IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, HANNAH OKWENGU & J. MOHAMMED JJ.A)

CIVIL APPEAL NO. 188 OF 2016

BETWEEN

TORO & TEAM LIMITED.....1ST APPELLANT

ELIUD MBURU GATHIRIMU.....2ND APPELLANT

AND

DISTRICT LAND REGISTRAR KIAMBU.....1ST RESPONDENT

PHILOMENA WANJERI NDIRANGU.....2ND RESPONDENT

EUNICE MUMBI GATHIRIMU.....3RD RESPONDENT

As administrators of the estate of **GEORGE KARANJA GATHIRIMU** also known as **KARANJA GATHIRIMU (deceased)**

(*Being an appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (D. Musinga, J.) dated 30th November, 2010 and 7th December 2010* in **J.R E.L.C MISC. APPLICATION NO. 8 OF 2010)**

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JUDGMENT OF THE COURT

Background

[1] This is an appeal against two rulings of Musinga, J. (as he then was) dated 30th November, 2010 and 7th December, 2010 where the learned Judge granted judicial review orders to the ex-parte applicants (the respondents herein).

[2] The matter before the court is a dispute between **Toro & Team Limited** (the 1st appellant) who purchased land parcel number **LIMURU/BIBIRIONI/159** (the suit property) from **Eliud Mburu Gathirimu** (the 2nd appellant).

[3] A background of the appeal as can be discerned from the record is that the suit property was originally registered in the name of the late **George Karanja Gathirimu** (the deceased). In 1998, **Eliud Mburu Gathirimu** (the 2nd appellant) who was a son of the deceased obtained letters of administration in respect of the estate of the deceased and caused the suit property to be transferred to himself on 24th March, 2000.

[4] Upon discovering that the 2nd appellant intended to sell the suit property to the 1st appellant, **Philomena Wanjeri Ndirangu** (the 2nd respondent), **Eunice Mumbi Gathirimu** (the 3rd respondent) and **Cecilia Nduta Gathirimu** lodged a caution on 5th May, 2000 against the title which was registered as entry number 8 in the register. The 2nd and 3rd respondents filed summons for revocation of grant on 15th August, 2000 seeking revocation of the grant issued to the 2nd appellant on the grounds that the proceedings leading to the grant of letters of administration were defective and that the grant of letters of administration was obtained fraudulently by making false statements and concealing material facts from the court.

[5] Dulu, J. considered the application for the revocation of the grant, and allowed it. In his ruling dated 7th June, 2006 the learned Judge noted that the 2nd appellant, ***"misled the court that he was entitled. I find that to be enough ground for me to revoke the letters of administration herein, so that the issues as to who was entitled to inherit will be heard and determined by the court on merits."***

[6] The caution lodged by the 2nd and 3rd respondents was removed at the instance of the 2nd appellant on 28th September, 2009 and the 2nd appellant entered into a sale agreement with the 1st appellant for the sale of the suit property. The suit property was subsequently transferred to the 1st appellant and title issued on 8th October, 2009.

[7] The 2nd and 3rd respondents filed a judicial review application dated 11th February, 2010 contending that the transfer to the 2nd appellant was fraudulent/illegal and precipitated by the District Land Registrar (the 1st respondent) who acted in excess of his powers in issuing title to the 2nd respondent and registering the transfer to the 1st appellant; that the grant in favour of the 2nd appellant was revoked on 7th February, 2006; that the sale to the 1st appellant was fraught with illegalities, in that the transfer was a nullity as it was not executed or attested to in accordance with the provisions of Legal Notice No. 146 of 16th December, 2005; the consideration thereof was not indicated on the transfer and photographs of the parties who executed the same on behalf of the 1st appellant were not affixed to the transfer; the transfer in favour of the 1st appellant was undated; the application for Land Control Board consent did not indicate the date of the application or the consideration thereof. The 2nd and 3rd respondents claimed that the 1st respondent exceeded his jurisdiction by issuing a title deed to the 1st appellant on 8th October, 2009 on the basis of an illegal transfer. Further, that the 1st respondent ignored the caution lodged on 28th May, 1982 as entry no. 4 by the Government of Kenya which had compulsorily acquired 0.150 acres from the suit property and duly paid compensation to the estate of the deceased.

[8] In the judicial review application, the 2nd and 3rd respondents sought *inter alia* orders of:

> **1.** ***Certiorari to quash the decision of the Registrar to register a transfer in favour of the 1st appellant;***
>
> **2.** ***Certiorari to quash the decision of the registrar to remove the caution no. 9 against the title;***
>
> **3.** ***Certiorari to quash the decision of the registrar to issue title of the suit property to the 1st appellant; and***
>
> **4.** ***Mandamus to compel the registrar to cancel registration of the 1st appellant as proprietor of the suit property as entry No. 10 and revert title to the original owner, the deceased.***

[9] Joseph Kamau Toro, the Managing Director of the 1st appellant, opposed the application. In his replying affidavit sworn on 14th April, 2010 deponed on behalf of the 1st appellant that he conducted a search on the suit property before the 1st appellant entered into a sale agreement with the 2nd appellant who was the registered owner of the property; that the Land Control Board at Limuru consented to the sale transaction; that the 2nd appellant had duly signed and executed the transfer documents; and that the 1st appellant was an innocent purchaser for value without notice of any other claims affecting the title.

[10] The 2nd appellant also filed a replying affidavit sworn on 30th March, 2010 wherein he deponed that although Dulu, J had revoked the grant, the transactions that had taken place under the grant had not been set aside or interfered with. Musinga, J (as he then was), considered the application and found that the irregularities complained of were valid. In a ruling delivered on 30th November, 2010; the learned Judge allowed the application stating in part as follows;-

> "***There is no dispute that the defects raised by the ex parte applicants regarding the transaction are true. The purchase price or consideration must be shown in every transfer. That is what informs the amount of stamp duty to be charged. The transfer did not have the seal of the 1st interested party who was the transferee. It was also not witnessed by a director and secretary of the 1st interested party. These are mandatory requirements of the law. It did not have any photograph of a director and secretary affixed to it. No reasons were given as to why those anomalies, among others were overlooked by the respondent. There was also no explanation as to why the transfer was registered in the face of a caution registered at the instance of the Government of Kenya claiming a purchaser's interest in respect of a portion of the suit land. Where a land registrar acts in excess of his power in effecting a registration or a transfer and issuing a title deed contrary to the law, his actions are amenable to review by this court. I am therefore satisfied that the orders sought by the applicants herein are merited and ought to be granted.***"

[11] Being dissatisfied the 2nd appellant made an application for review on the ground that there was an error on the face of the record in that his replying affidavit was missing from the court record and was therefore not considered by the court. Musinga J, in his second ruling dated 7th December, 2010 determined the application for review as follows:

> "***I have considered the 2nd interested party's replying affidavit. The Grant of Letters of Administration having been revoked by Dulu, J on the ground that the proceedings leading to the grant was defective and that the grant was obtained fraudulently and by making false statements, all the transactions that were undertaken pursuant to the grant are questionable. As regards removal of the caution that had been filed by the ex parte applicants, I agree with the 2nd interested party that it appears that the Land Registrar wrote to Cecilia Nduta Gathirimu on 12th August, 2009 and gave notice of intention to remove the same. However, the caution that was registered by the Government of Kenya on 23rd May, 1982 as entry No. 4 still subsists in the register. The Land Registrar decided to ignore the same when he was effecting the transfer of the suit land in favour of the 1st interested party.***"

[12] Aggrieved by that decision, the appellants have brought this appeal on grounds contained in their memorandum of appeal, *inter alia* that the application for judicial review was incurably defective; that the 1st appellant was an innocent purchaser for value without notice and therefore the title the 1st appellant acquired should not have been cancelled; and that there was misdirection on a point of law on the issue of a title acquired pursuant to a revoked certificate of confirmed grant.

[13] The appellants sought the following orders;-

> **1.** ***This appeal be allowed with costs.***

2. ***The Ruling and orders of the learned Trial Judge of the superior Court made on 30th November, 2010 as well as on 7th December, 2010 be set aside.***

3. ***The Title to Land Parcel No. LIMURU/BIBIRIONI/159 remain in the name of the 1st Appellant.***

4. The Respondents be ordered to pay the costs of this appeal and of the Superior Court.

Submissions

[14] The appeal was heard of by way of written submissions with brief oral highlights. Learned counsel **Mr. J. K Njuguna** represented the 1st appellant and held brief for **Mr Kiania Njau,** learned counsel for the 2nd appellant; Ms**. J. Ngelechei** represented the 1st respondent; while **Ms. Mary Muigai** represented the 2nd and 3rd respondents. **Mr Njuguna** informed the court that **Mr Kiania Njau** wholly adopted the 1st appellant's submissions.

[15] It was argued on behalf of the appellants that the application before the trial court was defective in substance and in form; that the application sought substantive orders of *mandamus* and *certiorari* yet the statement of facts accompanying it sought leave to apply for these orders; that this defect was incurable as the latter is a crucial document in an application for judicial review and a party is bound by it; that the court erred in quashing the transfer to the 2nd appellant and reverting title to the deceased; that the 1st appellant had acquired a good title from the 2nd appellant who was the registered proprietor of the property; and that revocation of the grant did not nullify title in favour of the 2nd appellant.

[16] The appellants challenged the decision of the learned judge not to review his first ruling in light of the new facts established by the 2nd appellant's replying affidavit; that the 1st appellant was a victim of circumstances and an innocent purchaser for value without notice and should therefore not be penalised with costs. Counsel urged the court to allow the appeal with costs.

[17] The 1st respondent opposed the appeal. It was submitted on his behalf that the defect in the application was curable under Article 159(d) of the Constitution which requires the court to administer justice without undue regard to procedural technicalities; that by the time the 1st appellant had purchased the suit property from the 2nd appellant, the grant had already been revoked and the 2nd appellant did not therefore have the capacity to pass on a good title to the 1st respondent; that the learned judge lawfully considered the 2nd appellant's replying affidavit and found no merit in reviewing his previous ruling. The 1st respondent supported the decision of the learned judge in his finding that the transfer documents were wanting and failed to meet the requirements of sections 38 and 108 of the Registered Land Act (repealed). The court was urged to dismiss the appeal with costs to the respondents.

[18] The 2nd and 3rd respondents opposed the appeal with arguments in line with those of the 1st respondent. They relied on the decisions of **Republic v KNEC ex parte Geoffrey Gathenji & 9 others [1997] eKLR** and **Anisminic Ltd v Foreign Compensation Commission (1969) 1 ALL ER 208** to support their argument that the learned Judge was right in quashing the transfer in favour of the 1st appellant on the grounds of illegality, procedural impropriety and irrationality; that the transfer in favour of the 1st appellant was effected by way of defective documents and that the 1st respondent ignored the caution lodged by the Government of Kenya; that as the 2nd appellant's title stemmed from an illegality, the title obtained by the 1st appellant was also tainted by illegality. Counsel relied on the case of **Republic v Cabinet Secretary, Ministry of Information & Communication & 10 others ex parte Adrian Kamotho Njenga**

[2015] eKLR for the proposition that the 1st appellant acquired title through procedural impropriety and therefore transactions or proceedings flowing therefrom are null and void.

Determination

[19] We have carefully considered this appeal, the record of appeal, the submissions made before us and the authorities cited. This being a first appeal, we are duty bound to apply the principles set in **Selle V Associated Motor Boat Co. [1968] EA 123**, in which Sir Clement De Lestang V.P. stated as follows;-

> **"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 always 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 witnesses is inconsistent with the evidence in the case generally."**

[20] The issues for determination are as follows;-

a) Whether the application was incurably defective.

b) Whether the Judicial Review Orders were appropriate in the circumstances

c) Whether the 1st appellant was an innocent purchasers for value without notice and whether the title it acquired should not have been cancelled.

[21] On the issue whether the application for judicial review was defective and if so, whether the defect was curable, the appellants have challenged the judicial review application on the ground that the statement of facts, which is a crucial document, sought leave for orders of

certiorari and ***mandamus,*** contrary to the application itself which sought substantive orders. The respondents in turn have argued that this defect is curable under Article 159(2)(d) of the Constitution.

[22] The learned Judge rendered himself as follows;-

> ***"I have looked at the application for leave as well as the substantive application seeking the orders for judicial review and with respect to the respondent and the interested parties, I would say that the orders sought are in compliance with the leave that was granted."***

The learned Judge concluded that **"Article 159(d) of the Constitution requires the court to administer justice without undue regard to procedural technicalities."**

[23] We are guided by the case of **Raila Odinga Vs I.E.B.C & Others (2013) eKLR** where the Supreme Court rendered itself thus:-

> ***"Article 159(2) (d) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court."***

[24] On the issue whether judicial review orders issued by the learned Judge were appropriate in the circumstances of the case, it is notable that section 38 of the Registered Land Act (repealed) stipulated that land shall not be disposed of except as provided for by the Act. Section 108 of the Registered Land Act (repealed) provided that:-

> ***"(1) Every disposition of land, a lease or a charge shall be effected by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve, and every person shall use a printed form issued by the Registrar unless the Registrar otherwise permits.***
>
> ***(2) Leases and charges shall be presented for registration in triplicate.***
>
> ***(3) Instruments shall contain a true statement of the amount or value or the purchase price or loan or other consideration (if any), and an acknowledgement of the receipt of the consideration."*** *(Emphasis added).*

[25] The 2nd and 3rd respondents pointed out several irregularities in the transfer of title to the 1st appellant; contrary to the provisions of **Section 108** of the Registered Land Act (repealed).

[26] In **Republic Vs Kenya National Examination Council ex parte Geoffrey Gathenji and 9 Others [1997] eKLR** this Court held as follows;-

> ***"The remedies of certiorari and prohibition are tools that this Court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment."***

[27] In **Anisminic Ltd v Foreign Compensation Commission (1969) 1 ALL ER 208** Lord Reid stated as follows;-

> ***"... ... there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."***

[28] Further, in **Mitchell & Others V Director of Public Prosecutions and Another (1987) LRC (const) 128,** it was held that:-

> ***"... in civilized society legal process is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly, it can be used improperly, and so abused. An instance of this is where it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral one or to gain some collateral advantage, which the law does not recognize as legitimate use of that process. But the circumstance in which abuse of process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes extrinsic evidence only. But if and when it is shown it happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do prove for its frustration in some instance."***

[29] The learned Judge therefore correctly found that in the circumstances of this case that where a land registrar acts in excess of his power in effecting a registration or a transfer and issuing a title deed contrary to the law, his actions are amenable to review by this Court.

[30] On the issue whether the 1st appellant was an innocent purchaser for value without notice and the title he acquired should not therefore

have been cancelled, we note from the record that the 1st appellant purchased the suit property from the 2nd appellant who had acquired it through transmission; the 2nd and 3rd respondents filed summons for revocation of the grant and lodged a caution in respect of the suit property. Dulu, J allowed the summons for revocation of grant and stated as follows;-

> ***"I find that to be enough ground for me to revoke the Letters of Administration herein, so that the issues as to who is entitled to inherit will be heard and determined by the court on merits."***

Upon revocation of the Letters of Administration, the 2nd appellant ceased to have any propriety interest in the suit property and therefore had no capacity to transfer the same.

[31] In **Musa Nyaribari Gekone & 2 Others V Peter Miyienda & Another [2015] eKLR** this Court cited with approval the case of

Re Estate of Christopher Jude Adela (Deceased) 2009 eKLR

where Rawal, J (as she then was) stated as follows;

> ***"The correct reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of section 23 of the RTA (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a Carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal action prejudicing the interests and rights or right beneficiaries of the estate.***
>
> ***In short, I do not agree that section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative."***

[32] On the issue that the learned Judge erred in failing to review his ruling on the ground that the 2nd appellant's replying affidavit was not considered; the power of review is a discretionary one donated by section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Before this Court can interfere with exercise of discretion by a learned judge, it must be shown that the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion, see **Mbogo & another v Shah [1968] EA 93**.

[33] In the ruling delivered on 7th December, 2010, the learned judge considered the matters raised in the 2nd appellant's replying affidavit and found that the 2nd and 3rd respondents' case warranted orders for judicial review. We are not satisfied that the appellants have proved any error that would justify this Court to interfere with the learned Judge's discretion which we find was exercised judicially in the circumstances of this case.

[34] We find and hold that the judicial review orders issued by the learned Judge were appropriate in the circumstances of this case. The result of the foregoing is that this appeal has no merit. It is dismissed with costs to the respondents.

Dated and Delivered at Nairobi this 8th day of March, 2019.

E. M. GITHINJI

JUDGE OF APPEAL

HANNAH OKWENGU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR