on 10th July 2013 is set aside and substituted with an order allowing the application dated 16th May 2012.***

b. ***The respondents shall meet the appellant's costs.***

B.N. OLAO

JUDGE

12TH MAY, 2016

Judgment delivered, dated and signed in open Court this 12th day of May, 2016

Ms Wangechi for Appellant present

Ms Kiragu for 1st Respondent present

Mr. Mugambi for 2nd Respondent present.

B.N. OLAO

JUDGE

12TH MAY, 2016