



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & GATEMBU, J.J.A.)

CIVIL APPEAL NO. 583 OF 2019

BETWEEN

ALTON HOMES LIMITED.....1ST APPELLANT

JOHN KANGOGO.....2ND APPELLANT

AND

DAVIS NATHAN CHELOGOI.....1ST RESPONDENT

JOHN NDUATI NJUGUNA.....2ND RESPONDENT

SAMUEL KUGEKA NDEGWA.....3RD RESPONDENT

JOSHUA OMONDI HALLONDA.....4TH RESPONDENT

TRANSNATIONAL BANK LTD.....5TH RESPONDENT

COMMERCIAL BANK OF AFRICA LTD.....6TH RESPONDENT

(Being an appeal from the Ruling and Order of the Environment and Land Court at Thika (L. Gacheru, J.) dated 25th October, 2019

in

Thika ELC Case No. 276'A' of 2017

Formerly

Nairobi ELC Case No. 193 of 2010)

JUDGMENT OF THE COURT

1. In this appeal, the appellants are aggrieved by a ruling delivered by the Environment and Land Court (ELC) at Thika on 25th October 2019. By that ruling, the ELC (*L. Gacheru, J.*) allowed an application by the 4th, 5th and 6th respondents to be joined in the suit after judgment in favour of the appellants had been granted on 23rd February 2018. In the same ruling, the court reviewed and set aside its said judgment and ordered the 4th respondent, who had been evicted from the suit property on the basis of the said judgment, to be restored in occupation.

2. The background, in brief: At the core of the dispute is a property known as Title Number Nairobi Block 26/113 (the property) which was originally allocated to the 1st respondent who agreed to sell it to the appellants. That transaction was not completed. Subsequently, the 1st respondent sold the property to the 2nd respondent. The appellants then filed suit against the 1st, 2nd and 3rd respondents. As against the 1st respondent, the appellants sought an order of specific performance of the agreement for sale and an order to compel him to deliver to them

the original certificate of lease and duly executed transfer and all necessary consents to facilitate the registration of the property in the name of the 1st appellant. The appellants also sought a declaration that the sale and transfer of the property by the 1st respondent to the 2nd respondent was null and void and an order to restrain the respondents generally from dealing with the property.

3. The suit was defended. The 1st respondent averred in his defence that the 1st appellant breached the terms of the sale agreement as a result of which he terminated the transaction; and that he thereafter sold the property to the 2nd respondent.

4. The 2nd respondent stated in his defence that he was an innocent purchaser of the property for value, having purchased the same from the 1st respondent; that he had a tenancy arrangement with the appellants; that the appellants defaulted in the payment of rent whereupon he levied distress for rent and evicted them from the property.

5. In a judgment in favour of the appellants delivered on 23rd February 2018, the learned trial Judge (**L. Gacheru, J.**) allowed the suit; declared the sale of the property by the 1st respondent to the 2nd respondent to have been in breach of the law, fraudulent, null and void; ordered the 1st respondent to specifically perform and complete the sale transaction with the appellant by transferring the property to the 1st appellant; and restrained the respondents from otherwise dealing with the property. In addition, the court awarded the appellants, amongst other reliefs, “*general damages of Kshs.5,000,000.00*” for breach of contract and unjust enrichment.

6. On 13th June 2018, the appellants presented a motion before the ELC seeking an order of eviction of the respondents “*or anyone claiming title and possession*” under the respondents. In a ruling delivered on 7th February 2019, the ELC (**B.M. Eboso, J.**) allowed that application and ordered: that the respondents, their servants or agents *or anyone claiming title under them* be evicted from the property; that warrants of eviction be issued to Siama Auctioneers; that the Officer Commanding Kileleshwa Police Station do provide assistance in enforcing the eviction; and that all documents required for purposes of transferring the property to the 1st appellant be executed by the Deputy Registrar of the court.

7. That order was executed on 1st March 2019. The 4th respondent and his family, who were occupying the property, were forcibly ejected in what the 4th respondent described as a ruthless manner without regard to human dignity. Soon after his ejection from the property, the 4th respondent presented an application before the ELC on 4th March 2019 seeking an order that he, as well as the 5th and 6th respondents, be joined in the suit. He also prayed for review and setting aside of the judgment delivered on 23rd February 2018 and for an order to be restored into occupation of the property. Also sought in the application was an order of stay of execution of the judgment pending the hearing of the application. That application was made under Order 22 Rules 22(2), 25 and 30; Order 51 Rule 1; Order 45 Rule 1 of the Civil Procedure Rules; Sections 1A, 1B, 3A, 63, 80, 88 of the Civil Procedure Act; Section 80 of the Land Registration Act; and Articles 27, 40, 50, and 159 of the Constitution of Kenya.

8. In support of the application, the 4th respondent deposed that the property was advertised for sale in the newspapers by the 5th respondent exercising its statutory power of sale as a chargee; that he entered into an agreement for sale with the chargor, the 2nd respondent, on the basis of which he purchased the property; that the 5th respondent discharged the property and the same was then transferred to him by the 2nd respondent after payment of the full purchase price to the advocates for the chargee, the 5th respondent; that he took possession of the property in June 2014 where he peacefully resided with his family until his ejection on 1st March 2019. He deposed further that he charged the property to the 6th respondent to secure a loan facility of Kshs.4,000,000.00.

9. The 5th respondent supported the application through an affidavit sworn by its legal officer, Silas Aluku, who deposed that the property was charged to the 5th respondent by the 2nd respondent to secure a loan facility granted to Uchumi International Agencies Limited, a company in which the 2nd respondent was a director; that following default in the repayment of the loan, the 5th respondent commenced the process of realization of its security and after the necessary prerequisites towards that end advertised the property for sale through auctioneers; that the lawyers for the 5th respondent found a purchaser and the 2nd respondent was agreeable to the sale; that a sale agreement was entered into between the 2nd respondent and the 4th respondent and after payment of the secured outstanding debt, the 5th respondent discharged the property and the same was transferred to the 4th respondent.

10. The 6th respondent also supported the application through an affidavit sworn by its head of Remedial Management Unit, Jacob Ogola, who deposed that the 6th respondent has a first legal charge registered against the property to secure a loan facility extended to Crane Travel and Tours Limited; that prior to taking the property as security, it carried out a search over the title to the property and ascertained it was registered in the name of the 4th respondent.

11. The facts as deposed in those affidavits in support of the application were not challenged. The appellants did not file any affidavit in reply to the application but filed grounds of opposition contending that “*joinder of parties is not permissible after judgment*”; that judgment for vacant possession of the property had been executed and there was nothing to stay; and that the application was an abuse of the process of the court.

12. After considering the application, the affidavits and submissions, the learned Judge of the ELC, as already indicated, allowed the application in terms of the impugned ruling delivered on 25th October 2019.

13. Urging the appeal before us, Isaac Rene, learned counsel for the appellants, canvassed the grounds of appeal in the memorandum of appeal and submitted that the Judge erred in allowing the joinder of the 4th to 6th respondents to the suit when there were no pending proceedings as final judgment in the matter had since been delivered; that under Order 1 Rule 10 of the Civil Procedure Rules, joinder can only be ordered “*at any stage of the proceedings*” but not where there are no proceedings pending; and that joinder of parties to an action could not be ordered after the suit had been concluded.

14. It was submitted that the decision of this Court in the case of JMK vs. MWM & another (above) on which the Judge relied is distinguishable in that there was, in that case, a specific prayer to set aside the judgment and for the hearing to start *de novo*; that in the present case the prayer to set aside was limited to the order for specific performance despite which the Judge granted 8 reliefs that had not been sought; and that the question of *de novo* hearing was not before the judge, not having been prayed for. In that regard, counsel referred to the decisions of this Court in Dakanga Distributors (K) Ltd vs. Kenya Seed Company Limited [2015] eKLR case and Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR for the proposition that the court is bound by the pleadings of the parties.

15. Opposing the appeal, **Mr. Odhiambo Ouma**, learned counsel for the 4th respondent, submitted that the learned Judge properly exercised her discretion under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules and that there is no basis for this Court to interfere with her decision; that the Judge was bound by the decision of this Court in the case of JMK vs. MWM & another (above) and properly relied on it; that it is not in dispute that the 4th to 6th respondents were not heard prior to the pronouncement of the judgment that directly affected them and the judgment was therefore liable to be set aside as of right, *ex debito justitiae*, as the proceedings were a nullity. In that regard counsel cited the decisions of this Court in Saulo Kandie vs. James Kwambai Cheruiyot [2019] eKLR and the case of Michael Maina & another vs. Stanley Kigara Kagombe [1996] eKLR. It was submitted that in the circumstances, the learned Judge properly ordered the trial to commence afresh upon the 4th to 6th respondents being made parties to the action.

16. Regarding the contention that it was not open to the Judge to set aside the judgment as there were no pending proceedings, it was submitted that the process of execution had not been completed; that the process of transferring the property to the appellants and attendant rectification of the land register, as ordered in the judgment, was yet to be executed and the judgment was therefore liable to be stayed; and that at the time of hearing the application the property was still registered in the name of the 4th respondent.

17. Counsel made reference to Order 22 rule 30 of the Civil Procedure Rules which requires, where a decree is for delivery of immoveable property, for notice of the decree to be given to persons entitled to occupy the property and who are not bound by the decree to relinquish occupancy; that the 4th respondent was not bound by the decree and was entitled to challenge his eviction through an application for review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

18. **Mr. Kibet**, learned counsel, pointed out that the 5th respondent for which he was acting no longer has an interest in the property as its debt was fully paid after which it discharged its security upon payment of the debt.

19. **Ms. Fiona Maina**, learned counsel, submitted that her client the 6th respondent is a pertinent party and was properly joined in the suit as it has an interest in the property as a chargee; that having advanced facilities on the security of the property, the 6th respondent stands to suffer if the impugned ruling of the ELC is set aside as its security will thereby be extinguished.

20. It was submitted that as the 6th respondent was not heard prior to the delivery of judgment and the principle of natural justice was violated. Citing the case of Onyango vs. Attorney General (1986-1989) EA 456, counsel submitted that a decision reached in violation of the rules of natural justice is not curable no matter how right it might otherwise be. In that regard, reference was also made to the decisions in Mbaki & others vs. Macharia & another [2005] 2 EA 206 and Patriotic Guards Ltd vs. James Kipchirchir Sambu [2018] eKLR.

21. It was submitted that the appellants should have produced an official search to show the status of the property prior to pronouncement of the judgment by the ELC. Counsel submitted that the decision of this Court in the case of JMK vs. MWM & another (above) applies to the present circumstances and that the ruling of the ELC should therefore be upheld.

22. We have considered the appeal and the submissions. The issue for consideration is whether the Judge erred in permitting the 4th, 5th and 6th respondents to be made parties to, or joined in the suit after judgment when, according to the appellants, “*there were no pending proceedings in the matter*”. Related to that is the question whether the Judge erred in setting aside the entire judgment and ordering the trial of the suit to commence *de novo* upon the joinder of the 4th, 5th and 6th respondents. The appellants have urged the Court to set aside the ruling and reinstate the judgment of the ELC given in their favour on 23rd February 2018. The 4th, 5th and 6th respondents, on the other hand, urge the Court to uphold the impugned ruling. Although the 1st, 2nd and 3rd respondents were duly served, they did not participate in the appeal.

23. We begin with the question whether the learned Judge erred in allowing the joinder of the 4th, 5th and 6th respondents to the suit after judgment. In allowing the joinder of the 4th to 6th respondents to the suit, the learned Judge expressed:

“The plaintiffs [appellants] have alleged joinder cannot be done once a judgement has been delivered since the proceedings are closed. However, as the court stated earlier, there are enforcement proceedings and these enforcement proceedings have affected the 1st & 3rd proposed interested parties standing over the suit property. The court finds that the proposed interested parties are necessary parties herein and their presence is necessary to enable the court to effectively and completely adjudicate upon the matter herein.”

24. Order 1 Rule 10(2) of the Civil Procedure Rules which the 4th respondent invoked in applying for the joinder provides that:

“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all

questions involved in the suit, be added.” [Emphasis]

25. Under that provision, the court is called upon to exercise judicial discretion in determining whether to permit the addition of a party to the suit, whether on application or *suo motto*. The circumstances when an appellate court can interfere with the exercise of judicial discretion by the lower court are limited. As stated by Sir Charles Newbold, P. in **Mbogo & Another vs. Shah [1968] E.A. 93** at page 96:

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....”

26. In effect, we cannot interfere with an exercise of judicial discretion unless it is shown that the discretion has not been exercised judicially.

27. As counsel for the appellants correctly submitted, the power of the court to order any person to be joined under Order 1 Rule 10(2) of the Civil Procedure Rules may be exercised “*at any stage of the proceedings*”. Commenting on similar provisions of the Indian Code of Civil Procedure, the editors of **Mulla, Code of Civil Procedure**, 14th edition, vol. II state at page 863, that, “*it is only when a suit or proceeding has been finally disposed of, so that there is nothing more to be done that this rule becomes inapplicable.*”

However, and as pointed out by counsel, by the time the application to review and set aside the judgment of 23rd February 2018 was made on 4th March 2019, that judgment had partially been executed to the extent that the 4th respondent was evicted on 1st March 2019 but the property had yet to be transferred in accordance with the judgment. It cannot therefore be said that there was nothing to stay when the application was made.

28. Moreover, the 4th to 6th respondents were not only seeking to be made parties to the suit. They also sought review and setting aside of the judgment. The circumstances in the case of **JMK vs. MWM & another** (above) on which the Judge relied, are not in our view, dissimilar to those obtaining here. In that case this Court stated as follows:

“It is not in dispute at all that when the appellant applied to be made a party to the proceedings on 10th June 2014, there were no pending proceedings before the Industrial Court to which he could have been made a party, the judgment having been delivered on 30th May 2014.

The appellant however had not applied solely to be added as a party to the suit; he had also applied for review and setting aside of the judgment of the court to give him an opportunity to be heard. In other words, the appellant was effectively applying for review and setting aside of the judgment of the Industrial Court and an order for de novo hearing of the suit, which would afford him an opportunity to be heard. The learned judge properly found, in our view, that the Court had jurisdiction to review and set aside its judgment.”

We can see no reason for faulting the Judge in applying the principle in that case to the circumstances obtaining here.

29. As stated earlier, the property is at the heart of the dispute in this matter. There is no dispute that 4th respondent who was evicted from the property on the basis of the judgment was the registered proprietor of the property at the time of his eviction.

There is also no dispute that the 6th respondent’s interest in the property, as holder of a first charge over the property, is also registered against the title. The 4th and 6th respondents are therefore directly and legally interested in the answer to the issues raised in the suit and are undoubtedly necessary and proper parties to the action.

30. The appellants have not demonstrated that in allowing the joinder of the 4th to 6th respondents in the suit, the Judge misdirected herself in law, or that she misapprehended the facts, or that she considered extraneous considerations, or that she failed to consider relevant considerations, or that her decision is plainly wrong. We do not have a basis for interfering with her decision in that regard.

31. Next is the question whether the Judge erred in setting aside the entire judgment and ordering the trial of the suit to commence *de novo* upon the joinder of the 4th, 5th and 6th respondents. It bears repeating that the 4th respondent as the registered owner of the property who was in occupation and the 6th respondent in whose favour the property was charged to secure loan facilities had direct interest in the outcome of the suit. Yet, by the judgment of the ELC, their respective interests in the property stood to be extinguished without those parties having been heard. It is instructive that Order 21 Rule 6 of the Civil Procedure Rules states:

“Where there is a prayer for a judgment the grant of which would result in some alteration to the title of land registered under any written law concerning the registration of title to land, a certified copy of the title shall be produced to the court before any such judgment is delivered.”

32. Had the appellants furnished the ELC with a certified copy of the title showing the status of the property at the time, the same would have revealed the 4th and 6th respondents’ interest in the property. The omission by the appellants to do so resulted in adverse decision against them, that would wipe out their interest in the property, without a hearing. We agree entirely with the statement by the Judge:

“It is not in doubt that the right to be heard is a valued right and which is enshrined in our Constitution. This right was not

observed herein because for reasons not made clear to this court, the 2nd defendant failed to bring on board the 1st interested party whom he sold his suit property to thus orders were issued by this court which Orders have adversely affected the 1st interested party. The Constitution of Kenya is very clear on the right to protection of one's property and the said property cannot be arbitrary taken away from such an owner without being heard or without being accorded an opportunity to ventilate his case."

33. Authorities abound that decisions reached in breach of the rules of natural justice are liable to be set aside as of right. See Onyango vs. Attorney General (above) and also Mbaki & others vs. Macharia & another (above) to which we were referred.

34. In conclusion therefore we are satisfied that the learned Judge did not err in setting aside the entire judgment and ordering the trial of the suit to commence *de novo* upon the joinder of the 4th, 5th and 6th respondents.

35. All in all, this appeal is devoid of merit and is dismissed with costs to the 4th, 5th and 6th respondents.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of October, 2020.

D.K. MUSINGA

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR