



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: VISRAM, KARANJA & KOOME, JJA.)**

**CIVIL APPEAL NO. 54 OF 2017**

**MUSK DEER LIMITED.....APPELLANT**

**VERSUS**

**BENJAMIN K. KIPKURUI.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MOMBASA formerly**

**THE MUNICIPAL COUNCIL OF MOMBASA.....2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling of the High Court of Kenya at Mombasa (Otieno, J.) dated 6<sup>th</sup> December, 2016*

**in**

**HC Constitutional Petition No. 9 of 2014)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

[1] Prior to an incident that happened on 16<sup>th</sup> June, 2007, Benjamin K. Kipkurui (1<sup>st</sup> respondent) may have thought he was the absolute registered proprietor of a property comprised in a Title registered at the Lands Titles Registry, Mombasa as C.R. 21127 (hereinafter referred to as the suit property). Alas not before the Municipal Council of Mombasa (3<sup>rd</sup> respondent) purported to send auctioneers to evict the 1<sup>st</sup> respondent from the suit premises on account that the suit property had been sold to recover outstanding rates under the Rating Act. The said auctioneers were armed with a court order purportedly issued by the **Chief Magistrate's Court in Civil Case Number 2094 of 2006 (Municipal Council of Mombasa –vs- Benjamin Kipkurui)**. To understand what was happening, the 1<sup>st</sup> respondent instructed an advocate who perused the said court file and to their utter consternation, they discovered proceedings were conducted wherein orders to sell their clients' property were issued without his knowledge.

[2] The record of proceedings show counsel for the appellant made frantic efforts to set aside the ex parte judgment and subsequent orders vesting the suit property to the appellant without success. This culminated in the filing of Civil Appeal No. 178 of 2007 before the High court (we shall advert to the said appeal later in this judgment). Nonetheless, before that appeal was heard or finalized, the 1<sup>st</sup> respondent perhaps changed tact and decided to file a constitutional petition claiming that several of his fundamental rights were breached in the process of the purported sale of his property and the issuance of the vesting orders which he claimed was done without jurisdiction. The 1<sup>st</sup> respondent filed the said constitutional petition against the Mombasa County Government (2<sup>nd</sup> respondent) and the 3<sup>rd</sup> respondent. The appellant who was an affected party successfully applied to be joined in the fray.

[3] The 1<sup>st</sup> respondent challenged the constitutionality of the purported sale which was authorized by the subordinate court without following the laid down procedure. He protested that by failing to follow the Constitution and the law when his property was purportedly sold, he was arbitrarily deprived of his property without a hearing; he was not given a fair hearing nor subjected to a fair administrative action or given access to information of the sale of his property despite the fact that he was affected most by the said sale. To demonstrate the blatant irregularities that attended the said sale, it was pointed out that the summonses were deliberately sent to the wrong address, a post office box in Mombasa which had never belonged to the 1<sup>st</sup> respondent.

[4] For all the breaches that he alleged were committed by the 3<sup>rd</sup> respondent and their advocates, the 1<sup>st</sup> respondent sought several remedies inter alia; that the subordinate court acted inconsistently with and in breach of the provisions of the Rating Act (Cap 267), the Civil Procedure Act and Rules, the Auctioneers Act and several Articles of the Constitution among them, 10, 21, 22, 27, 40, 47, 50 and 159. A

declaration that the 1<sup>st</sup> respondent's name as proprietor which was wrongfully, illegally and unlawfully removed from the Register of the suit property be restored. An order directing the Land Titles Registrar Mombasa County to rectify the records by reinstating the name of the 1<sup>st</sup> respondent as proprietor of the suit property and finally an order prohibiting the appellant whether by themselves or through any other person purporting to derive title through or under them from interfering with the 1<sup>st</sup> respondent's proprietary and/or possessory rights or enjoyment of his rights over the suit property.

[5] The petition was opposed by the appellant vide an affidavit sworn on 16<sup>th</sup> July, 2007 by **Armitial Purshottam Devani** who stated that he was their operations director. According to the appellant they came by an advertisement of a sale of the suit property by way of public auction in the Kenya Times daily newspaper of Saturday 24<sup>th</sup> February, 2007. The sale was scheduled for 16<sup>th</sup> March, 2007, which he attended on behalf of the appellant and bid for the suit property for a sum of Ksh. 15 million. The appellant was declared the highest bidder and proceeded to pay the deposit and the balance of the purchase price after which they were given the vesting order and certificate of sale. Subsequently he contended that possession of the suit property was handed to him on behalf of the appellant on the 16<sup>th</sup> June, 2007. According to the deponent the appellant was an innocent purchaser for value without notice.

[6] On the part of the 2<sup>nd</sup> respondent the predecessor of the 3<sup>rd</sup> respondent, one Hamisi Mwanguya swore a replying affidavit on the 9<sup>th</sup> April, 2015 in response to the petition. He claimed that he perused the records of the 3<sup>rd</sup> respondent and found the firm of **Meenye & Kirima Advocates** who purportedly filed the suit before the subordinate court were not in the panel of advocates of the 3<sup>rd</sup> respondent in the said year of 2006. However the deponent referred to an affidavit sworn by Mr Meenye Advocate wherein he stated that his firm was instructed by **Hon Lenny Kivuti t/a Geomaps** in February, 2006 to undertake collection of rate arrears for the 3<sup>rd</sup> respondent. A further perusal of the register of contracts did not reveal any such contract between the 3<sup>rd</sup> respondent and the said Lenny Kivuti authorising him to collect rates; therefore the firm of Meenye & Kirima Advocates had no authority to act in **CMCC No. 2094 of 2006**.

[7] This deponent also pointed out that no demand for rates was made to the 1<sup>st</sup> respondent prior to the filing of the suit requiring him to pay the outstanding rates in accordance with the Rating Act which ought to have been done by the Town Clerk or in his absence, the Treasurer of the local authority. This deponent went on to poke many holes in what he termed as procedural irregularities in the mode of service of the summonses that were purportedly sent by a registered mail and only 5 days later, Mr. Meenye was applying for summary judgment; for failing to abide by the conditions of sale; the fact that the firm of Meenye & Kirima Advocates acted without instructions, contrived a sale of the 1<sup>st</sup> respondent's property without following the due procedure under the Rating Act. In other words the 2<sup>nd</sup> respondent completely disowned the sale and distanced themselves from any of the processes leading to it.

[8] The matter fell for hearing before **P.J. Otieno J.**, who after carefully analysing the material that was placed before court and the law, found there was a failure of justice because the 1<sup>st</sup> respondent was not served with the demand notice, was not served with the court processes that was sent to the wrong address. The Judge therefore held the purported sale arising out of the ex parte judgment was a nullity; that the 1<sup>st</sup> respondent was arbitrarily deprived of his property rights; a proper title was not capable to vest upon the appellant due to obvious wrongs that were committed in the entire proceedings. The Judge therefore allowed the petition as per the orders of 6<sup>th</sup> December, 2016.

[9] Aggrieved by the above decision, the appellant challenged it in this appeal that is predicated on some 13 grounds of appeal which we will summarize as; the learned Judge erred in law and fact by;

- I. Dwelling on issues not pleaded, misapprehended facts and failed to appreciate and to apply the law properly.
- II. Exhibiting open bias against the appellant by taking into consideration irrelevant matters and for making contradictory findings
- III. Failing to consider the evidence and submissions by the appellant and thereby arriving at a grossly unfair decision
- IV. Failing to consider the doctrine of a bonafide and innocent purchaser for value without notice.
- V. By concluding that the appellant breached and/or was capable of breaching the 1<sup>st</sup> respondent's fundamental rights as regards the deprivation of property as provided for in the constitution; and for failing to reach a conclusion that the petition did not raise any constitutional issues; further failing to appreciate the cardinal principle that constitutional petitions are not a panacea for all the maladies
- VI. Failing to hold that the dispute before court involved a dispute over private property rights between the 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent.
- VII. Ignoring the fact that the 1<sup>st</sup> respondent had availed itself the appellate remedy by appealing from the subordinate court to the High court thus a constitutional petition was an abuse of the court process.
- VIII. Holding that the 1<sup>st</sup> respondent was denied a fair hearing and that he was deprived of the suit property through unlawful and fraudulent scheme to which the appellant was a participant without any evidence and for condemning the appellant to pay 75% of the costs.

[10] This appeal was disposed of by way of written and oral submissions. During the plenary hearing, **Mr. Oloo**, learned counsel for the appellant relied on his written submissions and in his oral highlights he argued that the Judge allocated himself jurisdiction to determine a matter that belongs to Environment and Land Court (ELC). Referring to **Article 162 (2) (b)** of the Constitution, which established a specialized court with power to hear and determine disputes relating to environment and land; since the enactment of the Land Act No. 19 of 2011 the original jurisdiction to determine any use and occupation of and title to land is vested exclusively in the ELC. In this regard counsel

made reference to this Court's decision in the case of **Karisa Chengo & 2 Others –vs- Republic Civil Appeal No. 44, 45, & 76 of 2014** where it was held that Judges of specialized courts of equal status with the High court lacked jurisdiction to hear criminal matters and vice versa. See also the decision of the Supreme Court in **Samuel Kamau Macharia & Another v Kenya Commercial Bank [2012] eKLR**;

*“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondent in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”*

[11] Further according to Mr. Oloo, the Judge failed to consider that the 1<sup>st</sup> respondent had invoked the appellate procedure which he should have strictly followed to the end. According to counsel invocation of the Constitution is not a panacea of all the problems especially where a statute prescribes an appellate procedure. There were parallel proceedings in the High court by way of an appeal against the decree of the subordinate court. All those allegations of fraud, collusion and complicity on the part of the appellant were without basis; it was counsel for the 3<sup>rd</sup> respondent who approached the subordinate court for a vesting order and indicated that the appellant had complied with the terms and conditions of sale which the court accepted and issued an order vesting the property upon the appellant who was an innocent purchaser for value without notice. There was no evidence adduced to show that the appellant participated in any way in the commission of the fraud. There were contradictory statements based on the evidence of **Mr. Meenye** advocate regarding how he was instructed to act for the 3<sup>rd</sup> respondent and whether or not the summonses were served. Moreover there was no joinder of the Registrar of Title, therefore it was erroneous for the Judge to make an order directing the cancellation of title.

[12] **Mr. Khagram**, learned counsel responding on behalf of the 1<sup>st</sup> respondent also relied on the written submissions filed on behalf of his client. In his oral highlights, he stated that the 1<sup>st</sup> respondent was evicted from his own property after a vesting order was issued by the subordinate court without his participation. When he approached the subordinate court that was seized of the matter to set aside the *ex parte* proceedings and orders, the court stated that it was *functus officio* of the matter after allowing a preliminary objection taken by the appellant way after counsel for the 1<sup>st</sup> respondent had argued the said application. Thus the main thrust in the said appeal was restricted on whether the court was *functus* of the matter or it was proper to allow a preliminary objection in the middle of a proceeding. Counsel referred us to the memorandum of appeal which essentially faulted the magistrate for upholding a preliminary objection and thereby failing to set aside the *ex parte* judgement. Counsel went on to state that it was not at all disputed that Mr. Meenye had no instructions to act for the 3<sup>rd</sup> respondent; that the 1<sup>st</sup> respondent was not served with the summonses as there was evidence that the post office box which was purportedly used to serve him did not belong to him and this was confirmed by the Post Office itself. The 1<sup>st</sup> respondents' correct address is indicated in the certificate of title whereas Mr. Meenye swore an affidavit of service indicating that the 1<sup>st</sup> respondent was served through an address in Mombasa by registered post, he later turned around and stated that he was not sure there was any service at all.

[13] Counsel further submitted that the 1<sup>st</sup> respondent was deprived of his property arbitrarily without a hearing which was contrary to the provisions of the Constitution. His property rights under the provisions of **Articles 40** of the Constitution were violated and contravened by the fraudulent conduct of various parties thereby resulting in unlawful deprivation and dispossession of property. The 1<sup>st</sup> respondent had every right to approach the High court with a constitutional petition seeking to secure and protect his fundamental rights; he was condemned unheard contrary to **Article 50**. Moreover the subordinate court had no jurisdiction to issue a decree and a vesting order when the 1<sup>st</sup> respondent was not served with the demand notice as required under the Local Government Act; thus the decree was a nullity ab initio, as was held in the case of **Ochieng & Another –vs- Ochieng & Others (1995-98) EA 260** where the Court of Appeal held that a sale which is void does not entitle the purchaser of such sale proprietorship or title to the land sold. The appellant applied to be joined in the proceedings post the sale, therefore its interest can only have arisen post the '*purported*' auction as stated in the Ruling by **Mureithi J.** Also of interest to note is that the appellant did not even fulfil the conditions of sale which clearly demonstrated that it was complicit to the fraud and cannot claim to be innocent purchasers for value. There was nothing for them to buy as the sale was a nullity. Counsel urged us to dismiss the appeal.

[14] **Mr. Buti** learned counsel for the 2<sup>nd</sup> respondent also relied on his written submissions and in his oral highlights he also associated himself with the submissions by counsel for the 1<sup>st</sup> respondent. According to Mr. Buti it is only the High court that has jurisdiction to vest a title on a buyer according to the provisions of **Section 64 of Cap 281**. Furthermore there is a mandatory requirement to issue the rate payer with a demand notice; there having been no service and non-availability of correct address of the rate payer, the whole purported sale of the 1<sup>st</sup> respondent's property by public auction was simply a nullity. The said Act provided the procedure of issuance of a statutory notice that is signed by the County treasurer or clerk as the case may be. Absence of issuance of such notice rendered all the proceedings before the subordinate court null and void for want of jurisdiction. The High court had all the powers to remedy the myriad of infringements of the rights complained of by the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent owned up to the irregularities that were committed on its behalf and urged us to dismiss the appeal.

[15] We have considered the rival submissions by counsel and examined the record of appeal as captured in the aforesaid summary of the salient matters. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. (See **Selle –vs- Associated Motor Boat Co. [1968] EA 123**; **Jabane –vs- Olenja. [1986] KLR 661, 664**; **Ephantus Mwangi –vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278** and **Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870**).

We recognize the case before us was a constitutional petition that largely dwelt on points of law as to whether the 1<sup>st</sup> respondent suffered constitutional breaches; whether the High court had jurisdiction to determine rights appertaining to title to land. The Court was also called upon by the appellant to hold that it was an innocent purchaser for value without notice a matter that involved an examination of certain facts. All in all as it has been held before by this Court in many cases among them; **Timamy Issa Abdalla v Swaleh Salim Imu & Others, Civil Appeal No. 36 of 2013**:

**“... Although the court has jurisdiction to re-consider the evidence, re-evaluate and draw its own conclusion, this jurisdiction must be exercised cautiously. This caution is of greater significance in an appeal such as the one before us where the right of appeal is limited to matters of law only, because, the jurisdiction of this court to draw its own conclusion can only apply to conclusions of law. We must therefore be careful to isolate conclusions of law from conclusions of facts and only interfere if two conditions are met. Firstly that the conclusions are conclusions of law, and secondly that the conclusions of law arrived at cannot reasonably be drawn from the findings of the lower court on the facts...”**

[16] To us the issues that we discern for determination are two fold; that is whether the 1<sup>st</sup> respondent was entitled to the remedies sought by way of a constitutional petition when he had invoked the appellate jurisdiction by appealing against the orders of the subordinate court; and whether the court erred by not finding the appellant was an innocent purchaser for value of the suit premises.

[17] On the overall issues of jurisdiction, it is clear by dint of **Article 22(1)** of the Constitution, every person has the right to institute court proceedings claiming that a right or freedom guaranteed in the Bill of Rights has been denied, violated, infringed or threatened. As a corollary, **Article 23(1)** confers on the High Court jurisdiction to hear and determine applications where a party alleges denial, violation, infringement, or threat to a right or freedom guaranteed by the Bill of Rights. This is what the said **Article 22 (1)** of the Constitution portends;

**“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened**

...

**23(1)**

**The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights”**

The 1<sup>st</sup> respondent approached the High Court because he had a mixed bag of issues that touched on fair hearing, the principles of fair administrative action, abuse of the court process and finally a declaration that he was deprived proprietary and possessory rights of his property arbitrarily. To us the germane issue that cuts across the entire spectrum of the petition was the allegation of breach of fundamental rights to a hearing and therefore to say the matter should have been filed before the ELC is like splitting of hairs. Supposing the 1<sup>st</sup> respondent did so and he was met with another objection that ELC had no jurisdiction to rule over such matters as fair hearing, lack of service and denial of information. This is what we would term a procedural technicality because the 1<sup>st</sup> respondent was predominantly challenging a court order issued *ex parte* and a null and void sale that resulted in the vesting of his property by a subordinate court that had no jurisdiction and the ultimate loss of his property. This ground of appeal therefore is without merit.

[18] Moving on to the other grounds, it is apparent looking at the petition, that the 1<sup>st</sup> respondent who was the petitioner framed the constitutional issues that he sought the intervention of the court through *inter alia*, declaratory orders that his fundamental rights to a fair hearing, fair administrative action and protection of property rights and freedom from arbitrary deprivation thereof were all breached; that sale was contrary to the Constitution and the Rating Act; that the 1<sup>st</sup> respondent be restored as the registered owner of the suit property and an order of prohibition against the appellant, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents either by themselves or agents from interfering with his proprietary and possessory rights and enjoyments of the suit property.

[19] In our considered view we see nothing in the Constitution, statute or procedure that barred the 1<sup>st</sup> respondent from seeking redress against the detailed violations of his constitutional rights. This finding is buttressed by a similar position taken by **Chaskalson, J.** In the South African case of: - ***Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others*** (CCT) 31/99 [2000] ZACC 1; 2000 (2) ZA 674:

**“Review power of the court is no longer grounded in the common law, and therefore susceptible to being restricted or ousted by legislation. Instead the Constitution itself has conferred fundamental rights to administrative justice and through the doctrine of Constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of ‘constitutionalizing’ what had previously been common law grounds of judicial review of administrative action. This means that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication of a refusal of a request to provide reasons for administrative actions involves the direct application of the constitution.”**

[20] Since the appellant spent a considerable amount of time arguing that the Constitution is not the panacea of all the grievances and the 1<sup>st</sup> respondent ought to have pursued the appeal, we have to further expound on whether the 1<sup>st</sup> respondent’s complaints fell within the parameters of the Constitution? Looking at the petition that was filed before the High court, the 1<sup>st</sup> respondent complained that he was condemned unheard in **Mombasa CMCC No. 2094 of 2006 (Municipal Council of Mombasa –vs- Benjamin Kipkulei)** incidentally this fact is not only confirmed by the evidence filed by the 1<sup>st</sup> respondent but is also acknowledged in the replying affidavit of **Hamisi Mwanguya** on behalf of the 2<sup>nd</sup> respondent. The record shows the affidavit of service sworn by Mr. Meenye Advocate who conducted the proceedings indicates that he served the summonses on the 1<sup>st</sup> respondent through post office Box Number 84209, Mombasa; however the 1<sup>st</sup> respondent was able to produce a letter from the Posta Kenya that showed the foresaid post office Box has never been held by him but it belongs to a different person. This is what the Judge stated in his own words while dealing with the issue of service;

**“In this case the uncontroverted fact is that the petitioner has never rented from the Postal Corporation of Kenya post office Box Number 84029 Mombasa and the respondents have not availed any evidence to the contrary. In fact there is no assertion that the**

*box number ever belonged to the petitioner. It is to this court a basic learning that a fact that is asserted against a party and not controverted by that party is deemed admitted...*

*At this juncture, Mr. Meenye Advocate must be commended by this court for standing up to his calling to stand by the law and to be candid with the court irrespective of the stand taken by a party to the litigation before court. In the aforesaid affidavit, at paragraphs 15, 16, 17, 18 19 & 20 the advocate says:-*

*Paragraph 15: That I have also scrutinized previous Rates Demand Notes/Invoices issued to the Defendant by the Council, before the appointment of Geomaps/GIS and it appears that the debt allegedly owing is different from the amount shown on the GIS print-out. I attach these in a bundle marked 'GKM6'*

*Paragraph 16: That in view of the foregoing I am now convinced that the amount allegedly owing by the defendant was not factual and/or owing or that the defendant actually received the court process at the address given and the default judgment entered against him cannot lawfully stand.* (Emphasize provided)

[21] It was therefore crystal clear from the record that the 1<sup>st</sup> respondent was not served with the court documents and a far reaching judgement that ordered his property be sold in a public auction was made. What more was required to support this illegality when Mr. Meenye the advocate who conducted the proceedings and the sale by public auction admits that the judgment that gave rise to the sale cannot lawfully stand? We find the facts in this matter went to the core of the 1<sup>st</sup> respondent's rights to fair administrative action which includes the right to an expeditious, efficient, lawful, reasonable and procedurally fair process. We agree with the trial Judge the 1<sup>st</sup> respondent's complaints that he was not afforded a hearing passed muster of the principles of natural justice that are so central in the administration of justice. The oft' referred to Latin *audi alteram partem rule* (hear the other side) was breached. We agree as per the provisions of Article 40 of the Constitution which guarantees protection of property, the 1<sup>st</sup> respondent as the registered owner of a property and being in possession thereof could not have been deprived of his property through a contrived process that appeared made to look legal. It is apparent from the record, the learned Judge was acutely conscious of this rule as he cited the case of **Bakari v Mohamed & 2 Others [2003] eKLR** where those principles of natural justice are well articulated.

[22] We also find the 1<sup>st</sup> respondent clearly set out in details the particulars of how his constitutional rights were breached as provided in the case of in the case of **Anarita Karimi Njeru vs. The Republic (1976-1980) KLR 1272** where it was held that:

*“...if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”*

He identified **Article 10** of the Constitution which sets out the National values and principles of good governance that guide State Organs, State officers, public officers and all persons whenever any of them applies or interprets the law. The 1<sup>st</sup> respondent's property was sold by the Mombasa Municipal Council the predecessor of the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent confirms that there was no statutory notice that was issued in accordance with the provisions of **Section 17 (1) (2) of (Cap 267)**, the Rating Act which provides:-

*“if, after the time fixed for payment of any rate, any person fails to pay any such rate due from him and any interest..., the rating authority may cause a written demand to be made upon such a person to pay, within fourteen days after service thereof on him, the rate due...which demand shall be in an appropriate form set out in the second schedule”*

It is the said second schedule that provides the demand notice should be signed by either the Town Clerk or in his or her absence the Treasurer of the local Authority. In the circumstances of the matter, the 2<sup>nd</sup> respondent agreed that no such demand notice was issued, the purported service of summonses was sent to the wrong address therefore the entire process was flawed and the subordinate court lacked jurisdiction to move an inch with the matter let alone to issue a vesting order of the suit premises. We agree the process undertaken by the 3<sup>rd</sup> respondent did not comply with the values of Article 10.

[23] On our part we are satisfied in the circumstances of this matter any order(s) that was the outcome of those ex- parte proceedings was a nullity and void. See the persuasive authority in the case of; - **Macfoy vs. United Africa Company Ltd. [1961] 3 ALL E.R 1169** wherein Lord Denning stated,

*“If an act is void, then it is in law a nullity. It is not only bad, but it is incurably bad. There is no need for an order of the court to be set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”*

[24] We think we have said enough to demonstrate the 1<sup>st</sup> respondent had pleaded a proper case calling the High court to exercise its jurisdiction to make right the blatant anomalies and irregularities that went on before the subordinate court. We have also looked at the memorandum of appeal that was filed by the 1<sup>st</sup> respondent before the High Court being Civil Appeal No.178 of 2007. This is in answer to the allegation that the 1<sup>st</sup> respondent was abusing the court process by filling a constitutional petition. As stated earlier in the opening paragraphs of this judgement, this was an appeal from the decree/order of the Resident Magistrate Mr. M. K. Mwangi given on 4<sup>th</sup> October, 2007. This appeal is largely faulting the learned magistrate for allowing a preliminary objection dated 20<sup>th</sup> August, 2007 raised when the 1<sup>st</sup> respondent's application to set aside the ex parte judgment was partly heard. This in our view could not have stopped the 1<sup>st</sup> respondent from pursuing his constitutional rights. There is no duplication of prayers and therefore we are not persuaded there was any abuse of the court process in this regard.

[25] The last issue was whether the Judge erred by failing to find the appellant was an innocent purchaser for value of the suit premises without any notice of defect in the title. This issue was not addressed by the Judge perhaps because he determined that due to the flawed process through which the title was transferred there could not have been a valid sale and transfer to an innocent buyer. Be that as it may, looking at the events that unfolded after the so called auction which was conducted on the 16<sup>th</sup> March, 2007. The appellant was supposed to pay the balance of the purchase price and they were informed by Mr. Meenye advocate acting for the 3<sup>rd</sup> respondent that it was supposed to pay the said balance by 15<sup>th</sup> April, 2007 according to clause 7 of the conditions of sale that were relied on by the appellant. Despite the fact that this was a court initiated sale, the appellant varied the terms and conditions of sale without reference to the court; also the advocate obtained a court order on the 19<sup>th</sup> April, 2007 to confirm and make the appellant an absolute owner when it had not paid the balance of the purchase price while misrepresenting the balance had been paid. The balance was paid on 25<sup>th</sup> April, 2007 after the property had been vested.

[26] Another anomaly that occurred after the appellant was at the centre of this whole saga was an application made in the subordinate court on 5<sup>th</sup> June, 2007 directing the Registrar of Title to issue a provisional title without following the laid down procedure in compliance with the provisions of **Section 71** of the **Registration of Titles Act** (now repealed) which provides for gazette notice to issue for a certain period of time when a title is lost. Was this title lost; truth be told, it was with the 1<sup>st</sup> respondent and it is for these reasons that one would wonder whether the appellant was truly oblivious of all candour that requires a party to carry out due diligence before entering into what turns out to be a murky deal; or was the appellant a complicit participant. What happened to the common and obvious caution that “*buyer beware*”? The appellant did not demonstrate having carried out any due diligence whatsoever. In Any event, even if the appellant was an innocent purchaser, which we think it was not, the decree having been a nullity all consequential steps that were taken pursuant thereto were also a nullity in law. There was nothing in terms of a title to transfer to the appellant because a sale which was void cannot entitle the purchaser proprietorship his or her innocence notwithstanding.

[27] It is quite clear that the learned Judge appreciated the nature of the constitutional petition before him and the role of the court in the circumstances. He also properly exercised his discretion by the orders granted. Therefore this appeal lacks merit and it is hereby dismissed. On the issue of costs, it seems the party that initiated this whole saga fizzled out into thin air, first the 2<sup>nd</sup> respondent who took over from the 3<sup>rd</sup> respondent disassociated themselves completely with the sale or having given instructions to Mr. Meenye Advocate or issuing the demand notice. It remains a mystery who was paid the purchase price; the appellant may have fallen prey to fraudulent cartels that capitalize on depriving innocent Kenyans of their parcels of land. In the event, we are reluctant to condemn the appellant to bear the costs both for this appeal and in the High Court. We direct each party to bear their own costs.

**Dated and delivered at Mombasa this 5<sup>th</sup> day of July, 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**