



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MAKHANDIA, GATEMBU & M'INOTI, JJ.A)**

**CIVIL APPEAL NO. 336 OF 2010**

**BETWEEN**

**CYRUS KOMO.....APPELLANT**

**AND**

**HANNAH NYAMBURA GIKAMU.....RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Nairobi*

*(Muchelule, J)dated 6<sup>th</sup> July, 2010*

*in*

**NAIROBI H.C.C.A. NO. 75 OF 1991**

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**JUDGMENT OF THE COURT**

1. This is an appeal from the judgment of the High Court (Muchelule, J. delivered on 6<sup>th</sup> July 2010 setting aside an order of the Magistrate's court given on 30<sup>th</sup> November 1990. By that order, the Magistrate's court had declined to grant the respondent's application for restitution under Section 91 of the Civil Procedure Act following the reversal of an earlier order by the Magistrate's court to remove a caution over all that piece or parcel of land known as Title Number Githunguri/Gathangari/1218 ("the suit property"). By the same judgment of 6<sup>th</sup> July 2010, the High Court ordered cancellation of subdivisions of the suit property that had been made after the order for the removal of the caution on the suit property which was subsequently reversed.

2. The background to this appeal is that on 6<sup>th</sup> October 1988, the appellant filed suit against the respondent before the resident Magistrate's Court at Kiambu in civil suit number 88 of 1988. The appellant pleaded that he purchased 6 acres out of the suit property from the then registered owner, one Muchai Karu for consideration of the Kshs. 100,000.00. He averred: that consent of the necessary land control board was obtained; that the portion he purchased was surveyed and assigned title number 1Githunguri/Gathangari /1720; that the vendor, Muchai Karu, executed a transfer in his favour; that he was unable to register the transfer because the respondent lodged a caution over the suit property. He accordingly sought judgment against the respondent for an order directing the respondent to remove the caution registered against the suit property, mesne profits and costs.

3. In her statement of defence dated 24<sup>th</sup> October 1988, the respondent asserted that she had an equal right over the suit property; and that she justifiably lodged the caution on the basis that her late husband had purchased the suit property from the vendor, Muchai Karu. She accordingly prayed for the dismissal of the appellant's suit.

4. By an application dated 2<sup>nd</sup> November 1988, the appellant applied to have the defence filed by the respondent struck out on the grounds that the same was frivolous, vexatious and intended to delay the fair trial of the action. Annexed to that application was an affidavit by Muchai Karu denying that he had sold the suit property to the respondent's husband. The respondent opposed the application by filing a replying affidavit maintaining that she had a good defence to the appellant's claim. During the hearing of that application, there was no attendance for the respondent. In a ruling delivered on 23<sup>rd</sup> December 1988, the court allowed the application, "dismissed" the defence and granted the prayers sought in the plaint and ordered the removal of the caution on the suit.

5. Soon after the delivery of the said ruling on 23<sup>rd</sup> December 1988, the respondent's advocates applied, by an application dated 4<sup>th</sup> January 1989, to set aside that ruling on the grounds that there had been a mix-up as to when the application dated 2<sup>nd</sup> November 1988 was scheduled for hearing. Although the appellant opposed that application, it was allowed in a ruling delivered on 17<sup>th</sup> February 1989. Consequently, the court set aside the ruling of the 23<sup>rd</sup> December 1988; ordered the reinstatement of the caution over the property; and directed that a full hearing of the case be commenced within 30 days "to expedite the trial."

6. It transpired thereafter that the caution over the suit property was removed and the suit property subdivided into two parcels namely Githunguri/ Gathangari /1720 and 1721. On 26<sup>th</sup> October 1989, the respondent made an application to the court for restitution under Section 91 of the Civil Procedure Act with a view to having those subdivisions cancelled and to restore the suit property as well as the caution that had been removed. Unless that was done, the respondent urged, the issues in the suit could not be effectively dealt with and determined.

7. The appellant opposed that application stating: that he bought the property, carried out the subdivision, and had the transfer forms signed in 1987; that before he could register the transfer the respondent placed a caution over the suit property; that upon removal of the caution on the basis of the court order given on 23<sup>rd</sup> December 1988 the transfer was effected.

8. After hearing that application, the court delivered its ruling on 30<sup>th</sup> November 1990 dismissing the respondent's application. The court expressed the view that the remedy lay as against the vendor. In effect, the court declined to restore the suit property or indeed the caution thereon.

9. The respondent was aggrieved by that ruling declining to restore the suit property. She lodged an appeal, being Civil Appeal No. 75 of 1991, before the High Court. That is the appeal that was heard by Muchelule, J who delivered the impugned judgment on 6<sup>th</sup> July 2010 (wrongly dated 6<sup>th</sup> July 2009) allowing the appeal and ordering: the cancellation of subdivisions Githunguri/ Gathangari /1720 and 1721; and the restoration of the suit property as well as the respondent's caution over that property.

10. The appellant was dissatisfied with that judgment. In his memorandum of appeal before this Court he complains that the Judge failed: to consider the effect of the judgment on third parties who were not privy to the suit; to have regard to Section 143 of the Registered Land Act; to make a distinction between the provisions of Section 91 of the Civil Procedure Act and Section 143 of the Registered Land Act.

11. During the hearing of the appeal before us, counsel relied on their respective written submissions. In his submissions, Mr. M. N. Oonge learned counsel for the appellant explained the background to the appeal after which he pointed out that after the ruling delivered on 17<sup>th</sup> February 1989 ordering the reinstatement of the caution over the suit property, the respondent had obtained a decree in her favour in a different suit, namely RMCC 21 of 1988, that she had instituted against the vendor Muchai Karu; that the

respondent's interest was limited to the sub-division in Githunguri/ Gathangari /1721 and not the suit property; that in rejecting the application for the cancellation of subdivisions Githunguri/ Gathangari /1720 and 1721 and for restoration of the suit property, the magistrate was aware of these facts and was correct in dismissing the application. Counsel put it thus:

*“As we have demonstrated early, the exparte Judgment caused the subdivision of Githunguri/Gathangari 1218 into Githunguri/Gathangari 1720 and 1721. The Defendant had put a caution to protect her interest on Githunguri/Gathangari 1218. When the subdivision was done she reinstated her caution on two plots, meanwhile she worn(sic) a case against the Registered proprietor of the original parcel of land Githunguri/Gathangari/1218 Muchai Karu and obtained a Decree. She later amended the Decree to read Githunguri/Gathangari/1720. This was in RMCC 21 of 1988. Therefore, her interested crystallized to Githunguri/Gathangari/1720 and not the entire Githunguri/Gathangari 1218...”*

12. Counsel submitted that in reversing the decision of the Magistrate's court, the learned Judge failed to appreciate the prevailing circumstances that the land was registered under the Registered Land Act in that the interests of a proprietor in possession who had acquired the title for valuable consideration could not be affected.

13. On his part, learned counsel for the respondent Mr. S. M. W. Kinuthia submitted that the learned Judge correctly applied Section 91 of the Civil Procedure Act; that the suit before the magistrates court related to removal of a caution over the suit property; that the order for removal of caution, upon judgment being granted related to the suit property; that the subsequent order for reinstatement of the caution made on 17<sup>th</sup> February 1989 could only relate to the suit property; that the reference made by counsel for the appellant to Section 143 of the Registered Land Act is irrelevant and is a matter for the trial court.

14. We have considered the appeal and the submissions by learned counsel. The substantive dispute between the parties is pending determination before the Magistrate's court. We must therefore exercise restraint in our pronouncements lest we embarrass that court when conducting the trial.

15. The judgment of High Court the subject of this appeal was reviewing an order of the magistrates' court declining an application for restitution under Section 91(1) of the Civil Procedure Act. Section 91(1) provides:

**“Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.”** [Emphasis]

16. That provision is concerned with restoration to a party, on the variation or reversal of a decree, what has been lost to such party in consequence of such decree. The principle behind that provision is that on the reversal or variation of the decree, the law imposes an obligation on the party to the suit who received the benefit of the reversed decree to make restitution to the other party for what he has lost. [ See **Mulla on the Code of Civil Procedure**, 14<sup>th</sup> edition, volume 1 para 144 at page 731].

17. By reason of the order of the Magistrate's court given on 23<sup>rd</sup> December 1988 „dismissing? (read, striking out) the respondent's defence and granting the order for the removal of the caution over the suit property, the respondent lost protection over the suit property. The subsequent order made on 17<sup>th</sup> February 1989 reversed the order of 23<sup>rd</sup> December 1988 and ordered reinstatement of the caution on the suit property thereby restoring the status quo ante the order of 23<sup>rd</sup> December 1988. The subsequent application dated 26<sup>th</sup> October 1989 made by the respondent under Section 91 sought to restore that status

by, as it were, undoing what had been done on the basis of the reversed order. In those circumstances, we hold, as the learned Judge did, that the application dated 26<sup>th</sup> October 1989 under Section 91 should have been allowed.

18. We understand the counsel for the appellant to say that the respondent no longer has an interest in the suit property but in the subdivision Githunguri/ Gathangari / 1721 over which he says she has a decree in a different suit, RMCC 21 of 1988 as against the vendor, Muchai Karu. Counsel for the appellant pointed out that pleadings in RMCC 88 of 1988 were indeed amended to reflect that position. That may very well be so. In our view, those are matters for the trial court. The impugned orders given by the High Court did no more than preserve the subject matter of the suit, as it was prior to the order for the removal of the caution, pending the hearing and determination of the suit. The manner in which the adjudication in RMCC 21 of 1988 might or might not affect or impact adjudication of the dispute in RMCC 88 of 1988 is, as we have said, a matter for the trial court.

19. As the learned Judge correctly observed, it was incumbent on the court, when an application was made on that behalf, to restore the status quo that was in place prior to the removal of the caution. We are accordingly unable to fault the judge for ordering the preservation of the subject matter of the suit pending the hearing of the suit. There is, therefore no merit in this appeal. It is dismissed with costs to the respondent.

20. As we have already noted the substantive dispute between the parties, initiated before the magistrate's court in 1988, some 30 years ago, has still not been heard and determined on merits. Regrettably, the decision we make in this appeal will in no way ameliorate the situation, to the extent that the real grievance will still have to be resolved by the magistrate's court. We direct that RMCC 88 of 1988 be mentioned before the Magistrate's Court within 14 days from the date of delivery of this Judgment for purposes of fixing hearing dates with a view to expeditiously disposing of this matter.

Orders accordingly.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of January, 2018.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**K.M'INOTI**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**