



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), GITHINJI & KANTAI, JJ. A)

CIVIL APPEAL NO. 94 OF 2018

BETWEEN

ATTAIN ADVISORY CONSULTANTS LIMITED APPELLANT

AND

NAIROBI CITY COUNTY.....1ST RESPONDENT

MUMTAZ HAWA D/O ABDUL REHMAN MOHIDIN HAWA....2ND RESPONDENT

AMINA HAWA D/O ABDUL REHMAN MOHIDIN HAWA.....3RD RESPONDENT

MOHIDIN S/O ABDUL REHMAN MOHIDIN HAWA.....4TH RESPONDENT

(Being an appeal against the Ruling and Order by the High Court of adopting the consent dated 20th December 2017 In the Environment and Land Court (**Obaga, J.**) given on 22nd February 2018 in ELC Misc. Cause No. 144 of 2014)

JUDGMENT OF THE COURT

[1] This is an appeal from the Ruling and Order of the Environment and Land Court (ELC) (**E.O. Obaga, J**) delivered on 22nd February, 2018 in which the learned judge rejected the appellant's objection to adoption of a consent letter as Ruling and Order of the Court and consequently adopted the consent dated 20th December, 2017 as an order of the court.

[2] The said consent letter was based on the notice of motion dated 28th January, 2016 as amended on 19th October, 2017. The amended notice of motion was filed by **Mumtaz Hawa; Abdul Amina Hawa** and **Mohidin**, the 2nd, 3rd and 4th respondents in the appeal. By the amended notice of motion, the 2nd, 3rd and 4th respondent asked the court;

- a. to stay the enforcement of orders granted by L. Gacheru, J. on 4th June 2014 and 6th November 2014 and all consequential processes arising from the said orders;
- b. to review set aside and discharge the said orders;
- c. to set aside the purported public auction and sale of LR No. 209/40/3 to Attain Advisory Consultants Limited (the appellant herein)
- d. to direct the Chief Land Registrar to cancel the transfer dated 15th July 2014 and title to the appellant
- e. to set aside, dismiss or nullify the entire proceedings and orders in Nairobi 1st class magistrate's court case No. 7 of 2013 between County Council of Nairobi and Habiba Abdul Herman Hawa (1st respondent). The application was based on various provisions of law including Article 165(6) of the Constitution and Orders 51 Rule 15; 22 rule 75; 45 rule 1 and order 11 rule 3(1)(h) of the Civil Procedure Rules.

[3] The application was supported by the affidavit of **Mohidin**, the 4th respondent herein and several documents. The application was opposed on the ground contained in the long replying affidavit sworn on 8th April, 2016 by **Amit Annwarbhai Mamdani** the Managing Director of the appellant and in the affidavit of **Peter Gathirwa Waweru**, a licensed auctioneer, sworn on 17th March, 2016. Both deponents annexed many documents to their respective affidavits. The advocates for the 2nd, 3rd and 4th respondents, **Prof. Albert Muma & Co. Advocates** filed lengthy submissions dated 8th November, 2017 in support of the application. Similarly, **Wagara Koyoko & Co. Advocates** for the appellant filed lengthy replying submissions dated 14th December 2017

[4] Before the application was heard, CM Advocates LLP, the advocates for Nairobi City County, the 1st respondent in the appeal, and the advocates for the 2nd, 3rd and 4th respondent filed a “consent order” dated 20th December, 2017 signed by the respective advocates for the parties. The consent order was in the following terms:

“1. The proceedings before Nairobi 1st Class Magistrates Court Case No. 7 of 2013 between County Council of Nairobi and Habiba Abdul Herman Hawa and subsequent instructions to P.G. Waweru T/A Ideal Auctioneers to sell LR. No. 209/403/3 situate in the City of Nairobi (Ngong Road) by public auction was irregular and are hereby withdrawn by the plaintiff and all consequential processes arising therefrom set aside.

2. Ownership and title to LR No. 209/403/3 situate in the City of Nairobi (Ngong Road) should and hereby reverts back to Habiba Abdul Herman, Mumtaz Hawa daughter of Abdulrehman Mohidin Hawa; Amina Hawa daughter of Abdulrehman Mohidin Hawa and Mohidin son of Abdulrehman Mohidin Hawa as the lawful registered proprietors of the property as tenants in common in equal shares.

3. Any monies paid by Attain Advisory Consultants Limited in purchase of LR No. 209/403/3 situate in the City of Nairobi (Ngong Road) following public auction conducted by P.G. Waweru T/A Ideal Auctioneers will be refunded to Attain Advisory Consultants Limited upon satisfactory proof of payments to the plaintiff.

4. The 2nd, 3rd and 4th defendants/applicants Amended Notice of Motion application dated 19th October, 2017 is hereby marked as settled between the plaintiff/respondent and the 2nd, 3rd and 4th defendants/applicants with no orders as to costs.”

[5] By a letter dated 23rd January, 2018, addressed to respective advocates for the 1st respondent and 2nd, 3rd and 4th respondents and copied to the Deputy Registrar of the court, the appellant’s advocates objected to the consent order as far as it relates to the appellant and affects its proprietorship interest over the property.

At the mention of the amended application on 29th January, 2018, counsel for the 2nd – 4th respondents asked the court to adopt the consent order as an order of the court to which the counsel for the 1st respondent agreed. However, **Mr. Wagara** learned counsel for the appellant objected to the adoption of the consent order as judgment of the court and referred to the letter of objection dated 23rd January, 2018. The grounds of objection as derived from the letter and counsel’s submissions were that the appellant did not consent to the terms of the consent and that the consent order was a clear fraud and conspiracy against the appellant as the purchaser of the property. The court reserved the ruling for 22nd February 2018. [6] In rejecting the objection, the ELC stated in part:

“The decree holder has conceded and rightly so that the auction process and the proceedings which resulted to the same were irregular and that the proceedings in the lower court as well as the auction should be set aside. The consent is meant to resolve a process which was irregular *ab initio*. I do not see why the purchaser should oppose the adoption of consent. The proceedings in the lower court were filed against a person who had already died. This in itself is irregular and any judgment flowing from those proceedings is null and void and can even be set aside *ex-debitio justitiae*.

.....

The purchaser was aware of the futility of the judgment which has been obtained against one co-owner of the purchased property who in any case had died before the suit was filed. The purchaser then moved the court *ex parte* to amend the decree to include the second, third, and fourth defendants who were not given an opportunity to be heard...”

[7] The following facts are derived from the affidavits and documents filed in relation to the amended application dated 19th October, 2017 as well as the court proceedings.

i. By a demand letter dated 3rd December 2012, the 1st respondent demanded payment of arrears and land rates and interest from Habiba Abdul Herman Hawa (Habiba) under the Rating Act in respect of LR No. 209/403/3 (suit property). The rates were not paid. The 1st respondent filed Civil Suit No. 7 of 2013 in the City Court against Habiba for recovery of rates and arrears amounting to Shs. 8,801,270 as at 31st January 2013. By an affidavit of service sworn on 17th June 2013, Julius Kiprop Cheruiyot, a licensed process server, deponed that he visited the suit property on 17th May 2013 and being unable to find anyone competent to accept the plaint and summons to enter appearance, he served the processes by fixing them on a conspicuous part of the building. A request for judgment was filed on 21st June 2013 on the basis that Habiba had failed to enter appearance and file a defence. A decree for Shs. 15,366,301/- was issued on 28th August 2013.

ii. The 1st respondent filed an application for execution of decree. A notice to show cause why execution should not issue was issued by the court on 3rd September 2013. Thereafter, a prohibitory order against the suit property was issued on 25th September 2012. In

October, 2013, Ideal Auctioneers caused the suit property to be valued and by a valuation report dated 31st October 2013, Bel Air Properties Limited valued the current open market value of the property at Shs. 40,000,000/- and the forced sale value at Shs. 30,000,000/-. The auctioneer issued a notification of the sale and sold the suit property to the appellant on 22nd January 2014 at shs. 30,000,000/-.

iii. On 8th May, 2014 the appellant filed ex-parte miscellaneous application No. 144 of 2104 in the High Court – Environment and Land Division for an order that sale of the suit property to the appellant be confirmed, made absolute and a vesting order be issued to the appellant. The orders were granted by L. Gacheru, J. on 4th June, 2014. A vesting Order dated 4th June, 2014 was issued on 13th June, 2014. Thereafter, a conveyance of the suit property to the appellant was executed by the Deputy Registrar of the court on 15th July, 2014.

iv. By an exparte application dated 7th August, 2014 filed in the City Court in Suit No. 7 of 2017, the 1st respondent sought an order that the decree issued on 28th August 2013 be reviewed to include the 2nd, 3rd and 4th respondents as defendants/judgment debtors. The application was based on the ground that it had emerged at the time of registration of the vesting order that the suit land was registered in the name of Habiba and the 2nd, 3rd and 4th respondents. The orders sought were granted on the same day by Hon. J. M. Omido of the City Court.

v. A further *ex parte* application dated 1st September, 2014 for review of orders of 4th June, 2014 to include the 2nd, 3rd and 4th respondents, was made in Misc. Application No. 144 of 2014 by the appellant's advocates on the ground that it had emerged at the time of the registration of the vesting order that the suit property was registered in the name of Habiba and the 2nd, 3rd and 4th respondents as tenants in common in equal shares. The application was allowed by L. Gacheru, J. on 6th November, 2014 and a second vesting order was issued on 13th November, 2014 which added the names of 2nd, 3rd and 4th respondents as co-proprietors of the suit land and vested the suit land upon the appellant. A certificate of postal search shows that thereafter the appellant was registered as proprietor of the entire property.

vi. On 8th November, 2014 the 1st respondent filed an application in City Court, Civil Suit No. 7 of 2013 for approval of accounts which application was supported by the affidavit of PG Waweru, the auctioneer. The auctioneer deponed that he received the full purchase price of Shs. 30 million from the appellant; that he paid Shs. 13,420,957 towards rates, that additional expenses which he tabulated was Shs. 7,051,445/- and that the balance was Shs. 9,507,598/- which he had deposited in court. The accounts were approved by an order dated 27th November, 2014.

vii. Sometime in August, 2015 the 2nd, 3rd and 4th respondents filed a Petition No. 775 of 2015 dated 7th August 2015 in the Environment and Land Court, in essence, for orders that judgment, decree and vesting order in the City Court Suit No. 7 of 2013 were null and void, the transfer of the suit property to the appellant was unconstitutional and null and void, cancellation of the transfer dated 15th July 2014 and a permanent injunction.

viii. The suit property measures approximately 0.85 of an acre and is developed with eight three-bedrooms residential maisonettes and domestic staff quarter block. By a valuation report dated 30th July 2015 Gimco Limited on the instructions of 2nd, 3rd and 4th respondents valued the current open market value at Shs. 385,000,000/-. At the time Civil Suit No. 7 of 2013 was filed and the property sold to the appellant, the registered proprietors of the suit property were Habiba W/o Abdulrehman Mohidin Hawa and the 2nd, 3rd and 4th respondents as tenants in common in equal shares. The certificate of death issued on 15th February 2011 indicates that Habiba died on 5th December, 2010 aged 88 years.

[8] The appeal is based on eight grounds. The appellant contends that the learned judge erred in law and in fact in adopting the consent order as an order of the court, when the appellant was not a party to or signatory to the terms of the consent; when the appellant did not consent to the refund of the purchase price; by setting aside a regular final judgment of the court; by adopting a consent order which the appellant vehemently opposed thereby occasioning a miscarriage of justice; by violating the appellant's rights to a fair hearing and rules of natural justice; by failing to appreciate that what was in issue was the suitability or otherwise of adopting the consent order as an order of the court and not the merits of the 2nd, 3rd and 4th respondents' amended notice of motion dated 19th October 2017; and by failing to appreciate that all matters compromised by the consent order were pending for determination in ELC Petition No. 775 of 2015. The orders sought in the appeal are that the ruling appealed from be set aside, the alterations in the Register of the suit property pursuant to consent order be rectified and that the court '*do appraise itself of the 2nd, 3rd and 4th respondents claim in their Amended Notice of motion dated 19th October 2017, the responses filed against it and the submissions filed and the entire case before the superior court and render a judgment/Ruling in the matter before the Court.*'

At the hearing of the appeal, **Mr. Joseph Wagara**, learned counsel for the appellant relied on the appellant's written submissions dated 27th September, 2018 which he orally highlighted. The appeal was supported by **P.C. Waweru** (auctioneer) the 1st interested party through his counsel **Joseph Makumi** who made oral submissions. **Mr. Justus Omollo**, learned counsel for the 2nd, 3rd and 4th respondents relied on the written submissions dated 29th January, 2019 which he orally highlighted and also on three authorities.

All the grounds of appeal arise from the rejection of the appellant's objection to the consent order and the subsequent adoption of the consent order as a judgment of the court. It is expedient therefore to consider the grounds of appeal together.

[9] The appellant in his brief written submissions submitted that there was no lawful agreement between the parties on the entire or part of the subject matter; that the subject matter of the proceedings was whether the appellant acquired the suit property lawfully; that the adoption of the consent was a violation of the provisions of order 25 rule 5 of the Civil Procedure Rules; that it was adopted in an illegal conspiracy between the respondents against the appellant and that it was adopted contrary to the law of contract and the policy of the court and also

without giving the appellant time to agitate his case as stated in its replying affidavit.

On his part, **Mr. Makumi** submitted that his client was not served with a hearing notice and was not aware of the matter; that the consent order implied that the 1st interested party was involved in fraud and that the learned judge decided the matter without hearing the parties.

Counsel for the 2nd, 3rd and 4th respondents identified two issues for determination namely; whether the learned judge had discretion to adopt the consent as filed and whether the appellant was a *bona fide* purchaser for value without notice of the defect of the title. He submitted, among other things, that the appellant was heard on the adoption of the consent; that the objection was considered; that the learned judge had a duty to set aside irregular and unlawful proceedings *ex-debito justitiae*; that the court did not need to be moved once it came to the realisation that the orders of 4th June, 2014 and 6th November, 2014 were irregular; that there was no proper suit before the court which would sustain the issuance of the orders of 4th June, 2014 and 6th November, 2014; that the 1st respondent was justified in conceding that the proceedings were irregular; a defect of jurisdiction goes to the root of the matter and strikes at the very authority of the court to pass a decree and that the appellant cannot rely on orders which were a nullity and void *ab initio* to assert ownership of the suit property.

[10] Although the proceedings in **City Court Nairobi Civil Case No. 7 of 2013** were not availed, the facts on which the learned judge relied on in rejecting the appellant's objection are indisputable. Those facts as stated in paragraph [7] above are not indeed disputed by the appellant. The appellant's contention in answer to the amended notice of motion dated 19th October, 2017 being that it was not aware of the suit or its outcome and was not a party to the alleged irregularities. It is worthwhile stressing that by the time the demand for arrears for rates was made, the suit instituted, *ex parte* judgment obtained, suit property sold and the sale confirmed and vesting orders issued on 4th June 2014, **Habiba** had long died on 5th October 2010. Further, although the 2nd, 3rd and 4th respondents were proprietors of the suit land in common with **Habiba** in equal shares, no demand for rates was made against them and were not joined in the suit nor was *ex parte* judgment entered against them. It is only when the Registrar of Titles declined to register the transfer and the vesting order in favour of the appellant that the decree and vesting order were reviewed by *ex parte* orders dated 7th August, 2014 and 6th November, 2014 respectively that the names of the 2nd, 3rd and 4th respondents featured in the proceedings. It is noteworthy that the two orders were made *ex-post facto* after the *ex parte* judgment and after the sale of the suit property.

[11] By the amended application dated 19th October 2017, the 2nd, 3rd and 4th respondents sought to reverse the *ex parte* orders of 4th June, 2014 and 6th November, 2014 through which their shares in the suit property were alienated. The effect of the impugned consent order was to set aside those orders, the sale of the suit property to the appellant and to terminate the entire proceedings. The appellant contends that the consent order was not lawful and relies on the provisions of order 25 Rule 5(1) of the CPR which provides:

“Where it is proved to the satisfaction of the court, and the court after hearing the parties directs that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall on the application of any party, order that such agreement compromise or satisfaction be recorded and enter judgment in accordance therewith.”

It is true that the appellant was not a party to the consent. The consent was between the decree holder and the 2nd, 3rd and 4th respondents. It is also clear that the appellant bought the suit property in execution of the decree of the court. By Order 10 rule 11 CPR, the court has jurisdiction to set aside a judgment and consequential decree or order. Further, by Order 22 Rule 75 CPR a court has jurisdiction to set aside the sale of immovable property on grounds of material irregularity or fraud in publishing or conduct of the sale on application of a decree holder or any person whose interests are affected by the sale upon proof that applicant has sustained substantial injury by reason of the irregularity or fraud.

[12] As the excerpt of the Ruling of the Court quoted at para [6] above shows, the court agreed with the decree holder as evidenced by the consent order that the proceedings and the auction process were irregular and made a finding that the consent was meant to resolve a process which was void *ab initio*. The court noted that the proceedings were against a dead person and that the 2nd, 3rd and 4th respondents were not given an opportunity to be heard before the decree was amended and said:

“no court of law can allow a party to benefit from an irregular judgment when the irregularity has been brought to a court's attention”

[13] The 2nd, 3rd and 4th respondents rely on **James Kanyiita Nderitu & another v Marios Philotas Ghikas & Another [2016] eKLR** where this Court said in part:

“In an irregular default judgment, on the other hand, judgment will be entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation the default judgment is set aside *ex debito justitiae* as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion.”

In that case, the court relying on authorities stated that the procedure by which the court is moved to set aside an irregular judgment is unimportant and indeed set aside an irregular judgment on an application by a party who was deceased and had not been substituted.

[14] The 2nd, 3rd and 4th respondents also rely on **Joseph Njenga Njoroge v Kabiri Mbiti [1986] eKLR**. Since the case is relevant, the facts were briefly as follows:

After *ex parte* judgment was entered in favour of the plaintiff for a money decree, the plaintiff applied for execution of the decree by

attachment and sale of the defendant's land. The land comprised in the title was 11 acres. The plaintiff attached 7 acres thereof out of the 11 acres. A prohibition was registered against the title and the 7 acres were sold at a public auction. However, the purchase price did not satisfy the decretal amount. Later the Land Registrar declined to register the transfer because of the discrepancy between 7 and 11 acres because the land was not sub-divided before the sale and because of the existence of the prohibitory order.

After the defendant had died, the purchaser obtained an *ex parte* order allowing the amendment of the application for attachment and sale and certificate of sale, lifting of the prohibition and an order to authorize the executive officer of the court to sign all necessary documents of transfer. The application was allowed and apparently, the entire 11 acres were transferred to the purchaser. Thereafter, a nephew of the deceased defendant applied for review and setting aside the *ex parte* order, setting aside of the purported sale of 7 acres and rectification of the register. His application was dismissed by the subordinate court on ground that he did not have sufficient interest as he had not obtained grant of letters of administration. His appeal to the High Court was allowed. The purchaser appealed to this Court. The appeal was dismissed. The court declared the sale of the land and the *ex parte* orders amending the execution documents a nullity. Platt Ag. JA (as he then was) with whom the other members of the Court agreed said in part:

“Should the learned magistrate have reviewed the order of March 26, 1980. The short answer to this is that he certainly should have done so, because the defendant had died and on any view of the case as the prohibitory order was to be lifted and the deceased's land transferred free of that order, the deceased had to be served. The deceased was not served because he had died. The *ex parte* order was a nullity on that account.

.....

If the *ex parte* order is set aside, the prohibitory order will be revived and the Registrar will refuse to register the title. That is because the sale is a nullity in reality. The error in size of the land is so great and the application for attachment and sale was wrong, because there was no division of the land... It is impossible to amend an application for attachment and sale after the sale has taken place. The proper cause to adopt was to set the sale aside and begin again. There was no application for setting aside the sale under order XXI Rules 78 to 80 of the rules in fact. But it must have the same effect, if the attachment has to be materially amended and that amendment is allowed. The sale cannot stand.”

On his part, *Gachuhi Ag. JA* (as he then was) said in part:

“There can never be a correction or amendment of the execution after a decree had been executed and realized. The other point is that there can never be any proceedings against a dead person.

A personal representative should have been brought in the suit by the decree holder. The proceedings after obtaining judgment were a nullity and the High Court was right in setting aside the proceedings and the orders thereon”.

[15] The paramount function of a court of law is to do substantial justice to the parties in a procedurally fair manner. That is not only a legal policy but also a constitutional principle. Further, by **Article 159(2)(d)** and **159(2)(e)** of the Constitution, justice has to be administered without undue regard to procedural technicalities and while protecting and promoting the purpose and principles of the Constitution. The right to fair hearing under **Article 50(2)** and the protection of right to property under Article 40 of the Constitution are fundamental rights. However, by Clause 6 of Article 40 property rights do not cover any property that is found to have been unlawfully acquired.

[16] In reference to this appeal, several egregious acts of nullity were committed in respect of the court proceedings and the sale of the suit property which deprived the court of jurisdiction. Firstly, the suit and decree against *Habiba* who was deceased was a nullity. Secondly, the sale of the entire suit land including the shares of the 2nd, 3rd and 4th respondents who were not parties to the suit was a nullity. Thirdly, the amendment of the decree and the vesting order retroactively after the sale, was a nullity. Fourthly, the amendment of the decree by superimposing the names of the 2nd, 3rd and 4th respondents who were not judgment debtors and against whom no order for sale of their share of the suit property had been made was a nullity. Fifthly, the *ex parte* amendment of the decree without giving the 2nd, 3rd and 4th respondents an opportunity to be heard as the rules require was a nullity. Sixthly, the *ex parte* amendment of the vesting order and the transfer of the 2nd, 3rd and 4th respondents' share of the suit property to the appellant without giving them an opportunity to be heard as provided by the rules was a nullity.

Cumulatively, all those acts resulted in an arbitrary deprivation of the 2nd, 3rd and 4th respondents of their property.

[17] The impugned decision of the court was based on points of law arising from undisputed facts in the proceedings and documents. The court was dealing with a more fundamental issue than the execution of the consent order – that of nullity of proceedings that precipitated the sale of the suit property. The court had inherent jurisdiction inspite of rules of procedure to make orders that may be necessary for the ends justice or to prevent abuse of the process of the court (section 3A of Civil Procedure Act). Rule 78 of order 22 CPR entitles a purchaser to refund of the purchase price where the sale of immovable property is set aside and that is perhaps why the consent order had provision for the refund of purchase money. The contention that the appellant was a purchaser for value without notice of defect in the proceedings is of no avail as court has control of its proceedings and has power to set aside a sale in execution of a decree. Nor would the grounds raised in this appeal hold where the proceedings and the sale is a nullity. In view of the impropriety in the court proceedings and in the sale of the suit property, the trial court had a duty as a court of justice to reject the objection to the consent order and set aside the decree and the execution proceedings.

[18] For the foregoing reasons, the appeal has no merit and is accordingly dismissed with costs to the 2nd, 3rd and 4th respondents. The 1st respondent did not take part in the appeal and is not entitled to costs. It is so ordered.

Dated and delivered at Nairobi this 22nd day of November, 2019.

W. OUKO (P)

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR